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WHITE-COLLAR CRIME

BY ROBERT G. MORVILLO AND ROBERT J. ANELLO

Foreign Corrupt Practices Act: An Update

Twenty-five years after its initial passage, the Foreign Corrupt Practices Act (FCPA)[1] remains a viable deterrent to international bribery by United States companies.

However, while the statute carries stiff penalties for bribery of foreign officials and has spawned numerous corporate compliance programs designed to eliminate such graft, international bribery still appears to be prevalent. While the FCPA has had some impact in policing American companies, international competition and the willingness of foreign officials to cast a blind eye toward corruption, particularly in developing countries, has, in the view of many businessmen, placed American companies at a competitive disadvantage and cost them business.

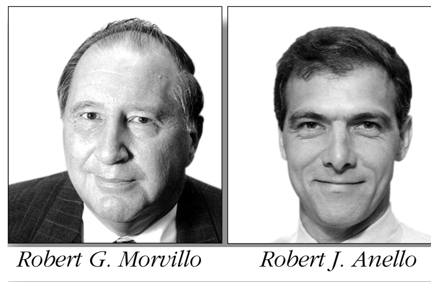
Even in the United States there have been impediments to effective enforcement as demonstrated by a recent Texas District Court decision holding that the act does not bar payments to foreign officials for the purpose of obtaining favorable tax treatment.[2]

Original Enactment

The FCPA was originally enacted in 1977 following revelations that major American businesses frequently bribed foreign public officials.

Although twice amended since its passage, the current iteration of the statute maintains the original version's dual coverage, encompassing provisions imposing strict corporate accounting requirements and other provisions prohibiting bribery of foreign officials.

Robert G. Morvillo and Robert J. Anello *are partners at Morvillo, Abramowitz, Grand, Iason & Silberberg PC in Manhattan.* **Judith L. Mogul,** *an attorney, assisted in the preparation of this article.*


Robert G. Morvillo *Robert J. Anello*

The accounting provisions impose record-keeping and disclosure requirements on publicly held domestic corporations. These requirements are intended to prevent companies from operating undisclosed slush funds from which illegal bribes may be paid, but, in practice, extend far beyond the area of foreign bribery. They rarely form the sole basis for an enforcement action or prosecution, and are generally invoked along with other statutory and regulatory violations.[3]

As discussed below, the anti-bribery provisions have had an arguably greater impact on American business culture by impeding previous corporate practices of bribing foreign government officials to secure contracts for international business.

Impact on American Business of Anti-Bribery Provisions. While enforcement of the FCPA has undoubtedly deterred some bribery, the impact of the FCPA on American business interests has been hotly debated. Because, until very recently, the United States had little company in barring its corporations from bribing foreign officials, many have argued that domestic companies were at a competitive disadvantage when bidding on foreign contracts against companies based in countries that imposed no similar restrictions. Studies placed losses to American business concerns at up to $30 billion per year as a result of the "uneven playing field" created by the FCPA.[4] The U.S. government reported that between 1994 and 1999, bribes were involved in international contracts valued at almost $150 billion, involving 133 firms from 43 countries.[5] But despite uncontroverted evidence of continued substantial bribery in international transactions, scholars, interest groups and even some business leaders consistently have contested the notion that American business interests have been compromised by the FCPA.[6] Moreover, a study released last month by Transparency International, a leading privately funded anti-corruption organization, concludes that despite the risk of severe penalties under the FCPA, even United States multinational corporations continue to "have a high propensity to pay bribes to foreign government officials."[7]

Regardless of the precise impact on American business, a consensus has emerged, however, that public corruption poses a substantial impediment to economic development. It not only raises the cost of doing business for the entities involved, but it also "has a corrosive impact on both market opportunities overseas and the broader business climate," and, for scrupulous companies, acts as a deterrent to investment in developing economies.[8]

OECD Convention

The appreciation that government corruption inhibits development, coupled with sustained pressure from the U.S. government on foreign governments to "level the playing field," led to the 1997 Convention of Combating Bribery of Foreign Public Official in International Business Transaction promulgated by the Organization of Economic and Cooperative Development (OECD Convention). All 29 member nations of the OECD, which include the United States, Canada, Mexico, Japan, Korea and most European countries and several nonmember countries

including Argentina, Brazil and Chile have signed the convention. The convention requires the signatories to enact broad reaching "effective, proportionate and dissuasive" criminal statutes prohibiting bribery in international business transactions and provides for cooperation in the extradition and prosecution of offenders of these provisions. It also establishes a process for mutual evaluation of each signatory's implementation of its obligations under the convention. In 1998, Congress amended the FCPA to conform to the somewhat broader requirements of the convention's anti-bribery provisions.

Current Reach of the FCPA

The antibribery provisions of the FCPA apply to any United States entity or citizen acting anywhere in the world, or to any foreign entity or person acting within the United States. It prohibits any action in furtherance of an offer of anything of value to any foreign official corruptly to induce or influence that official to act or refrain from acting or to secure any improper advantage, in order to obtain, retain or direct business to any person.[9] The FCPA contains an exception for "routine governmental action," such as "facilitating or expediting payment to a foreign official … the purpose of which is to expedite or to secure the performance of a routine governmental action." The act specifies that routine governmental actions falling within this exception include only those which are ordinarily and commonly performed by the official, such as obtaining permits or licenses; processing papers; or providing police protection, mail or phone services, power or water; or, scheduling inspections. The act also recognizes affirmative defenses to liability under the FCPA if the payment was lawful within the foreign official's country, or where the payment was a reasonable and bonafide expenditure incurred by the official, directly related to a demonstration or explanation of the services offered or to the execution or performance of the contract at issue.

Penalties

The FCPA contains both civil and criminal penalties.[10] Individuals convicted of violating the anti-bribery provisions are punished under §2B4.1 of the United States Sentencing Guidelines, with penalties ranging up to five years in prison and $100,000 in fines. Corporate violators are sentenced under Chapter 8 of the guidelines, with a maximum fine of $2 million, based on factors including the amount of the bribe, the extent to which high-level officials were involved in the bribery, and whether there was an effective compliance program in effect.[11]

Avoiding Liability

Because the Institutional Sentencing Guidelines place a high premium on cooperation with the authorities, companies facing prosecution under the FCPA may find themselves facing the difficult choice between mounting a vigorous defense, or receiving credit for cooperation.

Avoiding liability is thus paramount. Any company engaged in international business should have an effective compliance program in place, which educates and advises employees, polices their activities, and imposes appropriate sanctions for conduct which violates company policy. Contracts with foreign companies and agents should also spell out prohibited conduct and payments.

But navigating the international business landscape and the contours of the FCPA may prove difficult even for companies with the best of intentions. It is not always clear whether a particular payment or arrangement would violate the law. Under the FCPA, a company can obtain an advisory opinion from the Department of Justice as to whether contemplated conduct falls within the Department's present enforcement policy. An opinion by DOJ that the proposed conduct would not violate the FCPA creates a rebuttable presumption that the conduct was lawful in any subsequent prosecution.[12]

Anti-Bribery Provisions

Recent Prosecutions under the Anti-Bribery Provisions. Notwithstanding the belief by some, that American companies still are engaging in bribery of foreign officials to procure business, the government has brought relatively few successful prosecutions under the FCPA's anti-bribery provisions, commencing only a handful of cases in the last five years. One of those prosecutions involved a $50,000 bribe made through an affiliate of a Dutch corporation with two American subsidiaries to a Panamanian official in order to obtain a lease of property along the Panama Canal, government contracts, and favorable tax treatment. The corporate defendants were prosecuted in the District of Massachusetts, pled guilty to violating the FCPA, and were fined $1.5 million and sentenced to five years probation.[13] The president of one of the American subsidiaries was convicted after a three-week trial in a separate prosecution brought in the District of New Jersey.[14] A subsequent legal malpractice claim brought by the Dutch corporation against its attorneys for failing to advise against the company's involvement in the bribes was dismissed on the grounds that the guilty pleas and convictions obtained against the defendants conclusively established that the defendants acted with corrupt intent when they made the payments, and could not have relied on legal advice that the payments were legitimate.[15] Another recent FCPA case involved bribes, in the form of "consultant fees" paid to a Brazilian Air Force Officer to facilitate the sale of refurbished military equipment to the Brazilian government.[16] The government obtained a consent decree and civil fine of $400,000 against one corporation that provided first class air travel to the United States and a trip to Disney World for an Egyptian official and his entire family.[17]

To insulate themselves from the strictures of the FCPA, American companies often hire agents to assist them in dealing with foreign governments. While these agents are useful in a variety of legitimate ways such as gaining access, advising on cultural nuances and coping with language barriers, prosecutors suspect that portions of their commissions often find their way into the coffers of governmental officials.

Of course, the FCPA prohibits not only direct payments to a foreign official, but payments made through an agent or intermediary. In order to avoid the "head in the sand" approach, whereby parties could funnel otherwise prohibited payments through third-parties, Congress provided that the requisite criminal knowledge for liability under the statute is established if a person "is aware of a high probability" that prohibited payments will be made, "unless the person actually believes that such circumstance does not exist."[18] In settling on this language, Congress opted to subject defendants to liability based on conscious disregard or wilful blindness, as well as actual knowledge, but rejected a proposal that liability be predicated on a lower standard of recklessness.[19]

Most prosecutions under the FCPA concern payments or other things of value offered in exchange for obtaining foreign government business such as inducing a country to buy garbage incinerators.[20] But the government occasionally has used the FCPA to prosecute payments not related to the formation or retention of a particular contract. In United States v. Vitsua Corp.,[21] the illegal payments at issue were made to obtain payment owed to the defendant corporation under a legitimately obtained contract for the sale of powdered milk to the Dominican Republic. When the Dominican government refused to

pay for milk that already had been delivered, the company agreed to pay a "service fee" to a Dominican official to obtain his assistance in securing the payment due. The company and its president both were prosecuted, and pled guilty to violating the FCPA, apparently without mounting a challenge to the application of the FCPA to the conduct at issue.

The 'Kay' Case

As noted above most recently, the defendant in United States v. Kay[22] successfully argued that payments they allegedly made to Haitian officials to reduce customs duties and sales tax, as a matter of law, did not violate the FCPA. The defendants argued that the plain language of the statute prohibits payments made to a foreign official to "obtain or retain business," and that the payments in that case fell outside that prohibition because their business in Haiti was already established at the time the payments were made. The government countered that because the payments to reduce duties and taxes were an essential part of the defendants' business in Haiti, they constituted illegal payments to retain business. It sought to bolster this position by arguing that the payments made by the defendants did not fall within the specific exemptions recognized by the FCPA for "routine governmental action."

The court found that the "obtain or retain business" language of the statute, together with the enumerated exceptions made the statute ambiguous under the circumstances of that case. It then turned to the legislative history to determine if the payments involved fell within the statute's scope. The court noted that in passing the original act in 1977, Congress was aware of a high-profile bribery scandal involving payments by United Brands to the Honduran government to reduce export taxes on bananas, and yet both the House and the Senate rejected proposed versions of the bill that would have covered such payments in favor of the more limited language prohibiting payments to obtain or retain business. Specifically, the rejected House bill would have criminalized payments to foreign officials to influence "any act or decision of such official in his official capacity," while the rejected Senate version would have included language prohibiting payments made to influence legislation or regulation.[23] The court concluded that "Congress chose to limit the scope of the prohibited activities under the FCPA and did not intend to cover payments made to influence any and all governmental decisions."

The court went on to hold that the subsequent amendments to the FCPA support this conclusion. In amending the statute in 1988, Congress rejected language that would have expanded the reach of the statute to include payments to obtain "more favorable treatment by a foreign government." The court declined to give weight to the 1998 Conference Committee Report purporting to interpret broadly the "obtain or retain business" language to include payments made to obtain favorable tax treatment, reasoning that the report constituted "a belated interpretation of preexisting statutory language" rather than an authoritative explanation of an amendment, because the language it was discussing had not been amended.

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Similarly, the court noted that the narrow reading of the statute was supported by the 1998 amendments following passage of the OECD Convention. In that instance, Congress rejected a request to expand the statutory prohibition to payments for "other improper advantage," opting to retain the "obtain or retain business" language, unamended. Concluding that payments to obtain favorable tax treatment fell outside the scope of the FCPA, the court dismissed all charges against the defendants.

Conclusion

The key to controlling foreign bribery lies in the degree of vigor the signatories to the OECD convention will employ in enforcing bribery prohibitions. Resources and commitment will be needed in the future or the enforcement mechanisms will remain cosmetic and international bribery will flourish.

(1) 15 US.C. §§78dd-1 et seq.

(2) United States v Kay, No. Crim. A. H-01-914, 2002 WL 823608 (S.D. Tex. April 18, 2002).

(3) See Christopher F Corr & Judd Lawler, "Damned if You Do, Damned if You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures," 32 Vand. J. Transnat'l L. 1249, 1265-66 (1999).

(4) See, eg., S. Rep. No. 105-277, at 2 (1998); Statement by President William J. Clinton, Nov. 10, 1998, Glenn R. Simpson, "Foreign Deals Rely on Bribes, U.S. Contends," Wall St. Journal, Feb 23, 1999.

(5) See "Fighting Global Corruption: Business Risk Management," Department of State Publication 10731, May 2000

(6) See, eg., Daniel Pines, "Amending the Foreign Corrupt Practices Act to Include a Private Right of Action," Jennifer Dawn Taylor, "Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption," 82 Cal. L. Rev. 185, 207-216 n.47 (2001)(listing sources arguing against the "competitive disadvantage theory"); Corr & Lawler, 32 Vand. J. Transnat'l L. 1249, n.8 (1999)(same).

(7) The survey is available at wwwtransparency.org.

(8) Fighting Global Corruption, at 3 See also, Philip Segal, "Corruption Index May Aid Asia Investors," Wall. St. Journal, May 24, 2000; Joel Hellman, Geraint Jones & Daniel Kaufman, "Are Foreign Investors and Multinationals Engaging in Corrupt Practices in Transition Economies?" Transition, May-June-July 2000.

(9) 15 USC §78dd-1(applicable to issuers of securities); §78dd-2(applicable to domestic concerns); §78dd-3 (applicable to persons other than issuers or domestic concerns). The 1998 amendments expanded coverage of the FCPA to provide for extra-territorial jurisdiction over American companies and individuals and for jurisdiction over foreign companies and individuals operating within the United States.

(10) The 1998 amendments extended the availability of criminal sanctions against foreign nationals who are employees or agents of domestic companies Previously, such individuals were subject only to civil penalties, while United States citizens acting in the same capacity faced criminal exposure.

(11) In addition to fines and imprisonment, individuals and corporations convicted, or even charged under the FCPA can be debarred or suspended from contracting with government agencies

(12) 15 USC §78dd(e).

(13) United States v Saybolt Inc., No. 98-10266 (D. Mass. Dec. 3, 1998). See Corr & Lawler, 32 Vand. J. Transnat'l L. at 1274-75.

(14) United States v Mead, No. 98-3025 (D.N.J.), 4 F.C.P.A. Reports 699.606

(15) Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l v Schreiber, 145 F. Supp. 2d 356 (S.D.N.Y. 2001).

(16) United States v Control Systems, Cr-3-98-073 (S.D. Ohio), 4 F.C.P.A. Reports 699.587

(17) United States v Metcalf & Eddy, Inc., 99 Civ. 12566 (D. Mass.), 4 F.C.P.A. Reports 699.749.

(18) 15 US.C. §78dd-2(h)(3)(B).

(19) HR. Conf. Rep. 100-576, 1998 WL 170253 (language intended to prevent management officials from "tak[ing] refuge from the Act's prohibitions by their unwarranted obliviousness to any action (or inaction), language or other 'signalling device' that should reasonably alert them of the 'high probability' of an FCPA violation."

(20) United States v Tannenbaum, Cr. No. 97-4441 (S.D.N.Y.), 4 F.C.P.A. Reports 699.583.

(21) 3 F.C.P.A. Reports 699.155 (D. N.J. 1994).

(22) No Crim. A. H-01-914, 2002 WL 823608 (S.D. Tex. April 18, 2002).

(23) Id, quoting H.R. 3815, 95th Cong., §2 (1977); S. 305, 95th Cong. §103 (1977).

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