



# Foreign Direct Investment



# FDI

## Questions:

- ◆ What circumstances motivate a company's move from non-establishment forms of transacting to FDI?
- ◆ What is FDI?
- ◆ What costs are associated with FDI?
- ◆ What assessments should be made of the target country?
- ◆ Where should Research & Development be located?
- ◆ What are preferential incentives?

# Methods for Accomplishing FDI

- “Greenfield” investment, create a subsidiary, branch, or joint venture
- acquire an existing foreign company

# Barriers to M&A

- defensive & legal restrictions
  
- national security review of the transaction
  - French Government & GE's acquisition of Altom
  
- competition laws
  - Laws directed against conduct that unfairly tends to destroy competition itself. These Laws protect competition and the market as a whole, not individual competitors, the foundation of an antitrust claim is the alleged adverse effect on the market.  
<http://www.forbes.com/2001/06/15/0615topGE.html> (concern: GE's plane-leasing unit being used to dominate the market for jet engines and airplane electronics)

# Methods: Asset Acquisition

## ➤ GE-Altom

- G.E. ← Alstom's energy businesses, which makes turbines to generate electricity and the infrastructure to transmit and distribute power
- G.E. -> Alstom as a stand-alone transport business, building high-speed trains and offering a variety of railway products and services (French government asked G.E. to combine its railroad signaling business with Alstom's).

# FCPA Problem 6-4

## ➤ PROBLEM 6-4

- Medtech is a publicly traded company located in Atlanta, Georgia. Medtech wishes to establish a foreign subsidiary to manufacture and sell its products in a developing country but has been warned by a local business consultant that it is customary to pay “substantial” fees for a business license. In addition, Medtech has been told that it is expected for new companies to make an additional payment of a “closing fee” of \$1 million to the minister of trade. The consultant says, “Don’t worry, this is all part of the business and legal culture here — everybody knows that it is legal and no one ever gets into trouble. It’s been done in the open for years and the ministry has even said that the practice will be codified in a new law. All of your foreign competitors are making payments and you don’t want to lose out to them, do you? I’ll handle everything for you and you won’t need to concern yourself with details. Just send payments to me when I ask for them. Also, if you are worried about your shareholders, you can file these payments under ‘Closing Costs.’ In fact, I’ll be in the U.S. on another matter next week and I can come and pick up the first payment from you at your head office.” What issues are involved? See 15 U.S.C. §§78m and 78dd-1.

# FCPA

- (1) Issuers, domestic concerns, and any person
- (2) from making use of interstate commerce [single phone call, a single e-mail, or the posting of a letter]
- (3) corruptly
- (4) in furtherance of an offer or payment of anything of value
- (5) to a foreign official, foreign political party, or candidate for political office
- (6) for the purpose of influencing any act of that foreign official in violation of the duty of that official or to secure any improper advantage in order to obtain or retain business.

# FCPA

## ➤ APPLICABLE TO:

- “Issuers” — any U.S. or foreign corporation with publicly traded securities in the United States.
- “Domestic concerns” refer to *any individual* who is a citizen, national, or resident of the United States and *any corporation* and other business entity organized under the laws of the United States or having its principal place of business in the United States. Company officials such as officers, directors, employees, or agents of issuers and domestic concerns are also covered by the FCPA.
- “Any person” covers both enterprises and individuals. Foreign entities that do not have publicly traded securities are included within this term as well as foreign nationals so long as they commit an act within the territory of the United States.



# FCPA--Penalties

## ➤ PENALTIES--BRIBERY PROVISIONS

### ➤ Criminal violations:

➤ entity: fine of not more than \$2 million per violation;

Individual: imprisoned for up to five years or a fine of \$100,000 or both per violation.

### ➤ Accounting violations:

➤ Individual: up to 20 years in prison; fines up to \$5 million or both

➤ entities: fined not more than \$25 million

# FCPA

- Exceptions:
- “grease payment” exception, when the payment is a facilitating payment to secure the performance of a routine government action. *See* 15 U.S.C. §78dd-1(b).
- payments that are lawful under the *written laws* of the foreign official’s country
- Payments for “bona fide expenditures” such as travel and lodging incurred by a foreign government official for the purpose of promoting the payor’s products or services.

# FCPA Problem 6-5

## ➤ PROBLEM 6-5

- Medtech is one of several companies that has applied to establish a \$30 million joint venture in Chile. Before Medtech submitted its joint venture project application, several officials from Medtech's U.S. headquarters flew to Chile and invited various officials of the national bureau on foreign investment, which will decide whether to approve Medtech's application for the project, out for an evening's get together in order to get acquainted with Medtech's business and its plans for Chile and South America. The government officials were first treated to a World Cup soccer match between Chile and Germany, then a lavish champagne dinner at an expensive restaurant, and, finally, an extravagant evening at an exclusive nightclub, all paid for by Medtech. The whole evening cost more than a year's salary of the chief of the investment bureau.
- As the evening concluded, the chief of the investment bureau asked Medtech where he can find a scholarship for his daughter to attend a prestigious university in California. A Medtech official later sends the following e-mail message to Medtech's finance department in Atlanta: "Can you look into the scholarship? There must be a way, so let's find it." What are the legal issues involved? *See* 15 U.S.C. §78dd-1(c)(2).

# FCPA Problem 6-6

## ➤ PROBLEM 6-6

- Medtech has been approached by Sino-Med, a privately owned medical company in China, to be its joint venture partner for the Chinese market. The president of Sino-Med has mentioned that it is customary for a foreign investor such as Medtech to give him \$250,000 cash in “lucky money” as a gesture of goodwill and mutual friendship. Is this unlawful under the FCPA or any other relevant laws? What if 60 percent of the shares of Sino-Med were owned by the Supervision Bureau of Pharmaceuticals, a local regulatory agency? Would you advise Medtech to make the payment? See 15 U.S.C. §§78dd- 1(a)(1)–(2) and 78dd-1(f )(1).

# FCPA Problem 6-7

## ➤ PROBLEM 6-7

Hyde Chemical Industries, a Delaware corporation, has established a wholly-owned subsidiary in the Congo Republic (CR). Under the CR's foreign investment laws, foreign invested companies are eligible to receive one of three designations: Level 1 for state-of-the-art technology, Level 2 for advanced technology, and Level 3 for high technology. Each designation carries a number of benefits. A Level 1 designation exempts the company from the CR's onerous environmental laws for a period of 20 years. Under the CR's laws, any foreign invested company can apply to the government for a review for a fee of \$500,000. Most companies that pay for the review obtain a technology designation. In 2003, Hyde donated \$5 million to CR's environmental protection bureau in order to allow the bureau to purchase and install a new computer system. In 2004, Hyde applied for a review and received a Level 1 designation. Later that year, the Justice Department charged Hyde with a violation of the FCPA. In its defense, Hyde argued that the donation was not for the purpose of obtaining new business. Hyde's plant was already established and Hyde had no intention of establishing any new businesses in the CR or in expanding its present operations. Does Hyde have a good argument?

# Bulgaria

Signatory to the OECD Convention; implementing legislation in force 29 January 1999

- The offence of *bribery of foreign public officials* is set forth in the Bulgarian Penal Code. Texts of the provisions related to the term “foreign public official” and to the punishment of foreign bribery are under section 93 para.15 and section 304(3), respectively.

Signatory to the UN Convention Against Corruption: 20 September 2006