# DOING BUSINESS ABROAD: RISK ASSESSMENTS AS PART OF AN EFFECTIVE FCPA COMPLIANCE PROGRAM

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## Cutting off the Bad Seed: How Recent Sanctions Could Expose International Businesses to Cash Flow Problems

*Isabelle De Smedt and Alexandra Lopez-Casero*

Recent sanctions could affect your business in unexpected ways. This alert discusses how Executive Order 13818 could be used to block transactions with foreign third parties if credible evidence of corruption is uncovered.

On December 20, 2017, President Trump issued Executive Order 13818 (the "Order"), implementing the Global Magnitsky Human Rights Accountability Act (the "Global Magnitsky Act" or "Act"). The Act, which was enacted by Congress with bipartisan support in 2016, provided the President with broad powers to target foreign individuals and entities believed to be engaged, directly or indirectly, in corruption and human rights violations. At first glance, the Order appears to target only foreign companies and nationals. But can the Order—and the blocking powers—be read so broadly that they enable the Secretary of the Treasury to block the assets of a domestic person or company? We think so.

**The Global Magnitsky Act**

The Global Magnitsky Act authorizes the President to impose sanctions—including the blocking of property—on any "foreign person" that he determines, by credible evidence, has materially assisted, sponsored or provided financial, material, or technological support for a government official (or a senior associate thereof) who is responsible for or complicit in significant corruption. For purposes of the Act, a "foreign person" is defined at 31 C.F.R. 595.304 and includes "any citizen or national of a foreign state (including any such individual who is also a citizen or national of the United States), or any entity not organized solely under the laws of the United States or existing solely in the United States, but does not include a foreign state." The term is thus broader than it might immediately appear. The Act defines corruption to include "the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery," as well as "the transfer or the facilitation of the transfer of the proceeds of corruption." To carry out its purpose, the Act gives the President the power to block transactions involving the property of persons and entities that fall under the above definitions.

The Order and its interplay with anti-bribery enforcement
In the Order, the President exercises the powers granted to him under the Act and imposes sanctions on several individuals and entities. After kicking off the first round of sanctions related to the Global Magnitsky Act, the President delegated his powers to the Secretary of the Treasury. Now, the Secretary of the Treasury may, without prior notice, impose sanctions on any foreign person that he determines has materially assisted a government official to engage in acts of significant corruption.

There is significance to the broad definition of "foreign person" as used in the Act. Because a business must exist solely in the United States to avoid falling under the definition, many international businesses are at risk of having their assets blocked by the Secretary of the Treasury if "credible evidence" of corruption is uncovered. As a result, businesses that become involved in investigations into potential violations of the Foreign

Corrupt Practices Act ("FCPA") or foreign anti-bribery laws may, without warning, find themselves with limited cash flow. For example, a New York company doing business in London could lose the ability to finance its operations through a New York bank if the Secretary of the Treasury becomes aware of credible evidence that the company violated the FCPA. Similarly, an international franchisor may be blocked from receiving foreign franchisee royalties if credible evidence of corruption exists. In either case, great harm could be done regardless of how the investigation unfolds.

Those and other challenges may arise from the introduction of the Global Magnitsky Act into the government's anti-corruption toolbox.

**Potential for more diverse targets**

While the FCPA criminalizes corrupt actors that have an adequate nexus to the United States, the Global Magnitsky Act can be enforced against any "foreign person" even in the absence of a jurisdictional connection. As a result, overseas companies such as distributors could cause businesses extreme financial harm even if any corrupt behavior occurred entirely without their knowledge and entirely overseas. Proper due diligence on foreign third-parties could help companies avoid seeing their business operations interrupted.

**Alternative anti-corruption enforcement option**

Because of its looser enforcement standard, the Global Magnitsky Act may be applied where criminal liability under the FCPA is weak or absent. As a result, the Act may provide an alternative mechanism to punish corrupt parties selectively, quickly and without needing to establish a criminal enforcement case.

Given the broad scope of the Global Magnitsky Act, companies doing business abroad are at risk of financial harm each time a new anti-corruption operation unfolds. Companies should be aware of the possible ramifications that sanctions under the Global Magnitsky Act could have on their daily business operations.

## DOJ Releases New FCPA Corporate Enforcement Policy

*Brian T. Kelly and Isabelle De Smedt*

The Department of Justice (DOJ) has incorporated a new FCPA Corporate Enforcement Policy ("Policy") into the United States Attorneys' Manual. The new Policy builds upon the FCPA Pilot Program, which was implemented in April 2016. The Pilot Program urged companies to self-disclose bribery in exchange for vastly reduced criminal fines and federal oversight. The Policy, which can be found here, builds upon the Pilot Program. Perhaps most importantly, it enables companies to better predict when self-disclosure will be rewarded with a declination.
Key takeaways from the Policy include:

- A presumption that the DOJ should decline to prosecute companies that voluntarily self-disclose, fully cooperate, and timely and appropriately remediate wrongdoing unless aggravating circumstances exist, such as involvement by executive management, significant profit to the company, pervasiveness of the misconduct, or criminal recidivism;
- Even if aggravating circumstances exist, the DOJ will agree to resolve the matter for a 50% reduction off of the low end of the Sentencing Guidelines' fine range for companies that voluntarily self-disclose, fully cooperate, and remediate wrongdoing, unless the company involved is a repeat offender. Companies that have in place an effective compliance program will generally avoid the appointment of a compliance monitor as well;
- The DOJ will agree to resolve the matter for up to a 25% reduction off of the low end of the Sentencing Guidelines' fine range even if the company involved does not self-disclose the misconduct, so long as it fully cooperates and appropriately remediates its wrongdoing;
- A company may still receive cooperation credit under the Principles of Federal Prosecution of Business Organizations if it attempts but fails to meet the requirements for full cooperation credit under the Policy;
- A company's size and resources will be taken into consideration in assessing the appropriateness of the company's anti-bribery and anti-corruption compliance program; and;
- Declinations under the Policy will be made public.

Because a declination is appropriate for first-time offenders that uncover an isolated incident of bribery by a low-level employee, the Policy may affect how companies approach an internal investigation. Facts may exist that enable an investigator to quickly rule out the involvement of executive management, or to quantify the profits of the alleged misconduct. By answering those questions in the early stages of an investigation, a company will be better positioned to make an informed decision concerning the possible benefits of self-disclosure within the time allotted by the Policy to receive full cooperation credit, including a declination.

The Policy's effect on cooperation and self-disclosure decisions remains to be seen, and will be driven largely by how the DOJ implements the Policy in specific cases going forward. We will continue to monitor developments.

**Tips for international franchisors establishing FCPA compliance programs**

As a new year begins, franchisors and others eagerly await likely changes to U.S. laws and regulations. President-elect Trump has vowed to make unprecedented changes to U.S. trade and minimum wage laws. Although in the past he characterized enforcement of the Foreign Corrupt Practices Act (FCPA) as "absolutely crazy" and "horrible,"[Interview of Donald Trump, Chairman & President, Trump Organization (May 15, 2012)] most practitioners agree that vigorous enforcement is here to stay. Accordingly, below we offer tips to international franchisors as they implement or revisit their FCPA compliance programs.

**The Foreign Corrupt Practices Act**

The FCPA criminalizes the corrupt giving of "anything of value" to foreign officials by domestic and publicly traded companies or their agents for the purpose of getting or keeping business. Prosecutors define "anything of value" very broadly. Recently, unpaid internships, hiring preferences and some charitable donations have satisfied this element. Bribes offered by third-party vendors and agents are often attributed to domestic and publicly traded companies to establish FCPA violations. Thus, international franchisors may be accountable for bribes paid by master and / or regional franchisees and their employees. Finally, the vagueness inherent in the FCPA's "business" prong also lends itself to broad interpretation. Prosecutors will closely examine any transaction that may influence a foreign official to support the franchisor's business.

**Tips for international franchisors**

FCPA enforcement actions often result in prison time for company officials or employees, criminal and civil penalties and severe reputational damage to a company. Comprehensive compliance programs establish a company-wide culture of compliance by instituting protocols and procedures specifically tailored to reduce the risks of corruption. In order to narrowly tailor compliance efforts, an international franchisor must first understand where corrupt foreign officials will interact with its system. To that end, we offer a few tips to keep in mind when focusing your compliance efforts.

**Know your current and target areas of operation**

Not every international opportunity bears equal risks. China, India and Brazil offer international franchisors huge populations and virtually unlimited potential for brand growth within a single country. At the same time, those countries account for approximately half of all FCPA enforcement actions. Meanwhile, international franchisors seeking to serve similar populations in Western Europe may be forced to enter a dozen or more countries, each having unique franchise laws and regulations. While the burden of entering multiple markets may be considerable, Western European markets account for only a handful of FCPA investigations. Your risks will vary depending on the territories you seek to operate in. Focus compliance efforts in countries with the greatest corruption risks.

**Know your master/regional franchisees and their partners and vendors**

Politically exposed third-parties should be avoided. Master/regional franchisees are a valuable tool when establishing an international brand, but any bribes paid to further the franchisor's business will be attributed to the franchisor. At times, bribes are considered a cost of doing business in those markets. As a result, international franchisors are at an increased risk that master/regional franchisees will unwittingly violate the FCPA by making illicit payments that they consider normal business transactions.

**Know your system**

Each brand is different, and each system bears its own risks. Some systems rely on supply arrangements or trade-secret ingredients that require the import of goods from the U.S. and interaction with corrupt customs officials. Others require storefronts that comply with the international franchisor's design standards, thus necessitating interactions with officials involved in the construction and permitting process. Still others encourage franchisees to win public contracts. Having a thorough understanding of your system's requirements is vital to designing a compliance system that addresses your high-risk operations.

**Know how to respond**

International franchisors who become aware of potential FCPA violations must investigate the circumstances.

Oftentimes, it is more cost effective and time efficient to vet the credibility of an internal whistle-blower or substantiate suspicious circumstances using in-house counsel and your compliance team, if one exists. Once allegations and suspicions are corroborated, outside counsel should be hired to direct any further investigation.

As the Trump presidency looms on the horizon, international franchisors should implement or revisit their FCPA compliance programs with the above tips in mind.

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Scott O'Connell is chair of the Litigation Department and a member of the firm's Management Committee. He is a trial lawyer known for his perseverance, strategic thinking and value driven service for clients. Scott focuses on trial work, class action and aggregate litigation, parallel proceeding and health service reimbursement litigation. He is currently representing financial services, life sciences, manufacturers and health care companies in high exposure disputes with associated significant reputational harm in parallel civil, criminal and regulatory proceedings.

**Practice Areas**

- Trials, Arbitrations and Evidentiary Proceedings
- Class Action, Mass Torts and Aggregate Litigation
- Crisis Intervention, Internal Investigations and Parallel Proceedings
- Health Service Reimbursement Litigation
- Constitutional Claims
- Domestic Violence Protection (Pro Bono)

**Recognition**

- Named "Lawyer of the Year" by Best Lawyers® for Appellate Practice, Boston (2019); Litigation-Health Care, Manchester (2018); Litigation-Securities, Boston (2016); Litigation-Banking and Finance, Boston (2014); Litigation-Securities, Boston (2013)
- Recognized in The Best Lawyers in America© for work in Appellate Practice, Bet-the-Company Litigation, Commercial Litigation, Litigation-Banking and Finance, Litigation-Health Care, Litigation-Municipal, Litigation-Securities, Mass Tort Litigation/Class Actions-Defendants, Product Liability Litigation-Defendants
- Chambers USA: America's Leading Lawyers for Business (2008 to present) Clients rate Scott O'Connell as an "expert on class actions." He is commended for his "well-thought arguments," his ability to "think on his feet" and his strong command of technical legal points.
- "New England Super Lawyer" in Securities Litigation and/or Class Action-Mass Torts (2007 to present)
- Litigation Star in Benchmark Litigation (MA and NH) (2008 to present) AV peer rating from Martindale-Hubbell (2004 to present)

**Pro Bono**

- As part of a commitment to give back to the community, Scott has dedicated substantial time to pro bono matters. He founded the Nixon Peabody Domestic Protection Team, which assists victims of domestic violence secure protective orders against their abusers. Scott also worked to secure the release of a client, who had been detained at Guantanamo Bay. For his work on this matter, Scott received the Frederick Douglass Human Rights Award from the Law Office of the Southern Center for Human Rights.
- In addition, Scott is a recipient of the New Hampshire Bar Association's 2011 Award for Dedicated Pro Bono Service for his exceptional work with the Domestic Violence Emergency Project (DOVE), a program that provides victims of domestic violence with emergency legal service.

**Education**

- Cornell Law School, J.D., 1991, (Editor, Law Review, Chancellor, Moot Court Board)
- St. Lawrence University, B.A., 1987, cum laude
- Harvard Business School, 2008, "Leading Professional Service Firms"