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Government Investigations ADVISORY ▪

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Agribusiness: The Next Frontier for Enforcement of the Foreign Corrupt Practices Act?

In recent years, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have aggressively enforced the anti-bribery and accounting provisions of the Foreign Corrupt Practices Act (FCPA), targeting industries as wide-ranging as energy, health care and Hollywood. The results of these efforts have been staggering. Since 2009, DOJ and the SEC have entered into more than 50 settlements and plea agreements with companies, yielding a total of more than $2 billion in penalties. Individuals have not been spared: in 2011, the former president of a Florida-based telecommunications company was sentenced to 15 years in prison for his role in a scheme to bribe Haitian government officials, the longest sentence ever in an FCPA case.

With senior government officials indicating that robust enforcement of the FCPA will continue for the foreseeable future, the natural question to ask is: which industry could be the next target for FCPA regulators? If recent events are any clue, it may be the agribusiness industry. On November 5, 2012, Archer-Daniels-Midland Company (ADM), an Illinois-based global food processing and commodities trading corporation with revenues in 2012 of $89 billion, disclosed in an SEC filing that it had initiated discussions with DOJ and the SEC to resolve FCPA matters relating to suspect transactions relating to grain and feed exports. ADM disclosed that, "[s]ince August 2008, the Company has been conducting an internal review of its policies, procedures and internal controls pertaining to the adequacy of its anti-corruption compliance program and of certain transactions conducted by the Company and its affiliates and joint ventures, primarily relating to grain and feed exports, that may have violated company policies, the U.S. Foreign Corrupt Practices Act, and other U.S. and foreign laws."

Although ADM is the first agribusiness company to publicly disclose an ongoing FCPA investigation, that announcement may indicate more such investigations to come within the industry. Historically, FCPA "industry sweeps"—such as those that targeted the oil and gas and pharmaceutical and medical device industries—have grown from an FCPA investigation into one company that led DOJ and the SEC to explore whether there was a broader industry-wide pattern of wrongdoing. The regulators' ability to expand the scope of their investigations are frequently facilitated by information volunteered by companies under investigation, which in turn leads to evidence about similar FCPA misconduct occurring at other companies in the industry. ADM's disclosure is therefore noteworthy for other companies in the agribusiness industry, particularly those that have significant business overseas.

In light of this recent development, companies in the agribusiness industry may wish to consider taking some of the steps described below to minimize risks of running afoul of the FCPA or, in the alternative, to maximize their bargaining power when negotiating a settlement with DOJ and the SEC.

Overview of the FCPA

The FCPA prohibits individuals and companies subject to U.S. jurisdiction from bribing, offering a bribe or promising a bribe to a foreign official for the purpose of influencing an official act in order to obtain or retain business. The FCPA has two components: (1) the anti-bribery provision, which applies to all companies that are traded on a U.S. exchange ("issuers"), or which have U.S. offices ("domestic concerns"), as well as their officers, directors, employees and agents; and (2) the accounting provision, which imposes recordkeeping and internal control requirements on issuers and prohibits individuals from falsifying an issuer's books and records or circumventing a system of internal controls.

Companies and individuals can be held criminally or civilly liable under either component of the FCPA. Penalties can be severe. For each violation, companies can be fined up to $25 million and individuals can be incarcerated for up to 20 years and fined up to $5 million. Other consequences of violating the FCPA include disgorgement of profits or the forced return of profits gained through the alleged bribery, debarment or suspension from doing business with the federal government, the risk of private lawsuits, and reputational damage and the loss of good will.

FCPA Risks for Companies in the Agribusiness Industry

The primary areas of FCPA risk for companies in the agribusiness industry are (1) direct liability for violations of the anti-bribery provision; (2) derivative liability for the acts of third-party agents or intermediaries; (3) liability for the conduct of joint ventures and acquisitions; and (4) violations of the accounting provision.

A. Direct Liability for Violations of the Anti-Bribery Provision

The FCPA broadly prohibits the corrupt giving, offer or promise of anything of value to a foreign official, with the intent to influence an official act for the purpose of obtaining or retaining business. DOJ and the SEC, in November 2012, issued a joint 120-page compendium called "A Resource Guide to the U.S. Foreign Corrupt Practices Act," which summarized the government's position on many important issues relating to the FCPA. In the Resource Guide, for example, the government reiterated that the term "anything of value" includes cash, gifts, travel, entertainment expenses and other items of hospitality.

This definition could pose a challenge for companies in the agribusiness industry that regularly import and export agricultural commodities to countries such as China, Mexico and Brazil, which are known to have high rates of corruption. Companies doing business in those countries or other emerging markets may face barriers to entry and expectations that payments to foreign officials are required to facilitate the performance of a wide range of official acts, such as processing export or import licenses, reducing customs duties and sales taxes, or making decisions on government contracts. However, even if bribes are customary, expected or solicited by foreign officials, companies may still be liable under the FCPA. Notably, the Resource Guide pointed out that FCPA liability cannot be avoided by claiming economic duress.

Companies in the agribusiness industry also need to be aware of DOJ and the SEC's broad interpretation of the term "foreign official," which includes officers or employees of an "instrumentality" of a foreign government. In the Resource Guide, DOJ and the SEC noted that such instrumentalities include state-owned or state-controlled entities, even if the foreign government is not the sole owner of the entity and the business is performing a nongovernmental function.

Therefore, in countries where the government is heavily involved in the private agribusiness sector, employees of foreign companies could be considered "foreign officials" and a U.S. agribusiness company that interacts with those employees could be implicated under the FCPA.

That being said, the Resource Guide confirms that items of nominal value, such as cab fare, cups of coffee or reasonable meals are unlikely to ever manifest the level of corrupt intent required to constitute an FCPA violation. The same applies to the payment of business travel and entertainment expenses: these expenditures will not be a violation of the FCPA if they are reasonable, bona fide and directly related to the promotion, demonstration or explanation of products or services or the execution or performance of a contract. Nevertheless, larger gifts (e.g., sports cars, fur coats and other luxury items), widespread gifts of smaller value or reimbursement of travel and entertainment expenses that are primarily personal in nature could potentially lead to an enforcement action.

B. Derivative Liability for Acts of Third-Party Agents or Intermediaries

In addition to prohibiting direct bribes to foreign officials, the FCPA also bans the indirect payment, offer or promise of things of value to foreign officials to influence an official act to obtain or retain business. Notably, a company can be found liable under the FCPA if a third-party agent or intermediary makes a corrupt payment to a foreign official even if the company did not have actual knowledge of such payment. Under the FCPA, "knowledge" of a third-party's corrupt payment can be established if the company is found to have been aware of facts suggesting that there was a high probability that an improper payment would be made, offered or promised by a third-party agent working on the company's behalf. DOJ and the SEC has made clear that this broad reading of "knowledge" was intended to eliminate the so-called "head-in-the-sand" problem that could otherwise insulate a company or individual from avoiding FCPA liability simply by turning a blind eye or recklessly disregarding red flags. Therefore, companies—as well as their officers, directors and employees—that deliberately ignore red flags involving third-party agents may be liable under the FCPA's anti-bribery provision just the same as if they had made, offered or promised the corrupt payment themselves.

Some of the common red flags associated with third-party agents include (1) excessive commissions demanded by third-party agents; (2) unreasonably large discounts demanded by third-party agents; (3) third-party "consulting agreements" that include only vaguely described services; (4) the third party is related to or closely associated with a foreign official; (5) the third party becomes part of the transaction at the express request or insistence of a foreign official; (6) the third party is merely a shell company incorporated in an offshore jurisdiction; and (7) the third party requests that payments be directed to offshore bank accounts. Companies encountering any of these, or similar, red flags should consult with their legal department.

C. Liability for the Conduct of Joint Ventures and Acquisitions

As the ADM disclosure demonstrates, conduct of a joint venture could result in FCPA liability. As a practical matter, DOJ and the SEC consider the activities of a joint venture to be imputed to each member irrespective of the members' ownership stake, as long as the member is found to have had sufficient "knowledge" of the activity (including actual knowledge or reckless disregard). For example, one recent case involved a joint venture of four multinational companies that allegedly bribed Nigerian government officials in order to win a series of liquefied natural gas construction projects. The joint venture partners and their agents were ultimately the subject of FCPA enforcement actions resulting in the imposition of $1.7 billion in civil and criminal sanctions, a criminal plea by one of the joint venture partner's subsidiaries and criminal pleas by several individuals. Thus, any company in the agribusiness industry considering entering into a joint venture should be cognizant of the risk that actions of the joint venture may create potential liability for all members.

Companies may also face FCPA liability when acquiring a new entity under the principle of successor liability. Generally, an acquiring company inherits the legal liabilities of its target, which include violations of the FCPA prior to acquisition. Agribusiness companies seeking to acquire another company should therefore take steps to mitigate the possibility of successor liability, which include conducting pre-acquisition due diligence, implementing a robust FCPA compliance program after the acquisition, conducting a post-acquisition audit and timely alerting the government to any FCPA issues that are uncovered either before or after the acquisition.

D. Violations of the Accounting Provision

In addition to the potential direct and indirect liability under the anti-bribery provision, companies in the agribusiness industry that are U.S. issuers—as well as their officers, directors, employees and agents—may be liable for violations of the FCPA's accounting provision. The accounting provision, which is meant to prevent the concealment and mischaracterization of bribe payments, has two components. Under the "books-and-records" component, issuers are required to make and keep accurate books, records and accounts that, in reasonable detail, accurately and fairly reflect the issuer's financial transactions. Under the "internal controls" component, issuers are required to maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations.

Because the FCPA's accounting provision does not require a connection to a corrupt payment, a charge under this provision will often be brought when the elements for an anti-bribery violation cannot be established or if regulators seek a compromise in settlement discussions. However, because the FCPA's accounting provision applies only to issuers, the jurisdiction for accounting violations is narrower than for anti-bribery violations.

Some of the more common violations of the FCPA's accounting provision have involved mischaracterizing bribe payments as commissions or royalties, consulting fees, sales and marketing expenses, scientific incentives, travel and entertainment expenses, rebates or discounts, after-sales service fees, miscellaneous expenses, petty cash withdrawals, free goods, intercompany accounts, supplier/vendor payments, write-offs and customs intervention payments. Companies encountering any suspected mischaracterizations in books and records should consult with their legal department about potential FCPA violations.

Managing FCPA Risks

Given the risks discussed above and the possibility that the agribusiness industry could be a future target of the government's continued commitment to aggressive enforcement of the FCPA, companies in this industry should consider taking proactive steps to minimize their potential liability, particularly if they have significant overseas business. As an initial matter, companies should consider implementing, reviewing and assessing their own internal FCPA compliance programs. While there is no one-size-fits-all approach, robust FCPA compliance programs may involve some or all of the following components:

- written FCPA compliance policies, standards, and procedures available to all employees of the company, and appropriate translations made into local languages;
- periodic FCPA training for employees, as well as for third-party agents and business partners;
- a designated and independent chief compliance officer.
- written requirements that require reporting of all actual or suspected FCPA violations;
- an effective reporting structure for misconduct, including a method by which employees can submit anonymous tips;

- a written system of discipline that provides for consequences, up to and including termination, for conduct that violates the FCPA;
- periodic compliance certifications from appropriate employees, third-party agents and business partners;
- contractual representations and warranties with third-party agents and business partners requiring compliance with all U.S. laws, including the FCPA;
- contracts that allow oversight and audit of the activities of third-party agents and business partners; and
- a compliance monitoring program.

In addition to implementing these measures, FCPA risk assessment and compliance auditing of proposed joint venture members and acquisition targets may also help in mitigating potential liability. Among the questions to consider in conducting such assessments and audits are:

- Do the joint venture members/acquisition target operate in a high-risk industry such as aerospace and defense manufacturing, banking and finance, health care and life sciences, energy, telecommunications or transportation?
- Do the joint venture members/acquisition target operate in high-risk countries?
- Do the joint venture members/acquisition target have connections with foreign officials?
- Has due diligence been performed on the joint venture members/acquisition target and their business partners, agents and other third parties?
- Do the joint venture members/acquisition target require annual certifications from business partners, agents and other third parties?
- Are there any red flags in the joint venture members'/acquisition target's business dealings, such as requests for large commissions, use of unusual off-shore accounts, employment of third-party intermediaries with ill-defined roles, etc.?
- Do the joint venture members/acquisition target have past or present FCPA issues?
- Do the joint venture members/acquisition target have an effective FCPA compliance program that includes the various elements referenced above?

FCPA compliance monitoring must be an ongoing process. As businesses grow and change, new risks may arise, and additional compliance efforts to address those risks may be necessary. If a company identifies a possible FCPA violation, the legal department should be contacted. By promptly investigating any potential violations, companies in the agribusiness industry can determine the proper strategic course—which may include consideration of a voluntary self-disclosure—and attempt to minimize, or eliminate altogether, any potential FCPA liability.

***This client advisory was written by* Edward T. Kang.**

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