

Hot Issues Alerts – Law Firms

Foreign Corrupt Practices Act 2.0 – Its Role In The 2009 Global Economy

The Editor interviews **Michael Himmel**, Partner and Chair of the Litigation Department and White Collar Defense Practice Group, Lowenstein Sandler PC.

Editor: Please describe your practice and why the FCPA plays an important role in your advisory to clients.

Himmel: I am chair of the firm's Litigation Department and White Collar Criminal Defense practice group. I represent corporations and individuals on a wide variety of criminal and complex business litigation matters. The FCPA is potentially implicated whenever a client does business in a foreign country or with foreign nationals doing business in the United States. Despite the economic downturn, increased international economic activity, globalization and the expansion and rise of the multinational corporation have resulted in more of our clients operating in locations with vastly divergent cultures, government regulation, political climates and economic and physical infrastructure. These companies sometimes have little ability to oversee their foreign representatives closely, even under the best of circumstances. Finally, companies that sleep on FCPA issues, particularly compliance programs, can wind up in hot water. The fines and other criminal sanctions can ruin a company's reputation, affect the bottom line and even put the company's survival at risk.

Editor: For some time after the FCPA was enacted in the 1970s it remained somewhat dormant. Then, in the late 1980s, it began to loom larger as an enforcement vehicle. Why was that?

Himmel: One of the key reasons was that the Department of Justice and Securities Exchange Commission started looking beyond hard-core bribery, which is not very common and which both parties have an interest in keeping concealed. The authorities began examining business transactions that occurred in the light of day and at first blush appeared to be legitimate. One example I can give you is the 1986 *Ashland Oil* case, where Ashland was accused of overpaying to acquire an interest in a company controlled by a foreign government in exchange for access to cheap foreign oil supplies. The case signaled that the authorities had begun to look past the form of the transaction to the substance behind it. *Ashland* turned out to be a large-scale kickback case.

Editor: The main thrust of the Act is to prevent bribery of foreign officials. How have the two enforcement bodies, the SEC and the Justice Department, interpreted "bribery"?

Himmel: The DOJ is the primary enforcement authority, while the SEC is the collateral authority. FCPA does not include the word "bribery"; it prohibits "corrupt payments" – anything of value. Interpreted broadly, it can be merely the offer or promise of corrupt benefits. The business that is retained or obtained need not be with a foreign government. Also, it

does not matter if the governmental official receiving the payment actually had the authority to affect the business at issue. It is the subjective belief – the corrupt intent of the bribe-giver – that controls. However, with what's called the "grease payment" exception, the FCPA is more limited in scope than many of the circuits' understanding of "bribery" and, in particular, "honest services fraud," which are broader in the United States. In practice, the DOJ and SEC have interpreted the statute to prohibit a wide range of conduct. For example, some cases involve a company's bribery of foreign officials to obtain coveted contracts such as engineering or procurement contracts. Other cases have focused on pharmaceutical and medical device companies' overseas marketing practices, specifically, questionable payments to doctors or other employees of state-owned hospitals in foreign countries as inducements to purchase the companies' products.

Editor: What can a company entering a joint venture abroad do to protect itself from a partner who may be directly or indirectly related to government officials?

Himmel: Although there is nothing *per se* improper about entering into such an arrangement, it is essential that the company conduct adequate due diligence of that potential partner to identify and address any FCPA "red flags" that may exist. In appropriate situations, a company considering whether to embark on a particular course of conduct might also want to utilize the DOJ's opinion procedure by asking for the DOJ's opinion as to whether, in the DOJ's view, that proposed course of conduct would violate the statute's anti-bribery provisions.

Editor: What has the track record been of U.S. companies in terms of being called to task, and even receiving indictments, for bribery of foreign officials? Has there been any abatement with the slump in world trade?

Himmel: There has certainly been a significant uptick in prosecutions, both in quantity and in magnitude. Part of the explanation is the significant headway U.S. contractors have made in regions that were previously closed off, such as Afghanistan and Iraq. It would be a mistake to conclude that the economic slump will reduce the likelihood of FCPA exposure. For one thing, as economic conditions worsen, companies and their sales and business development personnel can become desperate to generate new business or keep existing clients. This can naturally lead to cutting corners and unethical behavior that would not ordinarily take place when work is plentiful. In addition, perhaps the only significant source of new business in the foreseeable future is government spending. As governments put forward stimulus packages



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and other increases in spending, companies naturally shift their focus to obtaining and retaining that sort of work.

Editor: What kinds of practices do you recommend a client adopt when seeking to do business abroad?

Himmel: The keys are prevention and early detection. A good compliance program will address both of these objectives. The program should include such elements as anti-corruption policies and training. Internal accounting controls should be implemented to detect significant cash payments that have the potential of representing direct or indirect bribes of a government official. Companies should monitor the entertainment and business development activities of their employees and consultants in foreign countries. Companies should consider creating an independent compliance officer and establishing an anonymous hot line. If problems do arise, the ability to detect it, conduct an investigation and implement corrective action are imperative. A company that can accomplish this has the option of voluntary self-reporting to the DOJ, which in the right case can be hugely beneficial to the company in limiting its criminal and civil exposure and controlling what can become a public relations nightmare.

Editor: What provisions should be included in contracts when dealing with a foreign joint venture partner or contractor?

Himmel: At a minimum, contracts should include requirements that the partner have compliance programs in place, including anti-corruption policies and training for appropriate personnel. It may be desirable or necessary to include certain audit rights and reporting obligations.

Editor: How does one go about investigating a third-party agent operating abroad to ascertain that he or she has an unblemished reputation in terms of dealing at arm's length with government officials?

Himmel: There is no way to be 100 percent certain that business partners are operating in accordance with the FCPA, but this is true of all criminal laws that could be broken in the course of business dealings. At a minimum, public records need to be consulted, but when dealing with private companies in foreign nations (or even in the U.S.), the available information is somewhat limited. Sometimes, a reputable private investigator and/or business analyst can help provide valuable information about a particular company or individual.

Most often, there is no substitute for due diligence. Companies looking to partner with foreign businesses or to hire third parties need to do their homework. At a minimum, they should:

- understand the regulatory and cultural environment in which the company operates: that is, the local laws and regulations and the relevant country or locality's reputation for corruption;

- understand the company's history of corruption, including reported criminal violations and background checks on personnel who interact with government;

- review the company's compliance program, anti-corruption policies and training materials, and consider conducting interviews of relevant individuals;

- review the company's use and oversight of its own consultants and contractors, including lobbyists (for example, determine familial connections with government, review consulting agreements, etc.);

- review certain account records, and particularly cash accounts relating to government relations/entertainment, etc.

Editor: Please give some examples of "facilitating payments" that are exempt from the terms of the FCPA.

Himmel: In some countries, so-called "grease payments" are needed to transact even the most basic business. Grease payments are small payments to minor government officials conducting nondiscretionary duties that they may otherwise delay or refuse to undertake. They are generally in the nature of "tips" that are expected by local custom and not treated as illegal by local law enforcement. Some of the most common examples are small payments to government functionaries to expedite the issuance of a permit, license, or visa that should be routinely granted but will remain at "the bottom of the pile" without a small gratuity. Other common examples are payments to facilitate the provision of basic services such as police protection, mail service, and phone and water service.

Although an argument could be made that these types of payments could support low-level racketeering activities, Congress determined that such small violations are difficult to police and, if subjected to enforcement, would effectively leave U.S. companies at the whim of the lowest-level government official who simply refuses to do his job.

However, there is a fine line here. Companies are advised to use extreme caution in determining whether a payment is truly a grease payment and will not be interpreted by authorities as an actual FCPA violation.

Editor: What guidance may be gotten from the Department of Justice as to its present enforcement procedures?

Himmel: The DOJ's present enforcement procedures are best evidenced by the most recent explosion in its FCPA enforcement activity. The DOJ is taking aggressive action against individuals, companies and entire industries suspected of violating the statute.

At the same time, the DOJ has explicitly stated that those who voluntarily disclose possible FCPA violations, as well as those who cooperate with the authorities, will generally receive a benefit. In the event that a possible FCPA violation is discovered, timely consultation with experienced FCPA legal counsel is critical to determining the best course of action for minimizing or avoiding civil or criminal liability.