Foreign Corrupt Practices Act

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Conducting Business Abroad: What Are the Risks Under the Foreign Corrupt Practices Act?

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Your company is entering a new market overseas. You hire a local lawyer to help you navigate the steps necessary to obtain a license to conduct business in that country. Once you get your license, you hire third-party sales agents to sell your products and/or services. Your sales agents go out in the field and wine and dine potential clients.

Ultimately, the new clients, after several very lavish dinners, much-sought-after tickets to sporting events, and a trip to the United States, agree to enter into a contract to purchase your products and/or services. Win-win? That depends. Who is the lawyer? Is she married to an official who works in the government agency that can provide an advantage to your company, such as a favorable tax or customs ruling? Is that the reason she was hired? Is she being paid more than others charge in the same market? If so, you may have violated the Foreign Corrupt Practices Act ("FCPA") 15 U.S.C. §§ 78dd-1 et seq. And who are the target clients? Are they State-owned entities, as so many are in countries like China or the U.A.E.? If so, you may have, by allowing your agent to wine and dine the client's employees and send them on trips to the United States, engaged in a violation of the FCPA. What if the client is a department within the U.K. government? Safe under the new U.K. Bribery Act?

The FCPA provides tough criminal sanctions against individuals and companies who corruptly offer, give, or promise any money or *anything of value* to any foreign official for the purpose of influencing that foreign official to assist the company or person in obtaining or retaining business or any improper advantage. "Anything of value" does not have to be cash. It can be a lavish, unnecessary dinner, a valuable contract, as in the case of the lawyer posited above, certain trips or even a charitable donation to a legitimate charity where the government official you are seeking to influence sits on the board.

The term “foreign official” is viewed broadly to include not just government officials working in a ministry but also employees of government-owned or partially government-owned entities. That very client your sales agent is pitching may be a semi-private entity in which, unbeknownst to you, the State has an interest. The person being wined and dined may, therefore, be viewed as a foreign official. Recent positions taken by the U.S. Department of Justice (“DOJ”) in FCPA prosecutions brought against individuals reiterate its view that any employee of a partially State-owned entity can be a foreign official under the FCPA. *See* DOJ’s opposition papers in the *Lindsey Manufacturing* case. *United States v. Aguilar Noriega*, Cr. No. 10-1031(A)-AHM (C.D. Cal.) filed 3/10/11. So far, the U.S. courts have supported that view. *Id*.

Note also that an act “in furtherance” of a bribe or a mere offer is sufficient to invoke criminal penalties; an actual payment is not required. The FCPA also prohibits payments to a third party (such as a local agent) where the payer knows that the third party will pass on or share the payment with a foreign official. *E.g.,* 15 U.S.C. § 78dd-1(a)(3). Because willful blindness is no defense to FCPA liability, this provision essentially imposes a duty to monitor the activities of independent foreign sales agents and other third parties with whom one does business to ensure that they are not violating the FCPA on the company’s behalf. This duty is not just expected by the U.S. government; thirty-eight countries have adopted similar laws as signatories to the OECD Anti-Bribery Convention, which can be found here.

The anti-bribery provisions of the FCPA apply to all U.S. companies, persons, and other entities, whether or not they are “issuers” as defined in the statute. 15 U.S.C. § 78dd-1 to -2. These provisions also apply to foreign companies and persons that perform or cause another to perform any act within the United States that furthers the bribery. 15 U.S.C. § 78dd-3. Bribery by a subsidiary may give rise to liability for a U.S. parent if anyone acting on behalf of the parent authorizes, agree to, or in any way, facilitates the bribery by the foreign subsidiary or if the evidence establishes that the parent “knows” or “has reason to know” of the subsidiary’s activities. See DPA with Schnitzer Steel Industries, Inc. (Oct. 2006). Unlike the insider trading laws, there is no materiality threshold; the amount of the bribery, although relevant to show corrupt intent, is not dispositive of whether a violation took place.

The FCPA also provides civil and criminal penalties for violations of specified internal controls and books and records provisions for companies that issue securities or trade ADRs on the exchanges. So, for example, a failure to record a small bribe as a “bribe” (like the one involving the charitable contribution noted above) can, even if not prosecuted, result in significant civil penalties. *In the Matter of Schering-Plough Corporation*, Admin. Proc. Rel. No. 34-49838 (June 9, 2004). The SEC has recently extended this coverage to foreign companies generally not subject to its jurisdiction on a conspiracy theory and to high-level company officers who did not even know of the bribe on a “responsible corporate officer” theory. *See SEC v. Panalpina*, SEC Litigation Release No. 21727 (November 4, 2010); *SEC v. Nature’s Sunshine Products, Inc.,* SEC Litigation Release No. 21162 (July 31, 2009).

And the fines can be stiff. Recently Siemens paid $800 million in fines, penalties, and disgorgement to the U.S. and additional monies to the German authorities resulting in total fines of $1.6 billion. Read more. A convicted company can also be subject to debarment from federal programs. Individuals can face fines of up to $100,000 or twice the gain and sentences of up to five years in prison per violation of the bribery section and up to twenty years imprisonment per violation of the books and records/internal controls provisions. 15 U.S.C. § 78ff. And the "DOJ" has made it a point to focus more recently on prosecutions of individuals, at least one of whom was a passive investor who allegedly “should have known” the investment principal was engaging in FCPA violations. *See United States v. Bourke*, Cr. No. 05-518 (S.D.N.Y. 2005) (found guilty on July 10, 2009). *United States v. Gerald Green and Patricia Green,* Cr. No. 08-00051 (C.D. Cal. 2008), *and Remarks by U.S. Department of Justice Assistant Attorney General Lanny Breuer, at the Council on Foreign Relations* (May 4, 2010) (increased prosecutions of individuals is “part of a deliberate enforcement strategy”).

The implementation of the new whistleblower bounty in the Dodd-Frank Act will, likely, serve to increase the number of cases coming to the DOJ's attention and, concomitantly, the number of prosecutions.

So, how does a compliant company navigate the shoals of corruption? Putting in place an anticorruption program would be the prudent course. A program should include a due diligence process to vet any agents or third parties conducting business abroad on behalf of the company. It should also include specific representations and warranties in contracts that go beyond the boilerplate agreement not to violate the law. Accounting systems should be reviewed to ensure that slush funds cannot be easily created by gaps in controls. Once a program is in place, it should be subject to regular auditing to ensure it is working.

If you have any questions regarding the FCPA or anti-corruption programs, please contact Jacqueline Wolff at 212-790-4620, jwolff@manatt.com, John Libby at 310-312-4342, jlibby@manatt.com, or Steven Reich at 212-830-7196, sreich@manatt.com.