The Lacey Act is far from the only piece of legislation relevant to U.S. companies doing business overseas. In this short piece, Marcus Asner, Samuel Witten, and Jacklyn DeMar of law firm Arnold & Porter discuss the Foreign Corrupt Practices Act and its potential implications for the U.S. forestry industry.

**The Foreign Corrupt Practices Act**

The U.S. forestry industry has been focused intensely over the last few years on the Lacey Act and its 2008 amendments, and that focus has only increased in recent months in light of the US Fish and Wildlife Service's raids on Gibson Guitars in 2009 and subsequent investigations. The Gibson raids have led to a very public and sometimes acrimonious discussion about the scope and purpose of the Lacey Act. Some have articulated its benefits and importance and others have called the Act overbroad and are seeking to limit the US Government's enforcement authority.

For all of this shouting about the Lacey Act, the industry should take care not to lose track of another important US law that almost certainly will come into play in nearly every overseas logging scheme. The US Foreign Corrupt Practices Act (FCPA), which the US Department of Justice and the Securities & Exchange Commission like to enforce with particular vigor and enthusiasm, criminalizes corrupt payments to foreign officials, and is relevant wherever logging involves illegal payments to foreign officials. The FCPA was enacted in 1977 and amended in 1988, but enforcement has increased dramatically in the past five years. Though there is no explicit link between the two compliance laws, the possibility of a bribery scheme hides behind every tree: potential bribe takers in forestry schemes could run the gamut from the police, to forestry officials, to guards, to regulators, to customs and export officials, and even to officials at state-owned companies. While there has not been a case so far involving both the Lacey Act and the FCPA, it seems a likely scenario in the near future.

The FCPA prohibits US corporations and individuals, or those acting on their behalf, from corruptly giving anything of value to a foreign official in exchange for the official acting or failing to act, securing an improper advantage, or in order to obtain or retain business. The FCPA also applies to non-US firms which cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States. Under some circumstances, non-US companies who sell product to US firms in connection with corrupt schemes can also fall under the FCPA umbrella, perhaps finding themselves charged with conspiracy to violate the FCPA or aiding and abetting a violation.

The scope of the FCPA is staggering, and encompasses corrupt payments made to government officials to facilitate matters as diverse as granting an import or export license, approving an inspection, awarding a contract, not imposing a duty or tax obligation, modifying a regulatory requirement, or granting or expediting visas. The UK recently implemented similar anti-bribery legislation that could also be relevant to many anti-bribery schemes. The Bribery Act applies to UK citizens, residents and companies established under UK law, for corrupt actions anywhere in the world; remarkably, non-UK companies which do business in the UK also can be held liable if they do not take adequate steps to prevent bribery and are found to be responsible, for example through their personnel or agents, of acts of corruption.

The US, UK, and other countries are ramping up enforcement of anti-corruption laws. In the US in the last two years, for example, the DOJ brought 71 enforcement actions against companies and individuals, while the SEC brought 51 such enforcement actions. The penalties in those two years totaled approximately $2.45 billion. The last year also saw the longest FCPA-related jail sentence ever: a 15-year sentence for the former president of a Miami based telecommunications company for his role in a bribery scheme involving officials at a government-owned Haitian telecom firm. The UK Serious Fraud Office, which enforces the UK Bribery Act, has made clear that it will vigorously enforce that law. The focus of the anti-bribery authorities to date has spanned a wide swath of industries, ranging from oil and gas, defense and technology companies, to pharmaceutical, financial services and even cosmetics companies. In addition to the jail time and the criminal and civil penalties, companies are spending millions of dollars on investigations into suspected FCPA violations, as well as shareholder derivative suits.

Companies and persons involved in corrupt acts overseas also are at risk of prosecution under local law. In addition to the US and UK, several other countries relevant to the forestry industry are overhauling their anticorruption laws. For instance, a bill is before Parliament in Indonesia that would criminalize bribery of foreign officials and private sector officials. Foreigners could also be charged with corruption under the new law. Brazil is also grappling with a complete overhaul of its anti-corruption laws, with great political pressure to pass a strict law that will address Brazil’s extreme bribery problems. Brazilian President Dilma Rousseff has been aggressively pursuing anti-corruption initiatives since taking office, making several high profile arrests and working with the US on new government transparency programs and laws.

To make matters worse, an “I don't bribe” defense just won't cut it. Companies should be aware that, under some circumstances, they may be held responsible for the corrupt actions of persons acting corruptly on their behalf. Liability may be triggered if a company covered by the FCPA is aware of or suspects an event is likely, or if it deliberately avoids knowledge of corrupt act. For instance, Halliburton/KBR paid over $500 million in penalties for illegal payments made by agents hired by its joint venture to bribe Nigerian government officials. To avoid undue risks of liability for third parties or otherwise, a company should assess its corruption risks, including considering carefully the interactions it is likely to have with government officials, such as customs officials or regulators. It should develop and implement an effective, written anti-corruption compliance program that addresses those risks, and put a system in place to review third parties who will interact with foreign officials and limit hosting and gifts provided to government officials. It should train employees on its anti-corruption program to ensure they understand the rules monitor it to be sure it works.

One way companies can potentially help themselves when they uncover a suspected FCPA violation is to proactively self-report the issue to the DOJ and SEC and undertake an internal investigation into the matter. The government
encourages this practice and has stated that there will be "meaningful credit" given to the company for such cooperation, as it helps the government root out and prevent corruption, with relatively little cost to the government because the bulk of the cost of the investigation is taken on by the company and outside counsel for the company.

Additionally, companies concerned that some of their planned activities could implicate the FCPA can submit the facts to the DOJ to obtain an opinion as to whether the specified prospective conduct conforms with the DOJ's enforcement policies.

This is real, this is scary, and companies in the forestry industry really need to pay attention. Harvesting and trade in wood products often takes place in developing countries that present high corruption risk - just think of Indonesia, Cameroon, Brazil, Malaysia, Peru, Madagascar, and India, all of which have been deemed "highly corrupt" by Transparency International's Corruption Perceptions Index. To protect yourselves and your companies, you need to take proactive steps NOW to put in place comprehensive anti-corruption compliance programs before the DOJ or SEC come knocking.

For more information on the FCPA, UK Bribery Act, and other global anti-corruption initiatives, see Anti-Corruption Compliance: Avoiding Liability for the Actions of Third Parties; The New U.K. Bribery Act: An In-Depth Analysis; Global Enforcement Trends: Assessing and Preparing for Emerging US and UK Civil and Criminal Risks for Financial Institutions; and Building an Effective Anti-Corruption Compliance Contacts Program: Lessons Learned from the Recent Deferred Prosecution Agreements in Panalpina, Alcatel-Lucent, and Tyson Foods.

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3. Pete Kasperowicz, The Hill, "Lawmakers look to ease Lacey Act regulations after Gibson Guitar raid".
5. The UK Bribery Act.
8. DOJ, "Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti".
9. Bribery Act cases already being considered for investigation by the SFO?
10. Wall Street Journal, "Indonesia Moves Ahead With Foreign Bribery Legislation".
11. Govt mulls bringing corporates under proposed anti-graft law.
12. Alejandro Salas, Fox News: Has Dilma Rousseff Found the Anti-Corruption Formula for Latin America?

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