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## How the U.S. Foreign Corrupt Practices law affects non-U.S. businesses

What agents, consultants & distributors of U.S companies must consider

February 2009

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# FCPA Overview

- Anti-bribery Rules
- Enforcement and Penalties
- OECD and United Nations Anti-bribery Conventions
- Enforcement Environment and Trends
- FCPA Compliance Program
- Actual Prosecutions involving non-US companies

# Anti-bribery Rules

# U.S. Foreign Corrupt Practices Act (FCPA)



- FCPA first enacted in 1977
- Criminalizes the bribery of foreign officials anywhere in the world where the purpose of the bribe is to influence an official decision in order to obtain or retain business.
- Jointly enforced by the U.S. Department of Justice and the U.S. Securities and Exchange Commission



# Elements of an FCPA Violation

- A “covered” person / entity
- Must offer or give something of “value”
- To a “foreign official”
- To “obtain or retain business”
- With “corrupt” intent

## Indirect Offers/Payments Prohibited

- Payment or offers/promises to pay any person while knowing all or portion of value will be given, directly or indirectly, to any foreign official are prohibited
- “Knowing” means:
  - Actual awareness
  - A firm belief as to the existence of such circumstance or that such circumstance will occur
  - A high probability of the existence of circumstance unless the person “actually believes that such circumstance does not exist”
  - No “willful blindness” - i.e., conscious disregard or deliberate ignorance of known circumstances that should alert one to FCPA violations is not permitted

# Exceptions and Affirmative Defenses

- Exception
  - “Routine” governmental action - i.e., “grease payments”
- Affirmative Defenses
  - Payments authorized by written foreign law
  - Bona fide business expenditures



# Record Keeping Requirements

- Keep accurate books, records and accounts
  - In reasonable detail to accurately and fairly reflect the transactions and dispositions of the assets of the issuer
  - Requirement can apply to foreign subsidiaries
- Adhere to internal controls to ensure compliance
  - Expenditures have proper management authorization
  - In accordance with GAAP principles
  - Audited to show existing assets match books and records



# Enforcement and Penalties

# Anti-bribery Sanctions: Companies

- **Criminal Sanctions**

- Up to \$2 million criminal fine per violation, or twice the amount of pecuniary gain or loss
- Up to \$25 million for willful and knowing books and records or internal control violations

- **Civil Sanctions**

- Up to \$11K civil fine per violation
- In some circumstances, up to \$650K civil penalty, or the gross amount of pecuniary gain or loss, for books and records or internal control violations
- Disgorgement of any ill-gotten gains

- **Collateral Consequences**

- Harm to public relations and reputation
- Inability to partake in U.S. government procurement or receive export licenses
- Unlawful FCPA payments are not tax deductible as business expense, but are taxable items

# Anti-bribery Sanctions: Individuals

- Criminal Sanctions
  - Up to \$100K criminal fine per violation, or twice the amount of pecuniary gain or loss
  - Up to 5 years' imprisonment per violation
  - Up to \$5M or 20 years in prison for willful and knowing books and records or internal control violations
- Civil Sanctions
  - Up to \$11K civil fine per violation
  - In some circumstances, up to \$130K civil penalty, or the gross amount of pecuniary gain or loss, for books and records or internal control violations
  - Disgorgement of any ill-gotten gains
- Collateral Consequences
  - Fines are NOT reimbursable by the company

# OECD and United Nations Anti-bribery Conventions

# OECD Anti-bribery Convention

- “Globalization” of U.S. law by Organization for Economic Cooperation & Development (OECD)
  - Establishes standard to be met by all Parties in defining offense of bribery of foreign officials, which is similar to FCPA
  - Calls upon Parties to take all necessary measures to establish bribery of foreign officials as a criminal offense
  - Requires Parties to adopt effective, proportionate and dissuasive criminal penalties for bribery of foreign officials
- Ratified by 30 OECD countries and 7 non-OECD countries
- All ratifying countries have enacted some form of implementing legislation



# Ratification of OECD Convention

## United States



### Other OECD Countries



Australia



France



Japan



Poland



Austria



Germany



Korea



Portugal



Belgium



Greece



Luxembourg



Slovak Republic



Canada



Hungary



Mexico



Spain



Czech Republic



Iceland



The Netherlands



Sweden



Denmark



Ireland



New Zealand



Switzerland



Finland



Italy



Norway



Turkey



United Kingdom

### Non-OECD Countries

• Argentina

• Brazil



• Bulgaria

• Chile

• Estonia

• Slovenia

• S. Africa

## ... And (Now?) Peru

### **US FTA Article 19.9: Anti-Corruption Measures**

1. Each Party shall adopt or maintain the necessary legislative or other measures to establish that it is a criminal offense under its law, in matters affecting international trade or investment, for:
  - (c) any person subject to the jurisdiction of that Party intentionally to offer, promise, or give any undue pecuniary or other advantage, directly or indirectly, to a foreign official, for that official or for another person, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business; and
  - (d) any person subject to the jurisdiction of that Party to aid or abet, or to conspire in, the commission of any of the offenses described in subparagraph[s (a) through] (c) .

# United Nations Convention Against Corruption


- Entered into force on December 14, 2005
- Key Provisions:
  - Standards for corruption prevention applicable to both public and private sectors
  - Criminalization requirements for corruption offenses
  - International cooperation in the investigation and prosecution of cases
  - Asset recovery mechanisms and private rights of action for victims of corrupt practices
- Anticipate increased international cooperation in investigations and prosecutions





# FCPA Enforcement Trends

# Current Enforcement Environment

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- Active FCPA enforcement by both U.S. agencies with jurisdiction over the FCPA – SEC & DOJ
  - OECD anti-bribery convention “globalizes” U.S. anti-bribery law
  - U.S. companies and individual may be targeted by foreign governments under new foreign FCPA-type laws

# Actual FCPA Prosecutions

# *U.S. v. STATOIL, ASA (S.D.N.Y. 2006)*

- **Background:** STATOIL, ASA is a public company organized under the laws of the Kingdom of Norway, which is in the business of exploring for, producing and selling oil and natural gas resources around the world.
- The company has American Depositary Shares (ADRs) that traded on the New York Stock Exchange; thus, STATOIL is an “issuer” with the meaning of the FCPA.
- In November 2000, STATOIL entered into a Cooperation Agreement with a subsidiary of the National Iranian Oil Company (NIOC) which identified areas of mutual interest for future cooperation.
- The Iranian Government Official in charge of the NIOC subsidiary met with STATOIL’s senior employees in Norway, including the chief advisor to the CEO, in August 2001; they learned that the Iranian Government Official was an advisor to Iran’s oil minister and that the Official’s family was powerful and influential in the oil and gas business in Iran.



## *U.S. v. STATOIL, ASA (S.D.N.Y. 2006)*

- The CEO of STATOIL approved entering into a Consulting Contract that obligated STATOIL to pay the Iranian Official a total of \$15.2 million over approximately 11 years; the payments under the Consulting Contract were structured as payments for vaguely-defined consulting services through an off-shore intermediary company owned by a third party in London; the Consulting Contract did not name the Iranian Official.
- During the period June 2002 through January 2003, STATOIL, through a bank account in New York, wire transferred over \$5.2 million to the Iranian Official, in return for receiving non-public information concerning oil and gas projects in Iran, including copies of bid documents of competing companies.
- In October 2002, STATOIL was awarded a contract from the Iranian government to develop a major Iranian oil and gas field.

# *U.S. v. STATOIL, ASA (S.D.N.Y. 2006)*

## **The Result:**

- On October 13, 2006, the Company consented to an Order filed by the SEC requiring STATOIL to pay disgorgement of \$10.5 million to the U.S. Treasury and also requiring that STATOIL engage and pay for a Compliance Consultant, and adopt all of the Consultant's recommendations, unless they are shown to be unduly burdensome or costly.
- In a parallel investigation, the Norwegian government authorities imposed a penalty of approximately \$3.0 million on STATOIL and a penalty of approximately \$30,000 on a Senior Executive of STATOIL.

# *U.S. v. SSI International Far East, Ltd.* (D. Oregon 2006)

- **Background:** Schnitzer Steel Industries (SSI) is headquartered in Portland, Oregon.
- SSI International Far East, Ltd. (SSI Korea) is a wholly-owned subsidiary of SSI, organized under the laws of the Republic of Korea (South Korea). SSI Korea assisted in the sale of scrap metal to Schnitzer customers in South Korea and China.
- SSI Korea transmitted requests to the U.S. for approval and wire transfer of funds for payments to managers of SSI customers in South Korea and China; therefore, SSI Korea acted within the territorial jurisdiction of the U.S.



# *U.S. v. SSI International Far East, Ltd.*

## *(D. Oregon 2006)*

- During the period September 1999-May 2004, SSI Korea and SSI paid over \$205,000 in improper payments to managers of its government-owned customers in China in connection with 30 sales transactions. SSI's gross revenue for those transactions totaled \$96 million, and SSI earned \$6.3 million in net profits on the sales.
- During the same time period, SSI Korea and SSI employees also spent approximately \$138,000 in gift and entertainment expenses for managers of their customers in China and South Korea, including jewelry, gift certificates, perfume, and the use of SSI Korea's golf club membership and condominium timeshare.

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*U.S. v. SSI International Far East, Ltd.*  
(D. Oregon 2006)

- In May 2004, SSI's compliance department uncovered the improper payments and SSI began to investigate the potential FCPA violations. At that time, a senior executive of SSI prohibited any further payments, but nonetheless authorized SSI employees to increase entertainment expenses in lieu of cash payments to its customers. In response, SSI employees gave customers' managers additional gifts, including gift certificates worth \$10,000 and a watch worth \$2,400.
- Several months after SSI began its internal investigation, but before it issued a document hold memo, SSI Korea employees destroyed documents concerning the improper payments.

*U.S. v. SSI International Far East, Ltd.*  
(D. Oregon 2006)

**The Result:**

- On October 16, 2006, SSI Korea entered a guilty plea to criminal violations of the Anti-Bribery and Books and Records provisions of the FCPA; the parent company, SSI, entered into a deferred prosecution agreement with DOJ and SSI Korea agreed to pay a \$7.5 million criminal fine.
- On the same day, SSI agreed to a cease-and-desist order with the SEC, agreed to pay disgorgement and prejudgment interest in the total amount of \$7.7 million, and agreed to engage and pay for a Compliance Consultant.

# Questions?

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