

Avoiding FCPA Liability: Practical Compliance Considerations for Energy Companies

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I. Introduction

In the absence of a strong compliance program, the U.S. Foreign Corrupt Practices Act of 1977 (“FCPA”) can ensnare even the most scrupulous of companies.<sup>2</sup> This is especially so for energy companies, which often work with state-owned entities in politically unstable areas that are at high risks for corruption. To avoid FCPA liability, it is essential that energy companies understand the U.S. anti-bribery laws and create robust, risk-based, compliance programs. This paper sets forth five practical compliance tips energy companies may wish to consider in developing their compliance programs to avoid violating the FCPA.

II. Overview of the FCPA

The FCPA was enacted in 1977 to combat a bribery culture that had negatively impacted some of America’s largest companies.<sup>3</sup> The 1977 House Report on the then-titled “Unlawful Corporate Payments Act of 1977,” noted that bribery and corruption was perceived as widespread and entrenched.<sup>4</sup> The illicit behavior ran a gambit: “[f]rom straight out bribery to ‘facilitating payments’ to encouraging government functionaries to discharge certain ministerial or clerical duties.” The Report details that over four hundred corporations admitted to “questionable or illegal payments” that totaled over \$300 million in total payments to entities across the world at the time. Entities that operate in oil and gas production were specifically cited as an active violator.

The House Report discussed the detrimental effects a pervasive bribery culture could have on American businesses. It cited the need for anti-bribery and anticorruption statutes based on a moral and ethical concern centered on the “value of the American public” way of life and ideals.<sup>5</sup> The Report noted that a corrupt culture erodes confidence of the free market system and creates market inefficiency. It also erodes the reputation of American companies abroad.

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<sup>1</sup> The opinions expressed in this article are the authors’ alone and should not be attributed to Kirkland & Ellis LLP. Nothing in this article should be construed as legal advice.

<sup>2</sup> 15 U.S.C. § 78dd-1, *et seq.*; Mike Koehler, Foreign Corrupt Practices Act Statistics, Theories, Policies, and beyond, 65 Clev. St. L. Rev. 157, 172 (2017) (“In the minds of some, the FCPA is simple: “Just don’t bribe.” However, more sophisticated observers recognize the absurdity of such an absolutist position.”).

<sup>3</sup> A well-known example of bribery at the time occurred at Lockheed Martin. Lockheed Martin, at the time, was ranked as a Fortune 500 Company with over \$2 billion in revenues. Lockheed paid various governments (Italy, Germany, and Japan) over \$22 million in bribes for these sovereigns to complete purchases of its military aircrafts. This nearly brought Lockheed down, even after a government bailout in 1971 saved it from extinction.

<sup>4</sup> H.R. Rep. No. 95-640, at 1-2 (1977); Senate Banking Housing And Urban Affairs Committee, 94th Cong., Rep. of the Securities And Exchange Commission on Questionable and Illegal Corporate Payments and Practices, 1 - 2 (Comm. Print 1976); Theodore C. Sorensen, Improper Payments Abroad: Perspectives and Proposals, 54 Foreign Aff. 719 (1976).

<sup>5</sup> *Id.*

Relatedly, a culture of corruption creates a “race to the bottom” by encouraging those who do not bribe to eventually do so in order to get ahead.<sup>6</sup>

Bribery and corruption continue to exist in the U.S. and global economy. Since the passage of the FCPA, anti-bribery and anticorruption enforcement has increased in the U.S. and across the world.<sup>7</sup> From 1977 until 2017, the average number of enforcement actions brought by the Securities and Exchange Commission (“SEC”) and the Department of Justice (“DOJ”) grew exponentially from 2 in 1978 to a high of 56 in 2010 and 2016.<sup>8</sup> Global enforcement has also doubled since 2015 to 2017. In fact, 2016 was one of the highest years on record.

Total number of enforcement actions for the DOJ and the SEC.<sup>9</sup>

Year	SEC	DOJ
2014	8	15
2015	11	14
2016	29	27
2017	8	25
2018	4	4

Jurisdictions across the world have enacted their own form of anti-corruption regimes.<sup>10</sup> European jurisdictions such as the United Kingdom, Germany, Australia, Switzerland, Sweden, France, and Italy lead the way in enforcement actions outside of the U.S.

Non-U.S. enforcement actions concerning bribery of foreign officials 2010 - 2017.<sup>11</sup>

Year	Non-U.S. Enforcement Actions
2010	7
2011	16
2012	8
2013	9
2014	13

<sup>6</sup> *Id.*; Steven R. Peikin, Co-director, Enforcement Division, Sec. and Exch. Comm’n, Reflections on the Past, Present and Future of the SEC’s Enforcement of the Foreign Corrupt Practices Act (Nov. 9, 2017) (“bribery and corruption have no place in society . . . [creating] many other societal ills, including instability, inequality, and poverty, and have anti-competitive effects, including putting honest businesses at a disadvantage.”).

<sup>7</sup> Jonathan Webb, Anti-Bribery Enforcement Actions Increase Across the Globe: Prosecutors Crack Down on Corruption, *Forbes* (Mar. 2, 2017); *see also*, PR Newswire, Notable increase in bribery worldwide according to TRACE’s seventh annual Global Enforcement Report (Mar. 2, 2017), available at [https://www.prnewswire.com/news-releases/notable-increase-in-bribery-enforcement-worldwide-according-to-trace-seventh-annual-global-enforcement-report-300416608.html?tc=eml\\_cleartime](https://www.prnewswire.com/news-releases/notable-increase-in-bribery-enforcement-worldwide-according-to-trace-seventh-annual-global-enforcement-report-300416608.html?tc=eml_cleartime).

<sup>8</sup> Stamford Law School, Foreign Corrupt Practices Act Clearinghouse, Statistics & Analytics, <http://fcpa.stanford.edu/chart-penalties.html>

<sup>9</sup> *Id.*

<sup>10</sup> TRACE Intl., Global Enforcement Report, at 7 (Mar. 2018), available at <https://traceinternational.org/Uploads/PublicationFiles/GER2017.pdf>

<sup>11</sup> *Id.*

2015	3
2016	11
2017	12

Despite the continued focus on combatting bribery by government prosecutors around the globe, studies show that bribery and corruption continue to lure corporate executives. A 2016 Ernst and Young research study<sup>12</sup> found that:

- 36% of 2,825 executives surveyed “felt they could rationalize unethical conduct to improve financial performance.”
- 13% would offer cash payments to win or retain business.
- 39% of those surveyed considered bribery and corrupt practices to happen widely in their countries, consistent with 38% for the year prior.

### III. Conduct Prohibited By the FCPA

The FCPA contains two primary elements: anti-bribery provisions and the accounting provision.

#### A. Anti-bribery Provisions

The anti-bribery provisions of the FCPA prohibit payments to foreign officials to assist in retaining or obtaining business.<sup>13</sup> The FCPA applies to three categories of persons. First, they apply to “issuers”—companies that have a class of securities registered in the U.S. or are otherwise required to file periodic reports with the SEC, and officers, directors, employees, agents and shareholders acting on behalf of such companies. Second, the FCPA applies to “domestic concerns,” a broader category that includes U.S. citizens, nationals or residents, and companies organized under U.S. law or that have their principal place of business in the U.S.<sup>14</sup> Third, the FCPA applies to foreign nationals or entities that are neither issuers nor domestic concerns but, either directly or through an agent, engage in any act in furtherance of a corrupt payment within the territory of the U.S.<sup>15</sup>

For an FCPA violation to occur a covered entity must “pay or give, or promise to pay or give . . . anything of value.”<sup>16</sup> This includes any and all “offers” whether or not they are accepted. It also applies when an entity provides something of value corruptly or willfully to any person both directly or indirectly. Indirect payments or gifts are broadly defined under the statute and include payments to third-parties, such as: agents or consultants; distributors; joint venture partners; lawyers/accountants; and service providers.<sup>17</sup>

<sup>12</sup> EY, Corporate Misconduct - Individual Consequences, Global Enforcement Focuses the Spotlight on Executive Integrity, 14th Global Fraud Survey, [http://www.ey.com/Publication/vwLUAssets/ey-global-fraud-survey-2016/\\$FILE/ey-global-fraud-survey-final.pdf](http://www.ey.com/Publication/vwLUAssets/ey-global-fraud-survey-2016/$FILE/ey-global-fraud-survey-final.pdf).

<sup>13</sup> 15 U.S.C. §§ 78dd-1(a), (a)(3), 78dd-2(a).

<sup>14</sup> 15 U.S.C. §§ 78dd-2(h)(1)(B).

<sup>15</sup> 15 U.S.C. §§ 78dd-1(a), (a)(3), 78dd-2(a).

<sup>16</sup> 15 U.S.C. §§ 78dd-1, et seq.

<sup>17</sup> 15 U.S.C. § 78dd-1(a)(1); Bryan Cave, Feb. 15, 2012, The Foreign Corrupt Practices Act: Focus on the Mining and Oil & Gas Industries, [http://root.bryancavemedia.com/docs/021512\\_focus\\_mining\\_oil\\_gas.pdf](http://root.bryancavemedia.com/docs/021512_focus_mining_oil_gas.pdf).

The term “foreign official” is also defined broadly,<sup>18</sup> and not only includes “an officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization,” but also “[a]ny person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.”<sup>19</sup> For example, state-owned or state-controlled natural resources companies are deemed to be foreign officials under the FCPA.<sup>20</sup>

The payment to the foreign official must be given with the intent of “influencing any act or decision of the foreign official in their official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage.”<sup>21</sup> And the payment must be made “in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.”<sup>22</sup>

## B. Accounting Provisions

The accounting provisions of the FCPA require companies to make and keep adequate books and records and internal controls. The books and records requirement<sup>23</sup> was originally intended to combat “slush funds for illegal foreign payments”<sup>24</sup> because bribes are often hidden “under the guise of legitimate payments, such as commission or consulting fees.”<sup>25</sup> The provision requires that covered entities “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer”<sup>26</sup> It requires only “reasonable detail” which means “the level of detail that would ‘satisfy prudent officials in the conduct of their own affairs.’”<sup>27</sup>

To hold a company liable for a civil books and records violation, under Section 13(b)(2)(A) of the Securities Exchange Act of 1934, the SEC need only show that a payment, which was actually an improper inducement, was booked as something else (like a commission

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<sup>18</sup> Mike Koehler, Foreign Corrupt Practices Act Statistics, Theories, and Beyond, 65 Clev. St. L. Rev. 157, 182 (2017) (“the DOJ’s expansive ‘foreign official’ theory”).

<sup>19</sup> 15 U.S.C. § 78dd-1(f)(1)(A).

<sup>20</sup> *Id.* (“health care providers, to sovereign wealth fund, to a real estate development firm, a sugar factory, a cement company, a diamond mine, and an oil and gas company.”).

<sup>21</sup> 15 U.S.C. § 78dd-1(a)(1)(A)(i).

<sup>22</sup> 15 U.S.C. § 78dd-1.

<sup>23</sup> 15 U.S.C. § 78m(b)(2)(A); § 13(b)(2)(A) of the Exchange Act of 1934.

<sup>24</sup> The Legal Obligation to Maintain Accurate Books and Records in U.S. and Non-U.S. Operations, March 2006, available at <http://www.jonesday.com/The-Legal-Obligation-to-Maintain-Accurate-Books-and-Records-in-US-and-Non-US-Operations-03-14-2006/>.

<sup>25</sup> U.S. Dep’t of Justice & U.S. Sec. & Exch. Comm’n, A Resource Guide to the U.S. Foreign Corrupt Practices Act, at 37 (available at <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>).

<sup>26</sup> 15 U.S.C. § 78m(b)(2).

<sup>27</sup> U.S. Dep’t of Justice & U.S. Sec. & Exch. Comm’n, A Resource Guide to the U.S. Foreign Corrupt Practices Act, at 39 (available at <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>) (citing Section 13(b)(7) of the Exchange Act, 15 U.S.C. § 78m(b)(7)).

payment, for example). This results in a strict liability for civil books and records liability for issuers.<sup>28</sup>

Section 13(b)(2)(B) of the Securities Exchange Act of 1934 requires issuers to devise and maintain a system of internal accounting controls that are sufficient to assure control over the firm's assets.<sup>29</sup> The SEC does not need to prove any intent to mislead or any intent to violate the law by someone at the issuer to enforce the internal controls provisions.

### C. Affirmative Defenses

The FCPA contains two affirmative defenses and one exception: the local law defense, the reasonable and bona fide promotional expense defense, and the facilitating payment exception.

The "local law defense"<sup>30</sup> inoculates any "payment, gift, offer, or promise of anything of value" if such was made "under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country."<sup>31</sup> This defense is rarely used, because the local law must make the alleged "corrupt payments" lawful.

The reasonable and bona fide promotional expense defense allows companies to provide reasonable and bona fide travel and lodging expenses to a foreign official, where expenses are directly related to the promotion, demonstration, or explanation of a company's products or services, or are related to a company's execution or performance of a contract with a foreign government or agency." This affirmative defense is the most frequently used. It is fact-specific, and the defendant bears the burden of proof. Example of things covered include<sup>32</sup>: travel and expenses to visit company facilities or operations and travel and expenses for training.

The facilitating payment exception "[a]pplies only when a payment is made to further 'routine governmental action' that involves non-discretionary acts."<sup>33</sup> Payments that comply with this exception fall outside the scope of the FCPA. Routine governmental action is defined as "an action which is ordinarily and commonly performed by a foreign official." Examples include<sup>34</sup>: "providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country" and "providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration."

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<sup>28</sup> For non-U.S. foreign issuers, the SEC would still have to prove a U.S. nexus to the misconduct to impose liability under the anti-bribery provisions, in addition to the intent required for imposition of anti-bribery liability.

<sup>29</sup> See Exchange Act Sections 13(b)(2)(A) and 13(b)(2)(B).

<sup>30</sup> U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act, at 23 (available at <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>)

<sup>31</sup> *Id.*; see also, Section 30A(c)(1) of the Exchange Act, 15 U.S.C. § 78dd-1(c)(1), 15 U.S.C. §§ 78dd-2(c)(1), 78dd-3(c)(1).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

#### IV. FCPA Enforcement

FCPA enforcement in the United States is shared by the DOJ and the SEC. FCPA enforcement has continued to be strong under the Trump administration. The Attorney General, the SEC Chairman, and SEC FCPA Unit Chief have all come out in support of the FCPA.

##### A. SEC FCPA Enforcement

The SEC is “responsible for civil enforcement of the FCPA over issuers and their officers, directors, employees, and agents, or stockholders acting on issuer’s behalf.”<sup>35</sup> The SEC enforces the FCPA under Section 30A of the Securities Exchange Act of 1934.<sup>36</sup> The SEC played a major role in enactment of the FCPA and it continues to be a high priority area for the Commission.<sup>37</sup> In fact, in 2010 the Commission created the new Foreign Corrupt Practices unit which focuses on FCPA violations.<sup>38</sup> The SEC’s FCPA unit has over three dozen professionals dedicated to FCPA enforcement.<sup>39</sup> The Commission not only focuses on corporations but has also brought FCPA cases against individuals, and is “broadly committed to holding individuals accountable when the facts and the law support doing so.”<sup>40</sup>

##### B. DOJ FCPA Enforcement

DOJ has criminal enforcement authority for the FCPA.<sup>41</sup> An FCPA Unit within the Fraud Section of DOJ’s Criminal Division handles all FCPA investigations and matters and often collaborates with U.S. Attorneys throughout the nation.<sup>42</sup> The FCPA Unit also frequently consults the Federal Bureau of Investigation, the Department of Homeland Security and officials at the Department of Treasury to assist in FCPA investigations.<sup>43</sup>

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<sup>35</sup> *Id.* at 4 -5.

<sup>36</sup> Anti-Bribery Provision, 15 U.S.C. §78dd-1.

<sup>37</sup> U.S. Sec. & Exch. Comm’n, SEC Enforcement Actions: FCPA, <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>; Steven R. Peikin, Co-director, Enforcement Division, S.E.C., Reflections on the Past, Present and Future of the SEC’s Enforcement of the Foreign Corrupt Practices Act (Nov. 9, 2017) (citing U.S. Sec. & Exch. Comm’n, Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices (1976), reprinted in Special Supplement, Sec. Reg. & L. Rep. (BNA) No. 353 (May 19, 1976), available at [http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1970/1976\\_0512\\_SECQuestionable.pdf](http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1970/1976_0512_SECQuestionable.pdf) (“The SEC played a leading role in the investigations in the mid-1970’s that prompted the enactment of the FCPA”).

<sup>38</sup> Press Release, SEC (Jan. 31, 2010), <https://www.sec.gov/news/press/2010/2010-5.htm>

<sup>39</sup> *Id.*

<sup>40</sup> Steven R. Peikin, Co-director, Enforcement Division, S.E.C., Reflections on the Past, Present and Future of the SEC’s Enforcement of the Foreign Corrupt Practices Act (Nov. 9, 2017) <https://www.sec.gov/news/speech/speech-peikin-2017-11-09>.

<sup>41</sup> U.S. Dep’t of Justice & U.S. Sec. & Exch. Comm’n, A Resource Guide to the U.S. Foreign Corrupt Practices Act, at 4 -5 (Nov. 12, 2012), available at <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

DOJ has significantly increased the number of prosecutors dedicated to prosecuting FCPA violations over the last two years.<sup>44</sup> The FBI has established three dedicated FCPA and kleptocracy squads.<sup>45</sup> In fact “70% of the DOJ’s enforcement actions last year were FCPA related.”<sup>46</sup> Notably, under the Trump administration, DOJ’s Pilot Program designed to motivate companies to self-report FCPA-related conduct became permanent marking a significant milestone in the life of its enforcement.

## 1. DOJ’s FCPA Pilot Program

On April 5, 2016 the DOJ implemented the Pilot Program as an initiative “designed to motivate companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs.”<sup>47</sup> The key feature of the program is that it allowed companies that self-reported FCPA violations and remediated appropriately, to receive lesser penalties. “During the 18-month period of the Pilot Program, the FCPA Unit received 30 voluntary disclosures, compared to 18 voluntary disclosures during the previous 18-month period.”<sup>48</sup> In comparison, the 15 corporate resolutions that did not originate from a voluntary disclosure, all but three were resolved through guilty pleas, deferred prosecution agreements, or some combination of the two; and 10 imposed an independent compliance monitor.”<sup>49</sup>

## 2. DOJ’s FCPA Corporate Enforcement Policy

On November 29, 2017, the Pilot Program became an official DOJ policy entitled the FCPA Corporate Enforcement Policy.<sup>50</sup> There are four major differences between the new policy and the original DOJ Pilot Program. First, the new policy states that the DOJ will resolve a matter through declination if the company: voluntarily self-discloses, fully cooperates, and timely and appropriately remediates. The Pilot Program only instructed prosecutors to consider issuing a declination to companies that met these conditions. Second, if the company still complies with the requirements and there are aggravating circumstances, the “DOJ will still recommend a flat 50% reduction off the low end of the US Federal Sentencing Guidelines fine range.” However, criminal recidivists may not be eligible for such credit. The Pilot Program, provided much less certainty in the 50% reduction. Third, the policy provides more definitive guidance on the key hallmarks of compliance programs that would help in assessing whether a

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<sup>44</sup> Covington, Trends and Developments in Anti-Corruption Enforcement, Winter 2018, [https://www.cov.com/-/media/files/corporate/publications/2018/01/trends\\_and\\_developments\\_in\\_anti\\_corruption\\_enforcement\\_winter\\_2018.pdf](https://www.cov.com/-/media/files/corporate/publications/2018/01/trends_and_developments_in_anti_corruption_enforcement_winter_2018.pdf)

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Leslie R. Caldwell, Assistant Attorney General of the United States Department’s Criminal Division, Criminal Division Launches New FCPA Pilot Program (April 5, 2016), available at <https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program>.

<sup>48</sup> Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (November 29, 2017), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign>.

<sup>49</sup> *Id.*

<sup>50</sup> Remarks as prepared for delivery by Rod J. Rosenstein, Deputy Attorney General, 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rostensteindelivers-remarks-34th-international-conference-foreign/>.

company timely and properly remediated.<sup>51</sup> Finally, under the new policy, DOJ will publicize all FCPA declinations.<sup>52</sup>

If the DOJ finds “aggravating circumstances” then the policy will not apply.<sup>53</sup> Aggravating circumstances encompass a wide variety of activity, and there is a lack of clear guidance. There is a growing consensus that “involvement by regional managers or subsidiary executives generally does not rise to the level of a sufficiently aggravating circumstance.”<sup>54</sup> It is clear that this is a fact-base inquiry, which takes into consideration the following categories: involvement of executive management, profit, pervasiveness of ill conduct, and whether the incident has happen before.<sup>55</sup>

DOJ’s FCPA Corporate Enforcement policy does not apply to SEC enforcement actions, and other domestic and international enforcement bodies and regulators.<sup>56</sup> Although self-reporting may be strategically advantageous vis-à-vis the DOJ, it may subject companies to other penalties and sanctions such as shareholder derivative actions and enforcement actions from other regulators. Also, FCPA Corporate Enforcement policy only applies to criminal actions. Companies may face additional claims for relief and undertakings in civil actions, such as: termination of government licenses, disbarment from government contracting programs, appointment of independent compliance consultants and monitors, and possible tax implications.

### C. Anti-bribery and Anticorruption Statutes Around the World

Companies should not only be cognizant of U.S. anti-bribery and anticorruption laws, but should also take note of the anti-bribery and anticorruption regulations and laws in other jurisdictions where they operate. Some anti-bribery statutes in force in other jurisdictions are even considered stricter than the FCPA. For example, the UK’s Bribery Act of 2010 is considered one of the strictest anti-bribery statutes in the world in part because it punishes the

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<sup>51</sup> *Id.*

<sup>52</sup> “Historically, DOJ has been reluctant to announce publicly any decisions not to pursue charges. As a result, the government has had difficulty promoting the full value of self-disclosure and cooperation. Similarly, companies have struggled to assess the advantages for themselves. DOJ gradually has increased its release of declination letters, and will be expanding this practice formally under the new FCPA Policy. This change should improve transparency and confidence in the program by providing companies with more tangible examples of the benefits of self-disclosure.” See Eric Volkman, Erin Brown Jones, & Bridget R. Reineking, DOJ Expands and Codifies Policy Incentivizing Corporations to Voluntarily Self-Disclose FCPA Violations, [https://wp.nyu.edu/compliance\\_enforcement/2017/12/04/doj-expands-and-codifies-policy-incentivizing-corporations-to-voluntarily-self-disclose-fcpa-violations/](https://wp.nyu.edu/compliance_enforcement/2017/12/04/doj-expands-and-codifies-policy-incentivizing-corporations-to-voluntarily-self-disclose-fcpa-violations/); U.S. Dep.’t of Justice, Evaluation of Corp. Compliance Programs, <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

<sup>53</sup> Ryan Rohlfen, Sara Kimmer, Daniel Flaherty, U.S. DOJ’s FCPA Corporate Enforcement Policy: Pilot Program Redux, Mar. 2, 2018, available at <https://www.ropesgray.com/en/newsroom/alerts/2018/03/US-DOJs-FCPA-Corporate-Enforcement-Policy-Pilot-Program-Redux>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Unlike the DOJ, the SEC does not have a formal program to specifically detail credit given to companies that self-report FCPA violations and otherwise cooperate in investigations. However, the SEC issued a Report of Investigation and Statement “explaining its decision not to take enforcement action against a public company it had investigated for financial statement irregularities.” SEC, Enforcement Cooperation Program, available at <https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml>. The Seaboard factors include: self-reporting, self-policing, remediation and cooperation.

person paying the bribe, the recipient of the bribe has unlimited fines for corporations and individuals, and provides for up to 10-year prison terms.<sup>57</sup>

Some international measures are more specific to the energy sector, such as the the Extractive Industries Transparency Initiative (“EITI”). The EITI is an anti-bribery and corruption standard for energy and resource companies.<sup>58</sup> The EITI is “the global standard to promote the open and accountable management of oil, gas and mineral resources.”<sup>59</sup> “The EITI Standard requires countries and companies to disclose information on the key steps in the governance of oil, gas and mining revenues.”<sup>60</sup> It also requires “regular publication of all material oil, gas and mining payments by companies to government.”<sup>61</sup> “[P]ayments . . . are the subject of a credible, independent audit, applying international auditing standards.”<sup>62</sup> “Many countries (not the US) have implemented the standard: Mexico, many West African Countries, UK, Germany, and Ukraine.”<sup>63</sup>

Some international measures to combat corruption and bribery are general such as the Organization for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,<sup>64</sup> the UN Conventions Against Bribery, and the World Bank Anti-Corruption Guidelines. The World Bank has adopted and instituted guidelines that “are designed to prevent and combat fraud and corruption that may occur in connection with the use of proceeds of financing from the International Bank for Reconstruction and Development (IBRD) or the International Development Association (IDA) during the preparation and/or implementation of IBRD/IDA-financed investment projects.”<sup>65</sup> Everyone covered under the guidelines “must take all appropriate measures to prevent and combat fraud and corruption, and refrain from engaging in, fraud and corruption in connection with the use of the proceeds of IBRD or IDA financing.”<sup>66</sup> It is important to note that sanctions include a ban from World Bank-financed projects.

## V. FCPA Compliance Considerations for Energy Companies

### A. General Considerations

Development of a proper compliance program “depend[s] on the risk associated with the business.”<sup>67</sup> “Businesses whose operations expose them to a high risk of corruption will

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<sup>57</sup> *Id.*

<sup>58</sup> EITI, Who We Are, available at <https://eiti.org/who-we-are>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> EITI, The EITI Standard 2016, May 24, 2017 available at [https://eiti.org/sites/default/files/documents/the\\_eiti\\_standard\\_2016\\_-\\_english.pdf](https://eiti.org/sites/default/files/documents/the_eiti_standard_2016_-_english.pdf).

<sup>63</sup> EITI, Countries, <https://eiti.org/countries>

<sup>64</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf)

<sup>65</sup> World Bank, Oct. 15, 2006, On Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants, [http://siteresources.worldbank.org/INTOFFEVASUS/Resources/WB\\_Anti\\_Corruption\\_Guidelines\\_10\\_2006.pdf](http://siteresources.worldbank.org/INTOFFEVASUS/Resources/WB_Anti_Corruption_Guidelines_10_2006.pdf)

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 58.

necessarily devise and employ different internal controls than businesses that have a lesser exposure to corruption.”<sup>68</sup> “A company’s compliance program should be tailored to these differences.”<sup>69</sup>

Energy companies frequently engage in substantial business in locations that are at high-risk for corruption.”<sup>70</sup> Mining is ranked 15th out of 19 industry sectors for corruption.<sup>71</sup> Oil & gas is ranked 16th out of 19 industry sectors for corruption.<sup>72</sup> Companies in the oil and gas sectors have been found to be more likely to pay bribes to high-ranking officials, than to engage in private corruption that does not involve the government.”<sup>73</sup> There are several reasons for the increased potential for bribery in the oil and gas industry. First, oil and gas companies functioning in emerging markets encounter heavy bureaucracy and frequently interface with government officials who have relatively low salaries, increasing the risk of extortion.<sup>74</sup> Second, companies in the oil and gas sector must often engage in numerous complex transactions with government entities that provide goods and services. There are “lucrative, sometimes monopolistic, franchises under the control or influence of government officials” that control the very product (natural resources) that these companies sell.<sup>75</sup> In some locals there may be a “[l]ack of clarity as to whether individuals are acting in ‘official’ or ‘private’ capacities” which exacerbates the already attendant “cultural differences.”<sup>76</sup>

“Extractive Industries” rank number one of “U.S. Enforcement Actions Concerning Bribery of Domestic and Foreign Officials by Industry” and number two of “U.S. Investigations Concerning Bribery of Domestic and Foreign Officials by Industry.”<sup>77</sup> This remains true even outside of the United States for both enforcement actions and investigations.<sup>78</sup> The increased risk of bribery and corruption in the energy sector has resulted in increased scrutiny by regulatory authorities, assuming that similarly situated companies act similarly.<sup>79</sup>

In the face of these perceptions, it is critical that companies in the energy sector create robust, risk-based, compliance programs to protect against FCPA liability.

## B. Key Elements of All FCPA Compliance Programs

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<sup>68</sup> *Id.* at 57.

<sup>69</sup> *Id.*

<sup>70</sup> Bryan Cave, Feb. 15, 2012, The Foreign Corrupt Practices Act: Focus on the Mining and Oil & Gas Industries, [http://root.bryancavemedia.com/docs/021512\\_focus\\_mining\\_oil\\_gas.pdf](http://root.bryancavemedia.com/docs/021512_focus_mining_oil_gas.pdf).

<sup>71</sup> <https://www.transparency.org/research>; Bryan Cave, Feb. 15, 2012, The Foreign Corrupt Practices Act: Focus on the Mining and Oil & Gas Industries, [http://root.bryancavemedia.com/docs/021512\\_focus\\_mining\\_oil\\_gas.pdf](http://root.bryancavemedia.com/docs/021512_focus_mining_oil_gas.pdf);

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> OECD Anti-Corruption Network for Eastern Europe and Central Asia, Corruption Prevention in the Education, Extractive and Police Sectors in Eastern Europe and Central Asia, at 30, <https://www.oecd.org/corruption/acn/OECD-ACN-Study-Corruption-Prevention-Sector-Level-2017-ENG.pdf>

<sup>75</sup> Bryan Cave, Feb. 15, 2012, The Foreign Corrupt Practices Act: Focus on the Mining and Oil & Gas Industries, [http://root.bryancavemedia.com/docs/021512\\_focus\\_mining\\_oil\\_gas.pdf](http://root.bryancavemedia.com/docs/021512_focus_mining_oil_gas.pdf)

<sup>76</sup> *Id.*

<sup>77</sup> TRACE Intl., Global Enforcement Report, at 20-21 (Mar. 2018), available at <https://traceinternational.org/Uploads/PublicationFiles/GER2017.pdf>

<sup>78</sup> *Id.* at 18-19.

<sup>79</sup> *Id.*

The *2012 Resource Guide to the U.S. Foreign Corrupt Practices Act* (the “*Guide*”) sets forth the following hallmarks of an effective compliance program:

- Commitment from Senior Management and a Clearly Articulated Policy Against Corruption.
- Develop compliance policies and detailed implementation procedures on a risk basis
- Oversight, Autonomy, and Resources
- Risk Assessment
- Training and Continuing Advice
- Incentives and Disciplinary Measures
- Third-Party Due Diligence and Payments
- Confidential Reporting and Internal Investigation
- Continuous Improvement: Periodic Testing and Review

These hallmarks apply to energy and non-energy companies alike. Given the nature and risks associated with doing business in the energy sector, the following compliance areas warrant special consideration.

### C. Special Compliance Considerations for Energy Companies

#### 1. Contract Policies

Companies operating in the energy sector routinely engage in contractual relationships with parties in areas with high corruption risk. To mitigate this risk, energy companies should consider incorporating anticorruption safeguards in their contractual agreements. Energy companies should explore including representations and warranties concerning anti-bribery and anticorruption compliance and policies that permit them to exercise audit rights in addition to approval rights of subcontractors.<sup>80</sup> Companies would be wise to avoid delegating any form of due diligence to the entity with whom they are contracting. By conducting their own due diligence, companies can maintain control and consistency over the process and avoid haphazard due diligence that could result in an FCPA violation.

#### 2. Engagement with Local Entities

Because energy companies are frequently required to engage local entities in foreign countries, they should have specific policies that govern those engagements. Some countries enforce a local content requirement, which requires foreign businesses to use local services or a local partner for certain work. This local content requirement can be “fertile ground for FCPA

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<sup>80</sup> Benjamin S. Britz & N. Tien Pham, Practice note: Audit rights power up a compliance program, The FCPA Blog (Dec. 22, 2015, 7:28am), <http://www.fcpcbog.com/blog/2015/12/22/practice-note-audit-rights-power-up-a-compliance-program.html>; *see also*, U.S. Dep’t of Justice & U.S. Sec. & Exch. Comm’n, A Resource Guide to the U.S. Foreign Corrupt Practices Act, at 60 (Nov. 12, 2012), available at <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> (“Where appropriate, this may include updating due diligence periodically, exercising audit rights, providing periodic training, and requesting annual compliance certifications by the third party.”)

violations because [it] can create pressure to appease host government officials.”<sup>81</sup> Policies for navigating the local content requirement should center on completing a reputation check of the local entity.<sup>82</sup> Energy companies should review of the local entity’s reputation with the local and U.S. government, as well as review their compliance with local and U.S. laws, and may wish to enlist the assistance of an entity that has expertise in performing official due diligence.<sup>83</sup> In the event a company decides to work with a local entity that has a less than stellar reputation, the company would be wise to implement additional monitoring and internal controls.

The SEC’s June 2017 settled action with Halliburton, an American oil field services company, is an example of potential liability companies could face if they fail to implement adequate internal controls over engagements with local entities.<sup>84</sup> In this action, Angola’s state-owned oil company, Sonangol, ordered Halliburton to work with more local Angolan-owned businesses to fulfill the local content regulations for firms operating in Angola. A Halliburton executive was tasked with fulfilling these local content regulations. Rather than conducting a competitive bidding process or substantiating the need for a single source, as required by Halliburton’s internal controls, the executive retained a local Angolan company “that was owned by a former Halliburton employee who was a friend and neighbor of the government official who would on Sonangol’s behalf approve the award of the contracts in question to Halliburton.” Halliburton paid \$3.075 million to the local Angolan firm and in return Sonangol approved seven subcontracts to Halliburton.

The SEC charged Halliburton with violating books and records and internal controls provisions of the FCPA.<sup>85</sup> To resolve the SEC matter, Halliburton paid \$29.2 million in monetary relief and agreed to retain an independent consultant for a period of 18 months to review and evaluate the company’s anti-corruption policies and procedures for its business operations in Africa. The executive which caused the violations was also charged and paid a \$75,000 civil penalty.

In crafting a robust compliance policy around the local content requirement, it is important to have a review of all local contracts to ensure that internal controls have not been circumvented. There should be a requirement of heightened scrutiny in instances where there is only a single-source contract. It is also a good practice to subject the bidding for fulfilling the local content requirement to a competitive bidding process.

### 3. Interfacing with State-Owned Entities

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<sup>81</sup> Keith M. Korenchuk, *et. al.*, Assessing Halliburton’s FCPA Settlement and Lessons Learned, 18-2 Pratt’s Energy Law Report 63 (LexisNexis A.S. Pratt).

<sup>82</sup> U.S. Dep’t of Justice & U.S. Sec. & Exch. Comm’n, A Resource Guide to the U.S. Foreign Corrupt Practices Act, at 60 (Nov. 12, 2012), available at <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

<sup>83</sup> *Id.*

<sup>84</sup> Press Release, Sec. & Exch. Comm’n, Halliburton Paying \$29.2 million to Settle FCPA Violations (July 27, 2017), available at <https://www.sec.gov/news/press-release/2017-133>; U.S. Sec. & Exch. Comm’n, SEC Docket, Vol. 117, No. 5 (Jul. 24 - 28, 2017) (available at <https://www.sec.gov/litigation/admin/2017/34-81222.pdf>); Keith M. Korenchuk, *et. al.*, Assessing Halliburton’s FCPA Settlement and Lessons Learned, 18-2 Pratt’s Energy Law Report 63 (LexisNexis A.S. Pratt).

<sup>85</sup> *Id.*

Energy companies consistently deal with state-owned entities which have control over energy resources (such as oil and electricity), which can present a unique set of compliance challenges.<sup>86</sup> The risk of corruption is especially elevated during the “public tender” phase. The term “public tender” refers to a contract that is issued by a sovereign or public entity to invite competing offers for goods, services, products, works, or utilities needed by the sovereign or public entity.<sup>87</sup> During the public tender phase, the public entity or public officials may seek small “favours,”<sup>88</sup> which can include anything of value, from making donations to a charity to soliciting personal gifts, to providing an internship or job for a relative. These favours can be considered to be bribes under the FCPA. Companies, including those in the energy sector, should develop training, policies and procedures to ward against employees providing favours or gifts that would run afoul of the FCPA.

#### 4. Due Diligence in Contracts with Third Parties

Bribes are often concealed through the use of third party intermediaries and agents, especially those third parties that are involved in fundraising and investments.<sup>89</sup> Facilitating bribes through the use of third parties can be a particular problem in the energy sector due to the international nature of the business and the complexity of the transactions.

“Companies should develop a risk-based approach to understand the role and need of the third party.”<sup>90</sup> Companies may seek to inspect the third party’s corporate structure, compliance manual and anti-bribery policies. In a country with high corruption risk, the company may need to impose heightened internal controls.<sup>91</sup> They should seek to understand the business rationale for engaging the third party, the role and need for the third party, and the specific work to be performed. They should consider implementing ongoing monitoring procedures for third parties and requesting that the third parties provide annual compliance certifications.

Regulators remain keenly focused on third party relationships. In a recent action against Keppel Offshore & Marine Ltd. (Keppel) and its U.S. based subsidiary (“KOM”), the DOJ charged KOM with paying approximately \$55 million in illegal bribes to officials at the Brazilian state-owned oil company Petrobras and to the then-governing political party in Brazil, in order to win 13 contracts. After forming a joint venture with an engineering company, KOM<sup>92</sup> bid for contracts with Petrobras with the help of a Brazilian consultant.<sup>93</sup> The Brazilian consultant told KOM that the joint venture wouldn’t win the bid unless it paid a percentage of

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<sup>86</sup> U.S. Dep’t of Justice & U.S. Sec. & Exch. Comm’n, A Resource Guide to the U.S. Foreign Corrupt Practices Act, at 60 (Nov. 12, 2012), available at <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

<sup>87</sup> Tracker, <https://www.trackerintelligence.com/resources/how-do-public-tenders-work/>.

<sup>88</sup> In *US v. SBM Offshore N.V.*, 17-cr-686, Deferred Prosecution Agreement, available at <https://www.justice.gov/opa/press-release/file/1014801/download>, the FCPA violation included small bribes such as jewelry or electronics gifts.

<sup>89</sup> U.S. Dep’t of Justice & U.S. Sec. & Exch. Comm’n, A Resource Guide to the U.S. Foreign Corrupt Practices Act, at 60 (Nov. 12, 2012), available at <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *US v. Keppel Offshore & Marine USA, Inc.*, 17-cr-698, Plea Agreement, at ¶ 23, available at <https://www.justice.gov/opa/press-release/file/1020716/download> (citing violation of 15 U.S.C. §§ 78dd-2, 77dd-3).

<sup>93</sup> *Id.* at ¶ 27.

the contract value to Brazilian officials and a Brazilian political party.<sup>94</sup> KOM executives authorized the illegal payments through a consulting contract.<sup>95</sup> KOM executives also set up an offshore joint venture and shell company in an effort to hide the payments.<sup>96</sup>

Keppel entered into a settlement with DOJ in which they agreed to pay \$422 million in total penalties to the U.S., Brazil, and Singapore for violation of the anti-bribery provision of the FCPA. This Keppel case is an example of how failure to monitor third party relationships can lead to violations of the FCPA.

## 5. Training Employees Abroad

Energy companies often engage in business abroad, including acquiring subsidiaries in foreign countries.<sup>97</sup> Companies with offices abroad should require employees in all of their offices and subsidiaries to complete periodic compliance training and should provide the training in the primary language of the country in which the employees reside. Prior to beginning substantive work on projects, all new employees should be required to complete comprehensive training in the company's code of ethics and compliance program, including training related to anti-bribery policies and procedures. Companies should also require employees acquired through mergers or acquisitions to participate in compliance training. Effective training typically covers "company policies and procedures, instruction on applicable laws, practical advice using real-life scenarios, and case studies" and should undergo routine updates.

## VI. Conclusion

The nature of the energy business often requires companies in the energy sector to tailor their compliance programs to address heightened risks of bribery and corruption. This paper highlighted five categories of policies and procedures that oil and gas companies should consider in developing a robust compliance program.

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<sup>94</sup> *Id.* at ¶ 29.

<sup>95</sup> *Id.* at ¶ 39.

<sup>96</sup> *Id.* at ¶¶ 35 - 38.

<sup>97</sup> U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act, at 59-60 (Nov. 12, 2012), available at <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.