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Complying with U.S. Antibribery Laws

The United States is unique in protecting foreign government officials from being bribed; in Germany and France, for example, the bribing of foreign officials by a business remains tax deductible.[1] The increased globalization of business and heightened importance of international commerce to the U.S. economy has expanded the number of businesses which should be aware of and compliant with U.S. laws bearing on this matter. This article is a primer directed towards businesses that are or may be soliciting business from foreign governments and the attorneys who represent these businesses.

The Foreign Corrupt Practices Act of 1977 (the FCPA), as amended, punishes U.S. businesses and businesspeople who provide any payment or promise to foreign officials in exchange for obtaining or retaining business. Furthermore, it requires companies which have issued securities registered under the Securities Exchange Act of 1934 to maintain reasonably detailed record-keeping and accounting practices of their domestic and foreign operations.[2]

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1. In May 1997, the 29 members of the Organization for Economic Cooperation and Development (OECD), which includes Germany and France, agreed to criminalize the bribery of foreign government officials by 1998. The OECD will not enforce the agreement; rather, it is contemplated that each OECD member will pass legislation at the national level to ensure enforcement. Some observers remain skeptical as to whether or not the newly announced timetable will be met. *See OECD Agrees to Criminalize Bribery*, Daily Rep. for Executives (BNA), at A-4 (May 28, 1997) *available in* Westlaw, BNA-DER file.

2. The record-keeping requirements of the FCPA are not further discussed in this article.

I. The FCPA Applies to U.S. Businesses, Managers, Employees, and the Stockholders and Agents Thereof

The jurisdiction of the FCPA is very broad, reaching both publicly owned and privately owned business enterprises, as well as the managers, employees, and stockholders of such enterprises. Every issuer of a security registered pursuant to the Securities Exchange Act of 1934, including every officer, director, employee, agent, or stockholder of such issuer, is subject to the provisions of the FCPA.

Moreover, every "domestic concern" is subject to the FCPA. A "domestic concern" is (i) any individual who is a citizen, national, or resident of the United States or (ii) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States or which is organized under U.S. law.[3] Also, any officer, director, employee,[4] agent, or stockholder of a domestic concern is subject to the FCPA.[5]

Enforcement authority of the FCPA is asserted beyond the territorial borders of the United States. American nationals employed by foreign-incorporated subsidiaries are subject to the antibribery provisions of the FCPA.[6] Also, FCPA subject matter jurisdiction extends to foreign individuals, but not foreign companies, who act as agents for a domestic concern.[7] Although the foreign subsidiary of a U.S. corporation is not reached by the FCPA, the U.S. parent corporation is indirectly liable for violation of the FCPA by its subsidiary.[8]

The Securities and Exchange Commission and the Department of Justice (the Department) enforce the FCPA. The Securities and Exchange Commission fo-

3. 15 U.S.C. § 78dd-2(h)(1) (1996). For the sake of simplicity, because the narrower definition of "issuer" is included within the broader definition of a "domestic concern," this article hereinafter refers only to the "domestic concern" as the covered actor.

4. The employee of a domestic concern, acting as an agent of such domestic concern, can probably be prosecuted under the FCPA for an offense even if the domestic concern has not and cannot be convicted of similarly violating the FCPA. In United States v. McLean, 738 F.2d 655 (5th Cir. 1984), the Fifth Circuit held that an employee, acting as agent of his employer, could not be prosecuted for an FCPA violation where his employer entered into a plea agreement with the government, whereby the employer pled guilty to conspiracy to violate the FCPA and the government promised not to charge the employer with any FCPA violations. The Fifth Circuit's decision in *McLean* rested on the so-called Eckhardt Amendment to the FCPA. This amendment was specifically repealed in 1988 by Congress. While the legislative history does not reference *United States v. McLean*, the effect of the Congressional action is to directly overturn the *McLean* court's basis for denying FCPA prosecution of the defendant employee in that case. The legislative history does not indicate why the language was removed. *See* H.R. CONF. REP. No. 100-576, at 1047-48 (1988).

5. 15 U.S.C. at § 78dd-2(a) (1996).

6. Department of Justice statement on the antibribery provisions of the FCPA (Feb. 1992) (DOJ Statement).

7. Dooley v. United Tech. Corp., 803 F. Supp. 428, 440 (D.D.C. 1992) (finding no FCPA jurisdiction over foreign companies in the United States, but finding such jurisdiction over foreign individual who is otherwise under jurisdiction of a U.S. court).

8. H.R. CONF. REP. No. 95-831, at 13 (1977). Vicarious liability under the FCPA is addressed in greater detail below.

cuses its enforcement activity upon ensuring that issuers meet the reporting requirements and accounting procedures of the FCPA, while the Department of Justice enforces the antibribery provisions of the FCPA.

II. "Bribery" Under the FCPA Is Any Benefit Promised or Provided to a Foreign Official in Order to Obtain or Retain Business

Any act "in furtherance" of any offer, payment, payment promise, or the authorization of anything of value to a foreign: (i) government official, (ii) candidate for government office, or (iii) political party, to obtain or retain business, may violate the FCPA. In examining whether particular activity is subject to or in violation of the FCPA, the following six questions should be considered, and the following exceptions noted.

A. Is the Actor an Issuer or Domestic Concern?

Although the FCPA's definitions of covered entities are broad, they are not all-encompassing. For example, a U.S. court lacks subject matter jurisdiction under the FCPA over British companies that may have bribed foreign officials and misled the U.S. Government on resales to a Middle-Eastern country of U.S.-origin military equipment.[9] Entities that are not a domestic concern (or issuer) as defined by the FCPA are not regulated by the FCPA.

This does not mean, however, that a domestic concern may retain another to do what the domestic concern itself may not do under the FCPA. As discussed below, a payment or promise by a domestic concern to a third party, where the domestic concern knows that some or all of the benefit of the payment or promise will be transmitted from the third party to a foreign official in order to obtain or retain business, is a violation by the domestic concern of the FCPA.

B. Is There a "Corrupt" Intent in the Activity?

1. *Corrupt Intent, Rather Than Completed Payment or Desired Outcome, Necessary for FCPA Jurisdiction*

Only activity "corruptly" undertaken is a violation of the FCPA. Legislative history explains that "corruptly" means a purpose to "induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation" and "connotes an evil motive or purpose, an intent to wrongfully influence the recipient."[10] Where corrupt intent is established, it is irrelevant whether the proscribed

9. *See* Dooley v. United Tech. Corp., 803 F. Supp. 428 (D.D.C. 1992).

10. S. Rep. No. 95-114, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N 4108. *See also* United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991).

payment or promise was fully completed, or even whether the payment or promise was successful in its desired outcome.[11]

2. *Grease Payment and Other Exceptions*

An exception to the antibribery prohibition exists for any so-called grease payment. A "grease payment" is a payment facilitating or expediting performance of "routine governmental action."[12] Routine government action includes: (i) obtaining routine permits, licenses, or other official documents; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pickup and delivery; (iv) providing phone service, power and water supply; (v) loading and unloading cargo, or protecting perishable products; and (vi) scheduling inspections associated with contract performance or transit of goods across country.[13]

Further, there are two other statutory defenses rebutting allegations of corrupt intent. The first is that the payment or promise made was lawful under the written laws of the foreign country. This exception has given the U.S. Government a basis under which not to undertake enforcement action in circumstances involving payments to foreign officials.[14] Another exception is that the payment or promise was part of demonstrating a product or performing a contractual obligation.[15]

C. Is There Activity "in Furtherance of" a Promise or Provision of Something of Value?

Activity "in furtherance of" a payment or promise of payment, or something else of value, comes within the scope of the FCPA.[16] This definition is, obviously, very broadly drafted to encompass anything of value that is offered to a foreign official for an improper purpose.

D. Does the Promise or Payment Make Use of Interstate Commerce?

In order to come within the FCPA's jurisdiction, the payment or promise must "make use of the mails or any means or instrumentality of interstate commerce."[17] On the one hand, "interstate commerce" is a very broadly defined con-

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11. S. Rep. No. 95-114, at 10; *accord* H.R. Rep. No. 95-640, at 7-8 (1977).
12. 15 U.S.C. § 78dd-2(b) (1996).
13. *Id.* at § 78dd-2(h).
14. *See, e.g.*, Department of Justice FCPA Release 93-02 (May 11, 1993) (domestic concern may sign agreement with and pay commissions for services provided by foreign government-owned business, where local law requires military to deal only through such business and where commission payments are made directly to country's treasury or commission amount is deducted from purchase price); Department of Justice FCPA Release 82-03 (Apr. 22, 1982) (domestic concern could pay commission to foreign government entity for services usually performed by commercial agent, where local law required agency agreement with government-controlled trade organization).
15. 15 U.S.C. § 78dd-2(c) (1996).
16. *Id.* at § 78dd-2(a).
17. *Id.*

cept;[18] on the other hand, other than through vicarious liability, activity occurring wholly outside the United States may not come within the FCPA's scope.

Even attenuated contacts with the United States in a particular transaction may be sufficient to meet the FCPA's interstate commerce requirement. In addition to the standard mail, a mere telephone call, or facsimile or electronic mail transmission, may be enough to meet the requirement.

E. Is the Recipient of the Payment or Promise a Foreign Official or Other Covered Entity?

The FCPA does not prohibit a domestic concern from making payments or providing benefits to a private party, unless the domestic concern knows some or all of those benefits will be transmitted to an FCPA covered recipient by the private party. Conditions under which a domestic concern is deemed to "know" that a third party benefit-recipient passes along some or all of the benefit is further addressed below.

Under the FCPA, payments to obtain, retain, or direct business should not be made either directly or indirectly to a "foreign official." The statute defines "foreign official" to mean "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality."[19]

F. Was the Payment Provided to Obtain or Retain Business?

Payments provided to a foreign official to assist a domestic concern in obtaining or retaining business for or with, or directing business to, any person are prohibited under the FCPA.[20] Payments made for services provided that are legal in the law of the country in which they were made are permitted under the FCPA. Examples exist of no-enforcement action notices issued by the U.S. government in connection with payments to foreign governments, in addition to those already referenced above.[21]

18. Legislative history clarifies that "interstate commerce" means "trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof." H.R. Conf. Rep. No. 95-640, at 13. Also included is "intrastate use of a telephone or other interstate means of communication and the intrastate use of any other interstate instrumentality." *Id.*

19. 15 U.S.C. § 78dd-2(h)(2) (1996).

20. *Id.* at § 78dd-2(a).

21. *See* Department of Justice FCPA Release 93-01 (Apr. 20, 1993) (domestic concern in a joint-venture may initially pay directors' fees to directors who were also members of foreign government, where foreign partner ultimately reimburses such fees and the domestic concern educates foreign directors about the FCPA); Department of Justice FCPA Release 86-01 (July 19, 1986) (domestic concern could employ member of foreign parliament to act as sales representative where parliamentary duties occupied less than 20% of the person's time).

III. Vicarious Liability Under the FCPA

A domestic concern may not indirectly undertake activity which the FCPA directly prohibits. The statute explicitly prohibits a domestic concern from providing payments or promises of some benefit to a third party where the domestic concern knows some or all of such benefit will in turn be provided to a foreign official. A domestic concern also risks violation of the FCPA through agency and related theories of liability.

A. Did the Domestic Concern Know That Payments/Promises to an Agent Were to Be Passed on to a Foreign Official?

Promising or providing benefits to a third party, knowing that such benefits will be passed on by such third party to a foreign official, violates the FCPA. Under the statute, a domestic concern is deemed to have the requisite knowledge of an activity of a third person if the domestic concern (i) "is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur" or (ii) "has a firm belief that such circumstance exists or that such result is substantially certain to occur."[22]

Essentially, where a domestic concern "is aware of a high probability of the existence of"[23] activity prohibited by the FCPA, but does not have actual knowledge of the circumstance, the domestic concern is nonetheless deemed to "know" of the circumstance. A domestic concern can escape FCPA liability only if he holds a specific belief that the proscribed circumstance "does not exist."[24]

Legislative history has provided additional information, some of it contradictory, regarding when a domestic concern has the requisite knowledge of the actions of a third party. According to legislative history, "recklessness," "simple negligence," or "mere foolishness" are not sufficient for liability.[25] On the other hand, a domestic concern is liable for "conscious disregard," "willful blindness," "deliberate ignorance" of known circumstances which should alert a reasonable person to the "high probability" of an FCPA violation.[26] This additional guidance is partially inconsistent. While the legislative history states that "[t]he knowledge requirement is not equivalent to recklessness,"[27] it cites in support of this proposition a case in which knowledge is inferred if the defendant is reckless and willfully blind.[28]

22. 15 U.S.C. § 78dd-2(h)(3)(A) (1996).
23. *Id.* at § 78dd-2(h)(3)(B).
24. *Id.*
25. H.R. Conf. Rep. No. 100-576, at 1039 (1988).
26. *Id.*
27. *Id.* at 1040.
28. United States v. Jacobs, 475 F.2d 270, 287 (2d Cir. 1973) ("[I]f you find that a defendant acted with reckless disregard . . . and with a conscious purpose to avoid learning the truth the requirement of knowledge would be satisfied. . . .").

B. Agency and Other Theories of Vicarious Liability

U.S. companies and their officers often find themselves exposed to the risk of an FCPA violation from the activity of a foreign corporate subsidiary. The Department of Justice has stated that "a foreign-incorporated subsidiary of a U.S. firm will *not* be subject to the FCPA, but its U.S. parent may be liable if it authorizes, directs, or participates in the activity in question."[29]

Agency is the most common legal theory by which the Department may establish vicarious liability. A subsidiary does not become the agent of its parent merely because the parent company has control over the subsidiary through equity ownership.[30] To establish an agency relationship between a parent and its subsidiary in a given transaction, the particular circumstances at issue must demonstrate that the subsidiary in fact acted at the direction or authorization of the parent. Three elements must be met to establish agency: (i) the manifestation by the principal that the agent shall act for him; (ii) the agent's acceptance of the undertaking; and (iii) the parties' understanding that the principal is to be in control of the undertaking.[31] Where these elements are established, a parent company and its officers may be held criminally liable for the actions of a subsidiary company.[32]

29. Department of Justice FCPA Antibribery Provisions Brochure (Feb. 1992).

30. RESTATEMENT (SECOND) AGENCY § 14M (1957).

31. *Id.* at § 1.

32. *See also* 18 U.S.C. § 2 (1996); Nye & Nissen v. United States, 336 U.S. 613, 618-19 (1949) (one commanding, inducing, or procuring the commission of an act is responsible for the act as if he or she committed it directly); Morgan v. United States, 149 F.2d 185, 187 (5th Cir. 1945) (in determining criminal liability, the act of an agent with the knowledge and consent of his or her principal is treated as the act of the principal).

Other theories of criminal liability include conspiracy or aiding and abetting. Conspiracy is an agreement between two or more persons to commit an unlawful act or a lawful act in an unlawful manner. Involvement in the planning of a particular offense is not necessary, so long as the defendant agreed to the general type of offense(s) actually committed. Pinkerton v. United States, 328 U.S. 640 (1946). *See also* 18 U.S.C. §§ 2, 371 (1996). To sustain a conspiracy charge against a domestic concern on the basis of the activity of its foreign-incorporated subsidiary, the government must establish that there was some agreement between the domestic concern and the subsidiary and that the domestic concern sought to participate in the illegal activity. Mere awareness by the domestic concern of an existing conspiracy involving the subsidiary is not enough to make the domestic concern a co-conspirator. United States v. Grassi, 616 F.2d 1295, 1301 (5th Cir. 1980) (It is a cardinal rule of conspiracy law that one does not become a co-conspirator simply by virtue of knowledge of a conspiracy and association with conspirators. The essence of conspiracy is the agreement to engage in concerted unlawful activity. To connect the defendant to a conspiracy, the prosecution must demonstrate that the defendant agreed with others to join the conspiracy and participate in the achievement of the illegal objective.) (citations omitted).

To establish aiding and abetting, the government must prove: (i) the substantive offense was actually committed; (ii) the defendant committed overt acts or affirmative conduct to further the offense; and (iii) the defendant intended to facilitate commission of the crime. United States v. Dolt, 27 F.3d 235 (6th Cir. 1994). *See also* United States v. Ruffin, 613 F.2d 408, 411 (2d Cir. 1979) (to aid and abet another to commit a crime, " 'it is necessary that the accused wilfully associate himself in some way with the criminal venture, and wilfully participate in it as he would in something he wishes to bring about; that is to say, that he wilfully seek by some act or omission of his to make the criminal venture succeed.' ") (*cited in* H.R. REP. NO. 95-640, at 8 (1977)).

Absent a factual showing that these three elements are met, courts normally will not find a parent corporation liable for the acts of its corporate subsidiary. Unless courts find a justification to pierce the subsidiary's corporate veil and hold the parent corporation accountable, limited corporate liability will protect an incorporated parent company from the unauthorized actions of its subsidiary.[33] A court will find a corporate parent generally liable for the actions of its subsidiary only where there is evidence that over the period of time in question, the parent exercised extraordinary control,[34] amounting to "total domination," over the subsidiary.[35]

C. The Department's Infrequently Used Review Procedure

The Department has a review procedure through which it will examine a specific set of circumstances submitted to it.[36] Within 30 days of the complete submission (the Department may request additional information), the Attorney General will notify the requestor whether or not the Department intends to take FCPA enforcement action against the requestor in light of the circumstances described in the inquiry. The Department has discretion to determine when a requestor's submission is "complete." This review procedure is, understandably, infrequently utilized.

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33. Under the alter ego theory of liability, founded in equity, a court will pierce the corporate veil "when the court must prevent fraud, illegality or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability from a crime.' " Frank v. U.S. West, 3 F.3d 1357, 1362 n.2 (10th Cir. 1993). *See also* Zubik v. Zubik, 384 F.2d 267, 272 (3d Cir. 1967).

34. Other legal theories require an analogous level of domination of the subsidiary by the parent in order to hold the parent generally liable for the activity of the subsidiary. The theory of alter ego liability, among the best known of these theories, has already been referenced above. *See Zubik*, 384 F.2d at 272. Other theories requiring substantial control by the parent over the subsidiary for general liability are the "instrumentality test" and the "integrated enterprise" test, both of which are further detailed in *Frank*, 3 F.3d at 1362.

35. Baker v. Raymond Int'l, Inc., 656 F.2d 173, 181 (5th Cir. 1981). *See also Frank*, 3 F.3d at 1362.

To determine whether this extraordinary level of control exists, the *Baker* court noted consideration of the following nine factors: (i) common stock ownership; (ii) common directors or officers; (iii) whether the parent finances the subsidiary; (iv) whether the parent incorporated the subsidiary; (v) whether the subsidiary operates with "grossly inadequate" capital; (vi) whether the parent pays the salaries and other expenses or losses of the subsidiary; (vii) whether the subsidiary receives any business except that given to it by the parent; (viii) whether the parent uses the subsidiary's property as its own; and (ix) whether the directors and officers of the subsidiary act independently in the interest of the subsidiary, or whether they take their orders from the parent and act in the parent's interest. *Baker*, 656 F.2d at 180.

36. Inquiries may be submitted to the Assistant Attorney General, Criminal Division, FCPA Review Group, U.S. Department of Justice, P.O. Box 28188, Central Station, Washington, D.C. 20038.

IV. Businesses May Implement Procedures to Limit Exposure to FCPA Liability

Businesses may take a number of steps to help insure compliance with the FCPA. Controls should be instituted to prohibit payments to foreign officials, or to third parties who in turn may provide payments to such officials, in exchange for obtaining or retaining business. These controls require, for example, that a business have some knowledge about the third parties with which it has a business relationship, as well as clear conflict of interest policies with respect to its own sales representatives. The following policies are particularly useful for companies involved in the sale of defense, advanced technology, oil, or engineering-related products or services, as these are the types of companies which most often encounter FCPA compliance problems:

1. Sales representatives should be educated about the prohibition of providing payments or other benefits to foreign officials, or to third parties who may provide some or all of the payments or benefits to such officials, in exchange for obtaining or retaining business.
2. Sales representatives with relatives or family members employed by a foreign government should not be used to obtain or retain business from that foreign government in order to avoid even the appearance of a conflict of interest.
3. Sales representatives, especially foreign agent representatives, should be thoroughly investigated before being retained by a U.S. business. One point of inquiry is how the agent was referred to the company. Referral by a government customer should result in heightened scrutiny of the agent. One source for such investigation is the commercial office of the U.S. Embassy in the country in question. In addition, the appropriate country desk at the U.S. Department of State and U.S. Department of Commerce may be consulted. File memoranda of conversations with U.S. Government officials and any material they transmit should be retained in company records.
4. All retainer agreements with sales representatives should be fully documented and should include appropriate FCPA compliance clauses (*e.g.*, no payments may be made to foreign officials to obtain or retain business). Also, payments to sales representatives should be well documented (*i.e.*, should not be in cash).
5. Managers reviewing company records should be aware of any activity, or "red flags," to alert the company to potential FCPA compliance problems. For example:

   Significant payments from petty cash to a particular sales agent, or multiple payments to such sales agent in small amounts, or unusual bonus payments, may warrant further internal investigation.

Any unusual price discounts or payment terms, or political contributions coinciding with an important sale to a foreign government agency, should raise suspicions.

The above type of procedures should be memorialized in a memorandum or handbook distributed to management and sales personnel. Finally, businesses involved in the export of goods should be aware of related export control and trade regulatory matters.[37]

A company found in violation of the FCPA may be fined no more than $2 million; a company director or officer found in willful violation of the FCPA may be fined up to $100,000 and imprisoned up to five years. As referenced earlier, company directors or officers may be found in violation of the FCPA even if their employer is not found in violation of the statute.

37. For example, businesses should be aware of the list of countries with whose governments trade has been limited or prohibited by the U.S. Government. Presently, trade with the governments of Burma, the People's Republic of China, Cuba, Iran, Iraq, Libya, North Korea, Russia and other former Soviet republics, Sudan, and Syria are regulated. Also, U.S. businesses should be aware that they may not legally participate in the trade boycott of Israel by certain Arab nations.