Takeaways from FOREIGN CORRUPT PRACTICES ACT *Enforcement Actions in 2022*

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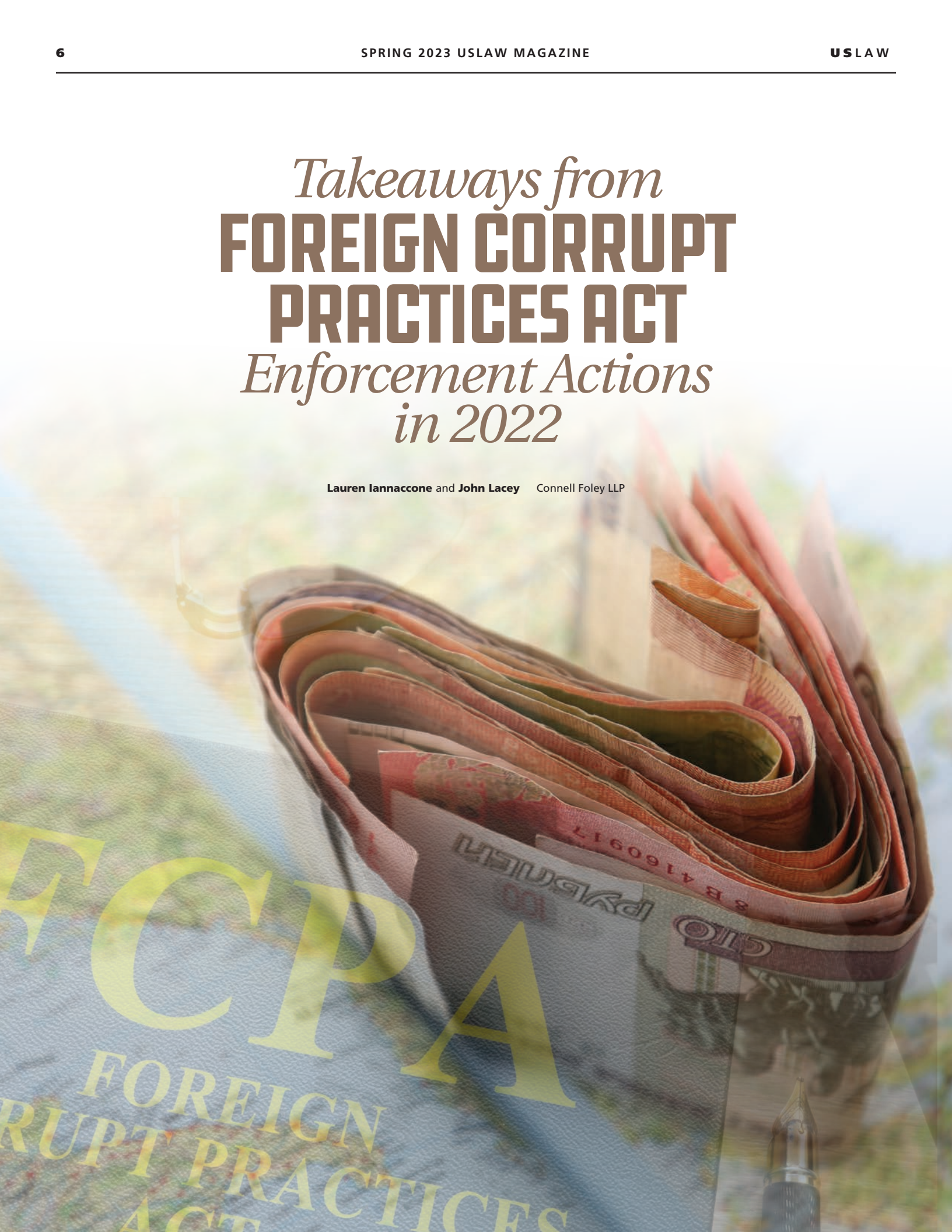

Since 1977, the U.S. Securities and Exchange Commission ("SEC") has led a crusade against companies gaining a business advantage by utilizing illegal business tactics, including bribery. The SEC can discipline offenders and take corrective action through the Foreign Corrupt Practices Act ("FCPA"), which generally prohibits companies and persons from offering, promising, authorizing, or paying money or anything of value, directly or indirectly, to a foreign official to obtain or retain business. The FCPA also mandates that public companies in the United States maintain accurate financial records and a system of internal accounting controls that, among other things, will reasonably detect and prevent improper payments to foreign officials.

Companies must beware that the FCPA's penalties are draconian. Last year alone, the SEC's enforcement of this critical statute led to more than $200 million in sanctions. This article will explore the 2022 top offenders and highlight some of the key FCPA provisions of which executives and counsel must be aware.

Under the FCPA, it is unlawful for companies to offer, promise to pay, pay, authorize payment, gift, give or authorize giving anything of value to "any foreign official" to, among other things, influence that foreign official in his or her official capacity, ask the foreign official to influence an act or decision. In short, companies cannot offer bribes or other incentives to secure a political, economic, or other advantage. In April 2022, a U.S.- based medical waste and document destruction company with more than 100 locations in the U.S. agreed to pay more than $28.2 million to resolve charges it allegedly bribed government customers in three foreign countries to obtain and maintain business. In this case, there were allegations that "sham third-party vendors" were created to hide payments through bogus invoices. Not surprisingly, the company also allegedly failed to implement the internal controls required under the FCPA to prevent such illegal payments to foreign officials.

The FCPA requires companies to devise and maintain a system of internal accounting controls that provide "reasonable assurances" that, among other things, transactions are authorized, and books and records show, with reasonable detail, these transactions. In February 2022, a technology company with a single office in Los Angeles, California, paid over $6.3 million to settle charges that it made improper payments in Korea and Vietnam. Of that amount, $3.5 million was for civil penalties, and $2.8 million was for the disgorgement of company profits. Once again, the SEC focused on the alleged lack of internal accounting controls concerning charitable donations, third-party payments, executive bonuses, and gift-card purchases.

Modifying company books is also impermissible under the FCPA. Specifically, "no person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account…." This past year, a global manufacturer and supplier of steel pipe products agreed to pay over $78 million to resolve charges that it allegedly violated this provision, among others.

Two years ago, the Supreme Court affirmed the SEC's ability to disgorge company profits as a penalty, which was precisely what happened when an electric company allegedly violated anti-bribery, books and records, and internal accounting control sections of the FCPA. There, the company was required to pay a $75 million penalty, $58 million disgorgement, and $14.5 million in prejudgment interest.

Utilizing off-the-books funds for bribes is also not permitted under the FCPA. An American-based computer company headquartered in Austin, Texas, agreed to pay a $15 million penalty and $8 million in disgorgement for allegedly creating off-the-books slush funds. These funds were allegedly used to incentivize foreign officials to attend technology conferences. The payments violated the company's anti-bribery policies and procedures, but this was not the company's first FCPA violation. In 2012, the company was also required to pay FCPA-related penalties to resolve claims that it created millions of dollars in slush funds.

FCPA provisions need to be effective across all management and employee ranks. For example, a Brazil-based airline that offers flights to the United States was charged with bribing foreign officers in exchange for payroll tax and aviation fuel tax reductions. Here, the director of the company was allegedly involved. The company agreed to pay $70 million for alleged violations of the FCPA; the SEC agreed to reduce this penalty due to the company's inability to pay.

A company's best means to ensure compliance with the FCPA is to adopt comprehensive ethics and accounting policies specifically designed to prevent violations of the FCPA and similar anti-corruption laws in other jurisdictions (including the U.K. Bribery Act, which in some instances, has more stringent provisions than the FCPA).

Such policies should:

1) Have a stated goal to detect, prevent, and sanction violations of the FCPA. It should set forth the company's obligations under the FCPA, as well as the significant penalties the company will impose (up to and including immediate termination) for any violation of the FCPA or the company policies. It also should highlight the penalties the company itself could face for each FCPA violation.
2) Require the maintenance of accurate books and records to document, payments, gifts, entertainment, and other expenses and things of value given to third-parties.
3) Set an internal accounting procedure and protocol to detect, prevent, and stop any impermissible expenditures.
4) Identify a procedure for employee questions concerning whether an expenditure is appropriate.
5) Assemble a procedure for employees concerned that a violation of the FCPA did, or is about to, occur.
6) Make sure that the policy is applied equally to all employees, including company executives.
7) Identify red flags that employees are required to report.
8) Require that any contracts entered with, or in, a foreign country have an anti-bribery provision.

Last year, the SEC filed more than 16 enforcement actions. The message to executives and companies that conduct business internationally is simple: The privilege to conduct international business comes with an ethical obligation to ensure that such business does not promote corrupt business practices. There is still time to review or adopt appropriate company policies.

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