

## CORPORATE COMPLIANCE ALERT

7/23/13

### The Foreign Corrupt Practices Act in Latin America

#### Introduction

The anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA) proscribe criminal and civil penalties for efforts to bribe foreign officials primarily for the purposes of obtaining business or some other economic advantage.<sup>1</sup> For purposes of establishing jurisdiction, the FCPA generally requires that any such effort involve the U.S. mail or some other instrumentality of interstate commerce.<sup>2</sup> However, a United States national or corporation organized under the laws of the U.S.<sup>3</sup> that pays a bribe to a foreign official in a foreign country may also be prosecuted even if there is no use of the mails or an instrumentality of interstate commerce.<sup>4</sup> In addition, corporations trading on national securities exchanges, corporations trading on over-the-counter markets, and foreign issuers with exchange traded American Depository Receipts may also violate the FCPA's accounting provisions by filing or causing the filing of a report that inaccurately records any improper payment made to a foreign official.<sup>5</sup>

#### Latin America

While countries in Latin America have established their positions as major economic players in an era of globalization, corruption remains prevalent in those countries. Indeed, any corporation conducting business in Latin America, including affiliates, subsidiaries, and joint ventures of corporations that conduct business in Latin America, must anticipate that the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) will closely scrutinize business transactions and the accounting of business transactions in an attempt to ferret out FCPA violations and FCPA violators.

In the last quarter alone, DOJ and SEC have focused heavily on FCPA violations in Latin America. The recent DOJ and SEC actions against individuals and corporations in Latin America are as follows:

#### Ralph Lauren Polo (Argentina)

The SEC announced its first ever FCPA-related non-prosecution agreement (NPA) in resolving its investigation of Ralph Lauren Corporation (RLC).<sup>6</sup> According to the NPAs, a manager of RLC's Argentinian subsidiary made \$593,000 in payments to a customs broker over a four-year period while knowing that the customs broker was passing some or all of that amount on to government customs officials to secure the importation of RLC products. The manager also allegedly provided improper gifts to Argentinian officials, including expensive perfume, dresses and handbags. RLC uncovered the alleged improper payments,

<sup>1</sup> See 15 U.S.C. Section 78dd-1-3.

<sup>2</sup> *Ibid*, at *supra*, at note 2

<sup>3</sup> FCPA defines a "United States person" very broadly to include a U.S. national or any corporation, partnership, association, joint stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States. See 15 U.S.C. Section 78dd-2(i)(2).

<sup>4</sup> See 15 U.S.C. Section 78dd-2(i) (alternative jurisdiction).

<sup>5</sup> See 15 U.S.C. Section 78m(b)(2)(A)-(B). FCPA contains two separate accounting provisions, the books and records provision and the internal controls provision. Put simply, FCPA liability will attach whenever a person required to file reports under Sections 13 and 15 of the 1934 Exchange Act knowingly falsifies a transaction in its books and records and whenever such person knowingly circumvents the requirement to maintain and devise internal controls that provide reasonable assurances that transactions are reported accurately and in reasonable detail. See 15 USC Section 78m(b)(5).

<sup>6</sup> <http://www.sec.gov/news/press/2013/2013-65.htm>

initiated an internal investigation, made a voluntary disclosure to DOJ and the SEC within two weeks of discovering the allegedly improper payments, and undertook a worldwide FCPA compliance review.

### **International Business Machines (Argentina)**

In the April 2013, 10Q filed by International Business Machines, IBM disclosed new DOJ investigations into FCPA violations occurring in Argentina as follows: "In April 2013, IBM learned that the U.S. Department of Justice (DOJ) is also investigating allegations related to the Poland matter, as well as allegations relating to transactions in Argentina, Bangladesh and Ukraine. The DOJ is also seeking information regarding the company's global FCPA compliance program and its public sector business. The company is cooperating with the DOJ in this matter."<sup>7</sup>

### **SEC v Herbert Steffen, et al (Argentina)**

Herbert Steffen was included as a defendant in an SEC enforcement action alleging that Mr. Steffen violated the FCPA books and records provisions.<sup>8</sup> According to the SEC complaint, Mr. Steffen was retained as a third-party consultant to Siemens AG for the sole purpose of bribing the Argentine government to enter into \$1 billion national identity card contracts with Siemens.

Ultimately, the Southern District of New York granted Mr. Steffen's motion to dismiss the SEC complaint contending that the SEC could not assert personal jurisdiction over Mr. Steffen based on his conduct. The holding in the case is, however, extremely narrow and based on the specific facts in the case.

### **Embraer, Aviation Giant (Brazil)**

Brazilian aviation giant Embraer disclosed the following information in its March 6K<sup>9</sup> (Form of Foreign Issuer): "We received a subpoena from the SEC in September, 2010....In response to this SEC-issued subpoena and associated inquiries into the possibility of non-compliance with [FCPA], we retained outside counsel to conduct an internal investigation on transactions carried out in three specific countries....[T]he Company has voluntarily expanded the scope of the internal investigation to include two additional countries...."

### **BizJet International Sales and Support Inc. (Brazil, Mexico, and Panama)**

Criminal FCPA charges were filed against four former executives of BizJet International Sales and Support, Inc. ("BizJet"), the Tulsa-based aircraft maintenance, repair and overhaul services company.<sup>10</sup> According to the indictment, between 2004 and 2010 the four charged individuals – Peter DuBois, Jald Jensen, Bernd Kowalewski, and Neal Uhl – conspired to bribe officials of various Latin American governments to secure contracts for BizJet from government air fleets in Brazil, Mexico and Panama. Acting Assistant Attorney General Raman said, "The charges announced today allege a conspiracy by senior executives at BizJet to win contracts in Latin American countries through bribery and illegal tactics."<sup>11</sup>

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<sup>7</sup> <http://investing.businessweek.com/research/stocks/financials/drawFiling.asp?docKey=137-000110465913035106-6701G53KMCSJ9B5IB8D1307251&docFormat=HTM&formType=10-Q>

<sup>8</sup> *SEC v. Herbert Steffen, et al*, No. 11-cv-09073 (S.D.N.Y. 2011). The district court dismissed the complaint against Mr. Steffen on very narrow grounds on February 19, 2013. *Id.* at DE-33.

<sup>9</sup> See Embraer S.A. SEC Form 6-K (Report of Foreign Private Issuer) filed March 13, 2013, at 9.

<sup>10</sup> <http://www.justice.gov/opa/pr/2013/April/13-crm-388.html>

<sup>11</sup> *Ibid*, at *supra*, at note 4.

### **Direct Access Partners, LLC (Venezuela)**

DOJ and SEC initiated criminal and civil enforcement actions against employees of Direct Access Partners (DAP) in one of the first cases against broker-dealers for FCPA violations.<sup>12</sup>

Employees of DAP's global trading group in Miami, Florida allegedly paid a senior official of Venezuela's state economic development bank, Banco de Desarrollo Económico y Social de Venezuela ("BANDES"), at least \$5 million in kickbacks between 2008 and 2010, in return for her directing more than \$66 million of BANDES' financial trading business to DAP. The DAP employees allegedly pocketed millions of dollars in commissions from these trades, out of which they paid a portion to the BANDES official.

On June 13, 2013, the U.S. Attorney's Office for the Southern District of Florida indicted the managing partner of DAP based on his alleged participation in the massive kickback scheme.<sup>13</sup>

### **Avon (FCPA Investigation Ongoing)**

In 2008, Avon disclosed that the company had received a whistleblower letter with allegations of possible violations of the Foreign Corrupt Practices Act (FCPA) in China. Since then, Avon has spent more than \$340 million in attorney's fees related to a global FCPA compliance effort.<sup>14</sup> Most recently Avon announced in its April 10Q that:

We are currently conducting an internal investigation and compliance reviews focused on compliance with the Foreign Corrupt Practices Act ("FCPA") and related United States ("U.S.") and foreign laws and we are in discussions with the United States Securities and Exchange Commission ("SEC") and the United States Department of Justice ("DOJ") regarding resolving their investigations of these matters.<sup>15</sup>

Because Avon conducts business in Latin America and Avon has undergone a "global" FCPA compliance review, it is reasonably foreseeable that the investigation (if it has not done so already) has uncovered FCPA violations committed by Avon in Latin America.

### **Conclusion**

Given the increasing amount of FCPA investigations and actions targeting Latin America, domestic and foreign companies would be well advised to undertake a risk assessment of the company's corporate structure to evaluate where, and under what circumstances, a FCPA violation is most likely to arise. That assessment will also require the corporation to identify whether or not, and to what extent, the DOJ or SEC could assert alternative jurisdiction over a "United States person" for a bribe occurring outside of the U.S. and will require the corporation to develop internal safeguards to minimize the possibility of such occurrences.

Furthermore, based on the DOJ and SEC's renewed interest in Latin America, it is incumbent upon companies to implement an effective FCPA compliance program that incorporates the eight criterion

<sup>12</sup> <http://www.sec.gov/news/press/2013/2013-84.htm>; see also *United States v. Tomas Clarke, et al.*, No. 13-MAG-0683-RLE (S.D. N. Y. Mar. 12, 2013) (indictment).

<sup>13</sup> <http://www.justice.gov/opa/pr/2013/june/13-crm-670.html>

<sup>14</sup> <http://www.sec.gov/Archives/edgar/data/8868/000000886813000011/avp10k2012.htm>

<sup>15</sup> See Avon 10Q Report, at page 33, (April 23, 2013)

identified by the U.S. Sentencing Commission.<sup>16</sup> One crucial component of an effective compliance program – not specifically addressed by the Commission – is consideration of the consequences of violating the local laws in Latin America, including Mexico, Colombia, Peru, Argentina and Brazil,<sup>17</sup> prohibiting bribery of public officials. Such considerations are essential to the adequate and effective implementation of a corporate compliance program.

Lastly, while implementation of a compliance program that successfully identifies, remediates and corrects violations of the FCPA is always a business decision, corporations that fail to implement such programs run the risk of incurring criminal penalties, civil penalties and multi-million dollar fines. Collateral consequences may also include debarment from participation in the international banking system, including the World Bank and other Multilateral Development Banks, debarment from participation in certain governmental programs or receiving government funds, or the loss of export privileges. Cumulatively, and standing alone, these potentially devastating consequences – not to mention the investigation fees, the fees for corporate monitors or consultants and attorney’s fees – strongly militate in favor of establishing and implementing a compliance program that faithfully incorporates the eight criterion identified by the U.S. Sentencing Commission.

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<sup>16</sup> See U.S.S.G. Section 8B2.1.

<sup>17</sup> Colombia, Brazil, Mexico, Argentina, and Chile have ratified the OECD Convention Combating Bribery of Foreign Public Officials in International Business Transactions.

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