



EVERYTHING MATTERS

# WELCOME TO OUR WEBINAR

## THE FCPA AND ITS IMPACT ON CLEAN TECHNOLOGY COMPANIES

Wednesday, July 21, 2010 9:00 a.m. PT | 12:00 p.m. ET

If you cannot hear us speaking, please make sure you have called into the teleconference number on your invite information.

- US participants: 800 268 2160
- Outside the US: + 1 303 223 2680

The audio portion is available via conference call. It is not broadcast through your computer

*\*This webinar is offered for informational purposes only, and the content should not be construed as legal advice on any matter.*

# Moderator and Speakers

- MODERATOR

- Mark Radcliffe, Partner, DLA Piper

- SPEAKERS

- Roy McDonald, Partner, DLA Piper
  - Marie Wilson, Office of Ethics & Compliance, Symantec Corp.

# DLA Piper: Introduction

- Largest Law Firm in the World
  - 3600 attorneys
  - 25 countries/65 offices
- Litigation Practice
  - Over 1,400 dispute resolution lawyers globally
  - All areas of litigation practice that affect businesses
- FCPA Practice
  - Government Investigations / White Collar Defense
  - Internal Investigations
  - Compliance
  - Training

# What is the FCPA (overview)?

- The FCPA has two primary components:
  - Anti-bribery provisions prohibit the payment of bribes to foreign officials to obtain or retain business for any company, public or private
  - Books & records provisions impose accounting and record-keeping requirements on companies registered on any U.S. stock exchange, including foreign companies, and Securities Exchange Act companies

# Anti-Bribery Provisions of the FCPA

- Prohibits U.S. persons, companies, or issuers, or their officers, directors, employees, or agents, from corruptly giving, offering to give, promising to give, or authorizing the giving of money or anything of value to a foreign official for an improper purpose
  - It does not matter if a payment is actually made or if the recipient actually does anything for you
  - A violation occurs the moment any act is taken “in furtherance of” an improper offer or payment
  - The offer does not need to be communicated to the foreign official, and the official does not need to accept it

# Who is a Foreign Official?

- An employee of a government agency
- A legislator
- A member of a political party
- A candidate for political office
- A member of a royal family who has official governmental responsibilities
- A consultant acting for or on behalf of a government or government agent
- A public international organization
- An official or employee of a state-controlled or state-owned business (note: in largely state-owned economies, includes almost any person or entity)

# Liability for Bribes by Intermediaries or Third Parties

- Bribery violation arises from awareness or substantial certainty that impropriety exists or is likely to occur
- You cannot insulate yourself from FCPA liability by using a go-between
- In addition to prohibiting direct bribes, the FCPA also prohibits U.S. corporations and their personnel (including their officers, directors, employees, and agents) from giving (or offering, promising, or authorizing the giving of) money or anything of value to a third party while knowing that all or a portion of the money or thing of value will be used by the third party for a bribe

# Liability for Bribes by Intermediaries or Third Parties

- You are deemed to know that a third party is using your funds (or any other thing of value) to make a bribe if you are aware or have a firm belief that:
  - the third party is using your funds to make a bribe
  - circumstances for the bribe exist, or
  - the bribe is substantially certain to occur
- You are also deemed to know of a third party's bribe if you are aware of a high probability that the bribe will occur
- Willful blindness will not shield a company or individual from liability

# Why Should it Matter to Companies?

- Unprecedented and increasing number of prosecutions by the U.S. Department of Justice (“DOJ”), enforcement actions by the U.S. Securities and Exchange Commission (“SEC”), parallel foreign proceedings, and companies self-reporting
  - “We've seen that CEOs and other high-level executives – and even a Member of Congress – think that paying bribes to get foreign contracts is simply ‘business as usual.’ ***It is not business as usual. It is illegal. And it will not be tolerated.*** And those that do pay or authorize bribes, or even just those who knowingly invest in corrupt deals, are now learning those lessons the hard way. If nothing else, this past year proves that.” (Asst. Atty. Gen. Lanny Breuer, Nov. 17, 2009)

# Increasing FCPA Focus and Activity

- At least 130 open investigations right now
- DOJ brought 26 new enforcement actions in 2009; highest number ever (up from 20 in 2008; 2 in 2004)
- DOJ has prosecuted over 80 individuals for FCPA violations since 2004
- SEC brought 14 actions in 2009 (up from 13 in 2008; 3 in 2004)
- SEC's Enforcement Division recently created a unit to specialize in FCPA enforcement

# Heightened FCPA Enforcement Expected to Continue

- Remarkable growth in FCPA enforcement activity expected to continue, especially in light of the administration's focus on heightened corporate regulation and enforcement amid economic downturn
  - “The importance of our efforts is **only heightened in the current economic climate**, one in which bribery in international markets offers a quick fix to the problem of a smaller pool of business opportunities, and in **which corporate executives may be tempted both to look the other way and to invest fewer resources in their compliance efforts**. I'm sure it will surprise no one here today if I caution you in this regard. **The Department is looking carefully at lapses - both past, present, and future - in corporate compliance as a result of the downturn in the global economy.**” (Asst. Atty. Gen. Lanny Breuer, Nov. 17, 2009)

# Heightened Global Anti-Corruption Efforts

- Increased enforcement efforts by – and cooperation among – global community
  - Organisation for Economic Co-Operation and Development (OECD)
  - Simultaneous corporate criminal prosecutions/settlements
  - Coordinated corruption-related search warrants by law enforcement in different countries
- U.K. Bribery Act of 2010
  - Makes it an offense to receive, as well as give, a bribe
  - Bribery of private individuals and companies is criminalized
  - No need to prove corrupt intent
  - Strict liability corporate offense for failing to prevent bribery
  - No exemption for facilitation payments; no statutory defense for legitimate promotional activities
  - Penalties: for individuals, up to 10 years imprisonment and fine; for companies, no limit on fine
  - Simply having UK presence (subsidiary, office, or operations) will create jurisdiction
  - Applies to both UK companies and foreign companies with operations in the UK, even if offenses take place in a third country and are unrelated to UK operations

# Why Should it Matter to Cleantech Companies?

- As recently made clear by the DOJ's head of FCPA prosecutions, West Coast-based and technology companies are particularly vulnerable and will be getting increasing attention because:
  - Relatively younger companies with less robust compliance measures that have not been focused on FCPA issues
  - Companies having extensive business in countries where much of the conduct covered by the FCPA is commonplace
  - Business models: channel partners, distributors
- Cleantech companies, by their nature, deal with government for permissions ranging from site selection to regulatory permissions
- Governmental funding and/or subsidies
- Current high profile of industry makes it attractive to prosecutors/regulators

# Why Should it Matter to Individuals?

- “Let me be clear, prosecuting individuals is a cornerstone of our enforcement strategy because, as long as it remains a tactic, paying large monetary penalties cannot be viewed by the business community as merely ‘the cost of doing business.’” (US Attorney General Eric Holder, May 31, 2010)
- “The prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations.” (Asst. Atty. Gen. Lanny Breuer, Nov. 17, 2009)
- On January 19, 2010, the DOJ announced the indictment and arrest of twenty-two corporate executives in the military and law enforcement products industry
  - Largest single enforcement action in FCPA history targeting individuals
  - The “foreign official” was an FBI agent engaged in an undercover sting operation

# Recent Record Settlements

- BAE Systems entered into a guilty plea and agreed to **\$400 million** fine with US prosecutors in February 2010
  - BAE pleaded guilty to, among other things, making false statements about its FCPA compliance program
  - BAE also settled with British regulators at the same time for \$45.1 million
- Halliburton Co. settled FCPA investigation in Jan. 2009 for **\$559 million**, largest FCPA settlement to date by US company
- Siemens AG settled FCPA investigation in Dec. 2008 for an unprecedented **\$800 million**
  - Also, over **US\$1 billion** in fines and disgorgement to German authorities
  - Siemens actually got credit for “exceptional” cooperation – without it, the criminal penalty alone could have reached \$2.7 billion

# Recent Enforcement Activity Not Limited to Egregious Examples

- Faro Technologies (Nasdaq: FARO)
  - At issue were approx. \$445K in “referral fees” that employees of Faro’s China sub paid to state-owned companies to obtain contracts worth approx. \$4.9 MM
- Westinghouse Air Brake Technologies Corp. (NYSE: WAB)
  - Pioneer, an Indian sub, allegedly paid \$137,400 in cash to various officials in the Indian Ministry of Railroads to obtain/retain business, schedule inspections, obtain issuance of delivery certificates, and curb “excessive” tax audits

# Unique Issues in China

- China is considered a “red flag” country
- It does not matter that passing through payments or gift-giving may be the way of doing business there
- Many entities still have some level of government affiliation, even if they appear private, and therefore such entities and their employees are deemed “government officials” for purposes of the FCPA
- Business models in China are susceptible to compliance issues that are difficult to control
- Use of third parties for payment of bribes is commonplace
- Extensive use of cash and receipts without sufficient detail pose challenges to compliance
- Local anti-corruption laws

# Unique Issues in Developing Countries

- Traditional acceptance of the concept of offering bribes
  - Use of bribes is often considered a sign of gratitude, akin to tipping
  - Bribery is highly institutionalized and individuals may sometimes even be given receipts for bribes paid
  - Local businesses are not sensitive to the need for compliance with foreign anti-corruption laws
- Low per capita income of government officials
  - Bribes are necessary to fund state and municipal elections that are not funded by the government
- Cumbersome bureaucracy encourages system of bribery
  - Bribes are often demanded to receive government permits and licenses, and to speed up lengthy government processes
- Lack of punishment for illicit payments
- Public sector enterprises constitute a substantial portion of industry

# Red Flags and High Risk Areas

- Third parties and foreign affiliates/subsidiaries: Often used as vehicles for concealing or mischaracterizing transactions; vet, audit, and manage carefully
- Commissions of all kinds: Should be reasonable, comply with local law, and not reach foreign officials
- Expense reimbursements: Expenses must be supported by appropriate receipts reflecting the nature of the expense

# Red Flags and High Risk Areas

- Unusually large payments for line of business
- Unusual credit granted to new customers
- Large bonuses for sales people
- Checks drawn to cash
- High travel or entertainment expenses
- Lack of standard invoices
- Lack of transparency in expenses and accounting records
- Over-invoicing by suppliers

# Red Flags and High Risk Areas

- Country of operation has a reputation for corruption
- Payments to persons outside the normal scope of a transaction (e.g., to a community fund)
- Payments made through a third country or another entity
- Insistence by the foreign customer that a particular person be used as an intermediary
- Use of a consultant who is connected or affiliated with a foreign official or political leader
- Prior accusations of improper business practices involving the agent or consultant
- Agent's refusal to represent to abide by the provisions of the FCPA and local anti-bribery laws

# Tips for Third Party Transactions/Agreements

- Third parties include consultants, distributors, representatives, agents, and service providers (e.g., design firms, bidding firms)
- Always stress due diligence
  - Evaluate the third party's reputation
  - Establish qualifications for the work to be performed
  - Investigate relationships with foreign officials
  - Evaluate proposed compensation versus the market rate
  - Investigate any red flags
  - Ensure third party is aware of anti-bribery laws and company policies

# Tips for Third Party Transactions/Agreements

Consider adding the following to any third party contract:

- Representation that the third party agrees to comply with the provisions of the FCPA and local anti-bribery laws
- A clause requiring payment by company check delivered to the representative's normal place of business in the name of the third party
- A clause stating that any commissions, fees, or political contributions will be disclosed, as required by law, regulation, or policy
- A termination clause enabling the Company to terminate the contract immediately in the event of a violation of the law
- A clause granting the company the right to audit any fees or expenses paid to or by the third party in connection with the contract

# Proactive Steps to Minimize Risk

- Compliance-oriented “tone at the top”
- Regular and thorough FCPA training, tailored for applicable countries, industries, and issues
- Review and implementation of FCPA-related policies and controls
- Monitoring and targeted reviews of operations to test compliance and/or identify red flags

# When an Issue Arises

- Issues may arise from a variety of sources, including government inquiry/subpoena, whistleblowers, internal audits, questionable expenses, discussions during training, or there may be industry-wide issues
- When an issue arises, the company needs to act promptly to investigate and remediate
- Circumstances will dictate who supervises the investigation (e.g., Audit Committee), use of outside counsel, and the scope of review
- Thoroughness and credibility of any internal investigation is critical
- Evaluate potential voluntary disclosure to the government

# Conclusions

- The FCPA is a real business risk that needs to be considered in the context of overall enterprise risk management
- The DOJ and SEC, as well as regulators outside the US, have become much more active in pursuing these cases, and fines and prosecutions have significantly increased
- The best way to limit exposure to FCPA risks is through strong internal controls, high quality accounting systems, proactive training programs, detailed due diligence, and ongoing monitoring of compliance
- It is good business practice to have a suitable incident response plan in place in case an incident is detected to ensure it is properly and thoroughly investigated and remediated

Thank you.