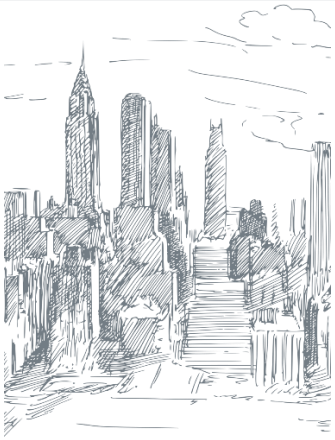
Insight&Advice

MICHAEL J. SUSSMAN PLLC

JANUARY 2015



IN THIS ARTICLE

THINGS TO REMEMBER UNDER THE U.S. FOREIGN CORRUPT PRACTICES ACT

The Foreign Corrupt Practices Act (the "FCPA") was adopted in 1977 under President Jimmy Carter, and the United States has shown leadership in the area. But enforcement by the Securities and Exchange Commission (the "SEC") and the Department of Justice (the "DOJ") was very spotty at first. Enforcement, however, has definitely picked up in the last few years. Although cases brought by the SEC and DOJ have fallen off a bit in very recent years, the trend is up and the fines and other consequences are up. In fact, the DOJ started 2015 strongly, bringing in the first few days a case against an individual alleging bribes to an official of the European Bank for Reconstruction and Development.

A quick look at just SEC cases tells the story. From 1977 to 2000, 23 years, the SEC brought to a conclusion some nine cases. From 2001 to 2009, nine further years, some 65 cases were bought to a conclusion. And from 2010 to the present, in October of 2014, less than 5 years, over 54 cases have been concluded. Of course, Gibson Dunn show the peak years as 2008-2010.1 In any event, it behooves anyone with securities sold in the United States, with a parent or sibling in the United States, or otherwise caught by the FCPA, to pay attention.

The FCPA has two major parts: (i) the prohibition on bribery and (ii) the requirement to keep accurate books and records, and a system of internal controls sufficient to provide reasonable assurances that transactions are carried out as approved. It may not be surprising, but the majority of cases brought under the FCPA focus on the bribery part of the act. Nevertheless, keeping accurate books and records is also a key ingredient to FCPA enforcement.

The sanctions can include SEC civil enforcement actions against issuers, their officers, directors, employees, securities holders and agents, disgorgement, interest and civil penalties.

ANTI-BRIBERY

The anti-bribery provision is aimed at U.S. persons and prohibits making payments to obtain a benefit not ordinarily obtained from officials of foreign governments, or agencies or instrumentalities.

The anti-bribery provisions cover the following:

(i) Issuers who regularly report to the SEC, including issuers of ADRs (who must report to the SEC) and any subsidiaries of the issuer – even foreign subsidiaries.

(ii) U.S. persons and entities no matter where established that have a principal place of business in the United States.

(iii) Anyone, other than an issuer or a U.S. concern, "in" the United States. The FCPA provision is broadly defined to catch as many as possible.

[1] See 2014 Mid-Year FCPA Update, Gibson Dunn July 7, 2014 (web).

While the definitions of what is a foreign official or an agency or instrumentality are not even now clear, there is enough to go on that a compliance program can be mapped out.

For example, for the first time in 2014, an appellate court, the 11th Circuit in *U.S. v. Ezquenazi*, found that an instrumentality of a government is (a) "controlled by the government of a foreign country" and (b) "performs a function the controlling government treats as its own". "Control" was to be determined by the application of six factors:

(i) the designation by the government;
(ii) the ownership percentage by the government;
(iii) the ability of government officials to hire and fire its personnel;
(iv) the extent to which the profits of the entity go directly into government coffers;
(v) the extent to which the government provides loans or grants to make up the difference between cost recovery and not; and
(vi) the length of time that these indicia have existed.

The government is shown to "treat as its own" entities to the extent to which:

(i) the entity has a monopoly;
(ii) the government subsidizes the costs of the entity;
(iii) the entity serves the public at large ; and
(iv) the government and the public perceive the entity as a public company.

So even though the precise nature of an instrumentality is dependent on the facts and circumstances surrounding the meaning of instrumentality, it is possible to put in a compliance policy a meaning of instrumentality that will cover most cases, and require a businessperson to get sign off if there is doubt.

The bribe must be "knowing", but a firm belief that the facts and circumstances lead a reasonable person to believe that bribery is taking place can be knowledge enough. For example, a payment that is very high compared to the service being provided might indicate, in the facts and circumstances, that bribery is taking place.

The payment must be made corruptly: i.e., with an intent to achieve an advantage not available to others.

The payment must be made to a government official. But again, this is broadly defined to include all government officials, including those of mere instrumentalities of the government. So, even officials that can make decisions for foreign corporations that are only partly owned by the government are likely to be included.

Even third party payments made knowingly – such as payments to third parties that the payor knows or has reason to know is to be used for a bribe – are caught.

Excepted are, narrowly, the following:

(i) Payments, called "grease payments" that don't change the outcome but do speed the process;
(ii) Payments or offers to pay that are specifically permitted by written law or regulation of the foreign government; and
(iii) Bona fide payments for the promotion, demonstration or explanation of a product or service, or for performance of an existing contract, such as travel expenses related to attending a promotional conference – but not if the benefit of doing so is

that the foreign government official makes a determination to award a contract to the provider.

Again, while working out precisely what is an exception must be carried out, it seems that a compliance policy can be adopted that will cover most situations.

RECORDKEEPING AND ACCOUNTING

The recordkeeping and accounting provisions cover all U.S. entities and 50% or more owned foreign subsidiaries, or in the case of less than 50%-owned foreign subsidiaries, a good faith effort to comply.

The recordkeeping and accounting provisions require that a covered entity keep all books and records depicting transactions fairly and use of assets in reasonable detail.

These also are important provisions, and among other things they should be discussed with accountants and auditors.

BUYING A BUSINESS

Of course, when buying a business, it is important to make sure, if necessary, that the FCPA issues are considered if applicable. Due diligence should include:

- FCPA prosecutions, fines and other sanctions;
- Corruption indices where operates;
- Number and quality of government interactions;
- Qualifications and experience of legal, compliance, accounting and other professionals involved in FCPA compliance;
- Accounting efficiency regarding FCPA matters; and
- Monitoring of FCPA compliance.

U.K. AND EUROPEAN ANTI-BRIBERY LAW

In 1997, the Organization for Economic Cooperation and Development (the "OECD") adopted the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and it has also adopted guidance on it. To date, all 34 member countries have adopted the convention, as well as seven non-member countries. The convention must be implemented in national law, but it effectively outlaws bribery.

Implementation, of course, is not at all uniform to date. But it is worth noting that the United Kingdom adopted the Anti-Terrorism, Crime and Security Act 2001 and the Bribery Act 2010. The latter could be said to go farther than the FCPA, in that it outlaws all bribery by decision makers, not just government officials. So far, there have not been a lot of successful prosecutions under the law, but the Serious Fraud Office is definitely working on it. Those with operations in the OECD countries, and in particular in the United Kingdom, or contemplating buying something based in one of those states, must take local law into account as well.

CONCLUSIONS

The FCPA enforcement against individuals and firms is higher than it was in the past, and U.S. firms – particularly those with cross-border operations, must consider a compliance program and monitoring to ensure against violations. Those with European operations have even more reason to do so than before, now that the United Kingdom has adopted a rigorous law as well. And those buying a business that has cross-border operations should make sure that these issues are addressed.