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Cross-Border Risks for International Lawyers
Legal, regulatory, and reputational risks
How to protect clients in a changing international legal environment

Presented by:
Foreign Lawyers' Section of
The Geneva Bar Association

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I. Avoiding Liability through Familiarity with the Foreign Corrupt Practices Act ("FCPA")

A. Language of the FCPA and Gray Areas

As such, the FCPA, which was enacted in 1977 in response to several corporate scandals, has two basic provisions: the anti-bribery provisions and accounting provisions. The anti-bribery provisions prohibit "corrupt" "payment of money or anything of value" to "foreign officials, foreign political part[ies], or candidate[s] for public office" that the payor "knows" is "for the purpose of influencing a government decision" or "to assist in obtaining or retaining business." There are several ambiguities in the wording of the statute:

- ***"Anything of Value":*** Anything of value is broadly defined. It has been construed to include gifts, discounts, entertainment, sports tickets, drinks, lodging (including accommodation upgrades), insurance benefits and a promise of future employment.
    - "Anything of value" can also include payments made to foreign officials, where no monetary benefit accrues to the foreign official, so long as the payment is made for the purpose of influencing the foreign official's decision to award business. In *SEC v. Schering-Plough Corp*., 2004 SEC LEXIS 1183 (Jun. 9, 2004), the SEC sued a pharmaceutical company because a Polish subsidiary of the company made a series of charitable donations to a foundation headed by the director of a Polish, state-run health fund. The pharmaceutical subsidiary was the largest charitable donor to the fund and company sales skyrocketed disproportionately to competitors' sales, after the donations were made.
    - ***Charitable Donations:*** On the other, guidance provided by the US DOJ has shown that legitimate donations to recognized charities appear to be exempt from the prohibitions of the FCPA, even if they nevertheless secure the contract or business as effectively as corrupt payments would. FCPA Review Procedure Release, III FCPA Rep. 711 (1996). If a donor

takes steps to assure that it can demonstrate that no portion of the proceeds of a donation accrued to a foreign official, the payment should be legal under the FCPA. For example, a company donates money for a local hospital in a foreign country. While this donation, might curry favor with a foreign regime, if the foreign officials do not monetarily benefit from it, the payment/donation is legal under the FCPA.

- ***"Knowing":*** The FCPA prohibits bribes where the offeror "knows" the payment is intended to influence a government decision. The word "knows" is not afforded its ordinary meaning, as it is interpreted broadly. "Willful blindness" or conscious disregard for how a payment is made or to whom it is made will suffice to meet the FCPA's "know[ledge]" requirement.
- ***"Corruptly":*** One of the main ambiguities of the FCPA anti-bribery provisions is the meaning or interpretation of a corrupt payment. In the leading case on this issue, *United States v. Liebo*, the Eighth Circuit concluded that an act was done corruptly if it was done "voluntarily," "intentionally" and "with a bad purpose" of accomplishing an unlawful result or using an unlawful means to accomplish a lawful result. *United States v. Leibo*, 923 F.2d 1308 (8th Cir. 1991)
- ***Foreign Officials Involved in Foreign Corporation:*** The DOJ has also given "no action" assurances for arrangements in which the foreign government officials are officers or shareholders of the local joint ventures or companies, where the officials are not involved in the decision-making process for the transaction and the official have agreed to not to make payments to other government officials. FCPA Review Procedure Release, III FCPA Rep. 729-30 (1996).
    - However, like the term "anything of value," the term "foreign officials" is broadly defined to include an employee of an "instrumentality" of a foreign government. This is especially important and has profound implications on anyone doing business with state-run institutions, such as hospitals or refineries. The DOJ and SEC dockets are filled with enforcement actions based on payments made to doctors in government-run foreign hospitals. For example, in 2008, AGA Medical Corporation agreed to pay a $2 million penalty and enter a deferred prosecution agreement for improper payments made to doctors employed at a state-run Chinese hospital in order to induce the doctors to buy AGA Medical Products. (See Press release, http://www.justice.gov/opa/pr/2008/June/08-crm-491.html.)
- ***"Business-Purpose" Test:*** The FCPA prohibits corrupt payments made to assist in "obtaining" or "retaining" business. Thus, there can only be a violation of the FCPA if the payment in question is made to obtain or retain business that otherwise would not have been available. 15 U.S.C. §78dd-1(a)(1)(B). But

what constitutes "retaining" and "obtaining" business? Courts have interpreted the business purpose test broadly. For example, in *United States v. Kay*, the Fifth Circuit found that the business-purpose test applies to obtaining favorable tax rulings and favorable legislation: "The FCPA's provision against payments to foreign officials to obtain or retain business was sufficiently broad to included bribes meant to affect administration of revenue laws." *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004)

The accounting provisions of the FCPA consist of "accounting and record-keeping provisions," and place an obligation on publicly traded companies to maintain proper records and maintain an internal system of accounting controls to monitor its record-keeping obligations. The SEC has authority over the accounting provisions of the FCPA. Similar to the anti-bribery provisions of the FCPA, for an issuer to be liable under the FCPA accounting provisions of the FCPA, the issuer must have acted "knowingly."

B. Exceptions and Affirmative Defenses

There is one exception and several viable affirmative defenses to the FCPA that will help an attorney in advising his client on what to do in structuring transactions with international entities and foreign officials. Firstly, the FCPA anti-bribery provisions do not "apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action…," where such routine governmental actions include: obtaining official documents to qualify an entity to do business in a foreign country, processing visas or work orders, providing protection, and inspections. 15 USC §78dd-1(f)(3)(A) (2011).

There are also several affirmative defenses under the FCPA. Most notably, if such payments to foreign officials are explicitly allowed per the written laws of the recipient's country, then these payments are allowed under the FCPA. Secondly, payments made for reasonable and bona fide expenditures, such as payments for travel and lodging expenses, also present a viable affirmative defense to FCPA violations. 15 USC 78dd-1(c)(2). To qualify for this affirmative defense, the payment must be directly related to the "promotion, demonstration or explanation of products or services" or "the execution or performance of a contract with a foreign government or agency thereof." *Id.* As discussed above, legitimate payments to charities that happen to also assist in securing business might be allowed under the FCPA.

C. Amendments to the FCPA: Application to Foreign Citizens

Of note, the FCPA has been amended several times since it was enacted in 1977. In 1988, Congress made the *mens rea* requirement stricter and clarified the meaning of some of the original FCPA provisions, most notably the meaning of "retaining or obtaining business" under the statute. The 1988 Amendments also added the defenses listed and discussed above. Most recently, in 1998, Congress expanded the scope of the FCPA to include foreign citizens and businesses "while in

the territory of the United States," which presents an additional concerns for lawyers involving clients located abroad. Thus, a sophisticated business cannot bribe foreign officials by making the payments through a non-American subsidiary and an attorney should not advise a client that such behavior is legal.

II. Avoiding Liability through Familiarity with the UK Bribery Act

Although there have been no corporate prosecutions under the UK Bribery Act since it was effective in July 2011, it is important for international clients to be familiar with this act, which is broader, more expansive, and has greater exterritorial reach than the FCPA:

- ***Private-to-private Bribery:*** Unlike the FCPA, the UK Bribery Act covers bribery in the private sector, i.e, the UK Bribery Act also criminalizes bribery from one private actor to another.
- ***Passive Bribery:*** Unlike the FCPA, the UK Bribery Act also extends to passive bribery, i.e., to foreign nationals receiving bribes.
- ***Failure to Prevent Bribery:*** Unlike the FCPA, the UK Bribery Act creates a strict liability corporate offense for failure to prevent bribery, subject to being able to establish that a company has "adequate procedures" in place to prevent such bribery. On the other hand, under the FCPA, a company subject to US jurisdiction can be held vicariously liable for acts of its employees or agents. The UK Bribery Act extends to acts of "associated persons," which is essentially defined as anyone who performs services for or on behalf of the commercial organization.
- ***Intent:*** Under the FCPA, it must be proven that the person offering the bribe did so "corruptly." This provides the basis for charitable contributions permitted under the FCPA. In contrast, the UK Bribery Act contains no such requirement for a "corrupt" or "improper" intent.
- ***Facilitation Payments:*** Unlike the FCPA, the UK Bribery Act does not provide an exception for facilitation payments, although the UK Ministry of Justice Guidance confirms that prosecutors will exercise discretion in determining whether to prosecute.
- ***Bona Fide Promotional Expenses:*** Unlike the FCPA, which provides an affirmative defense for certain bona fide promotional expenses, there is no such defense under the UK Bribery Act. Again, the UK Ministry of Justice has said that it would exercise discretion in deciding who to prosecute under the UK Bribery Act.
- ***Penalties:*** While offenders under the FCPA and UK Bribery Act, are subject to incarceration and monetary fines, in general, the available penalties are tougher under the UK Bribery Act. For example, offenders under the UK Bribery Act can face an unlimited fine, but an individual found guilty under the FCPA is only subject to a $250,000 maximum fine per violation and a

company found guilty is liable for a maximum fine of $2M per violation. Violators found guilty under the UK Bribery Act, are subject to a 10 year maximum prison sentence, but the maximum prison sentence under the FCPA is 5 years.

III. Solutions to Preventing Professional Exposure and Exposure to Clients

A. Knowing the Law

As outlined above, the best and most basic way to protect clients from regulatory and reputational risks is to know about the complexities of anti-bribery legislation and other international laws affecting business. Companies should seek legal professionals who are knowledgeable and seasoned in these pieces of legislation and the related compliance.

B. Know the Red Flags

In November 2011, the SFO provided guidance as to what the agency deems to be corruption indicators, or "red flags" in corruption:

- Abnormal cash payments;
- Pressure exerted for payments to be made urgently or ahead of schedule;
- Payments being made through a third party country, e.g. goods or services supplied to country 'A' but payment is being made, usually to shell company in country 'B';
- Private meetings with public contractors or companies hoping to tender for contracts;
- Lavish gifts;
- Agreeing to contracts not favorable to the organization either with terms or time period; and
- Unexplained preference for certain contractors during tendering period.

The same corruption indicators apply to the FCPA and other international anti-bribery legislation.

C. Due Diligence

In addition to familiarity with the statutory language, red flags, and penalties for violating the FCPA and other legislation governing international business, attorneys must exercise due diligence in understanding and researching potential transactions involving a client and government officials. This includes due diligence of:

- The parties involved in the transactions,
- The relationship between an international party and the local government, and
- Local counsel that is hired to negotiate or assist in a given, international transaction.

D. Governmental Review Procedures

The Justice Department Review Procedure can help attorneys avoid violations of the FCPA. A company or person that is concerned about a potential liability under the

FCPA may provide the relevant facts to the DOJ. The DOJ will respond within 30 days, by giving an opinion indicating that it will take no enforcement action in a particular situation. The information submitted to the DOJ is treated as confidential, however, the DOJ can issue a press release which names the requesting party, the affected country and the general nature of the proposed conduct. 28 C.F.R. §80.14(b). The British Home Department has a similar review program in place.

E. Compliance Programs

All companies that conduct international business should create and implement FCPA and UK Bribery Act compliance programs to reduce the likelihood that the company will engage in violations of the anti-bribery provisions of the FCPA, UK Bribery Act, or other anti-bribery legislation. The company should assess the risks it faces in violating particular pieces of anti-bribery legislation and then consider what controls and monitoring systems need to be put in place to ensure that a company's workforce is in compliance with this law.

F. Corporate Hospitality Programs

Companies should review their corporate hospitality programs. While neither the FCPA nor the UK Bribery Act ban corporations from getting to know clients through entertainment, these legislations ultimately proscribe the gifts that businesspeople can lavish upon their clients to those expenditures that are "sensible and proportionate." With respect to giving away tickets to sporting events, U.K. Secretary of State for Justice Kenneth Clarke said "Rest assured—no one wants to stop firms from getting to know their clients by taking them to events like Wimbledon or the Grand Prix." Of course, this does not give companies carte blanche to give away tickets for sporting events to foreign officials. A lot depends on the value of the tickets. In fact the UK SFO has established five factors for determining whether a particular corporate expenditure is "reasonable and proportionate:" 1) whether the company has issued a clear policy on gifts and hospitality; 2) whether the scale of the expenditure in question is within the limits set out in the policy and, if not, whether the person making it asked a senior colleague for special permission to make it; 3) whether the expenditure was proportionate (based on who received it); 4) whether there is evidence that the company recorded the expenditure; and 5) whether the recipient was entitled to receive the hospitality under the law of the recipient's country.

The United States has not adopted a similar multi-factor test. However, anecdotally, there have been several enforcement actions and prosecutions of companies for their lavish gifts to foreign officials that can provide a solid guideline of what is allowed and what is prohibited under the FCPA. In 2007, Lucent Technologies paid $2.5 million in fines and penalties to settle parallel DOJ and SEC enforcement actions, in connections with $10 million it paid for employees of a Chinese state-owned company to take approximately 315 trips to the U.S., to tourist destinations including Las Vegas, Hawaii and Disney World, over a three-year period. The officials were given daily expense allowance of $500-$1000.00. Similarly, Control

Component, Inc. was fined over $18 million for bribes it provided to Malaysian, Chinese, South Korean, and UAE foreign officials in the form of trips to Disneyland, Las Vegas and Hawaii. IBM and Ingersoll-Rand have also made similar settlements in connection with paying bribes in the form of lavish entertainment expenditures.

In order to avoid problems with the UK Bribery Act, FCPA and other anti-bribery legislations, companies should:

- Require written preapproval of any corporate hospitality expenditures, especially those over a certain amount—maybe $250;
- Establish special scrutiny procedures for expenditures over that threshold amount, i.e., a policy stating that all tickets valued at more than $250.00 will be reviewed and subject to the approval of the company's compliance officer;
- Require company personnel to be in attendance at the event to support the business justification of relationship-building;
- Require employees to certify that they abided by the preapproved terms, after the expenditure is made;
- Be mindful of the proximity of the expenditure to the end of an existing contract or the awarding of new work;
- Avoid paying per diems or expense allowances to customers or business associates;
- Establish procedures and mechanisms for tracking business-related offenses; and
- Avoid entertaining government officials.

IV. Attorney Exposure Under the FCPA

The SEC, which enforces the civil mechanism of the FCPA and also regulates attorneys who practice before it, may bring several types of actions against attorneys whose advice led a client to violate the FCPA. Familiarity with the ramifications of violating the FCPA might deter attorneys from doing so:

- ***Rule 102(e) Proceedings:*** Rule 102(e) proceedings allow the SEC to censure attorneys who practice before it. The SEC may censure an attorney if the advice he gives to a client leads to a violations of the FCPA, following a determination of negligence or unethical conduct (although the SEC tends not to bring 102(e) actions for negligence). Even though the SEC primarily enforces the accounting provisions under the FCPA, the SEC can bring a 102(e) proceeding against an attorney whose advice causes a client to violate either provision of the FCPA. The penalties that an attorney faces for violating this rule includes temporary suspension from practice and disbarment. 17 C.F.R. §201.102(e).
- ***Conspiracy to Violate the FCPA:*** Depending on their involvement in a particular transaction, an attorney who advises a client on a specific transaction, could be held liable for conspiracy to violate the FCPA.

- ***Aiding and Abetting Violations Under 15 U.S.C. §78t(e):*** Under 15 U.S.C. §78t(e), the SEC may bring actions against attorneys whose conduct aids in the violation of federal securities laws. The SEC must, however prove scienter, i.e., that the attorney "knowingly provide[d] substantial assistance." Because of the scienter requirement, it is often difficult to pursue an aiding and abetting claim against an attorney.
- ***Reporting Violations- Sarbanes-Oxley 307:*** Attorneys are required to report evidence of material violations of federal and state securities laws and any other fraudulent act to the company's chief counsel or the company's CEO. This would obviously include knowledge of bribes or accounting fraud covered under the FCPA. Thus, depending on the attorney's position and when he came upon knowledge of the fraud, an attorney might have a duty to report the fraud "up-the-ladder" to the appropriate authority. Furthermore, if the attorney does not get a response from the company's CEO or general counsel, he must report the violation to an audit committee or qualified legal compliance committee. An attorney who violates these reporting rules could face temporary suspension or permanent disbarment from the practice of law.
- ***"Controlling Person" Liability under 15 U.S.C. 78t(a):*** If an attorney acts in bad faith or takes an active role in structuring or making payments to foreign officials, he could be held liable as a "controlling person" who caused a violation of the FCPA. An attorney who is hired by an issuer of securities merely to render advice on the FCPA probably will not meet the criteria for "controlling person liability" and therefore this means of redress is unlikely.
- ***There is no private cause of action under the FCPA***. *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990). However, attorneys can be liable for malpractice for giving erroneous advice on the FCPA. In *Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173 (2d Cir. 2003), although not ultimately reaching the issue of the attorney's malpractice and culpability, the Second Circuit found that a company could maintain an action for legal malpractice against a company's legal counsel as a result of that company's criminal liability under the FCPA. In *Schreiber*, the CEO of a multi-national company sued a director of the company who, as an attorney occasionally provided legal services to the company for attorney malpractice, alleging that the director advised that there would be no violation of the FCPA if the multi-national company made a $50,000 bribe to a Panamanian official through its Dutch entity. The suit was dismissed on non-substantive grounds.

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