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## retail

August 15, 2012

Dear Retail Clients and Friends,

Retailers with an international presence should take note of a recent investigation into one of the world's largest retailers for alleged violations of the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78dd-1, et seq. The investigation has caused a number of other retailers to self-report potential FCPA violations to the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). This edition of ***Morgan Lewis Retail Did You Know?*** describes the anti-corruption risk faced by retailers and provides factors that should be considered when deciding to self-disclose potential FCPA violations.

### Background

Although the DOJ and the SEC have been aggressively enforcing the FCPA, the retail industry has, until recently, stayed under the U.S. government's radar. This changed a few months ago when it was announced that one of the world's largest retailers is being investigated for allegedly participating in widespread bribery in connection with its Mexican operations. A July 26 Reuters article reported that, in the wake of that investigation, other retailers are self-reporting potential FCPA violations, leading the DOJ and the SEC to consider a wide-ranging examination of the entire retail industry.

While international retail companies arguably face less anti-corruption risk than those in other recently targeted industries (such as energy and life sciences), retail companies, nevertheless, are exposed to anti-corruption risk with every interaction with a foreign official. That means retail companies' interactions with government employees in connection with customs clearances, tax collections, building permits, and business licenses implicate the FCPA and other international anti-corruption laws.

### Self-Disclosure Considerations

While it is true that the DOJ and the SEC have taken an industrywide approach to past FCPA investigations, it is unclear why a large investigation of one company in a particular industry would cause other companies in the industry to self-disclose. A company has no obligation to self-disclose an FCPA violation, and the benefit achieved through self-disclosure is not easily defined. The self-disclosure decision is a complicated one that should be driven by the circumstances of the individual case. Among the many factors that should be considered are the nature of the violation, the strength and completeness of the evidence, concerns about discovery of additional improper conduct, and the possibility of greater leniency. Another significant consideration is the likelihood of independent discovery.

Thus, while the existence of an FCPA investigation in the retail industry may afford the U.S. government with an opportunity to learn and understand the particular FCPA risks that retailers face, it does not, in and of itself, supply an independent reason to self-disclose an FCPA violation by another retail company.

### Practical Implications

The most effective thing that retail companies can do in this enforcement environment is ensure that they have a strong compliance program that includes anti-corruption policies and procedures, training, and a system for reporting suspected violations. If a potential violation is reported or discovered, compliance programs must allow a company to react quickly to investigate the allegations and respond to the investigation findings.

# Morgan Lewis

## How We Can Help

Morgan Lewis can assist with the review of a retail company's compliance program and the implementation of strong anti-corruption policies and procedures that will allow a company to quickly investigate and respond to any allegations of FCPA violations. We can also assist with the decision of whether to self-disclose potential FCPA violations to the DOJ and/or the SEC.

## Contacts

If we can be of assistance to you in these matters, please feel free to get in touch with your Morgan Lewis contact or any of our Retail or FCPA Practice leaders:

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These individuals are part of our international Retail Practice. Attorneys from our 24 offices regularly represent national, regional, and local retailers in a broad array of subject matters including litigation, labor and employment, real estate, tax, transactional, and regulatory.

**About Morgan Lewis Retail Did You Know?** This message is part of our effort to educate our retail clients and friends about important legal developments. One thing we hear frequently from our retail clients is that it is hard to keep track of new and emerging laws and lawsuit trends that affect retailers. All too frequently, the first notice comes in the form of a lawsuit seeking millions of dollars. To help you be more proactive in managing legal compliance, we are providing these emails.

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