FCPA Backgrounder: What You Need to Know About the Foreign Corrupt Practices Act (“FCPA”)

What is the FCPA?

• The FCPA prohibits paying – or promising to pay – anything of value to a foreign government official where the purpose is to obtain or retain business.

• The FCPA also requires publicly traded companies to keep accurate books and records and implement appropriate internal controls.

Why is the FCPA Important to You?

• FCPA applies to all U.S. nationals (companies or individuals) and any foreign company listed on a U.S. exchange or that submits reports to the SEC as result of capital raising activities (including trading American Depository Receipts).

• Companies can be held responsible for FCPA violations by agents and joint venture partners.

• Increasing number and size of FCPA cases: In 2002, there were zero criminal prosecutions. In 2004, there were only 2. By 2012, there were more than 10, with an estimated 150 open U.S. Department of Justice (“DOJ”) investigations.

• Growing trend to aggressively enforce the FCPA both by DOJ and U.S. Securities and Exchange Commission (“SEC”), with an increasing number of tag-along civil litigations.
  o Enforcement priority with increasing dedicated resources.
  o Steep financial penalties (e.g., Siemens was fined $800 million in U.S.; KBR/Halliburton was fined $579 million; and BAE was fined $400 million).
  o Four letter word: J-A-I-L (increased enforcement against individuals).
  o Essentially strict liability for parent company for FCPA books and records violations of its wholly-owned subsidiaries.
  o Relevant to all industries: not just oil or pharmaceutical. Additional target industries include: technology, financial services and telecom.
  o Relevant to many geographies: China, Russia, Latin America, and many other countries/regions where emerging economies are deemed "high risk."
Collateral consequences, including debarment from government contracts and reputational harm.

Growing global patchwork of anti-corruption laws and multi-national cooperation (i.e., OECD Convention, UK Bribery Act 2010, 8th Amendments to the PRC Criminal Law).

How Can Morrison & Foerster Help?

- Our domestic and international offices advise on and investigate FCPA matters. Offices in key financial and technology centers around the world provide us with global reach and geographic diversity. We have a deep bench, and work seamlessly across our offices.

- Been there, done that: We have performed dozens of corruption-related investigations -- large and small -- in China, Japan, Korea, Thailand, Indonesia, other Asian countries, Europe and Latin America.

- We have vast experience in scores of FCPA matters for major companies and individuals, across a wide range of FCPA issues:
  - **Diligence:** conducted due diligence reviews for potential M&A transactions (both buy and sell side), prospective agents, distributors, consultants and joint venture partners, and in other contexts, in Asia-Pacific, Europe, Middle East, South America, and North America.
  - **Counseling:** advised on anti-corruption compliance policies and procedures, including real-time counseling to legal and compliance departments when problematic facts emerge.
  - **Compliance Programs/Training:** designed, reviewed, and provided anti-corruption compliance training (in numerous languages including English, Japanese, Mandarin and Spanish).
  - **Investigations:** conducted scores of cross-border internal investigations on behalf of companies and boards of directors; represented companies and individuals in investigations by DOJ and SEC.
  - **Remediation:** when anti-corruption problems are detected, we help companies fix those problems.

- We are well-equipped to represent companies and individuals in parallel criminal, SEC and civil proceedings, as well as with related government contracts issues.

- Largest investigation practice among international firms in Asia, including more than 30 litigators in Japan and more than 20 Chinese-trained lawyers in our Beijing, Shanghai, Hong Kong and Singapore offices. Dozens of our litigators in Asia specialize in the skills and techniques necessary to effectively conduct internal investigations.

- Strong presence in the UK.

- Follow the money: we have an in-house Forensic Accounting Services Group which specializes in cases involving the securities laws and provides assistance with internal investigations.

- Our Privacy + Data Security Group assists in cross-border investigations.

Expertise Based on Handling Scores of FCPA Matters

- Represented many global companies in internal investigations, government investigations, compliance reviews and training programs. Our experience crosses an array of sectors that include aerospace,
biotechnology, defense, information technology, telecommunications, healthcare, consumer products and services, and transportation.

- Where necessary, we can field a team in multiple countries simultaneously.
- Following is a representative sample of our work:
  - Conducting a cross-border internal investigation into potential violations of anti-corruption laws at several European affiliates of one of the largest companies in Asia.
  - Represented the Audit Committee of an international fertilizer company in its internal investigation resulting from a whistleblower complaint alleging violations of the FCPA in the Middle East. After we completed the investigation and reported the results to the SEC, it declined to conduct an investigation of its own and closed the file.
  - Conducting an anti-corruption compliance review in Mexico for a leading international energy corporation, as well as numerous additional anti-corruption matters in Mexico and Latin America.
  - Conducting an internal investigation into potential violations of anti-corruption laws at Chinese and Korean subsidiaries of a leading international high-technology equipment manufacturer, as well as potential revenue recognition and financial reporting issues.
  - Representing a senior executive of a global retailer in connection with an investigation by the DOJ, SEC and other agencies into possible violations of the FCPA in Mexico, Brazil and other countries.
  - Conducting anti-corruption compliance review for a global company regarding its operations in India.
  - Represented a Fortune 50 multinational company in an internal investigation of whistleblower allegations of violations of the FCPA and self-dealing in China and other Asian countries, with interviews and forensic activities in seven countries.
  - Represented senior executives of multinational corporations in investigations by the DOJ and the SEC into allegations of illegal payments to government officials in Nigeria, Angola, Kazakhstan, and Thailand.
  - Conducted an internal investigation of possible FCPA violations involving a telecom company in Venezuela.

**UK Bribery Act 2010**

- As of July 2011, companies doing business in the UK are subject to this new law globally.
- It is broader than the FCPA in important respects. We advise companies on exposure to and compliance with this new law.
- Contact Kevin Roberts in the firm’s London office for more information at kroberts@mofo.com or 020-7920-4160.