Chapter 13

Avoiding FCPA Liability: Practical Compliance Considerations for Energy Companies

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Synopsis

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1 The opinions expressed in this chapter are the authors' alone and should not be attributed to Kirkland & Ellis LLP. Nothing in this chapter should be construed as legal advice.

§ 13.01. 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.[2] This is especially true for energy companies, which often work with foreign entities located in politically unstable areas that are at high risk 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 chapter provides an overview of the FCPA, describes recent developments in government enforcement of the FCPA, and sets forth practical compliance tips energy companies may wish to consider in developing compliance programs to avoid FCPA violations.

§ 13.02. Overview of the FCPA.

[1] — History of the FCPA.

The FCPA was enacted in 1977 to combat a bribery culture that negatively impacted some of America's largest companies.[3] The House Report on the then-titled "Unlawful Corporate Payments Act of 1977" noted that bribery and corruption were perceived as widespread and entrenched.[4]

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2 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).

3 A well-known example of bribery occurred at Lockheed Martin. The scandal involving Lockheed Martin came to a head in 1976. 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. The scandal and its aftermath nearly put the company out of business. H.R. Rep. No. 95-640, at 1-2 (1977).

4 *Id.*; Senate Banking Housing and Urban Affairs Committee, 94th Cong., Rep. of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and

The illicit behavior detailed in the report ran the gamut — from outright bribery of foreign officials to subtly transmitting payments designed to encourage government functionaries to discharge certain governmental or clerical duties. The Report details that over 400 corporations, many of which operated in oil and gas production, admitted to questionable or unlawful payments totaling over $300 million in payments to entities across the world. To avoid the detrimental effects a pervasive bribery culture would have on American businesses, Congress enacted the FCPA to deter bribery and corruption, maintain confidence in the free market system, and avoid market inefficiency.[5]

[2]— FCPA: Elements and Defenses.

The FCPA contains two primary components: anti-bribery provisions and accounting provisions. The FCPA applies to three categories of persons. First, it applies to "issuers," which are 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.[6] 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.[7] 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.[8]

Practices, 1 -2 (Comm. Print 1976); Theodore C. Sorensen, *Improper Payments Abroad: Perspectives and Proposals*, 54 Foreign Aff. 719 (1976).

5 *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").

6 15 U.S.C. § 78dd-1.

7 15 U.S.C. § 78dd-2.

8 15 U.S.C. § 78dd-3.

[3] — Anti-bribery Provisions.

The anti-bribery provisions of the FCPA prohibit payments to foreign officials to assist in retaining or obtaining business.[9] Violations of these provisions are enforced criminally by the Department of Justice ("DOJ") and civilly by the Securities and Exchange Commission ("SEC"). To prove an FCPA violation, the government must show: (1) there was a payment, offer or promise to pay or give something of value, (2) that a foreign official was involved or it was known that the promise or payment would be transmitted to a foreign official, and that the payment was (3) made corruptly, (4) to induce or influence the actions of the person receiving the bribe, (5) to retain or obtain business.[10] 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.[11]

The term "foreign official" also has a broad definition,[12] and not only includes employees and officers of a foreign government or any agency, department or instrumentality thereof, but also anyone operating officially for or on behalf of any such entity or a public international organization.[13] For example, state-owned or state-controlled natural resources companies are deemed to be foreign officials under the FCPA.[14] To be considered a violation, the payment to the foreign official must be given with intent to influence an act or decision to be made by them in their official capacity, persuade them to act or fail to act in violation of their lawful duties or to secure an improper advantage.[15]

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9 15 U.S.C. § 78dd-1 *et seq.*

10 *Id.*

11 *Id.*

12 *See* Mike Koehler, *Foreign Corrupt Practices Act Statistics, Theories, and Beyond*, 65 Clev. St. L. Rev. 157, 182 (2017).

13 15 U.S.C. § 78dd-1(f)(1)(A).

14 Mike Koehler, *Foreign Corrupt Practices Act Statistics, Theories, and Beyond*, 65 Clev. St. L. Rev. 157, 182 (2017).

15 15 U.S.C. § 78dd-1(a)(1)(A)(i).

[4] — Accounting Provisions.

The accounting provisions of the FCPA require companies to make and keep adequate books and records as well as internal controls. While the anti-bribery provisions are enforced both criminally by the DOJ and civilly by the SEC, the accounting provisions of the FCPA are primarily enforced by the SEC as civil violations. The books and records requirement[16] was originally intended to combat deceitful foreign payments, because bribes are often disguised as valid, routine payments listed under items such as consulting fees. The provision requires that covered entities make and keep accurate books, records, and accounts that fairly reflect the issuer's transactions and assets.[17] It requires only reasonable detail, defined as that which would "satisfy prudent officials in the conduct of their own affairs."[18]

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 (*i.e.*, a commission payment). The SEC does not need to prove any intent to mislead or violate the law to enforce the books and records provisions. In other words, a showing that a fraudulent payment was recorded as something else results in strict liability.[19]

The accounting provisions of the FCPA also include an internal control requirement. Section 13(b)(2)(B) of the Securities Exchange Act of 1934 requires issuers to devise and maintain a system of internal accounting measures that are sufficient to assure control over the firm's assets.[20] Under this provision any issuer subject to regulation by the SEC is required to provide

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16 15 U.S.C. § 78m; § 13(b)(2)(A) of the Exchange Act of 1934.

17 15 U.S.C. § 78m(b)(2)(A).

18 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)).

19 *See* TRACE Intl., Revisiting the FCPA's Internal Accounting Controls Provision: Addressing Common Misconceptions and Challenges at 5, https://www.traceinternational.org/Uploads/PublicationFiles/RevisitingtheFCPAsInternalAccountingControlsProvision_1.pdf.

20 §§ 13(b)(2)(A) and 13(b)(2)(B).

reasonable assurances that its system of internal accounting controls functions adequately.[21] To hold a company liable for an internal control violation, the SEC must prove a company's internal controls system is lacking.[22] The provision does not, however, outline explicit standards the government must follow to evaluate the adequacy of a company's internal controls. "The Act simply states that a company's system of internal accounting controls must provide 'reasonable assurances' that transactions are recorded accurately. What 'reasonable assurances' must be met is left open to interpretation."[23]

[5] — 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[24] immunizes any payment or promise of anything of value if it was made pursuant to the laws and regulations of the foreign recipient's country.[25] The viability of the defense depends on the applicable local law making the alleged corrupt payments lawful. Currently, there are no known countries with written laws permitting bribery,[26] so the defense is rarely used.

The second affirmative defense is known as the reasonable and bona fide promotional expense defense. Certain expenses related to travel and expenses can be immune to FCPA liability if the accused can prove that the payment in question was a reasonable and bona fide expenditure. To achieve this, there

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21 TRACE Intl., Revisiting the FCPA's Internal Accounting Controls Provision: Addressing Common Misconceptions and Challenges at 5, https://www.traceinternational.org/Uploads/PublicationFiles/RevisitingtheFCPAsInternalAccountingControlsProvision_1.pdf.

22 *Id*.

23 *Id*.

24 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).

25 *Id*.; *see als*o, Section 30A(c)(1) of the Exchange Act, 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).

26 *See* The Foreign Corrupt Practices Act: Overview, Practical Law Practice Note Overview 0-502-2006.

must be a showing that the payment was directly related to the promotion, demonstration or explanation of products or services or to the execution or performance of a contract with a foreign government or agency.[27] This defense is fact specific, and it is the most frequently used affirmative defense.

Finally, the FCPA provides for one exception to liability — the facilitating payment exception. The facilitating payment exception only applies in situations where a payment is made to foreign officials to cause them to perform routine, nondiscretionary governmental actions.[28] Payments that comply with this exception fall outside the scope of the FCPA. These actions must be commonly performed by a foreign official, and may not include any decision by a foreign official to initiate or continue business with a party. Examples include foreign officials providing phone, power or water services, police protection, mail delivery or routine licensing.[29]

§ 13.03. FCPA Enforcement.

FCPA enforcement has continued to be strong under the Trump administration. The Attorney General and the SEC Chairman Unit Chief have both expressed support for the FCPA.[30] Punishment for FCPA violations can range from monetary fines to incarceration, although imprisonment tends to be less common. Violations of the anti-bribery provisions of the FCPA can carry penalties of up to five years' imprisonment per violation or a maximum of 20 years for certain willful violations.[31] Fines for these offenses can range up to $2 million per violation for corporations and a $100,000 maximum for

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27 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), and 78dd-3(c)(2).

28 *Id*.

29 *Id*.

30 Rod Rosenstein, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017) (available at https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign; SEC Chairman Nominee Won't Abandon Anti-Bribery Law, Bloomberg Law, https://www.bna.com/sec-chairman-nominee-n57982086171/).

31 15 U.S.C. §§ 78dd-1 and 78ff.

individuals.[32] For willful violations, those fines can increase to $25 million for corporations and $5 million for individuals.[33]

Those who violate the FCPA may also be subject to collateral consequences, including exclusion from certain federal programs and debarment from the securities industry.[34] Additionally, FCPA violations serve as predicate acts under the Racketeer Influenced and Corrupt Organizations (RICO) Act, and can trigger private RICO actions by aggrieved competitors or government forfeiture proceedings.[35] The FCPA prohibits indemnification by issuers when fines are imposed on officers, directors, employees, agents or stockholders.[36]

Since the passage of the FCPA in 1977, anti-bribery and anti-corruption enforcement has increased in the U.S. and across the world.[37] The average number of enforcement actions brought by the SEC and the DOJ grew exponentially from two actions in 1978 to a high of 56 actions recorded in both 2010 and 2016.[38] Global enforcement also increased significantly from 2015 to 2017.

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32 15 U.S.C. § 78dd-1 and 18 U.S.C. § 3571.

33 15 U.S.C. § 78ff(a).

34 Jessica Tillipman, *Suspension and Debarment Part I: An Introduction*, The FCPA Blog, (Jun. 5, 2012, 4:28 a.m.), http://www.fcpablog.com/blog/2012/6/5/suspension-debarment-part-i-an-introduction.html.

35 The Foreign Corrupt Practices Act: Overview, Practical Law Practice Note Overview 0-502-2006.

36 15 U.S.C. § 78ff(c)(3).

37 Jonathan Webb, *Anti-Bribery Enforcement Actions Increase Across the Globe: Prosecutors Crack Down on Corruption*, Forbes (Mar. 2, 2017); *see also* Notable increase in bribery worldwide according to TRACE's seventh annual Global Enforcement Report, PR Newswire (Mar. 2, 2017, 6:00 a.m.), https://www.prnewswire.com/news-releases/notable-increase-in-bribery-enforcement-worldwide-according-to-traces-seventh-annual-global-enforcement-report-300416608.html?tc=eml_cleartime.

38 Stanford Law School, Foreign Corrupt Practices Act Clearinghouse, Statistics & Analytics, http://fcpa.stanford.edu/chart-penalties.html (last visited October 9, 2018).

Table 1. Total number of enforcement actions for the DOJ and the SEC.[39]

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

Since the enactment of the FCPA, jurisdictions across the world have enacted their own form of anti-corruption regimes.[40] The United Kingdom, Germany, Australia, Switzerland, Sweden, France, and Italy lead the way in enforcement actions outside of the U.S.

Table 2. Non-U.S. enforcement actions concerning bribery of foreign officials from 2010 to 2017.[41]

Year	Non-U.S. Enforcement Actions
2010	7
2011	16
2012	8
2013	9
2014	13
2015	3

39 *Id.*

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

41 *Id.*

Despite continued focus on combatting bribery by government prosecutors around the globe, bribery and corruption continue to lure corporate executives. A 2016 Ernst and Young research study[42] found that:

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

[1] —FCPA Enforcement by the SEC.

As stated above, the SEC handles FCPA civil actions, including enforcement actions against issuers and their officers, directors, employees, and agents, or stockholders acting on the issuer's behalf.[43] The SEC enforces the FCPA under Section 30A of the Securities Exchange Act of 1934.[44] FCPA enforcement continues to be a high-priority area for the Commission.[45] In fact, in 2010 the Commission created a Foreign Corrupt Practices Unit, which focuses on FCPA violations.[46] The SEC's FCPA Unit has over three dozen professionals dedicated to FCPA enforcement.[47] The Commission focuses both on corporations and individuals, and has expressed its commitment

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42 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.

43 *Id*. at 4–5.

44 15 U.S.C. § 78dd-1.

45 U.S. Sec. & Exch. Comm'n, SEC Enforcement Actions: FCPA Cases, https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml; Steven R. Peikin, Co-Director, Enforcement Division, U.S. Sec. & Exch. Comm'n, Reflections on the Past, Present and Future of the SEC's Enforcement of the Foreign Corrupt Practices Act (Nov. 9, 2017).

46 Press Release, U.S. Sec. & Exch. Comm'n, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence (Jan. 31, 2010), https://www.sec.gov/news/press/2010/2010-5.htm.

47 *Id*.

to holding individuals accountable for FCPA violations when doing so is supported by the facts and law.[48]

The SEC's Enforcement Division has developed a formal cooperation for individuals and entities, including those that are the subject of FCPA investigations.[49] In October 2001, the SEC issued a Report of Investigation and Statement detailing factors that motivate its decision of whether to decline to take enforcement action against a public company previously under SEC investigation for financial statement inconsistencies.[50] The "Seaboard factors" listed in that report include: self-reporting, self-policing, remediation and cooperation.[51]

[2] — FCPA Enforcement by the DOJ.

The DOJ has criminal enforcement authority for the FCPA.[52] An FCPA Unit within the Fraud Section of the Department's Criminal Division handles all criminal FCPA investigations and matters, often collaborating with U.S. Attorneys throughout the nation.[53] 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.[54]

The DOJ has significantly increased the number of prosecutors dedicated to prosecuting FCPA violations over the last two years.[55] In 2015, the DOJ's

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48 Steven R. Peikin, Co-Director, Enforcement Division, U.S. Sec. & Exch. Comm'n, Reflections on the Past, Present and Future of the SEC's Enforcement of the Foreign Corrupt Practices Act (Nov. 9, 2017).

49 SEC, Enforcement Cooperation Program, https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml.

50 Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Statement on the Relationship of Cooperation to Agency Enforcement Decisions, https://www.sec.gov/litigation/investreport/34-44969.htm (last visited October 9, 2018).

51 *Id*.

52 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.

53 *Id*.

54 *Id*.

55 U.S. Dep't of Justice, 2017 Fraud Section Year in Review, at 4, available at https://www.justice.gov/criminal-fraud/file/1026996/download.

FCPA Unit included 19 trial attorneys and five supervisory prosecutors.[56] In 2017, the FCPA Unit increased to 32 prosecutors.[57] Relatedly, approximately 70 percent of the Department's enforcement actions last year were connected to the FCPA.[58] Additionally, the FBI has established three dedicated FCPA and kleptocracy squads.[59] Notably, under the Trump administration, the 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.

[a] — FCPA Pilot Program.

On April 5, 2016, the DOJ implemented an FCPA Pilot Program as an initiative designed to incentivize self-disclosure of FCPA-related misconduct amongst companies. The initiative was also created to encourage companies to cooperate with the Fraud Section and remediate flaws in their internal control and compliance programs, if necessary.[60] A key feature of the program was that it allowed companies that self-reported FCPA violations and remediated appropriately to receive lesser penalties.

The program was successful. The implementation of the Pilot Program was followed by an increase of self-reported violations of the FCPA to the DOJ. For the 18-month period the Pilot Program was in place, the DOJ's FCPA Unit received 30 voluntary disclosures, marking a significant increase compared to the 18 voluntary disclosures recorded during the 18 months prior to the program's implementation.[61] In comparison, of the 15 corporate

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56 U.S. Dep't of Justice, 2015 Fraud Section Year in Review, at 4, available at https://www.justice.gov/criminal-fraud/file/833301/download.

57 U.S. Dep't of Justice, 2017 Fraud Section Year in Review, at 4, available at https://www.justice.gov/criminal-fraud/file/1026996/download.

58 *Id*.

59 *Id*.

60 Press Release, Leslie R. Caldwell, Assistant Attorney General of the U.S. Dep't of Justice Criminal Div., 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).

61 Rod Rosenstein, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), (available at https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign).

resolutions that did not originate from voluntary disclosures, all but three were resolved through guilty pleas, deferred prosecution agreements, or both; and 10 of the resolutions imposed an independent compliance monitor.[62] Thus, the Pilot Program bred better outcomes across the board — both for the DOJ and the companies who implicated potential misconduct through the self-reporting system.

[b] — FCPA Corporate Enforcement Policy.

On November 29, 2017, the DOJ memorialized the Pilot Program as an official DOJ policy entitled the FCPA Corporate Enforcement Policy.[63] There are four major differences between the new policy and the original DOJ Pilot Program.

First, the new policy states that except in cases where there are aggravating circumstances, the DOJ will resolve a matter through declination if the company: voluntarily self-discloses, fully cooperates, and timely and appropriately remediates. In contrast, the Pilot Program only instructed prosecutors to consider issuing a declination to companies that met these conditions. Second, if a company complies with the requirements of the Corporate Enforcement Policy, but there are aggravating circumstances, the Corporate Enforcement Policy provides that the Department will still suggest a flat 50 percent reduction off the low end of the U.S. Federal Sentencing Guidelines fine range. Criminal recidivists, however, may not be eligible for such credit. Again, the new policy offers concrete guidance, where the Pilot Program provided much less certainty regarding the 50 percent reduction. Third, the Corporate Enforcement Policy provides more definitive guidance on the key hallmarks of compliance programs that would help assess whether a company timely and properly remediated from the Department's perspective.[64] Finally, under the new policy, the DOJ establishes that it will

62 *Id.*
63 *Id.*
64 *Id.*

publicize all FCPA declinations, so long as it may do so by law in the relevant jurisdictions.[65]

It is worth noting that the presence of aggravating circumstances, which may encompass a wide variety of activity, can cause the DOJ to refuse to apply the Corporate Enforcement Policy.[66] Determining whether aggravating circumstances are present requires a fact-based inquiry, taking into consideration a range of information in the wake of a violation including: involvement of executive management, profit, pervasiveness of ill conduct, and whether the incident has previously occurred.[67] There is a growing consensus that things such as regional managers' or subsidiary executives' involvement in illicit activity generally do not constitute aggravating circumstances.[68] Beyond this, the DOJ has not clarified the specific actions it may find to be aggravating circumstances that may preclude companies from taking advantage of the benefits of the Corporate Enforcement Policy.

Companies should also be mindful that the DOJ's Corporate Enforcement Policy does not apply to SEC enforcement actions, nor does it apply to other domestic and international enforcement bodies and regulators. While the Corporate Enforcement Policy encourages self-reporting, companies still need to analyze whether it is beneficial to voluntarily self-disclose a potential FCPA violation. This analysis remains one that is complex, fact sensitive, and is not without risk.

Although self-reporting may be strategically advantageous vis-à-vis the DOJ, it may subject companies to other penalties and sanctions such as

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65 *See* Eric Volkman, Erin Brown Jones, & Bridget R. Reineking, *DOJ Expands and Codifies Policy Incentivizing Corporations to Voluntarily Self-Disclose FCPA Violations*, Compliance and Enforcement Blog (Dec. 4, 2017), 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.

66 Rod Rosenstein, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), (available at https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign).

67 U.S. Attorney's Manual, 9-47.120, FCPA Corporate Enforcement Policy, available at https://www.justice.gov/criminal-fraud/file/838416/download.

68 *Id*.

shareholder derivative actions and enforcement actions from other regulators, including the SEC. It is also important to note that the Corporate Enforcement Policy only applies to criminal actions. Companies may face additional claims for relief and undertakings in civil actions regardless of their status with the DOJ, such as: termination of government licenses, debarment from government contracting programs, appointment of independent compliance consultants and monitors, and possible tax implications. The DOJ can decide to share information that is voluntarily disclosed to them with regulators who are not bound by the policy or declination guidelines. In fact, cooperation between the U.S. and foreign regulators is increasing with regard to FCPA enforcement.

[3] — Anti-bribery and Anti-corruption Statutes Around the World.

In addition to being cognizant of U.S. anti-bribery and anti-corruption laws, companies should also take note of the anti-bribery and anti-corruption regulations and laws in other jurisdictions where they operate. Certain anti-bribery statutes in jurisdictions outside the U.S. are considered much stricter than the FCPA. For example, the United Kingdom's Bribery Act of 2010 is considered one of the strictest anti-bribery statutes in the world. This is in part because the United Kingdom's statute punishes both the person paying the bribe and the recipient. Additionally, the United Kingdom's law provides for unlimited fines for corporations and individuals found to be in violation, and provides for punishment of up to 10 years imprisonment.[69]

Some international measures are more relevant to the energy sector, like the Extractive Industries Transparency Initiative ("EITI"). The EITI is an anti-bribery and anti-corruption standard for energy and resource companies, and includes a global standard for promoting the open and responsible management of oil, gas and mineral resources.[70] The EITI standard mandates disclosure from countries and companies regarding information on key steps

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69 Transparency Intl., The Bribery Act, http://www.transparency.org.uk/our-work/business-integrity/bribery-act/#.W0U8TmyWzTc (last visited October 9, 2018).

70 EITI, Who We Are, https://eiti.org/who-we-are.

in their control of revenue stemming from oil, gas and mining.[71] It requires that all material oil, gas and mining payments made to the government by companies be published regularly.[72] These payments must be subject to independent audits that are credible and apply international auditing standards.[73] A number of countries have implemented the EITI standard, including Afghanistan, Germany, Mexico, Ukraine, the United Kingdom and a host of West African countries.[74]

§ 13.04. FCPA Compliance Considerations for Energy Companies.

[1] — General Considerations.

"Extractive Industries" are currently the first ranked industry in the list of U.S. enforcement actions against bribery of domestic and foreign officials, and second in the list of U.S. investigations concerning bribery of the same officials by industry.[75] Extractive industries remain high on the list even outside of the U.S. for both enforcement actions and investigations.[76] The increased risk of bribery and corruption in the energy sector has resulted in increased scrutiny by regulatory authorities, largely based on the assumption that similarly situated companies operate in similar fashion.[77]

Given the increased focus on anti-bribery and corruption in the U.S. and around the world, it is critical that companies, especially companies in the energy sector, craft and maintain vigorous compliance programs. Development of a proper compliance program should consider the risk associated with the business.[78] The international nature of the energy business and complexity of transactions distinguish it with respect to FCPA

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71 *Id*.

72 *Id*.

73 The EITI Standard 2016, EITI (May 24, 2017) (available at https://eiti.org/sites/default/files/documents/the_eiti_standard_2016_-_english.pdf).

74 EITI, Countries, https://eiti.org/countries (last visited October 9, 2018).

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

76 *Id*. at 18-19.

77 *Id*.

78 *Id*. at 58.

compliance, because energy companies interact heavily with state entities, foreign countries and local representatives in areas with high corruption risk.

In addition to global nature of the industry, other factors also lead to an increased risk of potential bribery for energy companies. Oil and gas companies functioning in emerging markets often encounter heavy bureaucracy and frequently interface with government officials who have relatively low salaries, increasing the risk of potential extortion.[79] They also often engage in complex transactions with government entities that provide goods and services and have control, or significant influence, over the very product (natural resources) that the oil and gas companies sell.[80] In some localities it may be unclear whether individuals are acting in their official governmental capacity. Even when officials are acting in their official governmental capacities they may engage in corruption. These factors highlight the need for energy companies to be vigilant and implement strong compliance programs.

Set forth below are general and specific compliance policies and procedures that energy companies should consider to mitigate the risk of bribery and corruption.

[2] — Hallmarks of an Effective Compliance Program.

In 2012, the DOJ and the SEC published the *2012 Resource Guide to the U.S. Foreign Corrupt Practices Act,* which 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

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79 Corruption Prevention in the Education, Extractive and Police Sectors in Eastern Europe and Central Asia, OECD (2017) at 30, available at https://www.oecd.org/corruption/acn/OECD-ACN-Study-Corruption-Prevention-Sector-Level-2017-ENG.pdf.

80 Corporate Misconduct — Managing Bribery and Corruption Risks in the Oil and Gas Industry, EY (2014) available at https://www.ey.com/Publication/vwLUAssets/EY-Managing-bribery-and-corruption-risk-in-the-oil-and-gas-industry/$FILE/EY-Managing-bribery-and-corruption-risk-in-the-oil-and-gas-industry.pdf.

- 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

Many of these hallmarks were also referenced in the 2016 DOJ guidance manual entitled "Evaluating Corporate Compliance Programs," and in 2017 by Deputy Attorney General Rosenstein when he announced the DOJ's Corporate Enforcement Policy.[81] These hallmarks apply to energy and non-energy companies alike. Because of the nature and risks associated with doing business in the energy sector, these hallmarks may not be sufficient for oil and gas companies. The following five additional compliance considerations are targeted to address the unique nature of the energy business.

[3] — Special Compliance Considerations for Energy Companies.

[a] — Contract Policies.

First, energy companies should structure contractual agreements to allow for a reasonable degree of oversight to mitigate FCPA compliance risks. As noted above, companies operating in the energy sector routinely engage in contractual relationships with parties in areas with a high risk for bribery and corruption. To mitigate this risk, energy companies should strive to incorporate anti-corruption safeguards in their contracts. These safeguards may include policies providing the company with approval rights of subcontractors, the ability to exercise audit rights, and representations and warranties concerning anti-bribery and anti-corruption compliance.[82]

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81 Rod Rosenstein, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017) (available at https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.)

82 Benjamin S. Britz and N. Tien Pham, *Practice note: Audit rights power up a compliance program*, The FCPA Blog (Dec. 22, 2015, 7:28am), http://www.fcpablog.com/blog/2015/12/22/practice-note-audit-rights-power-up-a-compliance-program.html; *see also*,

[i] — Audit Rights.

Energy companies should consider including audit right provisions in contracts with third parties. "Right to audit" provisions are generally structured to give one party the ability to access and analyze the books and records of the other party to the contract. Including audit rights in contracts with third party contractors can be advantageous to energy companies working in foreign jurisdictions because in the wake of a potential violation, both the DOJ and SEC may give credit to companies that provide evidence of adequate internal controls, including audit rights.

It is important to note that simply including audit rights in contracts with third parties may not be sufficient to receive credit. The DOJ and SEC will examine how companies choose to exercise those audit rights.[83] To enhance the enforceability of a "right to audit" clause, company counsel should consider including specific details about the audit rights in the contract, such as the type of information and documentation required in the audit, as well as delegation of the authority to define the scope of the audit, including selection of auditors.

[ii] — Legal Inclusions.

In addition to including audit rights in contracts with third party contractors, companies should examine whether their contracts with third parties include representations, warranties and covenants by the contractor regarding compliance with the FCPA and anti-corruption laws of all jurisdictions where the contractor will provide services. It is a good idea to require third party contractors to provide periodic certification of such compliance. Companies should also consider including terms in contracts with third parties that provide indemnification and termination rights in favor of the company. In

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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").

83 *Id.*

addition, it is a good practice to require lawyers to sign off on contracts with third parties, as opposed to allowing them to be finalized by another sector of the company, and to provide all third party contractors with copies of the company's code of conduct and FCPA policy.

[b] — Engagement with Local Entities.

Because energy companies are often required to engage local entities in foreign countries, it is prudent for them to implement specific compliance policies to govern those engagements. Some countries enforce a local content requirement, requiring foreign businesses to use local services or a local partner for certain work. The pressure to appease host government officials often associated with the local content requirement can lead to FCPA violations.[84]

Policies for navigating the local content requirement should center on completing a reputation check of the local entity.[85] All local contracts should be subject to review by company counsel to ensure consistency with internal controls. The review should include examining the local entity's reputation with both the local and U.S. government and their compliance with local and U.S. laws. Companies may wish to also enlist the assistance of a law firm or other expert that can assist the company in performing official due diligence to ensure a more thorough check.[86] In the event a company decides to work with a local entity that has a less than stellar reputation, the company should implement additional monitoring and internal controls with respect to that entity.

In crafting a strong compliance policy to counteract the risks of local content requirements, it is important to review 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

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84 Keith M. Korenchuk, *et. al*., *Assessing Halliburton's FCPA Settlement and Lessons Learned*, 18-2, Pratt's Energy Law Report 63 (Steven A. Meyerowitz, ed., 2017).

85 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).

86 *Id*.

single-source contract. In countries where use of local partners or services for work are required, energy companies should ensure that local contract bidding is competitive, and all dealings should be monitored pursuant to a risk assessment that considers the risks of corruption posed by the particular area or country of business. Together, these components provide internal controls to maintain FCPA compliance even in contracts subject to local content requirements.

[c] — Interfacing with State-Owned Entities.

Energy companies must avoid favors commonly associated with business engagements with foreign, state-owned entities to maintain FCPA compliance. In addition to frequent dealings with local entities, energy companies consistently interact with state-owned entities, which have control over energy resources (such as oil and electricity), presenting a unique set of compliance challenges.[87]

A state-owned entity is a company or organization that is owned or controlled by a non-U.S. government.[88] To identify state-owned entities, courts have adopted a multifactor test based on control and function.[89] To determine function, courts consider whether the entity has a monopoly over the function it carries out, serves the public at large, is viewed as performing a governmental function, and whether the government subsidizes the services provided by the entity.[90] Common examples of state-owned entities include utilities, port authorities, defense contractors, oil companies, and mining operations. To identify whether the state controls an entity, courts consider: (1) the foreign government's formal designation of the entity, (2) whether the government has a majority interest in the entity, (3) the government's power to hire and fire the principals of the entity, (4) the extent to which the

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87 *Id*.

88 State Participation and State-Owned Enterprises, National Resource Governance Institute (Mar. 2015), https://resourcegovernance.org/sites/default/files/nrgi_State-Participation-and-SOEs.pdf.

89 U.S. v. Esquenzi, 752 F. 3d 912 (11th Cir. 2014).

90 *Id*.

government profits from or subsidizes the entity, and (5) the duration of the aforementioned indicia.[91]

Among the challenges energy companies face when doing business with state-owned entities is the risk of corruption. The risk is especially elevated during the "public tender" phase of the state-owned entity's procurement process. 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.[92] The risk of corruption increases during this phase of the procurement process because it often requires companies to have extensive contact with foreign officials who have discretion in awarding contracts. During the public tender phase of procurement, public entities or public officials may seek items of value or "favors."[93] These favors can range from making donations to a charity, to soliciting personal gifts, to providing an internship or job for a relative. These favors are likely to be prohibited under the FCPA. As a safeguard, energy companies should develop training, policies and procedures to ward against employees providing favors or gifts that would violate the FCPA, especially during the public tender phase.

[i] — An Example of Bribery Risk with State-Owned Entities: *DOJ v. Keppel Offshore & Marine Ltd.*

In December 2017, the DOJ entered into a settlement with Keppel Offshore & Marine, Ltd., an oil services company, for violations of the anti-bribery provision of the FCPA stemming from improper engagement with state-owned entities. Executives at Keppel formed a joint venture and offshore shell companies to facilitate bribery payments after a Brazilian consultant told

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91 *Id.*

92 TRACKER, HOW DO PUBLIC TENDERS WORK?, https://www.trackerintelligence.com/resources/how-do-public-tenders-work/ (last visited October 9, 2018).

93 In U.S. 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.

Keppel executives that Keppel would not win contract bids unless they paid a percentage of the contract value to Brazilian officials.[94] The bribes continued over the course of 13 years and resulted in Keppel paying $50 million in bribes to win 13 contracts with Petrobras, the Brazilian state-owned energy company. Keppel concealed the bribes by paying outsized commissions to an intermediary under the guise of consulting arrangements.[95] The intermediary then made the illegal payments to Brazilian officials through a series of shell companies. Keppel entered into a deferred prosecution agreement with the DOJ and agreed to pay $422 million in combined total penalties to resolve charges with authorities in the U.S., Brazil and Singapore. The company did receive credit for its cooperation and for taking remedial measures to improve its compliance program.

[d] — Due Diligence in Contracts with Third Parties.

Bribes are often concealed through the use of third party intermediaries and agents, especially third parties involved in fundraising and investments.[96] Facilitating bribes through the use of third parties can be a particular problem in the energy sector due to the nature and complexity of the international business the companies conduct. Energy companies should include robust third party due diligence policies and procedures in their compliance programs.

Prior to entering into a contract with a third party, companies should conduct a risk-based analysis to examine the nature of the third party's business, including the rationale for engaging the third party, the role and need for the third party, and the specific work to be done.[97] Before hiring a third party contractor, companies should request to inspect the third party's

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94 U.S. v. Keppel Offshore & Marine USA, Inc., 17-cr-698, Plea Agreement, at ¶ 23-29 (available at https://www.justice.gov/opa/press-release/file/1020716/download) (citing violation of 15 U.S.C. §§ 78dd-2, 77dd-3).

95 *Id*. at ¶ 39.

96 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).

97 *Id*.

corporate structure, compliance manual and anti-bribery policies. The frequency with which the third party interacts with government entities, and the risk of the jurisdiction in which the third party regularly operates should also be examined. In jurisdictions with high corruption risks, companies may also need to impose heightened internal controls.[98]

As stated above, including audit rights in contracts with certain third party contractors can assist companies in mitigating the risk of corruption. Companies should also examine the third party contractor's relationships with subcontractors and whether they are conducting due diligence before retaining subcontractors. Companies may want to consider including terms in contracts with third parties that provide them with approval rights over subcontractor hiring depending on the risk of corruption in the jurisdiction in which they are seeking to operate, the nature of the contractor's business and other factors. Maintaining control of approval rights over subcontractor hiring allows energy companies to exercise a reasonable degree of oversight, which government enforcement agencies may consider should an FCPA issue ever arise.

In addition, companies should implement ongoing monitoring procedures for third parties and require third parties to provide annual compliance certifications. These procedures should include determining whether their third party contractors have codes of conduct and/or anti-corruption policies and procedures of their own. Companies may also want to hire a firm or investigator to visit the third party's office, to make sure it exists and has the requisite staff to perform the services under the contract, and to examine the ownership and structure of the third party for any connection to government officials. Companies should avoid delegating 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.

Further, companies should consider detailing the disciplinary measures employees will face if they are found to have engaged in misconduct in their

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98 *Id.*

interactions with third parties.[99] When FCPA violations occur, disciplinary actions should be promptly and consistently applied. Publicizing disciplinary actions within a company, where appropriate under local law, can have a deterrent effect.[100]

[i] — An Example of the Importance of Conducting Due Diligence of Third Party Contractors: *SEC v. Halliburton*.

Regulators remain keenly focused on third party relationships. The SEC's June 2017 settled action with Halliburton, an American oil field services company, is an example of potential liability companies could incur under the FCPA if they do not adequately monitor third party relationships.[101] In this case, Angola's state-owned oil company, Sonangol, ordered Halliburton to work with a local, Angolan-owned businesses to fulfill the local content regulations for firms operating in Angola. Halliburton tasked one of its executives 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 owned by a former Halliburton employee. This former employee was a neighbor and friend of the official slated to approve the award of the contracts to Halliburton on Sonangol's behalf. Halliburton paid $3.075 million to the local Angolan firm and in return Sonangol awarded seven subcontracts to Halliburton.

The SEC charged Halliburton with violating books and records and internal controls provisions of the FCPA.[102] To resolve the SEC matter, Halliburton agreed to settle the case without admitting or denying

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99 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.

100 *Id*.

101 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).

102 *Id*.

wrongdoing and paid $29.2 million in monetary relief. It also 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 who caused the violations was also charged and paid a $75,000 civil penalty.[103]

[e] — Training Employees Abroad.

Comprehensive anti-corruption training is a key component of any FCPA compliance program. Employee training is especially important for energy companies because they often engage in business abroad and acquire subsidiaries in foreign countries.[104] Training should be conducted for all employees, officers, directors, and where appropriate, for agents and business partners. Companies with offices abroad should require employees in all of their offices and subsidiaries to complete periodic compliance training. The training should be provided in the primary language of the country in which the employees reside.

Prior to beginning substantive work on projects, new employees should be required to complete comprehensive training on the company's code of ethics and compliance program, including training related to anti-bribery policies and procedures. This requirement should also extend to employees acquired through mergers or acquisitions.

Although anti-corruption training can be done online, the more effective training occurs face-to-face.[105] Regardless of the training medium or location, effective programs cover company policies and procedures, offer guidance on relevant law and cite culturally specific examples. If possible, companies should try to present case studies to illustrate recent examples of FCPA enforcement and provide practical advice using real-life scenarios.[106]

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103 *Id.*
104 *Id.*
105 Beyond Reproach: Achieving Best Practice in FCPA Compliance, Practical Law Article 2-500-8453.
106 *Id.*

The most effective training programs are comprehensive, realistic and continuous.

§ 13.05. Conclusion.

Energy companies experience unique challenges related to maintaining compliance with the FCPA. To mitigate the risk of corruption and bribery, companies in the energy sector should work closely with company counsel to create risk-based compliance programs that include strong contract provisions and detailed procedures for appropriately interfacing with local entities and state-owned entities, require thorough due diligence of third parties, and provide comprehensive training to all employees. A thorough, risk-based approach to compliance that takes into consideration the unique nature of the energy business, while also complying with the hallmarks of an effective compliance program, can assist energy companies in not only decreasing the likelihood of an FCPA violation, but also help to lessen negative consequences in the event an FCPA violation does occur.