INFORMATION TECHNOLOGY

UNDERSTANDING THE FOREIGN CORRUPT PRACTICES ACT AND ITS APPLICATION TO LOCAL ENTITIES

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We operate in an increasingly global economy. Foreign companies relocate to our area and local companies increase their revenues by expanding their operations and sales to foreign countries. Regardless of whether our clients are in music, healthcare, technology, or food services, as they expand into international operations they become subject to a new set of laws that create very real civil and criminal risks.

One set of laws that has become increasingly important for international operations involves prohibitions against bribery. Don't laugh – it happens … and increasingly it happens with respect to even well-intentioned companies that operate in our local area. We are not just talking about brown paper bags filled with cash (although those involved in our state in the bribery business seem to prefer that form of transfer). A bribe can be as simple as an offer of a ticket to a college or professional sports game to the wrong person, with the wrong intent.

The Foreign Corrupt Practices Act

In the United States bribery in the international context is covered under the Foreign Corrupt Practices Act (FCPA).[1] The FCPA makes it illegal for a US person (or company) to offer, pay, promise to pay, or authorize the payment of money or the giving of *anything of value* to a foreign official (or candidate) to obtain an improper advantage or affect or influence any act or decision of a foreign government.[2] The FCPA also covers foreign firms and persons who take any action with respect to such prohibited payments while in the US.[3] These prohibited acts are typically referred to as the anti-bribery provisions of the FCPA.

The FCPA also requires that companies subject to the jurisdiction of the Securities and Exchange Commission (SEC) make and keep financial books, records and accounts that accurately reflect the financial transactions of the company and maintain a system of internal accounting controls sufficient to detect and prevent the payments prohibited under the FCPA.[4] This "books and records" requirement applies not only to companies whose securities are listed on a US stock exchange or publicly traded, but all companies that are required to file reports with the SEC.

Enforcement Provisions of the FCPA

The anti-bribery provisions of the FCPA are subject to enforcement by the Department of Justice (DOJ) and recently the enforcement business has been good. From 2009 to 2010, there was an 85% increase in the number of DOJ actions under the FCPA. The penalties assessed under the FCPA have seen even more astronomical increases, with penalties, fines, and discouragement of profits totaling in the hundreds of millions of dollars per action (coupled with equal dollar amount expenditures in legal, audit, and on-going compliance fees). Local companies have also been the subject DOJ investigations involving relatively small (but improper) payments under the FCPA that have resulted in multi-million dollar penalties. Individuals subject to FCPA violations (including officers of companies that are involved in improper payments) can be faced with up to five years imprisonment.

The books and records provisions of the FCPA are subject to enforcement by the SEC. Violation of these provisions can result in not only significant economic penalties but also injunctive relief that can have catastrophic consequences for both companies and the responsible executives within these companies (including being barred from doing business with the federal government).

Why Haven't I Heard More about these FCPA Actions

Unless you are a securities lawyer or involved in ethics and compliance programs for large companies, you probably haven't heard much about the FCPA other than what you can read in the newspapers. One reason most attorneys are not familiar with the provisions of the FCPA is that the actions by the DOJ and SEC rarely result in actual convictions that are included within traditional legal reporters. In fact, the first actual conviction of a company for violation of the FCPA was just announced by the DOJ in May 2011.[5] In most cases, companies subject to DOJ and/or SEC actions under the FCPA enter into non-prosecution agreements (NPAs) by which they acknowledge wrong-doing and agree to pay damages and engage in remedial actions (which can include provision for an independent entity to monitor or audit future compliance). In some cases the NPAs are very public (and can be reviewed at the DOJ website). In other cases, the terms of settlement between the DOJ/SEC and the respective company may not be completely public (e.g. the exact standards set by an independent monitor with which a company under investigation must comply). The result is that practitioners have to pull from a variety of what lawyers would typically consider secondary legal resources the issues that have become important in FCPA enforcement actions. This list of issues is typically referred to as FCPA "red flags" – a list of situations that have traditionally been associated with the type of bad deeds that the FCPA seeks to prohibit.

The New UK Bribery Act

In addition to the increased enforcement activity under the FCPA, a new law will take effect in the United Kingdom in July 2011 that substantially expands current ant-bribery prohibitions for US entities. The UK Bribery Act of 2010 (the "Act"),[6] prohibits not only bribes to foreign officials (as currently prohibited under the FCPA),[7] but also offering or agreeing to accept a bribe in private commerce. The end result is that offering or agreeing to accept a bribe (i.e. "anything of value") as between private companies with an intent for that offer to induce some action that the company would not otherwise take becomes a criminal offense.[8] The Act also includes a new offense for failing

to have procedures and controls in place within a company to prevent bribery.[9]

Why should a new UK law worry a US company? Because the Act provides that the UK government can exert jurisdiction over non-UK entities for offenses committed outside of the UK by any person who has a "close connection with the United Kingdom."[10] Basically, "there is a new sheriff in town" and US companies can expect the new enforcement agency for the Act (the Serious Fraud Office) to come knocking at their door later this year.

In addition to incorporating more offenses than the FCPA, the Act also has a number of other provisions that should worry any US company. The prison sentences for violations of the Act are double their US counterparts, the Act provides for unlimited fines, and violators are subject to mandatory (not permissive) debarment from government contracting within the European Union (or acting as a director/senior officer of another covered company). The Act also specifically prohibits small "facilitation payments" that have traditionally been made by US companies to induce foreign officials to perform their normal duties (such as small payments to customs officials to clear individual shipments in foreign destinations) and creates some ambiguity over whether payments for tickets, sporting events, and other traditional hospitality items are prohibited or restricted.[11]

Implications for US Companies

Given the SEC books and records requirements and the Act's requirement for control process to be in place within companies to prevent bribery, the risk profile for US companies continues to increase with respect to acts of bribery. Companies must self-police their employees (and potentially their agents and contractors) and have reporting processes in place to detect (and report) potentially prohibited gifts or payments and control processes to prevent such gifts and payments. Companies may also be required to educate third parties with whom they deal (joint venture partners, supply chain contractors, sale channel distribution partners, shipping agents, etc) with respect to the provisions of the FCPA and the Act and include within their contractual commitments a provision that these third parties will not engage in the types of payments or gifts that are prohibited. Last, with the additional "whistleblower" provisions of the new Dodd-Frank Wall Street Reform and Consumer Protection Act[12] there are mandatory cash rewards that must be paid to those who voluntarily provide the SEC with information leading to a successful prosecution under the books and records provisions of the FCPA (a minimum of 10% and a maximum of 30% of sanctions recovered). Given that sanctions for FCPA violations seem to have a floor in the low millions of dollars, informers with respect to FCPA violations now can expect a minimum six figure bounty for turning in their employers and executives (plus being the beneficiary of prohibitions against retaliation by their companies for the information provided to the SEC).

Summary and Conclusions

Bribers are bad, morally, legally, and on a macro-economic level financially. Good business practices should dictate that companies avoid brides and have control processes in place to manage their risks with respect to such prohibited behavior. But creating such processes, especially sustainable processes within budgets, can be hard. Failing to practically accommodate to the changing enforcement patterns with respect to bribery and potentially facing prosecution by the DOJ or sanctions by the SEC in the US or civil or criminal indictments by the Serious Fraud Office in the UK could be much harder.

US companies need to reevaluate their current compliance programs (or immediately implement a compliance program if none is in place) that are proportionate to the new risks in the international marketplace. Companies also need to understand that bribes are the ultimate "slippery slope" – once "small gifts" become ingrained in the culture of an organization, larger gifts seem less suspect, and actual violations of the FCPA and the Act become the subject of closet conversations rather than affirmative action. Such a process places both the organization, and its senior executives, at risk of both large civil actions and potential criminal convictions.

The FCPA and the Act have become local concerns. They now both require local action by our clients.

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[1] Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, et seq. (1977).

[2] 15 U.S.C. § 78dd-2.

[3] 15 U.S.C. § 78dd-3.

[4] 15 U.S.C. § 78m.

[5] Press Release, DOJ, California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico (May 10, 2011), available at http://www.justice.gov/opa/pr/2011/May/11-crm-596.html.

[6] Bribery Act, 2010, c.23 (U.K.), available at http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf.

[7] Bribery Act, 2001, c.23 § 6.

[8] Bribery Act, 2001, c.23 § 1-2.

[9] Bribery Act, 2001, c.23 § 7.

[10] Bribery Act, 2001, c.23 § 12.

[11] See generally the guide manual for the Act. The Bribery Act 2010: Guidance about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010), Ministry of Justice (2010), available at http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf.

[12] Section 922, amending 15 U.S.C. § 78a et seq.

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