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LEGAL NOTE Discusses Corruption Compliance for Doing Business in China

Recent trends in federal law enforcement reflect an increase in Securities and Exchange Commission (SEC) and Justice Department application of the Foreign Corrupt Practices Act (FCPA). One area of specific focus is on businesses conducting affairs in China. This increased interest, and several unique FCPA-related challenges that country poses, creates an imperative for U.S. businesses to develop effective corruption controls for their Chinese activities, write two foreign corruption law experts in a new Washington Legal Foundation CONTEMPORARY LEGAL NOTE.

The paper, **DOING BUSINESS IN CHINA: UNIQUE CORRUPTION COMPLIANCE CONCERNS AND STRATEGIES**, was authored *pro bono* by **Judith A. Lee** and **James D. Slear** of the law firm *Gibson, Dunn & Crutcher LLP*.

The authors initially provide a brief explanation of the FCPA's requirements, focusing on its antibribery and accounting provisions. Notable among the accounting provisions, they write, are the internal controls requirements, which dictate the need to account for all company transactions and ensure that off-book accounts and disbursements are rapidly discovered and disclosed. Of greatest significance to those who do business in China, Lee and Slear caution, is that the U.S. government will hold businesses fully accountable if its controls do not constrain the activities of subsidiaries.

The authors next turn to the special FCPA compliance concerns that China poses for U.S. companies. The two main factors they discuss are first, that many enterprises that U.S. companies may deal with in China are state-owned and/or state-operated; and second, that doing business in China normally requires the use of local partners and agents. To illustrate these two factors, Lee and Slear briefly examine SEC's recent enforcement action against a U.S. company, Diagnostic Products Corporation, and a resulting settlement.

That particular case also reveals two "traps for the unwary," which the authors write otherwise "may not be easily detected by internal controls that are focused on classic bribery scenarios." The first they describe is inside information, including the act of seeking information about competitors' bids from a government official acting on behalf of a Chinese enterprise. The second involves offering employees of Chinese businesses opportunities to travel for purposes of training, an activity which is built into many contracts and is considered wholly appropriate when both businesses are entirely private. In the context of Chinese businesses, however, because the employee

could be an agent of the government, such benefits might be considered illegal inducements under the FCPA. The paper describes several potential affirmative defenses to charges related to these activities, but cautions that their successful use is based on an interpretation of Chinese law.

The paper concludes with a succinct checklist of key FCPA compliance considerations for U.S. business activity in China.

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