

PUBLICATION

Insurance Coverage Now Available for Foreign Corrupt Practices Act Investigation Costs

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The anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA) make it unlawful for a company, its employees, directors/officers and agents to make a corrupt payment or give anything of value to a foreign government official for the purpose of obtaining or retaining business. To assist organizations in managing the rising costs of anti-bribery actions, two of the world's leading insurance brokers and risk advisors have created new forms of insurance protection designed to provide coverage for FCPA investigations.

"FCPA enforcement is stronger than it's ever been – and getting stronger," in the words of Assistant Attorney General Lanny A Breuer on November 16, 2010, addressing the American Conference Institute's 24th National Conference on the Foreign Corrupt Practices Act. Both the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) – the statute's dual enforcers – have vowed to continue to aggressively investigate and prosecute violators. In addition to Breuer's promise that "[W]e are in a new era of FCPA enforcement; and we are here to stay," Cheryl J. Scarboro, former chief of the SEC's FCPA Unit, pledged that the SEC "will continue to focus on industry-wide sweeps, and no industry is immune from investigation."

The first of the two FCPA insurance products was introduced in March of this year. This product was intended to cover costs "arising from SEC investigations, including those related to internal investigations." The policy is intended to provide coverage to a company, but not directors or officers, for various investigations undertaken by securities law enforcement authorities. The coverage is limited essentially to the costs of defending against or responding to an investigation, and specifically does not include coverage for any fines, penalties or other amounts that may be awarded or have to be paid in a settlement. With regard to FCPA and similar violations, however, the new policy form contains the following exclusion:

The Insurer shall not be liable to make any payment for Loss in connection with any Investigation . . . of any actual or alleged bribery or violation of the U.S. Foreign Corrupt Practices Act of 1977, U.K. Bribery Act 2010, Canadian Corruption of Foreign Public Officials Act or any similar state, local or foreign law, rule or regulation.

However, optional FCPA coverage, with a sublimit of \$5 million, can be purchased. Unfortunately, in the event of an FCPA investigation such as that against Siemens, where the company paid approximately \$850 million in legal and accounting fees and expenses over two years, or the ongoing investigation against Avon Products, where the company has disclosed that its own costs have reached approximately \$154 million, the sublimit of \$5 million may be inadequate in larger cases.

The second FCPA insurance product, introduced in July of this year, was designed for companies of all sizes that conduct business globally. This second new product maintains existing Directors and Officers (D&O) liability insurance policy limits intact for their intended primary uses, such as securities class action lawsuits.

Responding to investigations launched under the FCPA and other anti-bribery statutes requires organizations to dedicate significant time and expense, including legal, accounting, auditing and consulting costs. FCPA Corporate Response provides cost of investigation coverage for both individuals and the organization. The insurance policy can be triggered by anti-corruption investigations launched under the FCPA as well as those

initiated pursuant to the U.K. Bribery Act and other foreign regulations to the extent that they are consistent with the FCPA's anti-bribery provisions. In addition to insurance coverage, this second product offering provides clients with access to diagnostic and assessment services provided through a panel of consultants fluent in FCPA investigations and related issues.

This is certainly a type of insurance that companies should consider for their risk management portfolio, even if the coverage is limited to investigative costs. One of the keys to obtaining this coverage is a satisfactory review by the insurer of a company's compliance program. It is unlikely that insurance brokers and risk advisors, whether current providers or future entries to this insurance space, will provide coverage to companies with no compliance program (or a substandard program). Further, standard D&O insurance coverage may not apply if directors' actions do not fulfill their responsibilities under the Federal Sentencing Guidelines or comport with best practices derived from Deferred Prosecution Agreements. Finally, companies and their boards must now consider the risks of derivative and related private lawsuits and the impact on D&O coverage when assessing the desirability of such coverage.

If you wish to discuss the need for FCPA insurance for your business or if you have questions concerning compliance with the FCPA, the U.K. Bribery Act or similar anti-corruption regimes and the relevant Federal Sentencing Guidelines, contact your Baker Donelson attorney.