The Foreign Corrupt Practices Act: SEC Enforcement and Lessons in Corporate Compliance

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The Foreign Corrupt Practices Act of 1977 ("FCPA") amended the Securities Exchange Act of 1934 ("Exchange Act") and is enforced by the Securities and Exchange Commission ("SEC"). The purpose of the FCPA is to bolster the anti-corruption provisions of the Exchange Act by prohibiting U.S. citizens and entities from bribing foreign government officials to benefit their business interests. Contrary to common misconception, the FCPA's anti-bribery provisions apply to both public and private companies. The FCPA also has important books and records provisions, which require entities to maintain accurate corporate records in operating their businesses. Specifically, the FCPA requires a company's records to be kept "in reasonable detail, [and to] accurately and fairly reflect the transactions and dispositions of [assets]" of the company.

President Trump's economic adviser Larry Kudlow recently announced that the administration would be "looking at" reforms to the FCPA. In the past, President Trump has indicated he may seek to cut back on FCPA regulations, stating that he viewed the law as disadvantageous to U.S. companies. However, the FCPA is widely viewed as a benefit to domestic and global trade in preventing corrupt practices, and many other countries have enacted laws modeled after it. As such, it is uncertain whether a weakening of FCPA provisions would gain traction in Congress, even in the current regulatory environment.

Despite the Trump administration's opposition to FCPA restrictions on U.S. companies, it has used the FCPA against foreign companies, as seen in the recent enforcement action against European aircraft manufacturer Airbus. On January 31, 2020, the SEC fined Airbus $294 million for a pattern and practice of engaging in a widespread scheme to pay bribes to foreign officials and other decision makers in multiple countries to improperly obtain business advantages such as aircraft orders. For instance, Airbus employees made and concealed bribe payments to Chinese officials, which included lavish trips to Hawaii and entertainment, in order to obtain or retain business in China. Although the U.S. Department of Justice ("DOJ") acknowledged that its territorial jurisdiction over Airbus' conduct was limited (since Airbus is a European company), Airbus ultimately agreed to the FCPA fine as one component of an overall settlement

with the DOJ as well as French and U.K. authorities. The final settlement, which included fines for other international violations, totaled a massive $3.9 billion.

Public and private companies would be wise to heed the lessons that Airbus learned the hard way. First, they should be sure that their international business practices do not run afoul of the FCPA's anti-bribery provisions by carefully examining how their money is being spent, on whom, and for what purposes. Second, they can accomplish this by obtaining legal advice to help determine what is a legitimate entertainment or marketing expense versus conduct that crosses the line into corrupt business practice. Past enforcement actions indicate that paying for items as seemingly insignificant as a round of golf, cocktails, or meal expenses may constitute improper conduct under the FCPA.

Furthermore, companies should be vigilant in inspecting and maintaining their corporate records to comply with the FCPA's books and records requirements. Companies can do this by fully and accurately recording all transactions and dispositions of assets in their corporate books. Ultimately, keeping accurate books and records is good corporate governance and commonsense corporate practice in general, above and beyond FCPA compliance.