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Roundtable: Compliance and Litigation Issues As Foreign Corrupt Practices Act Enforcement Is On The Rise

The fight against corruption and bribery has intensified. As a service to our readers, we present a roundtable discussing the implications for corporations consisting of the following partners of Akin Gump Strauss Hauer & Feld LLP: ***Paul W. Butler, Mark J. MacDougall, Edward L. Rubinoff, Wynn H. Segall*** *and* ***Thomas McCarthy, Jr.****, in Washington, D.C.*

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Mark J. MacDougall

Thomas McCarthy, Jr.

Edward L. Rubinoff

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Editor: Ed, please kick off the discussion.

Rubinoff: Wynn and I are regulatory compliance lawyers, and Paul and Tom are white collar litigators. Mark's areas include investigations, cross-border litigation, reputational recovery, and white collar defense. We have a multi-disciplinary, cross-departmental approach to dealing with FCPA and anti-corruption. Wynn and I focus mostly on the compliance and counseling side – helping people understand how these laws apply, developing programs to keep companies compliant, and conducting due diligence in transactions. Paul and Tom focus mostly on investigations and enforcement, so we'll try to keep our answers divided up that way as much as possible.

From my perspective, the key takeaway is that, with recent trends in increased enforcement, escalating fines, extensions of the FCPA to non-U.S. persons, increased focus on individual liability and a new whistle-blower provision, there has been a broad expansion of the FCPA.

Coupled with the internationalization of anti-corruption laws, these trends add up to one critical message for companies – not just U.S. companies – but companies around the world – that they must become familiar with the various anti-corruption laws of the jurisdictions in which they operate.

Companies need good advice on how these laws apply to their operations and how to develop effective policies and procedures to comply with them. The consequences of non-compliance are enormous in terms of financial impact, reputational harm and the ability to do business around the world.

Editor: Are the DOJ and SEC perceived as good guys by virtue of their vigorous enforcement of the FCPA?

Rubinoff: That depends on who you ask or if you've been subjected to one of their investigations. Insofar as the DOJ and the SEC have been very aggressive and proactive in enforcing these laws against non-U.S. persons, it could be said that they are helping to create a level playing field for U.S. companies competing around the world. To the extent that companies outside the U.S. now are subject to the FCPA and other national laws, perhaps U.S. companies are enjoying the benefits of a greater degree of fairness in international business dealings.

Segall: It is critical for companies to align their compliance programs and practices with guidance provided by past DOJ

cases and to be proactive in their international business dealings to safeguard compliance in dealing with other parties. Where they find that they are dealing with another party that may be engaged in improper behavior, it is important to take steps that draw a line of separation from that kind of behavior and to conduct internal investigations where necessary to assure that they remain on the right side of the line.

It is worth noting that Congress recently enacted a new whistle-blower statute that effectively pays company personnel to come forward and report on potential incidents of bribery. This further elevates the risks of government enforcement and the value for a company to establish and maintain effective internal controls, including good training and education of personnel, to maintain an effective culture of compliance in relation to anti-bribery concerns.

U.S. companies face substantial risks as a result of the varied ways in which other countries have approached anti-bribery concerns to date. There is a widely varied awareness and sensitivity in the international business community to anti-bribery concerns. The international business environment is evolving on these issues in terms of how different countries are implementing multilateral conventions, such as the OECD Convention and the UN Convention Against Bribery. Enforcement practices of other countries also vary widely. Certainly, for the U.S. business community, there is a real premium on the compliance side – getting it right up front and being very proactive so that they are aligned with the DOJ. To the extent that the DOJ recognizes the importance of a good compliance program in its approach to enforcement, companies can position themselves to advantage by taking a rigorous approach to compliance on the front end.

Editor: What are the implications of voluntary disclosure?

Butler: The DOJ encourages companies to make voluntary disclosures with the promise that companies will obtain a benefit for coming forward voluntarily. For a company with a good compliance program and track record, it is important to continue that dialogue so it can bring smaller problems to the attention of the DOJ and feel that it will be trusted to address the matter internally.

The problem is that not every company has had that experience with these matters. Thus, in-house counsel struggle with the following questions: will the company get the benefit of voluntary disclosure and how do you limit a voluntary disclosure so that it doesn't turn the company upside down, disrupt its business, meander into other business lines and involve talking to witnesses who might have confidential information about unrelated matters.

When we talk to in-house counsel, they express a desire to develop a very rigorous compliance program. They want to have that kind of dialogue with the government and get the benefit of the Justice Department's attempts to level the playing field. Their biggest concern is controlling costs and minimizing disruption of business. These are difficult issues to address, because it is very hard to get an up-front commitment from the DOJ and SEC regarding critical parameters of an acceptable internal investigation conducted by the company, such as when it will be over and how it will be closed out.

Companies that take this road make an enormous financial commitment with very little certainty about the outcome. Broadly speaking, U.S. companies are seeing some benefit to the ramped-up FCPA enforcement, which is aimed at leveling the international playing field. On a more micro level, companies are questioning whether they really are getting the benefit of all these disclosures in light of the costly and intrusive internal investigations that they trigger.

Segall: Paul's comments underscore that it is critical to implement an effective compliance program up front. If that is not done, the difficulty is amplified if focus on these issues only comes after you discover a problem and then have to deal with managing how to proceed with the enforcement issue and related compliance safeguards concerns.

Editor: The FCPA is unclear in many respects; does the government provide adequate guidance?

Butler: I deal closely with Ed and Wynn in helping companies not only to navigate the broader matter of voluntary disclosure but also to resolve the day to day issues about whether something is a reasonable promotional expense or fits within the facilitating payment exception. These are often difficult judgment calls. Moreover, even the best compliance programs will not necessarily catch everything, leaving companies to wrestle with the prospect of voluntary disclosure.

There is no clear guidance on identifying the size and nature of a problem and whether it constitutes a core failure in the compliance program that would require a broader internal investigation and perhaps a disclosure to the government. There are many ambiguous factors that need to be weighed when a company decides whether or not to make a voluntary disclosure. Are you certain that a violation occurred? Do you go to the DOJ if you're only 51 percent sure that a violation has occurred? Should you present a small problem in good faith, only to have the subsequent investigation turn the company inside out – with the cost and disruption far outweighing the severity of the problem?

These issues are the flip side of the "leveling of the playing field" benefit the companies see in the voluntary disclosure program. While beneficial in potentially insulating a company from very serious enforcement action, the criteria for voluntary disclosure are not entirely clear and it is fraught with risk. This is a major concern for in-house counsel.

Rubinoff: Clients frequently ask whether a particular payment is violation of the FCPA. There is no bright line test specified in the Act or developed by the agencies. We help clients work through existing guidelines to give them a sense of what types of government functions are largely ministerial, where a payment is permitted, or one where a decision is being made, where it is not ministerial. We also advise on internal procedures to ensure that these payments are properly vetted and evaluated as to whether there is unintended risk or a justified basis for doing it.

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Editor: The trend toward criminal prosecution of individuals presents serious issues. How are executives coping and how will this development affect corporate governance?

MacDougall: Prosecution of individual officers and directors for corporate offenses is nothing new. There are actually long-standing policies that discourage the federal prosecution of corporations without also punishing the individuals who are responsible for the corporate conduct. When you think about it, this makes complete sense. The decisions that corporations make that result in criminal investigation are really the actions of senior managers, corporate officers and boards of directors. It makes sense that the way to raise the consciousness of the people who run large corporations – and whose performance is compensated at the highest levels – is to make clear the risk that they run if their decisions violate the law. But I'm not sure that there is really any long-term impact on commercial behavior. There have been periodic waves of prosecutions of corporate officers – Enron, Tyco, HealthSouth, all the way back to the hundreds of savings and loan prosecutions in the early 1990s. Have these cases really caused a long-term change in how corporate managers do business? I don't think anyone can answer that question.

Editor: Please describe your reputation recovery practice. How do exonerated companies and executives protect their good name, particularly when international business transactions are at stake?

MacDougall: Working to protect the reputations of companies and their shareholders, who want access to securities markets in the United States and the U.K., is in many respects coincident to heightened FCPA enforcement. Like so many other aspects of commercial life today, the Internet has changed everything. For most of this country's history, if you wanted to publish news, you had to invest in a printing plant, find advertisers, deliver or sell your newspaper or magazine and most importantly, hire editors who maintained the integrity and accuracy of the journalism. The news that you published, even if you were a major newspaper, rarely traveled more than 50 miles from the printing press. Now, anybody with a laptop computer and a website can become an international publisher and send news – or rumors, unfounded allegations, pure fiction, or manufactured attacks dressed up like news - around the world in a matter of seconds.

So how does this intersect with the FCPA? Let me give you an actual composite case study – without naming names. A Canadian oil exploration company – with securities registered with the SEC and sold in the United States – was bidding on a large oil and gas concession in Southeast Asia. A competitor for the contract wanted the Canadian company out of the picture. So they hired a private investigator (who had just quit his job as a journalist) to go visit two guys who worked in a converted basement apartment in Amsterdam and ran an Internet "intelligence alert newsletter." With some manufactured documents and a few thousand dollars on the table, the investigator arranged with the boys in Amsterdam to run a story on their intelligence newsletter saying that classified sources reported that the Canadian company was under investigation for paying bribes to government officials in its last big project in West Africa.

It wasn't true, but it didn't matter. The story went around the world in seconds and in a matter of a couple of weeks it was being carried by oil industry trade publications. The company issued a public denial, but it was too late. The virus was loose. The next week, the story appeared simultaneously in a second tier financial newspaper in Europe. A few days later, a major Canadian newspaper ran a story that "published reports indicate" that the hometown oil exploration company was under investigation for corrupt activities in West Africa. A short time after that, the company's lead bank in New York suspended a new revolving credit agreement, citing unspecified "compliance problems." The same day, the chairman of the Canadian company's audit committee – a U.S. citizen living in Chicago - called for an emergency board meeting to address what he called "alarming allegations of FCPA violations." The competitor had accomplished its mission and was poised to win the exploration contract in Southeast Asia.

How do you combat this kind of attack, which is not at all uncommon in cross-border transactions? It's not easy, but by using good investigators and confronting the mainstream publications with hard facts and evidence, the tide of this kind of attack can be turned. Ultimately, you have to identify the source, obtain published retractions and get false articles removed from the Internet. Sometimes you have to bring suit in the U.K. and other jurisdictions that have developed more sophisticated legal ways of dealing with the abuse of the Internet to publish false commercial attacks. In my story, we ultimately found the on-line intelligence experts in their basement in Amsterdam – but it wasn't easy.

Editor: Describe the international trend toward adoption by other countries of laws curbing corruption and bribery.

McCarthy: In my view, the DOJ has not been viewed as the good guy by most U.S companies, but now this is beginning to change. Up until 13-15 months ago, the DOJ was seen as enforcing a law with which no one else in the world really had to comply. They did it in a way that was very vigorous, with no clear guidelines on many of the aspects of the FCPA. U.S. companies felt that they were being held to a much higher standard than other companies competing with them around the world. They felt they were being unfairly put upon and that, in fact, the FCPA had made it impossible for U.S. companies to compete with their foreign counterparts. Every year, we had these rather sensational cases where FCPA enforcement broke new ground. Often, the outcome was a finding that there had been no violation of the FCPA. This created mistrust and resentment in the U.S. business community.

Let me add that the international anti-corruption community has always considered the U.S. DOJ as the good guys – the guys in the white hats who were really doing something about transnational bribery, whereas hardly anyone else in the world really was. What we have now is a fundamental shift, where a number of factors have come together that create a huge opportunity for U.S. companies to use the DOJ to help them compete on a level playing field.

In the last two years, anti-corruption efforts have been internationalized. The OECD enhanced recommendations for fighting bribery came out last December. The OECD guidelines now provide much clearer rules for what companies need to

do than does the FCPA.

Finally, we have unprecedented cooperation between the DOJ and other national law enforcement agencies, starting with Siemens. Here, the DOJ worked very closely with the German law enforcement authorities. Now, we see the UK also bringing enforcement actions and, further, the DOJ working with foreign law enforcement agencies to go after foreign companies.

The Siemens case was really significant. Not only was it a non U.S. company, but for the first time, the DOJ really worked with the company to create a sanction that was going to keep it in business. They had to thread a needle so that Siemens was not de-barred for ten years under the EU Public Procurement Guidelines. They also needed to make sure that Siemens wasn't de-barred by the World Bank and the other multilateral development agencies.

The DOJ worked with Siemens to forge a deal that actually allowed Siemens to avoid very serious sanctions and stay in business. So here, for the first time, we saw the DOJ working with a company who they were convinced had seen the light on anti-corruption and was going to do the right thing. Since then, it's really been a brave new world.

There is a lot of opportunity for U.S. businesses to use the DOJ and its cooperation agreements with other national law enforcement agencies to enforce anti-bribery and anti-corruption laws against competitors who are paying bribes. Among the more significant developments we see is that U.S. business is waking up to how they can use DOJ, almost as a business partner, in the recent internationalization of anti-corruption efforts.

Butler: My sense is that the U.S. business community views this very significant trend in global FCPA enforcement as, on balance, a good thing. However, the jury's still out on that. Any good law-abiding company would like to see people who are breaking the law exposed and punished; however, we can all agree that the international enforcement has been uneven. We have seen some very interesting new developments in other countries like Germany and the UK really begin to take enforcement action seriously.

Companies around the world, and particularly U.S. companies, are aware of the increased commitment of resources globally to fighting corruption. There is increased use of international tools of law enforcement, such as mutual legal assistance, treaties, informal international coordination and even increased extradition in certain areas. The U.S. business community has to adapt to all of that.

Whether international developments have helped U.S. companies compete better is a very industry- and geographically-specific assessment. Has it helped in areas where international companies are competing for natural resources in third world countries? I'm not sure that the case can be made for that. Is it helping in developed countries in sophisticated markets for high technology medical devices and similar industries? It probably has. You have to break it down industry by industry and region by region to see whether U.S. business interests are being served sufficiently to offset burdensome compliance programs.

There is no doubt that the global anti-corruption initiative ultimately is a good thing for American business. American business has been working with the DOJ and with these international initiatives to try to develop international standards of compliance and enforcement. The vast majority of American businesses want to do the right thing. They want to compete on all the right issues and not on paying bribes. We've seen that transparency and requiring enforcement against corruption are keys to several U.S. global initiatives, even to issues like Afghanistan and Iraq. Therefore, though our comments may sound excessively focused on the day-to-day burdens – most U.S. companies see this trend as a net positive.

Rubinoff: With respect to the OECD, it undertook three phases of evaluation of its anti-corruption convention since it was adopted about ten years ago. In the first phase, it evaluated implementation of the agreement by national laws, and I believe all members have adopted laws. Phase two looked at the infrastructure to administer and enforce these laws, and now they recently started phase three, which is evaluating enforcement of national laws. The first countries evaluated on that basis were the United States and Finland. The U.S. evaluation recently was finished, and a report is being released. The results of this evaluation phase will be very telling. As Paul said, the data and anecdotal evidence reflect that enforcement has been sporadic and inconsistent. In the ten years of the OECD agreement, the U.S. represents about 75 percent of all known investigations and enforcement actions. OECD evaluations may provoke other countries to be more proactive in the enforcement of their laws.

Editor: What are the legal theories underlying the increased enforcement of the FCPA against non-U.S. persons and corporations?

MacDougall: There has been a trend, for more than two decades, of expanding the extraterritorial jurisdiction of U.S. courts and criminal law. The USA PATRIOT Act is probably the best-known recent example, but certainly not the only one. Although the federal courts have begun to put some limits on the use of this theory, the basic idea is that if a transaction intersects with U.S. commerce then U.S. law can be applied. While the FCPA pretty clearly defines the scope of enforcement, most multi-national companies of any size want to have offices, sell their securities, hire senior managers and otherwise do business in the United States.

Editor: What issues does the adoption by individual countries of anticorruption legislation pose?

Butler: The FCPA is no longer the only anti-corruption law to which companies that do business overseas need to pay attention. To add value and assist their clients, law firms and attorneys in this field need to be aware of and familiar with a multitude of anti-corruption and anti-bribery laws. We're talking about global compliance, not just FCPA compliance.

Segall: Our clients are international companies that do business in many different jurisdictions around the world. Currently, we are helping our clients to review their current compliance programs to benchmark them against new laws that are coming online in other places. In some ways, laws like the bribery act in the UK have greater power to go after U.S. companies in areas that were considered settled in the United States. The international anti-bribery enforcement climate is a work in progress. The bribery act in the UK does not have any expressed allowances for facilitation payments, gifts or gratuities. In the United

States, we have benchmarks and guidance from the DOJ that help us advise clients on expressed policies and enable them to give fairly specific guidance to their employees. Depending on how the bribery act ultimately is applied, you have to be careful you do not have a compliance program that has written into it prima facie evidence that your company is not comporting with the laws of that country. Thus, we are looking at existing programs and essentially recalibrating them to take the multilateral considerations into account. It is a critical moment for U.S. and international business communities to reevaluate their practices and compliance programs to accommodate the new environment.

Editor: Mark, one important development is that countries and government-owned companies are also becoming involved in corruption issues. Please describe Akin Gump's role in the very recent anti-corruption investigation by the government of Ukraine.

MacDougall: We shouldn't mislead ourselves into thinking that only we in the United States understand the harm that comes from public and commercial corruption. The investigation in Ukraine was a good example. Plato Cacheris and his firm, Trout Cacheris, PLLC, had the lead in that case and we also worked closely with the international investigative firm Kroll, Inc. You don't have room here to talk about the Ukraine investigation in detail, but the Ministry of Finance has posted the entire report, as well as the supporting documentary exhibits at http://minfin.gov.ua/document/274231/report1.pdf. It's worth reading if you are interested in how public and commercial corruption looks at the ground level.

Editor: In a politically charged situation such as this, how do investigators distinguish between substantive allegations and political posturing?

MacDougall: It's pretty easy. We don't do politics. The clients understand from the beginning that our work is all about facts and evidence. The investigation goes where it goes. It's like preparing a complex case for trial when you put together the order of proof - every statement of fact that we report has to be backed up by hard evidence, which we test just as if we were preparing to try the case. If there is a prospect of recovery by pursuing civil litigation in courts in the United States, the U.K. or elsewhere, we explain the options. What the politicians have to say after our work is done is not our business.

Editor: In the case of the Ukraine investigation, as well as work that you have done for the national aluminum concession of Bahrain, civil suits have been brought in federal courts in the United States, as well as the High Court of Justice in London, against companies that are alleged to have been involved in corrupt schemes. What is the purpose of these civil suits?

MacDougall: I don't want to publicly comment on matters that are pending in federal court. In general terms, however, if there is an FCPA violation then there is a victim. This is true with almost all white collar offenses. In the context of the FCPA, that victim is most often a government-owned enterprise in the country where the corrupt activity took place. The company that has paid the bribe or gratuity expects and almost always gains an economic advantage. That advantage generates an offsetting loss to the state-owned enterprise – whether it involves minerals sold at a discount or equipment purchased at a premium to market. Although there is no statutory civil right of action in the FCPA, there is nothing unreasonable about the idea that if a government-owned enterprise has been victimized by corrupt activities, there should be some prospect of relief in the courts of the United States, the U.K. and other jurisdictions that have reliable and transparent judicial systems.

Editor: What final comments do you have for readers and viewers with respect to how companies can remain compliant with new foreign anti-bribery laws and international enforcement efforts?

McCarthy: The short answer is to partner with a law firm that has a global perspective on compliance and is aware of emerging laws and compliance norms around the world.

MacDougall: I think that there is really no substitute for leadership and fostering the right corporate culture. Formal training is helpful, but the real test is whether corporate leaders and managers – starting with the board of directors – are willing to maintain a culture that says we will compete on an even playing field and the use of bribery and gratuities – no matter how they are dressed up – will not be tolerated.