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## FOREIGN CORRUPT PRACTICE ACT UPDATE

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Recent criminal indictments of FIFA officials should remind businesses to review their obligations under the Foreign Corrupt Practices Act (FCPA). Those who violate the FCPA can face civil and criminal penalties, including prison time and repayment of twice the gain that results from commercial bribery or other corrupt payments.

The FCPA was passed in 1977 and includes anti-bribery provisions that apply to all domestic concerns and record-keeping and internal control provisions for issuers of securities listed on U.S. exchanges. Each requirement is outlined below.

### FCPA's Anti-Bribery Provisions

The FCPA prohibits virtually all bribery of non-U.S. public officials that have a business purpose. The FCPA's anti-bribery provisions make it illegal to corruptly offer, provide, promise, or authorize the payment of money or "anything of value" to "foreign officials." Federal courts have interpreted the term "foreign officials" broadly to include officers or employees of foreign governments and public international organizations, foreign political parties, foreign party officials, and candidates for foreign political office. FCPA liability can attach regardless of the "rank" of the government official receiving a bribe.

The offer or provision of money value to foreign officials must be for the purpose of influencing that person to assist in obtaining or retaining business. This requirement is known as the "business purpose test" and is broadly interpreted. Examples of actions to obtain or retain business include bribe payments made for winning a contract, influencing the procurement of a contract, circumventing rules for importation of products, evading taxes or penalties, influencing the adjudication of lawsuits or enforcement actions, avoiding contract termination, and obtaining exceptions to regulations.

A leading case is the decision by the U.S. Court of Appeals for the Fifth Circuit in *United States v. Kay*, 359 F.3d 738, 755-56 (5th Cir. 2004), which held that bribes paid to obtain favorable tax treatment—which reduced a company's customs duties and sales taxes on imports—could constitute payments made to "obtain or retain" business within the meaning of FCPA. This case illustrates that the business effect of bribery payments may be direct or indirect and still be prohibited by the FCPA.

The anti-bribery provisions apply to "issuers," "domestic concerns," and any other person who violates the FCPA while in the territory of the United States, as well as any officer, director, employee, agent, or stockholder acting on behalf of a covered person or entity. The term "issuer" includes any business entity that is registered under 15 U.S.C. § 78l or that is required to file periodic reports under 15 U.S.C. § 78o(d). The term "domestic concern" is

defined broadly to include any U.S. citizen, national, or resident, as well as any business entity that is organized under the laws of a U.S. state or that has its principal place of business in the United States.

## **FCPA's Accounting Requirements**

In addition, the FCPA establishes requirements for internal accounting controls and record-keeping at publicly traded corporations. The accounting requirements are intended to ferret out wrong-doing by eliminating "off-the-books" transactions that often facilitate the payment of bribes.

The record-keeping provisions require that issuers "make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." The internal accounting controls provision requires that issuers maintain a system of controls that provide reasonable assurance that the company is following its stated policies and that the company's books and records are accurate.

A covered company is responsible for ensuring that its controlled subsidiaries, including foreign subsidiaries, comply with the FCPA's accounting provisions.

## **Heightened Focus on Anti-Corruption by the United States Government**

The U.S. Government continues to focus on enforcement of anti-corruption matters. The Securities and Exchange Commission (SEC) announced in February that Goodyear Tire & Rubber Company had agreed to pay more than \$16 million in disgorgement and prejudgment interest to settle charges that Goodyear violated the books and records and internal control provisions of the FCPA.

The alleged violations related to the sales of tires by two Goodyear subsidiaries in Kenya and Angola which allegedly resulted in illicit profits of more than \$14 million. According to the SEC, Goodyear failed over a four-year period to detect or prevent bribes paid in cash to employees of private companies or government-owned entities as well as other local authorities such as police or city council officials. The improper payments were falsely recorded as legitimate business expenses in the books and records of the subsidiaries, which were consolidated into Goodyear's books and records. The SEC alleged that Goodyear violated the FCPA and the books and internal control provisions of the Securities Exchange Act of 1934 by failing to institute adequate FCPA compliance controls at these two subsidiaries and by failing to conduct adequate due diligence at the time of the acquisition of its interest in one of the subsidiaries.

U.S. companies doing business in foreign countries must implement a bona fide and comprehensive FCPA compliance program. The Department of Justice and SEC have made it clear that they will not grant special consideration to companies which are entering unfamiliar foreign markets for the first time. Instead, companies should design compliance programs before entering into a new foreign market, particularly in countries that have established reputations for corruption.

If you have any questions about the Foreign Corrupt Practice Act or other compliance issues, please contact your Smith Anderson lawyer.

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