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FCPA: AN OVERVIEW ON COMPLIANCE AND ENFORCEMENT

This article provides an overview of the Foreign Corrupt Practices Act. It advocates the general importance of compliance programs and highlights the following three key areas where FCPA risks often arise: third parties; gifts, travel and entertainment; and M&A successor liability.

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In 2022, then-Assistant Attorney General (“AAG”) Kenneth Polite offered companies some advice concerning the United States’ enforcement of the Foreign Corrupt Practices Act (“FCPA”): “[C]ompanies that make a serious investment in improving their compliance programs and internal controls will be viewed in a better light by the Department. Support your compliance team now or pay later.”¹ Officials with the Department of Justice (“DOJ”) and the Securities Exchange Commission (“SEC”) publicly promise “credit” to companies with strong compliance programs, but have they fulfilled these promises? And where should a company’s priorities lie? What should a company’s compliance program address? In what areas does it face the greatest risk of FCPA liability and how can it minimize that risk efficiently while advancing its strategic goals?

¹ DOJ announces compliance certifications to be considered as part of corporate criminal resolutions, DAVIS POLK (Mar. 31, 2024), <https://www.davispolk.com/insights/client-update/doj-announces-compliance-certifications-be-considered-part-corporate>.

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A BRIEF HISTORY OF THE FCPA

The FCPA was enacted in 1977 in the wake of the Watergate scandal. Watergate gave rise to multiple congressional and SEC investigations which found several corporations and executives had made illegal domestic political contributions to the Nixon campaign, and “questionable” payments to foreign governments and officials that raised serious moral, national security, and securities law concerns.² To address these concerns, the Act prohibits foreign bribes and it imposes a record-keeping requirement to deter companies from forming slush fund accounts for purposes of paying such bribes. Two affirmative defenses exist by statute: nominal “grease” payments to advance ministerial actions are permissible, as are payments that are explicitly permitted by foreign law. The Act is enforced jointly by the DOJ and SEC, and offenders face the risk of both civil and

² Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1622–26 (2017).

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