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Panel on China and the FCPA: Emerging Trends in FCPA Enforcement

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PANEL ON CHINA AND THE FCPA
EMERGING TRENDS IN FCPA ENFORCEMENT*

Thomas O. Gorman⁺

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INTRODUCTION

The US Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) have brought more Foreign

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Corrupt Practices Act (“FCPA”) cases in recent years than during any period since the passage of the statute in 1977. Significant sums have been paid by business organizations to resolve those actions. Corporate boards have been faced with seemingly impossible choices regarding potential liability, self-reporting, cooperation, expansive and costly investigations, and extensive remediation.

Recently the number of actions initiated has declined. Nevertheless, any organization conducting business overseas is immediately confronted with issues regarding FCPA compliance. This is particularly true if business is being conducted in high risk areas of the world such as China (“PRC”). There, local laws, years old customs, and demands to partner with, or work through, local organizations can make conducting business a daunting process. Indeed, the company can quickly find itself in the middle of a DOJ or SEC FCPA investigation tied to the actions of local agents and affiliates.

Three key issues for business organizations with operations in the PRC emerge in this context: 1) Is FCPA enforcement still a priority; 2) What are critical current issues; and 3) What are the key trends for the future? Each of these points will be analyzed below.

I. IS FCPA ENFORCEMENT A CURRENT PRIORITY?

While FCPA enforcement has been an enforcement priority, the number of actions brought has declined recently. For example, the SEC reports that in 2013 it brought eight FCPA actions. The prior year the agency brought ten actions, while in 2011 and 2010 it brought fifteen in each year.¹ Trends in criminal actions brought by the DOJ are similar.² Overall it is clear that the number of cases being brought in recent years has declined.

1. *Spotlight on Foreign Corrupt Practices Act*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last visited May 12, 2014).

2. See, e.g., Mark Jenkins et al., *FCPA Compliance in China*, FIDELITY FORENSICS GROUP 3, <http://www.fidelityforensics.com/wordpress/2013/10/18/fcpa-compliance-china> (last visited May 12, 2014); *Corporate FCPA Enforcement Was Down in 2013, Or Was It Up, Or Was It Down?*, FCPA PROFESSOR BLOG (Jan. 9, 2014), <http://www.fcpaprofessor.com/corporate-fcpa-enforcement-was-down-in-2013-or-was-it-up-or-was-it-down>.

In view of these statistics some may be lead to believe that enforcement efforts have waned. Before reaching this conclusion, however, two critical points should be considered: 1) The recent remarks of enforcement officials; and 2) Significant recent cases. Together, these points suggest that FCPA enforcement continues to be a key focus of enforcement officials.

A. Remarks of Enforcement Officials

In recent remarks enforcement officials have stressed the importance of FCPA enforcement, suggesting that efforts be increased. For example, Acting DOJ Deputy AG Mythili Raman, Chief, DOJ Criminal Division, recently called FCPA and anti-corruption enforcement a “core priority of the Department of Justice.”³

To illustrate her point, Ms. Raman noted that since 2009 the DOJ has resolved over forty corporate corruption cases. Those include nine of the top ten largest settlements in terms of penalties in the history of the Act, resulting in about US\$2.5 billion being paid in monetary fines. The DOJ is also coordinating with officials from other countries.

Ms. Raman went on to note that last February the DOJ, SEC, and FBI hosted what she called an “unprecedented” meeting of “130 judges, prosecutors, investigators, and regulators from more than thirty countries, multi-development banks, and international organizations around the world.” The purpose was for training and to exchange ideas for combating foreign corruption. The conference also furthered specific prosecutions.

Collectively these points illustrate the priority being given to FCPA enforcement. Ms. Raman thus concluded her remarks by calling for increased, not decreased, enforcement efforts, stating that “I am certain that now is the time to *enhance, not*

3. Mythili Raman, Acting DOJ Deputy Att’y Gen., Chief, DOJ Criminal Division, Keynote Address at the Global Anti-Corruption Congress, Washington, D.C. (June 17, 2013), *available at* <http://www.justice.gov/criminal/pr/speeches/2013/crm-speech-130617.html>.

diminish, our anti-corruption efforts. The fight against global corruption is a critical mission . . ."⁴

B. *Significant Recent Cases*

Examination of the FCPA actions brought in the last twelve months confirms Ms. Raman's comments. In the last twelve months the DOJ and the SEC have teamed to bring three of the largest FCPA cases in the history of the Act when measured by the sums paid to resolve the actions.⁵ In May 2013 French oil and gas giant Total, S.A. paid US\$398 million to the DOJ and the SEC to resolve FCPA charges and is now number four on the top ten list. In November 2013 Swiss based Weatherford International paid US\$152 million to resolve FCPA charges and is now number ten on the list. And, in January 2014 Alcoa, Inc. paid US\$384 million to settle DOJ and SEC FCPA charges, putting the firm at number five. In addition, the Department of Justice recently brought criminal FCPA charges against three individuals. Collectively these actions suggest that FCPA enforcement continues to be a priority. The cases are briefly summarized below.

1. Total S.A.⁶

The actions involving Total stem from the efforts of the company to re-enter the Iranian oil market. In 1995 Total negotiated a development contract with the National Iranian Oil Company ("NIOC"), a government instrumentality, for the development of the Sirri A and E oil and gas fields. Prior to executing the agreement, Total met with an Iranian Official who had the ability to influence the award of the contract. The firm and the official entered into a so-called consulting arrangement which was used as a conduit for US\$16 million in corrupt payments over the next two and one half years.

4. *Id.* (emphasis added).

5. The Top Ten list is maintained by the FCPA blog and updated periodically. It is available at www.fcpablog.com.

6. *United States v. Total, S.A.*, Criminal No. 1:13 cr 239 (E.D. Va. Filed May 29, 2013); *In re Total, S.A.*, Adm. Proc. File No. 3-15338 (filed May 29, 2013). The discussion of the cases in the text is drawn from the court papers in these cases.

In 1997 the company entered into a second arrangement with NIOC. This agreement was to develop phases 2 and 3 of the South Pars gas field, a joint venture with a number of other multinational oil and gas companies. As with the initial project, Total entered into a consulting arrangement with the Iranian official. Over the next several years the company made a series of payments under this agreement which totaled about US\$44 million. None of the payments were properly recorded in the books and records of the company.

Total resolved the criminal charges by entering into a deferred prosecution agreement under which it paid a criminal fine of US\$245.2 million, retained a monitor for three years, enhanced its compliance systems, and continued to cooperate with enforcement officials. To resolve the SEC administrative proceeding the company consented to the entry of a cease and desist order based on Exchange Act sections 30A, 13(b)(2)(A), and 13(b)(2)(B), and agreed to pay disgorgement of US\$153 million and retain a consultant.

2. Weatherford International, Inc.⁷

Weatherford International Ltd. and its subsidiaries resolved FCPA charges with the DOJ and SEC and also settled export control charges, paying a total of US\$252 million. The bribery charges are based on three schemes. The first involved a joint venture established by Weatherford subsidiary Weatherford Services in Angola with two local entities in 2005. The two local entities principals included foreign officials. The venture was used solely as a conduit for millions of US dollars of payments by the Weatherford subsidiary to the foreign officials controlling them, according to the court papers. In exchange for the payments, Weatherford Services obtained lucrative contracts and information about the pricing of competitors.

The second scheme involved the bribery in Africa of a foreign official by employees of Weatherford Services. The

7. United States v. Weatherford Services, Ltd., No. 13 CR 734 (S.D. Tex. filed Nov. 26, 2013); United States v. Weatherford International Ltd., No. 13 CR 733 (S.D. Tex. filed Nov. 26, 2013); SEC v. Weatherford International, Ltd., Civil Action No. 4:13-CV-03500 (S.D. Tex. filed Nov. 26, 2013). The discussion in the text is based on the court papers filed in these actions. *See also* SEC Lit. Rel. No. 22880 (Nov. 26, 2013).

purpose of the payments was to secure the renewal of an oil services contract. The payments were made through a freight forwarding agent. The payment made was concealed by the creation of sham purchase orders and similar records crafted by the forwarding agent. The contract was renewed in 2006.

The third scheme involved payments in the Middle East from 2005 through 2011 by employees of Weatherford Oil Tools Middle East Limited (“WOTME”). In this scheme what were claimed to be volume discounts to a distributor who supplied company products to a government owned national oil company were actually used to create a slush fund. That fund was used to make payments to the national oil company. During the period WOTME paid about US\$15 million to the distributor.

To resolve the FCPA charges with the DOJ, the company entered into a deferred prosecution agreement. It required the payment of an US\$87.2 million criminal penalty and the retention of a monitor for eighteen months. The underlying criminal information contains one count of violating the internal controls provisions of the FCPA. In addition, Weatherford Services agreed to plead guilty to violating the anti-bribery provisions.

The SEC’s complaint alleged violations of Exchange Act sections 30A, 13(b)(2)(A), and 13(b)(2)(B). To resolve the charges the company agreed to pay US\$90,984,844 in disgorgement, prejudgment interest, and a US\$1.875 million civil penalty assessed in part for a lack of cooperation during the investigation. US\$31,646,907 of the payment will be satisfied by the agreement of the company to pay an equal amount to the USAO.⁸

3. Alcoa, Inc.⁹

The DOJ and SEC FCPA actions involving the company were against its majority-owned and controlled global alumina

8. In a separate matter, from 1998 through 2007, the company and certain subsidiaries violated various US export control and sanctions laws. During the period they exported or re-exported oil and gas drilling equipment to sanctioned countries Cuba, Iran, Sudan and Syria. These charges were resolved with the payment of US\$100 million, a deferred prosecution agreement and two guilty pleas.

9. *United States v. Alcoa World Alumina LLC*, No. 14-CR-00007-DWA (W.D. Pa. January 9, 2014); *In re Alcoa Inc.*, Adm. Proc. File No. 3-15673 (January 9, 2014)

sales company and the parent, which is a public company based in Pittsburgh, Pennsylvania. Alcoa of Australia, a subsidiary of Alcoa, secured a long term alumina supply agreement with Aluminum Bahrain B.S.C. (“Alba”), an aluminum smelter controlled by the government of Bahrain. Subsequently, members of the Royal Family that controlled the tender process had Alcoa of Australia insert a London based middleman into the arrangement. As the relationship between Alcoa of Australia expanded with the middleman, invoices with increasingly large volumes of alumina were submitted through shell companies. This permitted the consultant to pay bribes to certain government officials.

In 2004 Alcoa World Alumina secured a long term alumina supply agreement with Alba. It called for the sale of over 1.5 million metric tons of alumina to Alba through offshore shell companies owned by the consultant. The consultant added mark-ups to the price of the alumina totaling about US\$188 million over a four year period beginning in 2005. Those mark-ups were used to pay bribes. The payments were concealed through false invoices. While officials at Alcoa reviewed certain matters involved in these transactions, the SEC’s Order states that there is “no findings that an officer, director or employee of Alcoa knowingly engaged in the bribe scheme.”

To resolve the criminal case Alcoa World Alumina agreed to plead guilty to one count of violating the anti-bribery provisions of the FCPA. The firm also agreed to pay a US\$209 million criminal fine and administratively forfeit US\$14 million. Alcoa, as part of the resolution, agreed to maintain and implement an enhanced global anti-corruption compliance program.

The SEC’s Order alleges violations of Exchange Act Section 30A(a), 30A(g), 13(b)(2)(A), and 13(b)(2)(B). To resolve the proceeding the firm consented to the entry of a cease and desist order based on Section 30A as well as the books and records and internal controls sections. It also agreed to pay disgorgement of US\$175 million, a portion of which is deemed satisfied by the payment of the forfeiture order in the criminal case to the extent that obligation is paid. The total amount paid to resolve the criminal and civil charges places Alcoa at number five on the list of top ten FCPA cases by the amount paid.

4. Individuals¹⁰

In November 2013 criminal FCPA charges against three foreign nationals were announced by the Department of Justice. At that time criminal complaints were filed against Knut Hammar skjold and Joseph Sigelman, former co-CEOs of PetroTiger. Each complaint contains one count of conspiracy to commit wire fraud, one count of conspiracy to violate the FCPA, three counts of FCPA violations and one count of money laundering. The charges are based on a scheme executed by the two men, along with the former general counsel of the company, Gregory Weisman.

As part of the scheme three payments were made on behalf of the company to an official at Columbia's state-owned and controlled oil company to secure a lucrative oil services contract. Initially, the defendants tried to conceal the payments by depositing them into the account of the official's wife. When that proved unsuccessful the payments were deposited into the account of the official. The defendants are also alleged to have attempted to secure kickback payments at the expense of PetroTiger's board members in connection with the negotiation of an acquisition. Mr. Weisman pleaded guilty on November 8, 2013, to a criminal information charge of one count of conspiracy to violate the FCPA and to commit fire fraud.¹¹ The actions were unsealed on January 6, 2014.

II. *CRITICAL CURRENT ISSUES*

Three critical, current issues for business organizations center on self-reporting and cooperation, compliance, and doing business in high risk environments such as the PRC.

A. *Self-reporting and Cooperation*

One of the most difficult issues business organizations face is self-reporting and cooperation. It is a complex and difficult decision which must be considered in the context of the fact and circumstances of each situation, carefully assessing the

10. United States v. Hammar skjold, No. 13-2086 (D. N.J. filed Nov. 8, 2013); United States v. Sigelman, No. 13-2087 (D.N.Y. filed Nov. 8, 2013)

11. United States v. Weisman, No. 1:13-CR-00730 (D.N.J. filed Nov. 8, 2013).

pertinent facts, the legal obligations of the company, and the impact of self-reporting and cooperation.

Enforcement officials are increasing the pressure on companies to self-report and cooperate. This is illustrated by the recent remarks of Deputy Attorney General James Cole and two recent settlements. In his remarks Deputy AG Cole stressed the importance of cooperation late last fall noting:

Because your role in the enforcement of the FCPA is vital to its success, I want to assure you that we are committed to demonstrating the benefits of your working cooperatively with us. But, this does not mean that we will blindly accept the conclusions of internal investigations. To the contrary, we will continue to actively pursue our own investigations in order to pressure test the results of your internal investigations and be able to identify those companies that are truly cooperating.¹²

Mr. Cole stressed that the cooperation must be genuine and cautioned against what he called “gamesmanship,” that is, creating the appearance of cooperation without actually furnishing it. Self-reporting and cooperation might thus be viewed as a balance where on the one side enforcement officials are determined to hold those who violate the law accountable, but on the other intend to reward self-reporting and cooperation. Mr. Cole stressed that the choice belongs to each individual firm.¹³

The actions involving Weatherford, previously discussed, and Diebold, Inc. fortify these points. In *Weatherford* the company was sanctioned for failing to cooperate with the enforcement inquiries. In *Diebold*, the firm did in fact self-report and cooperated but was criticized by enforcement officials for what they claimed was inadequate remediation.¹⁴ These cases,

12. James Cole, Deputy Att’y Gen., Address at the Foreign Corrupt Practices Act Conference, Washington, D.C. (Nov. 19, 2013), *available at* <http://www.justice.gov/iso/opa/dag/speeches/2013/dag-speech-131119.html>.

13. *Id.*

14. Diebold, Inc., Civil Action No. 1:13-cv-01609 (D.D.C. filed Oct. 22, 2013). The actions centered on payments made through the subsidiaries of the company in China, Indonesia and Russia from 2005 through 2010. In China, for example, there were payments for travel, entertainment, and gifts to foreign officials through its subsidiary, Diebold China. In addition, the subsidiary provided bank officials with cash gifts ranging from less than US\$100 to over US\$600. Similar travel and entertainment

along with Mr. Cole's remarks, serve to highlight some of the key questions surrounding the issue of self-reporting and cooperation.

B. Compliance and Its Impact

Compliance is not a defense but it may be sufficient to earn the firm a declination or at least a reduced penalty. Accordingly, implementing appropriate compliance procedures may be critical not just to avoid liability but, if necessary, mitigating it. This is illustrated by the recent actions involving Morgan Stanley employee Garth Peterson. There the firm received a declination based on its compliance procedures. Mr. Peterson pleaded guilty to a criminal charge.¹⁵

Garth Peterson was the head of Morgan Stanley's Shanghai office. The FCPA charges stem from his dealings with the former Chairman of Yongye Enterprise (Group) Co., a Chinese state owned entity involved in real estate. From 2004 through 2008 Morgan Stanley partnered with Yongye on a number of significant Chinese real estate investments. At the same time Mr. Peterson and the Chairman expanded their dealings in real estate, secretly acquiring real estate from Morgan Stanley and investing in other endeavors. Mr. Peterson did not disclose these dealings to his firm as required.

In one transaction Mr. Peterson encouraged his firm to sell an interest in Shanghai real estate to Yongye. Mr. Peterson falsely represented that the purchaser was owned by the Chinese company. In fact it was owned by Mr. Peterson, the Chairman,

expenses were paid for state officials by the other two subsidiaries. While there is no claim that the parent company knew about the payments in Indonesia, in China a local regulatory proceeding brought the matter to the attention of the parent as did the discovery of payments by distributors in Russia. Nevertheless, the practices continued. Diebold resolved the FCPA charges with the DOJ, agreeing to pay a US\$25.2 million penalty and entered into a three year deferred prosecution agreement to resolve possible criminal charges. With the SEC, Diebold consented to the entry of a permanent injunction prohibiting future violations of Exchange Act sections 30A, 13(b)(2)(A), and 13(b)(2)(B) and agreed to pay disgorgement and prejudgment interest totaling US\$22,972,942. Although the company self-reported and cooperated, a monitor was installed under the deferred prosecution agreement and SEC settlement for at least eighteen months.

15. *United States v. Peterson*, CR 12-224 (E.D.N.Y. filed Apr. 25, 2012); *SEC v. Peterson*, Civil Action No. CV 12-2033 (E.D.N.Y. filed Apr. 25, 2012). The facts in the text are drawn from the court papers in the proceedings.

and a Canadian lawyer. Mr. Peterson thus negotiated for both sides. He secured Morgan Stanley's approval for the sale at a discounted price. As a result of the deal the shell company had an immediate profit of about US\$2.5 million.

In 2006 Morgan Stanley negotiated at least five separate Chinese real estate investments involving Yongye. Mr. Peterson invited the Chinese official to invest along with Morgan Stanley and its funds to reward him for what he had done for the firm and further incentivize him. He set up an arrangement for Morgan Stanley to sell the Chinese official a 3% interest in each deal he brought to the firm for the cost of 2%. This gave the official a discount of 1% which Mr. Peterson called a finder's fee. Mr. Peterson also promised the official an added return. When Mr. Peterson disclosed this arrangement to his supervisors he was warned of the FCPA bribery implications and told to drop the arrangement. Nevertheless, Mr. Peterson paid the official.

Mr. Peterson settled FCPA charges with the DOJ and the SEC. In the criminal case he pleaded guilty to one count of conspiracy to evade the company's internal accounting controls and was sentenced to serve nine months in prison followed by three years of supervised release. Mr. Peterson also settled with the SEC, whose complaint alleged violations of the bribery and books and records and internal control provisions. He agreed to the entry of an injunction and to pay disgorgement of US\$250,000. In addition, Mr. Peterson will relinquish his interest in Shanghai real estate valued at about US\$3.4 million and he consented to be permanently barred from the securities industry.

The company, in contrast, was not prosecuted in view of its compliance procedures and cooperation. Both the DOJ and the SEC acknowledged Morgan Stanley's internal controls and compliance procedures.¹⁶ According to enforcement officials,

16. The press release issued by the DOJ highlighted Morgan Stanley's internal compliance procedures:

Morgan Stanley maintained a system of internal controls meant to ensure accountability for its assets and to prevent employees from offering, promising or paying anything of value to foreign government officials. Morgan Stanley's internal policies which were updated regularly to reflect regulatory developments and specific risks, prohibited bribery and addressed

those policies were regularly updated to reflect regulatory developments and specific risks and prohibited bribery. They also addressed the corruption risks associated with giving gifts, business entertainment, travel, lodging, meals, charitable contributions, and employment. In addition, the procedures provided for periodic training. The firm regularly monitored transactions and required employees to disclose outside business interests.

Mr. Peterson received FCPA training seven times and was reminded to comply with the Act on thirty-five occasions. In one instance the firm specifically told him that employees of Yongye were government officials for FCPA purposes. He was also furnished with written materials which he maintained in his office. Periodically Morgan Stanley required Mr. Peterson to certify compliance with the Act. Those certifications were maintained as a part of his permanent record.

The DOJ concluded that Morgan Stanley's internal policies and procedures provided reasonable assurances that its employees were not bribing government officials. In view of those procedures, as well as the fact that the firm voluntarily reported the matter and cooperated, the DOJ declined to prosecute the firm. The SEC also acknowledged the cooperation of Morgan Stanley.¹⁷

corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions and employment. Morgan Stanley frequently trained its employees on its internal policies, the FCPA and other anti-corruption laws. Between 2002 and 2008 Morgan Stanley trained various groups of Asia-based personnel on the FCPA 54 times. During the same period, Morgan Stanley trained Peterson on the FCPA seven times and reminded him to comply with the FCPA at least 35 times. Morgan Stanley's compliance personnel regularly monitored transactions, randomly audited particular employees, transactions and business units, and tested to identify illicit payments. Moreover, Morgan Stanley conducted extensive due diligence on all new business partners and imposed stringent controls on payments to business partners.

US DOJ Press Release, *Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA* (April 25, 2012), *available at* <http://www.justice.gov/opa/pr/2012/April/12-crm-534.html>.

17. The FCPA cases involving Biomet Inc. are another example of potential liability from alleged violations in the PRC and other countries being mitigated through cooperation. Biomet Inc. is a global medical device company headquartered in Warsaw, Indiana whose shares are listed on NASDAQ. The company, along with its subsidiaries, made more than US\$1.5 million in payments in violation of the FCPA from 2000 to 2008 to publicly-employed health care providers in Argentina, Brazil, and

C. Compliance—Basic Principles

Implementing a sound compliance system does not necessarily require that the firm expend huge sums or purchase every new product in the FCPA market place. What it does require is that firms carefully and thoughtfully construct a system based on key principles. Those principles were explicated in the recently published DOJ/SEC Guide regarding the Foreign Corrupt Practices Act.¹⁸ They require:

- *Tone at the top*: “[C]ompliance begins with the board of directors and senior executives setting the proper tone for the rest of the company.”¹⁹ This requires more than a good, well written program. Rather, it requires the creation of a dynamic, strong culture which demands fair play.
- *Code of conduct*: The foundation of any set of procedures is often the code of conduct. As the Guide states: The policies and procedures of the organization should “outline responsibilities for compliance within the company, detail proper internal controls, auditing practices, and documentation policies, and set forth disciplinary procedures.”²⁰ These can take a wide variety of

China. Biomet China made illegal payments through a distributor in China who provided publicly-employed doctors with money and travel in exchange for purchases with the knowledge of Biomet employees. The payments were falsely recorded in the books and records of the company. The company resolved charges with the DOJ by entering into a deferred prosecution agreement. Under the agreement the company paid a criminal fine of US\$17.28 million, implemented rigorous internal controls, cooperated with the DOJ and retained a compliance monitor for eighteen months. The DOJ acknowledged the extensive cooperation of the company which consisted of “wide-reaching self-investigation . . . remedial efforts and compliance improvements.” As a result the company received a reduced penalty. *United States v. Biomet, Inc.*, Case No. 1:12-cr-00080 (D.D.C. filed Mar. 26, 2012). Biomet also settled with the SEC, consenting to the entry of a permanent injunction without admitting or denying the allegations in the complaint, which prohibits future violations of Exchange Act sections 30A, 13(b)(2)(A), and 13(b)(2)(B). The company also agreed to pay disgorgement of US\$4,432,998 along with prejudgment interest and retain an independent compliance consultant for eighteen months to review its FCPA compliance program. *SEC v. Biomet, Inc.*, Civil Action No. 1:12-cv-00454 (D.D.C. filed Mar. 26, 2012).

18. U.S. Dep’t of Justice & Sec. and Exch. Comm’n, A Resource Guide to the Foreign Corrupt Practices Act (Nov. 14, 2012) [hereinafter FCPA Resource Guide], available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

19. *Id.* at 57.

20. *Id.* at 58.

forms such as a web-based compliance program for the approval of routine gifts, travel and entertainment.

- *Responsibility*: Critical to any program is assigning responsibility “for oversight and implementation of a company’s compliance program to one or more specific senior executives within the organization. Those individuals must have appropriate authority within the organization, adequate autonomy from management, and sufficient resources . . .”²¹
- *Risk assessment*: Fundamental to an effective compliance program is risk assessment. One size does not fit all or even every part of the organization. The approach and procedures may differ across the organization depending on the risk. As the Guide states: “Factors to consider, for instance, include risks presented by: the country and industry sector, the business opportunity, potential business partners, level of involvement with governments, amount of government regulation and oversight, and exposure to customs and immigration in conducting business affairs.”²²
- *Training and updating*: Compliance procedures must, to be effective, be communicated throughout the organization and periodically updated in view of experience. This can be done in a variety of ways such as through web-based and in-person training sessions. There should also be periodic reviews and updates of the system based on the experience of the organization and the dictates of the market place.
- *Incentives and disciplinary measures*: The procedures must apply to every person in the organization. Critical to this is making integrity and ethics a part of the overall promotion, compensation and evaluation process which provides positive incentives for compliance. At the same time, there must be an appropriate disciplinary scheme for those who do not comply with the system.

21. *Id.* at 58.

22. *Id.* at 59.

- *Third party due diligence*: Agents, consultants, distributors and other third parties have frequently been at the center of FCPA actions. An effective set of procedures keyed to risk based principles, an understanding of the business rationale for using the third party and any payments and on-going monitoring is key. Again, this is not a one-size fits all approach but rather a program crafted to the dictates of the market place and situation.
- *Confidential reporting*: Finally, any program should have a mechanism for confidential reporting. This can be used to encourage employees to report questions to the organization which should have a mechanism in place to conduct the appropriate internal investigation and take the proper steps.

D. *Doing Business in the PRC*

It is axiomatic that doing business in a high risk environment such as the PRC presents certain challenges. The reports regarding the current FCPA investigations into JPMorgan regarding its so-called “sons and daughters” program in which the children of prominent officials were retained is one example.²³ Another is the inquiry into the drug promotion practices of Glaxo Smith Kline.²⁴

A recent report by the US China Business Council, titled *Best Practices for Managing Compliance in China*,²⁵ based on a survey of enterprises currently conducting business in China, provides useful insight into current practices. It begins by

23. See, e.g., Ben Protess & Jessica Silver-Greenberg, *On Defensive, JPMorgan Hired China's Elite*, N.Y. TIMES (Dec. 29, 2013, 9:22 PM), <http://dealbook.nytimes.com/2013/12/29/on-defensive-jpmorgan-hired-chinas-elite/>; *Protecting JPMorgan from China's Corruption*, CNBC.COM (Dec. 21, 2013, 7:00 AM), www.cnbc.com/id/101302196/print; Aruna Viswanatha & Emily Flitter, *Exclusive: U.S. Expands China Hiring Probe to Morgan Stanley*, REUTERS (Nov. 26, 2013, 4:58 PM), <http://www.reuters.com/article/2013/11/26/us-china-jpmorgan-morganstanley-idUSBRE9AP19T20131126>

24. See, e.g., Emily Flitter & Ben Hirschler, *GlaxoSmithKline Under Investigation For Allegedly Bribing Doctors In China*, REUTERS (Sept. 6, 2013, 4:48 PM), available at http://www.huffingtonpost.com/2013/09/06/gsk-bribery_n_3882744.html.

25. U.S. China Bus. Council, *Best Practices for Managing Compliance in China* (Oct. 2013), available at <http://www.uschina.org/sites/default/files/USCBC%20Compliance%20Report%202013.pdf>

recognizing the difficulty of conducting business in China while maintaining an effective compliance program:

Foreign companies doing business in China encounter local perspectives and assumptions that make adherence to corporate compliance programs an ever evolving and challenging effort. Practices normally considered unacceptable in the U.S. may not only be allowed in China, but may even be strongly encouraged by local cultural conventions. Developing internal practices that take these norms into consideration—while protecting a company’s legal obligations and international reputation—is a difficult process that requires balancing strongly competing interests.²⁶

Companies doing business in China must manage not just FCPA compliance but also a variety of local laws while competing with enterprises that are not focused on anti-corruption compliance. China does not have any overriding statute such as the FCPA, according to the Report. There are, however, local laws which companies must consider including: PRC criminal law; interpretations of select courts; anti-unfair competition law; and certain interim provisions on prohibition of commercial bribery activities.

While contending with these laws, and maintaining FCPA compliance, business organizations must also compete with those who are not following the US statute. About 60% of companies reported in the survey that they are “more concerned with competition from firms not following FCPA strictures than with managing compliance program enforcement in China.” Thus 35% of the companies surveyed by the Business Council in a separate membership survey indicated a loss of business due to FCPA compliance. Nevertheless, none of the companies surveyed questioned the benefits of compliance included protection from possible violations, company branding in the market place, lower costs and a better ability to manage local government expectations. Indeed, one company reported an increase of 17% in profit margins after winnowing its distributor relationships after conducting rigorous FCPA due diligence.²⁷

26. *Id.*

27. *Id.* at 6–7.

The Business Council survey also provides insight into compliance practices currently being utilized by companies doing business in China. These include:

Structure: About 40% of the companies reported employing full time compliance officers at the local level either covering China or Asia-Pacific. A variety of reporting structures were used including: 1) direct report to Asia-Pacific leadership with a dotted line to China and US compliance heads; 2) Direct report to US compliance with a dotted line to China leadership; and 3) China compliance committee direct report to China leadership with a dotted line reporting to the US compliance head.²⁸

Local adoption: Over 90% of the companies surveyed reported that compliance policies are developed by their global teams and then implemented in specific regions. Nearly 60% have China-specific rules built on global compliance principles.

Entertainment: One of the key risks faced by companies stems from commercial and government entertainment. Ninety-four percent of the firms responding in the survey reported using mandatory monetary thresholds or limits on the amount that can be spent on entertainment and gift giving. Forty-four percent of those companies use global company wide limits in US dollars while 56% keep the thresholds in local currency. The average threshold for entertainment expenses in China is about US\$72 per event.

Gifts: Another key issue is gift giving, which is customary in China. Most companies reported that they discourage gifts. When they are unavoidable, typically firms favor giving gifts of minimal monetary value with corporate logos such as flash drives, calendars, notebooks, and small toys directly related to the business of the company. Most companies also maintain a threshold for gifts. The average amount for those in the survey was US\$57.²⁹

Approval process: About 51% of those surveyed reported setting pre-approval expense thresholds that are tailored to various employee functions and levels. Only 16% of the

28. *Id.* at 10.

29. *Id.* at 13–15.

responding companies reported having no pre-approval process.³⁰

Social responsibility activities: Most companies reported that they do not participate in corporate social responsibility initiatives. Companies that do participate prefer to work with organizations that have an international track record or a global agreement with the company.

Training: Those responding in the survey stressed frequent and continuous training. Some companies tie training to yearly reviews.³¹

Auditing: The most common method for monitoring compliance is auditing. Approximately 44% of those responding reported utilizing an external firm while 36% use internal auditors and external firms.³²

Whistleblowers: Nearly all of the companies in the survey offer hotlines for staff to anonymously report compliance concerns. The most successful are those with multi-lingual support and local call-in numbers.

Joint ventures: These present some of the most challenging issues, according to those who responded. Companies in the survey stated that the most effective approach comes from continual reinforcement over a long period. In view of the cultural nuances of conducting business in China those responding in the survey stated “it may be most effective to work behind the scenes with key company leaders to win their support for more stringent compliance observance.”³³

IV. TRENDS FOR THE FUTURE

An analysis of current and past FCPA enforcement efforts suggests four key trends for the future: A renewed emphasis on individuals; an emphasis on cooperation and remedial efforts; an approach to the statutes which requires a broader understanding of regulatory trends; and whistleblowers.

Individuals: While in the past there have been a number of actions brought against individuals, to a large extent the focus

30. *Id.* at 16–17.

31. *Id.* at 19.

32. *Id.* at 21.

33. *Id.* at 22–23.

has been on business organizations. Following the recent market crisis there has been an increased emphasis on individual accountability.

In the FCPA area, individual accountability has always been difficult. Many of the cases involve either foreign corporations or the overseas subsidiaries of US enterprises. As such, frequently the individuals involved are not US citizens or residents. This can make holding individuals accountable in US courts difficult. The cases currently being litigated by the SEC are a good illustration where in one instance the court concluded that it had jurisdiction over an individual and in another a motion to dismiss was granted based on a lack of minimum contacts.³⁴ At the same time the SEC is continuing with those actions. And, the Department of Justice recently announced criminal charges against three other individuals, discussed earlier. In the current regulatory environment this trend can be expected to continue.

Cooperation and remedial efforts: The remarks of Deputy Attorney General Cole reiterated a long established policy of the Department of Justice and the SEC regarding self-reporting and cooperation. These have always been critical factors in FCPA investigations.

The actions involving Weatherford and Diebold only serve to underscore the critical nature of these issues. Weatherford was fined for its lack of cooperation, not just denied cooperation credit. Likewise, Diebold was cited for its incomplete remediation despite having self-reported and cooperation. The critical point is that earning cooperation credit in the future is going to require real, substantial and perhaps extensive efforts.

Trends: To understand recent trends in FCPA enforcement, it is critical to examine not just corruption actions but the broader regulatory environment in which the DOJ and the SEC make investigative and charging decisions. The SEC, for example, is often at the outer edge of enforcement, opening investigations on emerging issues. For example, when

34. SEC v. Straub, No. 11 Civ. 9645 (S.D.N.Y. Opinion issued Feb. 8, 2013) (dismissing FCPA claims where individual did not have sufficient contacts with the United States); SEC v. Sharef, No. 11 Civ. 907 (S.D.N.Y. Opinion issued Feb. 19, 2013) (granting motion to dismiss where individual in FCPA case had sufficient contacts to the United States).

Hollywood executives began making efforts to open the Chinese markets for their product, it was the SEC that initiated inquiries into those events.³⁵ When firms had extensive dealings with sovereign wealth funds again it was the SEC opening the investigations.³⁶

Other trends also emerge from the broader regulatory environment. The sanctions imposed on Weatherford, for example, might be considered novel in the FCPA context, but in the past the SEC has imposed penalties on those who failed to cooperate during their investigations. Likewise, some may have considered the SEC's action against Oracle Corporation³⁷ for FCPA books and records violations based on what was characterized as a slush fund aggressive. Yet the Commission has

35. See, e.g., Aruna Viswanatha, *Exclusive: SEC Probes Movie Studios over Dealings in China*, REUTERS (April 24, 2012, 6:14 PM) (“[The SEC] has sent letters of inquiry to at least five movie studios in the past two months”); see also Edward Wyatt et al., *S.E.C. Asks if Hollywood Paid Bribes in China*, N.Y. TIMES, Apr. 24, 2012, <http://www.nytimes.com/2012/04/25/business/global/sec-asks-if-hollywood-paid-bribes-in-china.html>; Michael White, *Hollywood Moves on China No Matter What SEC Probe Finds*, BLOOMBERG (May 16, 2012, 8:55 PM), <http://www.bloomberg.com/news/2012-05-17/hollywood-moves-on-china-no-matter-what-sec-probe-finds.html>.

36. See, e.g., Peter Lattman & Michael J. De La Merced, *S.E.C. Looking Into Deals With Sovereign Funds*, N.Y. TIMES, (Jan. 13, 2011), available at <http://www.famegame.com/news/articleInfo?q=2194268>; Peter J. Henning, *For Wall Street, Antibribery Inquiry Is Cause for Concern*, N.Y. TIMES (Jan. 18, 2011, 1:51 PM), http://dealbook.nytimes.com/2011/01/18/for-wall-street-antibribery-inquiry-is-cause-for-concern/?_php=true&_type=blogs&_r=0; Joshua Gallu, *SEC Probes Financial Firms on Sovereign Funds Bribes*, BLOOMBERG (Jan. 14, 2011, 6:59 PM), <http://www.bloomberg.com/news/2011-01-14/sec-probes-financial-firms-on-possible-bribes-to-sovereign-wealth-funds.html>.

37. SEC v. Oracle Corporation, CV 12 4310 (N.D. Ca. filed Aug. 16, 2012) is a settled FCPA action against the software company based on the actions of its subsidiary, Oracle India Private Limited. Specifically, the complaint states that over a two year period beginning in 2005, the subsidiary “parked” portions of the proceeds from certain sales to the Indian government and “put the money to unauthorized use, creating the potential for bribery or embezzlement.” Over a dozen transactions were structured so that US\$2.2 million could be held by distributors off the books of the subsidiary. The money was then paid out to vendors, several of whom were mere store fronts. The complaint alleges violations of Exchange Act Sections 13(b)(2)(A) and 13(b)(2)(B). The company settled the action, consenting to the entry of a permanent injunction prohibiting future violations of the Sections cited in the complaint. It also agreed to pay a US\$2 million civil penalty. The settlement takes into account the fact that Oracle voluntarily disclosed the matter, cooperated with the investigation, made significant enhancements to its FCPA program, and terminated the employees involved. See also Lit. Rel. No. 22450.

taken other similar actions in the securities area.³⁸ Accordingly, in assessing regulatory trends it is critical to examine not just how enforcement officials are administering the FCPA but also the regulatory environment and the methods being utilized by those officials.

Whistleblowers: Finally, while there has been much talk about the SEC's Dodd-Frank whistleblower program, there is perhaps a more important trend in this area involving what might be called corporate whistleblowers. Companies such as Siemens, Johnson & Johnson, and others have expanded the notion of corporate cooperation to include corporate whistleblowing. Stated differently, to earn cooperation credit these firms and others are developing information not just about their own violations to furnish enforcement officials, but those of others. Given the insight of these firms into the business area and operations of their competitors, this type of information can be expected to be most effective.³⁹ This trend has the potential to significantly impact FCPA enforcement as well as place increased pressure on the decision to self-report, cooperate, and conduct any necessary remediation.

38. See, e.g., *In re Goldman, Sachs & Co.*, Adm. Proc. File No. 3-14845 (Apr. 12, 2012) (settled administrative proceeding which alleged the firm had inadequate procedures to protect material non-public information because there was a serious risk that type of information might be inappropriately shared by certain firm employees).

39. Thomas O. Gorman & William P. McGrath, Jr., *The New Era of FCPA Enforcement: Moving Toward a New Era of Compliance*, 40 SEC. REG. L.J. 341, 350 (2012) (discussing emerging trend of corporate whistleblowers seeking cooperation credit in FCPA investigations).

