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FCPA Exceptions and Affirmative Defenses

Complying With the Requirements for Gifts, Hospitality and Facilitation Payments

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FCPA Exceptions and Affirmative Defenses

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Agenda

- Overview
 - US Foreign Corrupt Practices Act (FCPA)
 - UK Bribery Act
- Facilitating or Expediting Payments Exception
 - FCPA Exception
 - Treatment Under UK Law
- Affirmative Defenses
 - FCPA Defenses: Bona Fide Expenditures & Legal Under Local Law
 - Treatment Under UK Law
- Compliance Practice for Gifts, Hospitality and Facilitating Payments

Statutory Overview

Statutory Overview: FCPA

- Prohibits bribery of foreign (that is, non-US) government officials
- Applies to
 - Issuers registered on US exchanges
 - Domestic concerns (US citizens, residents, companies)
 - Officers, directors, employees, or agents of issuers and US companies
 - Foreign persons and companies that act while in the US
- Also requires issuers to make and keep appropriate books and records and to maintain a system of adequate internal accounting controls

Statutory Overview: UK Bribery Act

- Comes into force in April 2011
- Punishes:
 - The giving and taking of bribes in the public and private sectors by
 - UK nationals, UK residents and UK companies acting anywhere in the world
 - Any person or company when part of the offense takes place in the UK
 - Failure to prevent a person associated with a company from committing bribery on the company's behalf anywhere in the world
 - Applies to companies that do business or part of a business in the UK
 - A company can escape liability by proving that it had “adequate procedures” in place to prevent bribery

Facilitating and Expediting Payments

Facilitating and Expediting Payments: FCPA Exception

- Language of the statute: “Exception for routine governmental action”

Subsections (a) and (g) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.”

Facilitating and Expediting Payments: FCPA Exception

Definition of “Routine Governmental Action”

(A) The term “routine governmental action” means only an action which is ordinarily and commonly performed by a foreign official in—

- (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- (ii) processing governmental papers, such as visas and work orders;
- (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- (v) actions of a similar nature.

(B) The term “routine governmental action” does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decisionmaking process to encourage a decision to award new business to or continue business with a particular party.

Facilitating and Expediting Payments: Applying the FCPA Exception

- Points to consider:

- “[S]hall not apply to any facilitating and expediting payment”
- “[T]he purpose of which is to expedite or secure the performance of”
- “[A] routine governmental action”

- Legislative History (1988):

- “The conference substitute reflects the intent of the Conferees that the scope of the "routine governmental action" exception apply only to the listed subcategories (i)-(iv) and actions of a similar nature.
- “The Conferees wish to make clear that "ordinarily and commonly performed" actions with respect to permits or licenses would not include those governmental approvals involving an exercise of discretion by a government official where the actions are the functional equivalent of "obtaining or retaining business for or with, or directing business to, any person.”

Facilitating and Expediting Payments: US Enforcement Actions

- Con-Way

- Customs officials: “hundreds of small payments”
- Officials at state-owned airlines
- Books and records

- Delta & Pine Land Co. / Turk Deltapine

- Inspections by Ministry of Agriculture
- Laboratory certifications
- Books and records / corrupt payments

- NATCO Group

- Work visa

Facilitating and Expediting Payments: Treatment Under UK Law

- UK law has never exempted facilitating payments
- The new UK Bribery Act also does not contain an exception for facilitating payments
- UK officials have
 - Described facilitating payments as “small bribes” for which there is a risk of prosecution if sufficient evidence of wrongdoing exists and prosecution is in the public interest
 - Encouraged companies to employ a “zero tolerance” policy for facilitating payments as part of their “adequate procedures”
 - Stated that a small, one-off facilitating payment, particularly in emergency situations, might not be prosecuted

Facilitating and Expediting Payments: Practical Implications

- DOJ steadfast in refusal to define grease payments
- Must accurately book the payment in your books and records
- You know it when you see it
 - Amount – Small
 - Key Factor: Purpose of payment – Is it truly ministerial?
 - Reduce a customs/tax obligation
 - Licenses/permits/registrations tantamount to obtaining/retaining business
 - Were you clearly entitled?
 - Where is \$\$ going?
 - Don't forget local law
- Consider impact of UK Bribery Act

Affirmative Defenses

Affirmative Defenses: Overview

- Statutory Prohibition Under the FCPA
- Scope of the FCPA Affirmative Defenses
 - Bona fide expenditures
 - Lawful under the written law of the foreign country
- US Enforcement Actions
- DOJ Guidance on the Affirmative Defense
- Treatment of Promotional Expenses & Local Law Under the UK Bribery Act

Affirmative Defenses: Statutory Prohibition Under the FCPA

- Statutory Prohibition:

“It shall be unlawful ... to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to ... any foreign official”

- Examples:

- Golf, sporting events, meals, hunting or fishing trips, travel, concerts, spa trips, theme parks, tangible gifts, etc.

- Requires corrupt intent:

- If the gift is not given with corrupt intent, that element is not satisfied
- Many take the view that nominal, token, traditional and/or customary gift-giving courtesies or hospitalities (meals, travel, entertainment, etc.) do not exhibit corrupt intent
- Risk that any gift-giving will be construed as intended to corrupt a foreign official’s conduct

Affirmative Defenses: Language of FCPA Defenses

- It shall be an affirmative defense ... that—
 - (1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or
 - (2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—
 - (A) the promotion, demonstration, or explanation of products or services; or
 - (B) the execution or performance of a contract with a foreign government or agency thereof.

Affirmative Defenses: Bona Fide Expenditures

- Promotional Expenses: “[T]ravel and lodging” expressly identified in the FCPA
- Reasonable and bona fide expenditure:
 - Reasonable: Not lavish.
 - DOJ guidance and enforcement activity suggests that first class airfare, lavish hotel stays, personal vacations, large gifts, etc., will be viewed as unreasonable.
 - No sham expenses
- Directly related to—
 - (A) the promotion, demonstration, or explanation of products or services; or
 - (B) the execution or performance of a contract with a foreign government or agency thereof.

Affirmative Defenses: Relevant US Enforcement Actions

SEC v UTStarcom, Inc. (2009)

- Conduct:

- Over 5 year period, \$7 million paid for approx. 225 overseas trips and extensive gift-giving
 - Some purportedly in compliance with contractual obligations
 - “While UTSI’s bid was under consideration, UTSI’s general manager in Thailand spent nearly \$10,000 on French wine as a gift to agents of the government customer, including rare bottles that cost more than \$600 each.”
- China, Thailand, Mongolia

- Penalty:

- DOJ: \$1.5 million fine, no prosecution
- SEC: \$1.5 million fine, injunction

Affirmative Defenses: Relevant US Enforcement Actions

SEC v. Lucent Technologies (2007)

- Conduct:
 - 315 trips value at approximately \$10 million; per diem of up to \$500 or \$1,000, and spouses and children were sometimes included
 - Recorded in a “factory inspection” account, included “side trips” to Las Vegas, Disney World, Hawaii, Niagara Falls
 - MBA tuition - \$21,000
 - Books and records violations (inaccurate “factory inspection” account) and Internal Controls violations (lack of training)
- Penalty:
 - SEC: \$1.5 million fine
 - DOJ: Non Prosecution Agreement and \$1 million fine

Affirmative Defenses: Relevant US Enforcement Actions

SEC v. Turk Deltapine, Inc. (2007)

- From 2001-06, payments values at approximately \$43,000 included:
 - Cash
 - Travel and hotel expenses
 - Air conditioners, computers, office furniture and refrigerators
- In order to obtain governmental reports and certifications necessary to operate their business
- “These payments, which assisted the Defendants in obtaining and retaining business, violated the anti-bribery provisions of the” FCPA

Affirmative Defenses: DOJ Guidance on Bona Fide Expenditures Defense

- DOJ Opinion Procedure Releases 07-01 (July 2007) & 07-02 (Sept. 2007)
 - Government officials selected by foreign country
 - Official had no decision-making authority regarding operations in country
 - Payments directly to service provider, not government official
 - Airline economy class for travel within the US only (no international travel)
 - Sponsorship for U.S. visit complied with local law
 - No per-diem stipend
 - Reimbursement for incidental daily expenses with receipts
 - Souvenirs of nominal value
 - No expenses for family members
 - Modest tours permitted (4-hour sightseeing tour)

Treatment of Bona Fide Expenditures Under UK Bribery Act

- No affirmative defense for hospitality, gifts, travel, or other promotional expenses
- However, to violate the Act, such expenditures would have to be made with an intent to induce another to act improperly or to influence a foreign public official in his/her official capacity
- According to UK officials, the requisite intent will probably not exist with respect to expenditures that are
 - Routine or incidental business courtesies of small value
 - Reasonable and proportionate to the nature of the organization's business
 - Not lavish (e.g., a five-star holiday is different from “ordinary” travel for a promotional visit to a company site)

Affirmative Defenses: Legal Under Local Law

FCPA Defense

- “[L]awful under the written laws and regulations of the foreign official’s ... country.”
- Written, written, written
 - Custom, tradition, courtesy, practice, etc. do not suffice absent *written* law permitting the gifts/payments.
- Affirmatively lawful, rather than merely not prohibited or relieved from criminal liability:
 - Judge’s Order: “[T]here is no immunity from prosecution under the FCPA if a person could not have been prosecuted in the foreign country due to a technicality (e.g., time-barred) or because a provision in the foreign law ‘relieves’ a person of criminal responsibility. An individual may be prosecuted under the FCPA that violates foreign law even if that individual is relieved of criminal responsibility for his actions by a provision of the foreign law.”

Treatment of Local Law Under UK Bribery Act

- No affirmative defense for local law
- However, no section 6 offense is committed when the foreign public official is “permitted or required by the written law applicable to [the official] to be influenced in [the official’s] capacity as a foreign public official by the offer, promise or gift.”
- “Written law” is further defined
 - In a way that preferences UK law or the written rules of a public international organization, if relevant; and
 - As contained in any written constitution, legislation, or published judicial decision

Compliance Practice for Gifts, Hospitality and Facilitating Payments

Compliance Practice

- Policies and procedures
 - FCPA policy expressly addresses company's position on facilitating payments
 - Consider impact of UK Bribery Act on approach to facilitating payments
 - Guidance and procedures for gifts and hospitalities
 - All-encompassing v differentiating between government officials and private commercial parties
- Training:
 - Ensure employees and third parties recognize issues that implicate the FCPA and other applicable laws such as the UK Bribery Act
 - Ensure that employees and third parties follow the internal compliance controls developed to manage this risk

Compliance Practice

- Internal Controls:
 - Prior approval
 - Reporting
- “Adequate Procedures” Defense Under UK Bribery Act
 - Companies have the burden of proving “adequate procedures” to avoid liability for failing to prevent bribery
 - General guidance on what constitutes “adequate procedures” forthcoming from UK authorities (draft guidance was published in September)

QUESTIONS?