When Doing Business Internationally Becomes a Crime:

Assisting Clients in Understanding and Complying with the Foreign Corrupt Practices Act

By William C. Athanas

As global markets expand and economic turmoil increases, American companies of all sizes and types have initiated or intensified efforts to sell their products and services in foreign countries, particularly in emerging markets such as Brazil, Russia, India, China, and Africa. Those doing business overseas face a host of operational, cultural and legal challenges. Compliance with the Foreign Corrupt Practices Act (FCPA) had rapidly ascended toward the top of that list as a result of the recent proliferation of criminal prosecutions and civil enforcement actions under the statute.

The FCPA prohibits improper payments to foreign officials for the purpose of obtaining or retaining business and creates a thicket of legal issues impacting virtually every aspect of international commerce. From obtaining permits and licenses necessary to do business to securing contracts from foreign governments to hiring intermediaries to participating in joint ventures overseas, any interaction with those vested with official discretion and authority creates an opportunity for payments which may be intended to or interpreted as attempts to improperly influence official action. Failing to understand or comply with the FCPA's framework carries potentially severe civil and criminal consequences, including fines, disgorgement of profits, debarment from eligibility to receive government contracts, prohibition on receiving or revocation of export licenses, and, perhaps most significantly, substantial terms of imprisonment for violators.

Originally enacted in 1977 to combat corruption in the wake of Watergate, the FCPA received relatively little attention during much of its first three decades of existence. To the extent the statute was enforced, large corporations were the most frequent target, with civil and criminal actions typically resulting when those entities discovered and self reported violations to the government. Everything changed in 2005, when the Department of Justice dramatically increased its commitment to investigate and prosecute foreign bribery. Those efforts triggered a virtual explosion of activity under the statute, producing more criminal enforcement actions in the last four years than in the previous 29 of the statute's existence, with the rate of increase likely to continue to grow.

This striking surge in the volume of FCPA enforcement actions coincides not just with a substantial increase in the volume of investigative and prosecutorial resources dedicated to the statute, but also with a dramatic overhaul in the investigative tools employed to build cases. As the world continues to get smaller and American businesses continue their efforts to expand into countries where corruption runs rampant and bribes to government officials represent the status quo, these efforts will only continue to develop, causing the FCPA's impact to swell in breadth and depth. Those unprepared to adhere to the statute's mandates–or, even worse, those unaware of their existence–face an environment of elevated risks and dangerous consequences.

ELEMENTS OF THE STATUTE

The FCPA contains two main components, commonly referred to as the "anti-bribery" and "accounting" provisions. The anti-bribery provisions speak in prohibitive terms, forbidding anyone–including American companies of all sizes, U.S. citizens and permanent residents–from corruptly offering, promising or giving anything of value, directly or indirectly, to a foreign official for the purpose of obtaining or retaining business anywhere in the world. 15 U.S.C. §§ 78dd-1, dd-2 and dd-3. In contrast, the accounting provisions create affirmative obligations, requiring those companies registered with the Securities and Exchange Commission to maintain "books, records and accounts which, in reasonable detail, accurately and fairly reflect the transactions . . . of the issuer," and to devise and maintain internal controls designed to provide reasonable assurances that financial transactions are executed in accordance with generally accepted accounting standards. 15 U.S.C. § 78m(b)(2). Recognizing that corrupt activity flourishes when concealed, the accounting provisions seek to negatively reinforce compliance with the anti-bribery prohibitions by imposing separate and additional penalties where any registered company pays a bribe and fails to declare and disclose it as such in the company's books, records and accounts.

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While the process of understanding of the FCPA starts with its language, as with any statute, achieving a full grasp of the provision involves review of interpretive sources. Normally, reported decisions from courts serve to offer practical guidance on statutory requirements, and facilitate compliance. Because prosecutors invoked the FCPA against individuals on a limited basis for much of its existence, trials were few and far between, resulting in a striking scarcity of judicial opinions illuminating the contours of the statute's sometimes murky mandates.

In place of the reservoir of reported decisions which typically illuminate the contours of a criminal statute, those struggling to understand and comply with the FCPA have been left to rely on two sources of information: opinions issued by the Department of Justice in response to specific inquiries, 15 U.S.C. § 78dd-1(e), and the terms of negotiated settlement agreements executed between corporate violators and the government. Because criminal indictment, must less conviction, often represents the death knell for corporations, the government has long enjoyed a substantial advantage in negotiating leverage which has resulted in settlement terms reflecting a liberal interpretation of the FCPA's elements and a broad view of its scope. While this means that those settlement agreements do not necessarily represent the definitive standard for measuring conduct, they often represent the best information currently available.

THE ANTI-BRIBERY PROVISIONS

While some dispute exists regarding the precise elements of an anti-bribery violation, most courts and commentators agree that the government must show the corrupt offer, payment or promise to pay anything of value to a foreign official for the purposes of securing any improper advantage, influencing any act or decision of that foreign official in his official capacity, or inducing the foreign official to do or omit any act in violation of his lawful duty. Which each of these elements raises particularized concerns, the intent requirement constitutes the most notable component of the anti-bribery provisions, as the statute contains dense language regarding the various alternative methods of proving a violation. All violations must involve corrupt intent, a term the FCPA's legislative history defined to "connote an evil motive or purpose; an intent to wrongfully induce the recipient." S. Rep. No. 95-114 at 10 (1977). Intent is typically proven circumstantially, and may be demonstrated by the amount of a payment, its temporal relationship to a particular decision by a foreign official or its lack of transparency. For example, a $50,000 payment by an American company to a foreign official characterized as an "advance consulting fee" made just days before that official approves the company's bid for a $10 million contract with a state-run entity creates a compelling circumstantial evidence of an effort to corruptly influence the recipient in the performance of his official duties.

In those situations where enforcement is premised on payments through intermediaries, the FCPA allows for conviction where an individual or company corruptly transfers money or a thing of value to an intermediary "while knowing that all or a portion of [that money or thing of value]" will then be offered, given or promised to a foreign official in order to obtain or retain business. 15 U.S.C. § 78dd-1(a)(3). Under the statute, a person's state of mind is "knowing" if the person has actual awareness or even just a "firm belief" that the result is "substantially certain" to occur. The statute also provides that when proof of a particular circumstance is required, that knowledge may be deemed established "if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist." 15 U.S.C. § 78dd-1(f)(2).

In theory, the relatively minimal showing necessary to establish an FCPA violation in this context seeks to prevent individuals and companies from circumventing the statute's prohibitions by simply funneling money to third parties operating overseas in an effort to outsource the actual payment of bribes. In practice, this language transforms the process of divining the requisite level of intent into an evaluation of a calculus made up of factors

including various "red flags" which suggest that a person purposely avoided learning certain facts in order to escape liability. These red flags are numerous, and include such circumstances as operating in countries where there is widespread corruption (according to rankings complied annually by Transparency International, an international non-governmental organization aimed at fighting global corruption), contracting with third parties at the insistence of government customers, making payments which are secretive or unusual to third parties (including payments in cash), and dealing with parties who have a history of improper payment practices. Designed to prevent individuals and companies from simply "putting their head in the sand," the FCPA's reduced and amorphous intent requirement serves to create a separate due diligence obligation to investigate intermediaries and also to monitor their activities on an ongoing basis.

Defenses to the Anti-Bribery Provisions

In 1988, 11 years after enactment of the FCPA, Congress amended the anti-bribery provisions to recognize an exception and two affirmative defenses. While these modifications carve out safe harbors from liability, their narrow scope and infrequent application effectively serve to reinforce the breadth of the statute.

The exception authorizes the payment of "facilitating" or "grease" payments to foreign officials made to secure or speed the performance of routine, nondiscretionary government functions. 15 U.S.C. § 78dd-1(f). The statute defines these functions to include "processing governmental papers, mail pickup and delivery, providing phone service, and protecting perishable products." *Id.* True facilitation payments not only must relate to ministerial acts, they must also be small in amount–the Department of Justice has only authorized payments of less than $1,000 in previously issued opinions.

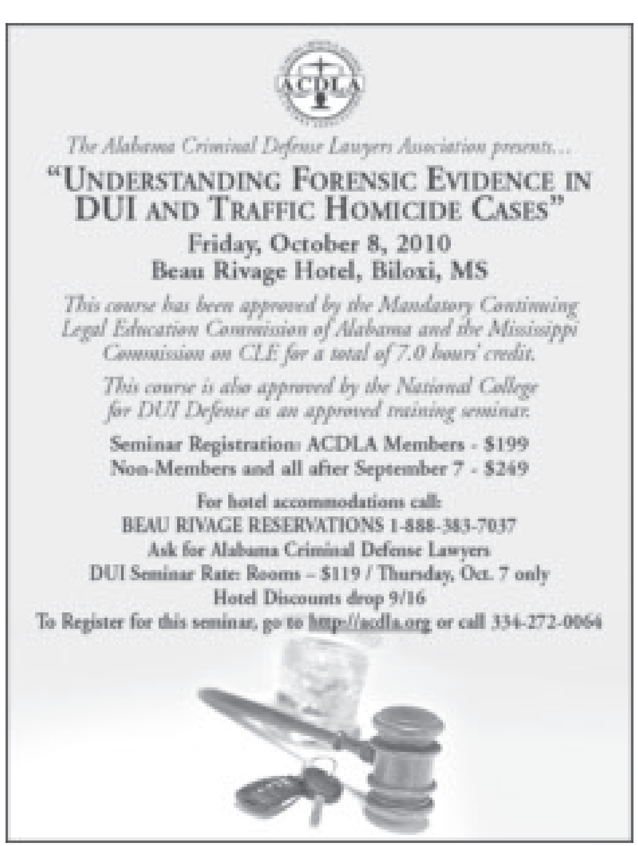
The FCPA recognizes an affirmative defense to liability where "the payment, gift, offer, or promise of anything of value that was made was lawful under the written laws and regulations of the [foreign official's] country." 15 U.S.C. § 78dd-1(c)(1). As a practical matter, this defense offers little shelter. "Lawful under written law" is fundamentally different from "consistent with local custom and practice," and no country in the world–even those with the most pervasive cultures of corruption–authorizes bribery under its written laws.

It is also an affirmative defense that a payment to a foreign official "was a reasonable and bona fide expenditure, such as travel or lodging expenses . . . and was directly related to . . . the promotion, demonstration, or explanation of products or services. . . " 15 U.S.C. § 78dd-1(c)(2). The government strictly construes this defense, wary that companies will utilize it as a means of concealing excessive payments under the guise of legitimate promotional activities. Enforcement actions have rejected efforts to include the payment of extravagant expenditures such as first-class travel, lodging at exclusive hotels and payment for families of government officials under this defense. Because hard and fast guidelines are difficult to articulate in this context, common-sense standards remain the guiding principles for evaluating the legitimacy of payments of this type.

Although not specifically referenced in the original or amended versions of the statute, extortion may also constitute a viable defense under the FCPA. But "extortion" can cover a wide range of activity, from demands for payment before the lights are turned on to threats of physical violence against employees. While the dearth of judicial guidance on this topic complicates matters, the legislative history of the statute recognizes that payments in the latter category are clearly exempted from the statute because "while the FCPA would apply to a situation in which a 'payment [is] demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract,' it would not apply to one in which payment is made to an official 'to keep an oil rig from being dynamited,' an example of 'true extortion.'" *United States v. Kozeny*, 582 F.Supp.2d 535, 539 (S.D.N.Y. 2008) (quoting S. Rep. 114, 95th Cong., 1st Sess. (1977) at 11). Thus, it would seem that "economic extortion" is different not only in degree, but in kind, from "true extortion" and therefore is unlikely to resonate as a defense to bribery allegations where the facilitation payment defense does not apply.

The Accounting Provisions

In contrast to the wide range of companies and individuals subject to the anti-bribery provisions, the accounting provisions apply only to "issuers"–those companies who register securities under § 12 of the Securities and Exchange Act of 1934 or are required to file reports under § 15(d) of that Act. This group consists primarily of those companies that list shares on U.S. stock exchanges. As noted above, the accounting provisions



mandate that issuers maintain books, records and accounts which accurately record transactions and the disposition of assets. This component of the statute aims to prevent companies from disguising bribe payments in their books as "commissions," "rebates," "consulting fees," "local taxes," or some other apparently innocuous label. The accounting provisions also direct issuers to implement and maintain a system of internal controls calculated to provide reasonable assurances that the issuer's transactions are executed in accordance with management's general or specific authorization and recorded in a manner necessary to allow for preparation of financial statements according to generally accepted standards. Notably, the accounting provisions' requirements are not limited to those transactions or assets which relate to the payment of bribes–any inaccurate or misleading entry or failure to fulfill the obligations suffices to impose liability.

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STRATEGIES FOR COMPLIANCE

A robust compliance program represents the most effective means to mitigate the risks the FCPA presents. A properly designed, implemented and maintained program must contain elements which manage internal and external threats, as assessed by the company in the most searching and candid fashion possible. Internal threats involve actions by employees–whether undertaken with or without improper intent–which expose companies to liability under the statute.

To implement this element of the program, companies should commit to construct a program which:

- provides education and training about the FCPA, including development and distribution of written standards of conduct;
- is overseen by a designated individual who is accessible to employees and has clear channels of communication to senior management;
- encourages and provides avenues for reporting of violations;
- identifies and enforces sanctions for noncompliance;
- utilizes audits and other techniques to monitor compliance, identify problem areas and assist in the reduction of identified problems; and
- provides for the non-employment or retention of excluded individuals who have violated corporate or compliance policies, applicable statutes and regulations.

External threats arise when outside individuals or entities–intermediaries, consultants or agents (including distributors, customs brokers and freight forwarders)–are retained to perform functions on behalf of the company, or when the company participates in joint ventures or merges with or acquires other entities. Because the FCPA recognizes a violation where a composite of factors demonstrates conscious avoidance of certain facts, doing business with unknown individuals or entities heightens the risk under the statute. In this context, individuals and companies need to undertake meaningful efforts to learn whether red flags exist–not just in their own organization but also as to those they do business with–and recognize that they will be held responsible for the failure to do so. As a practical matter, this means drafting joint venture and agency agreements which insist on representations and warranties pledging compliance with the FCPA (including those which require assurances that the individual or company has and will continue to comply with the statute and provides the right to inspect the party's books and records), securing remedies for violations of those warranties (including "claw-back" provisions which allow for recovery of amounts paid or render the agreement void *ab initio*), and committing to conduct thorough due diligence when acquiring or joining with another entity.

On this issue, it is vital to note that compliance programs are not "one size fits all" and cannot remain static after implementation. Nor may companies simply employ rigid and shallow due diligence procedures when dealing with outside entities in order to "paper the file." The scope of the risk defines the necessary scope of the compliance plan or the due diligence obligation. A business with $10 million a year in gross revenue is not expected to create and maintain a compliance program on the level of Exxon/Mobil or Boeing, nor is a company which exports books to Switzerland expected to build and operate the same program as a company which runs an oil refinery in Nigeria. But while the scope of the obligation for smaller companies operating in

traditionally recognized "safe" industries or countries may be reduced, it is not eliminated. The government expects all individuals and companies doing business overseas to undertake genuine efforts to comply with the FCPA–simply going through the motions will not prevent violations or insulate the company or individual from government sanctions when they occur.

The Future of FCPA Enforcement

Practice under the FCPA promises to continue to present dynamic challenges. In late 2008, the DOJ's chief of FCPA enforcement announced that "the number of individual prosecutions [under the FCPA] has risen–and that's not an accident . . . It is the [DOJ's] view that to have a credible deterrent effect, people have to go to jail." That warning coincided with the DOJ, SEC and FBI dramatically ramping up the resources allocated for FCPA enforcement, increasing the number of attorneys and agents assigned to investigate and prosecute cases.

These commitments rapidly produced real results. Not only has the government increased the number of individuals and companies charged, it has also consistently sought substantial penalties–in the form of lengthy prison sentences and hefty fines–for those who violate the FCPA. In April 2009, the government charged eight employees of Control Components, Inc., a California-based corporation which designed and produced valves for oil and gas production, with authorizing or paying over $5 million in bribes in 36 counties over a 10-year period. This was the largest number of individuals charged in one FCPA case until January 2010, when the government arrested 22 individuals after conducting a massive, Abscam-inspired undercover investigation in which federal agents posed as officials from the defense ministry of the African nation of Gabon and pretended to solicit bribes from suppliers of products in the law enforcement and tactical equipment industry.

The government has also altered its approach once individuals are indicted and convicted. In April 2010, the government secured a sentence of seven years' imprisonment for Charles Jumet, a Virginia man who bribed Panamanian officials to secure maritime contracts on the Panama Canal. That sentence–which is currently the longest ever imposed in an FCPA case–is likely to be dwarfed by subsequent cases as the government continues to intensify its efforts to prosecute international corruption by prosecuting larger cases and seeking lengthier prison sentences for violators. In fact, this year alone, the government sought a sentence of 10 years for Frederic Bourke, an investor convicted of paying bribes in furtherance of a failed venture to secure the privatization rights to Azerbaijan's state-owned oil industry, and over 20 years for Gerald and Patricia Green, two film producers convicted of paying $1.8 million in bribes to a Thai official in exchange for $13.5 million in contracts to produce the Bangkok Film Festival.

The scope of the government's focus will continue to expand as well. While the oil and gas, defense and telecommunications industries have long been breeding grounds for corrupt activity, the government has announced a plan to widen the scope of FCPA enforcement to target additional sectors. In late 2009, the government declared its intention to focus on the pharmaceutical industry, especially in those countries with state-run health systems (where every employee would theoretically meet the definition of "foreign official"). More industries are likely to be targeted, and more cases are likely to be made across the spectrum of industries of all sizes engaged in international commerce.

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Conclusion

In theory, the FCPA serves a clear purpose: preventing corrupt payments to foreign officials. In practice, the statute's broad reach and sometimes murky requirements can challenge even the most earnest individual or company doing business overseas. One byproduct of the government's increased focus on criminal prosecutions in general and individuals in particular will be a dramatic increase in the number of trials and appeals. In time, the rulings which arise from these cases should serve to further clarify the FCPA's obligations, elements and defenses, and facilitate the understanding and application of the statute's terms. In the meantime, however, individuals and companies engaged in international commerce–and the lawyers who advise them–will be forced to chart a course of compliance through treacherous seas.

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