



OUTSIDE COUNSEL

Expert Analysis

Foreign Judicial Corruption And Liability for Local Counsel

As Transparency International's Global report on Judicial corruption makes clear, "[c]orruption is undermining justice in many parts of the world, denying victims and the accused the basic human right to a fair and impartial trial."¹ Indeed, according to the organization's most recent Global Corruption Barometer, over 33 percent of the respondents from the 60 countries polled believe their judicial systems are corrupt.² The Global Corruption Barometer also makes clear that, with the exception of law enforcement, no institution is paid more bribes than the judiciary.³

Though judicial corruption in some foreign countries has been characterized as a "systemic problem," the issue largely has been ignored or viewed as irrelevant by U.S. companies doing business in those jurisdictions. However, U.S. companies now are increasingly finding themselves embroiled in litigations in foreign jurisdictions. To represent them in these foreign disputes, companies are turning to local foreign attorneys, who in turn are interacting with judges, law clerks, and other foreign governmental officials on behalf of these companies. And where it is standard practice, these local counsel sometimes are making improper payments to such governmental officials.

Bribing members of the judiciary no doubt might subject local counsel to liability under applicable foreign law. But, more alarming for companies employing such local counsel, and perhaps not as readily apparent, such payments may also expose the companies themselves to liability under U.S. law—specifically, the Foreign Corrupt Practices Act (FCPA).

To begin with, under the FCPA, issuers, domestic concerns and others within the



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territory of the United States have always been potentially liable for corrupt payments made by third parties with whom they do business. Specifically, since its enactment in 1977, the FCPA has always prohibited companies, inter alia, from offering anything of value to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office" for any forbidden purpose.⁴

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Consistent with these prohibitions, in 2004, the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) launched parallel investigations into Invision Technologies Inc.—a manufacturer of explosive detection systems used by airports—for payments made by agents and distributors of the company to foreign officials. Ultimately, the SEC filed a complaint alleging that because Invision had been aware of a high probability that its foreign representatives were paying or offering to pay government officials in order

to assist Invision in obtaining or retaining business, the company had violated the anti-bribery provision of the FCPA.⁵

Additionally, the SEC claimed that Invision's failure to properly select, train and monitor its foreign agents and distributors with an eye towards FCPA compliance constituted a violation of the internal controls provision of the act.⁶

Like any other third party hired by a company, FCPA violations committed by local counsel may subject the company itself to liability under the act. However, the question remains whether payments made to foreign judges or judicial officials in connection with litigation fall within the scope of the FCPA. Certainly, judges and judicial officials are considered foreign governmental officials under the FCPA.⁷ Nonetheless, and perhaps surprisingly, there is a plausible argument that the FCPA does not cover judicial corruption. Despite its moniker, the Foreign corruption Protection Act is not a blanket anti-corruption or anti-bribery law.

Business Nexus Requirement

Indeed, though the House of Representatives in 1977 initially proposed legislation that would "broadly prohibit [all] transactions that are corruptly intended to induce the recipient to use his or her influence to affect any act or decision of a foreign official,"⁸ that formulation was rejected. Ultimately, the FCPA as enacted was much narrower in scope, in that it prohibited only those payments designed to induce a foreign official to act in a way that is intended to assist in the obtaining or retaining of business.⁹ Thus, stated slightly differently, "an offense under the FCPA requires that the alleged bribery be committed for the purpose of inducing foreign officials to commit unlawful acts, the results of which will assist in obtaining or retaining business in their country"—also known as the "business nexus requirement."¹⁰

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While there are certain types of litigations, such as antitrust suits, that indisputably affect a company's ability to obtain or retain business—thereby bringing improper payments made in connection with those suits within the scope of the FCPA—the overwhelming majority of cases do not have such a clear impact on industry. Nonetheless, because of the manner in which the business nexus requirement has been judicially interpreted, companies are at risk of being held liable under the FCPA anytime their local counsel engage in judicial corruption, regardless of the nature of the underlying dispute.

The expansion of the business nexus requirement comes largely from the federal prosecutions of David Kay and Douglas Murphy. Kay and Murphy were both executives at American Rice Inc. a public company that exports rice to various parts of the world. In the 1990s, American Rice, through a foreign subsidiary, exported rice to Haiti. At the time, the Haitian government imposed significant duties and taxes on rice importers. Kay and Douglas, in order to reduce the taxes American Rice had to pay, authorized various payments to Haitian government officials. After the company learned of the payments, and self-reported, Kay and Douglas were eventually indicted on over a dozen counts, including violations of the anti-bribery provision of the FCPA. At trial, Kay and Douglas were convicted on all charges. Kay was sentenced to a thirty-seven month prison term and two years of supervised release. Murphy was sentenced to sixty-three months imprisonment and three years of supervised release. Both Kay and Douglas were also assessed monetary penalties.

Throughout the proceedings, Kay and Douglas had argued that because the bribes at issue allegedly were made in order to reduce the taxes American Rice had to pay, the payments were not made in order to obtain or retain business and hence were not prohibited under the FCPA.¹¹ That argument, however, was rejected by the U.S. Court of Appeals for the Fifth Circuit.¹² Ultimately, the court concluded that when payments are made to foreign officials so that the officials will perform acts that have the effect of lowering company operational costs and thus increasing profit margins, “thereby freeing up funds that the business

is otherwise legally obligated to expend,” the business nexus requirement is met.¹³

As a result of the *Kay* decision and the subsequent denial of certiorari in that case by the United States Supreme Court, companies are left to be guided by the principle that any activity undertaken to increase a company's bottom line may be deemed to be assisting the company in “obtaining or retaining business.” Because the vast majority of litigation matters have some financial impact of a company's bottom line (or at least the potential for such an impact), any time local counsel engages in judicial corruption as part of a litigation, the possibility of FCPA liability exists.

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Escalation in Enforcement

While, to date, the government has not appeared to be focused on using the FCPA to root out foreign judicial corruption, companies would be foolish to ignore the potential for liability. The past several years have seen a significant increase in the number of FCPA enforcement actions brought by the DOJ and SEC.

As part of the escalation in enforcement, companies are now facing increased governmental scrutiny not only for their actions, but also for the actions of their business partners and other third parties doing business on their behalf. And, as the government made clear late last year when it announced the record-breaking \$800 million dollar FCPA fine against Siemens AG, it is very much focused on “efforts to level the business playing field, making it free from corruption and fair to those who seek to participate in it.”¹⁴ Thus, as U.S. Companies (and others subject to the FCPA) continue to engage and be engaged in foreign litigation, the likelihood is that the actions of their local counsel

may come under DOJ and SEC scrutiny.

Accordingly, companies participating in litigation abroad would be wise to treat their local counsel as they would all other foreign agents and distributors. That means that companies should, among other things, conduct FCPA-focused due diligence prior to hiring local counsel; put in place procedures to properly train and monitor local counsel concerning FCPA compliance; and require local counsel to comply with standard FCPA policies and certify as such. Additionally, and perhaps most importantly, companies should engage FCPA counsel familiar with the applicable local jurisdictions, not only to act as liaison with and oversee local counsel, but also to monitor pending litigations for any red flags signaling that judicial corruption may have occurred or is occurring.

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1. Transparency International, *Global Corruption Report 2007*, xxi (Cambridge University Press 2007).
2. Transparency International, *Global Corruption Report 2008*, 303-07 (Cambridge University Press 2008).
3. *Id.*
4. See 15 U.S.C. §§78dd-1(a)(3); 78dd-2(a)(3); 78dd-3(a)(3).
5. Complaint at 6, *Securities and Exchange Commission v. GE InVision Inc. (fka InVision Tech. Inc.)*, (N.D. Cal. 2005) (No. c. 05 0660).
6. *Id.* at 7.
7. See 15 U.S.C. §§78dd-1(f)(1)(a) (“[t]he term ‘foreign official’ means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.”); 78dd-2(h)(2)(A) (same); 78dd-3(f)(2)(A) (same).
8. H.R. Rep. No. 95-640, at 7 (1977).
9. See 15 U.S.C. §§78dd-1(a)(1)-(3); 78dd-2(a)(1)-(3); 78dd-3(a)(1)-(3).
10. *United States v. Kay*, 359 F.3d 738, 742 (5th Cir 2004).
11. See, e.g., *United States v. Kay*, 200 F.Supp.2d 681, 682 (S.D. Tex. 2002).
12. *United States v. Kay*, 359 F.3d at 756.
13. *Id.* at 751-56.
14. Press release, Federal Bureau of Investigations, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15 2008) (available at <http://washingtondc.fbi.gov/dojpressrel/pressrel08/wfo121508.htm>).

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