



presents

Foreign Corrupt Practices Act in Mexico

Implementing FCPA Compliance Programs and Mitigating Risk

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

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Rebekah J. Poston, Partner, **Squire Sanders**, Miami, Fla.
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Thursday, March 4, 2010

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Strafford Webinar

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Corruption in Mexico

- Transparency International Corruption Perceptions Index: 3.3
- 89th in the world: tied with Lesotho, Malawi, Moldova, Morocco, and Rwanda



Corruption in Mexico

- M&C Latin American Survey on Corruption (2008):
 - Only 8% of respondents thought that anti-corruption laws were effective in Mexico
 - 54% of Mexican respondents are not aware of anyone being punished for making illicit payments related to obtaining business
 - 69% of Mexican respondents believe that an offender is unlikely to be punished
 - 46% of Mexican respondents say they have lost business due to corrupt practices by competitors

Corruption in Mexico: Police

- **92%** of Mexican survey respondents said that the police forces exhibited significant corruption
- Example: Employees in a car service on the way to the airport were stopped by a police officer who threatened to arrest the driver and impound the car unless they paid him

Corruption in Mexico: Other Government Agencies

- Judicial branch
 - 85% of Mexican survey respondents reported significant corruption
- Legislative branch
 - 62% of Mexican survey respondents reported significant corruption
- Executive branch
 - 38% of Mexican survey respondents reported significant corruption

Corruption in Mexico: Other Government Agencies

- Customs officials
 - 77% of Mexican survey respondents reported significant corruption
- Municipal officials:
 - 69% of Mexican survey respondents reported significant corruption
 - Example: Renting property from landlords who make improper payments to local officials for property permits

Anecdote: Baker ATLAS and explosives

In order to use explosives in a given Mexican state:

- Federal permit; only given after receiving all
- State permits; only given after (a) receiving, and then (b) independently verifying
- Municipal permits (e.g. 22 in Veracruz alone).

Doing this legally takes approx. 6-10 months, with constant monitoring (and sometimes reciprocal back-scratching, e.g. Coahuila)



So what is... MEXICAN LAW?



MEXICAN LAW – personal viewpoint

- This is me.
- I am not representing myself to be an expert on Mexican law generally.
- I am not providing legal advice.



Mexican Penal Code – a brief overview

Public Officials

Chapter III Art. 115 (“Abuse of Authority”)

Chapter VI, Art. 6 (“Extortion”)

Chapter XII, Art. 223 (“Embezzlement”)

Chapter XIII, Art. 224 (“Illicit Enrichment”)

Private Parties

Chapter X, Art. 222 (“Bribery”)

Chapter XI, Art. 222 (bis) (“Bribery of Foreign Officials”)



In Theory v. In Practice

- Under-application of law:
 - Mexico's CPI index
 - Mexico's (deserved) reputation
- Over-application of law:
 - Licensing and Procurement regulations



Under-application of laws and regulations

- Broad social sense of impunity
 - Approximately 85% of crimes are left unreported (2008)
 - Principal reasons: “waste of time”; “no confidence in the authorities”
 - Proof in the pudding: only 1 out of 1000 crimes is sentenced (2008)
 - Little organizational will to change; low level of quality: after 5 different reorganizations since 1982, 50% of the federal police force still failed background checks (2008)



Lack of Confidence in Mexican Justice

- Extremely low degree of confidence in institutions:
- “Little/no” confidence:
 - 84% local police
 - 80% federal police
 - 64% judiciary
 - 85% local prosecutors
 - 67% federal prosecutors



Over-application of laws and regulations

- Procurement
 - Between 1500-7000 pages, due within 30-45 days of issue
- Licenses and Permits
 - Up to 1 year and 24 different notarized documents, merely to use explosives in 1 Mexican state
 - (Does not include bunker permits)
- The more complex the regulations, the more incentive to cut corners and the more methods of hiding corrupt payments



NEW TRENDS



TREND 1: NAFTA AUDITS

Under NAFTA (TLC), Hacienda has the right to audit tax claims

- If you claim favorable treatment, you'd better back it up with appropriate documentation (Starbucks)
- Though not directly FCPA-related, can generate inappropriate incentives



TREND 2: FCPA CLAUSES

K clauses from Mexico counterparties (eg Pemex) sometimes now include certification and non-violation language

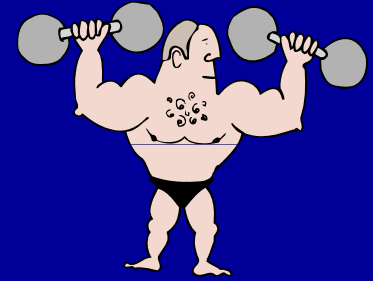
- Grudging acceptance
- If they don't, you should



Elements of an FCPA Antibribery Violation

- No *Issuer, Domestic Concern*, entity with nexus to U.S.
- May *corruptly*
- Take action *in furtherance of* payment or a promise, offer, or authorization of payment
- Of a bribe or *anything of value*
- *Directly or indirectly*
- To a *foreign official*
- To *obtain or retain business* or *improper advantage*

Enforcement Trends



- **FCPA on Steroids.**

- “2009 was the most dynamic single year in more than 30 years since the FCPA was enacted.” Lanny Breuer, AAG, Criminal Division.
- Forty cases (14 by the SEC, 26 by the DOJ) in 2009 – a record.
- Over 140 FCPA matters are pending investigation, according to the DOJ.

- **Increased monetary penalties.**

- The DOJ collected almost \$1.5 billion in fines and penalties in the past two years.
- Monetary penalties levied in 2008 exceeded the total penalties assessed in the preceding 31 years.

Enforcement Trends

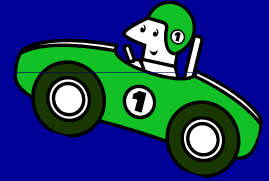
- The average fine in 2008, excluding Siemens, was \$11 million.
 - February 2009 – Halliburton & KRB paid \$579 million.
 - December 2008 – Siemens paid \$800 million.
 - April 2007 – Baker Hughes paid \$44.1 million.
- **Increased prosecutions of individuals.**
 - According to Mark Mendelsohn: “The most dramatic and widely-noted trend is the purposeful focus of individuals rather than corporations . . .”. There were 46 individuals prosecuted in 2009.
 - “Prosecution of individuals is a cornerstone of our enforcement strategy.” Lanny Breuer, AAG, Criminal Division. (www.justice.gov/criminal/pr/speeches/2009/11/11-17-09aagbreuer-remarks-fcpa.pdf).
 - 60% of all 2008 FCPA prosecutions were against individuals.

Enforcement Trends

- More than 91% of the individuals prosecuted in the past 10 years either pled guilty or were convicted at trial.
- **DPAs and NPAs continue to be popular.**
- **Monitors are coming in a variety of shapes and sizes.**
 - The standard model utilizes a monitor who through on-site reviews, interviews and forensic inspections of a company's books and records, and certifies to the DOJ through non-privileged reports a company's compliance with the FCPA.



Enforcement Trends



- Lately, new models have appeared:
 - **Ingersoll-Rand** was a case that involved travel and entertainment issues regarding Iraqi officials. The DOJ and SEC ratified the company's selection of outside counsel to act as a consultant for six months, during which time the consultant's tasks were to evaluate the compliance programs and make recommendations to the company, while providing copies of his reports to the DOJ.
 - **Paradigm** was a company that discovered improper payments being made in several countries when it was preparing for a public offering. It was allowed by the DOJ to proceed with its retention of its existing outside counsel (who had conducted the internal investigation for 18 months), utilizing them as "external compliance counsel."

Enforcement Trends

- ***Helmerich & Payne*** was a case which involved customs brokers' payments to customs officials in Venezuela and Argentina. The company was allowed to self-monitor its implementation of a compliance program which was required under its NPA, carry out its own in-house initial review, report back to the government with two follow-ups, and self-report any suspect corrupt payments it might discover.
- ***UTStarcom*** was a case where monies and travel were provided to foreign officials. The company received an NPA and was allowed to self-monitor.

Enforcement Trends

- **Wabtec** was a case involving improper payments to officials of the Indian Railway Board (“IRB”) by a subsidiary of Wabtec (Pioneer Friction Limited) in order to assist the subsidiary to obtain and retain business with the IRB, schedule free shipping inspections, obtain product delivery certificates, and stop what Pioneer considered to be excessive tax audits.
- The company was allowed to retain an independent compliance consultant for a 60-day review of its compliance program.



Enforcement Trends

- **Industry-wide targeting by the DOJ continues to be a trend.**
 - Telecommunications and oil and gas prosecutions figured prominently in 2009.
 - The DOJ has announced to the pharmaceutical and medical device industries they are in the DOJ's sites for 2010.
 - Currently at least 13 pending investigations of drug companies.
 - Lanny Breuer: “The depth of government involvement in foreign health systems combined with fierce industry competition and the closed nature of many public formularies, create significant risk that corrupt payment will infect the process.”

Enforcement Trends



- **Aggressive investigative techniques are being employed in FCPA investigations, e.g. undercover sting operations, wiretaps, confidential informants and material witness warrants.**
 - The law enforcement products and military equipment industries got a taste of this – big time, on January 19, 2010, in Las Vegas.
 - This was the first large-scale FCPA sting operation ever: 120 FBI agents; 14 search warrants in US; 22 defendants; 7 search warrants in U.K.
 - A D.C. federal grand jury returned 16 sealed indictments against 22 individuals charging conspiracy to violate the FCPA, conspiracy to money launder, substantive FCPA violations, and forfeiture counts.



Enforcement Trends

- The DOJ announced in its press release the arrests were part “of the largest single investigation and prosecution against individuals in the history of the DOJ’s enforcement of the FCPA.”
 - The defendants are charged with planning to bribe a minister of defense in an African country – a minister who apparently was only a figment of an undercover FBI agent’s imagination.
 - “From now on, would be violators should stop and ponder whether the person they are trying to bribe might really be a federal agent.” Lanny Breuer, AAG, Criminal Division.
 - What was in play was a \$15 million deal to equip this African country’s presidential guard with weaponry and law enforcement and military hardware.

Enforcement Trends

- The defendants agreed to pay to the undercover FBI agent posing as the sales agent, a 20% commission, half of which they allegedly understood was to go to the African Minister of Defense and the other half to the supposed sales agent.
- Around the same time these arrests were made, the U.K.'s City of London police were executing seven search warrants in connection with their own investigations into the companies involved.
- Additional indictments and arrests are expected.
- The DOJ is no longer just relying on whistleblowers, competitors and disgruntled employees to make its cases.

Enforcement Trends

- **Increased cooperation between the DOJ and its foreign counterparts.**
 - The DOJ is providing evidence, technical and forensic training, and FCPA-trained attorneys abroad to assist foreign prosecutors with local bribery prosecutions.
- **Asset seizure and forfeiture charges.**
 - Combining FCPA charges with money laundering and other criminal statutes (Travel Act, mail and wire fraud).

Enforcement Trends

- *U.S. v. Proceeds of Crime Transferred to Certain Domestic Financial Accounts, No. 07-21791-CIV*
 - In July, 2007, federal prosecutors in Miami sought the forfeiture of 19 separate accounts held in U.S. financial institutions, including UBS PaineWebber, Morgan Stanley, Dean Witter, Merrill Lynch, Citibank and Wachovia Securities.
 - The assets held in these accounts were the personal property of persons who had bribed Italian government officials to influence civil trials in Italy.
 - The defendants agreed to a \$100 million forfeiture settlement.

Enforcement Trends

- *Siemens*
 - The DOJ filed a forfeiture action against accounts worth nearly \$3 million alleged to be the proceeds of a wide-ranging conspiracy to bribe public officials in Bangladesh and their family members, in connection with various public work projects.
 - The illicit funds flowed through U.S. financial institutions before they were deposited into accounts in Singapore, thereby subjecting them to U.S. jurisdiction and U.S. money laundering laws.

Enforcement Trends

- *U.S. v. Joel Esquenzai, et al.*
 - In this alleged bribery case of Haitian telecommunications officials, the government filed a combination of FCPA money laundering, conspiracy and criminal forfeiture charges against various individuals.
 - The government seeks to forfeit hundreds of thousands of dollars in illegal proceeds, commission payments, properties and substitute assets.

Enforcement Trends



- **The SEC is “working vigorously across borders to detect and punish such illicit conduct,” according to SEC Chairman, Mary Schapiro.**
 - The International Organization of Securities Commissions (“IOSCO”) has had its Multilateral Memorandum of Understanding (“MMOU”) in place since 2003. This MMOU promotes sharing and exchanging investigative data, including bank and brokerage records, with securities regulators around the world.

Enforcement Trends

- The United States SEC has hailed this MMOU as an important tool for it in overcoming procedural impediments to cross-border enforcement. (41 SRLR 397, 3/9/09).
- Presently, there are 64 signatories, with 46 members committed to becoming signatories.
- The SEC reported in 2008 it made a record 594 requests to foreign regulators for assistance with investigations and cooperated with 414 incoming requests.

Enforcement Trends

- On January 13, 2010, the SEC revealed in the second version of its Enforcement Manual a new arsenal of enforcement weapons for prosecuting FCPA violations. (See www.sec.gov/divisions/enforce/enforcementmanual.pdf)
 - Some of the new weapons include:
 - Cooperation Tools
 - Proffer Agreements
 - Cooperation Agreements
 - Settlement Recommendations
 - DPAs, NPAs

Enforcement Trends

- Cheryl Scarborough, Chief of the SEC’s new FCPA Enforcement Unit, in commenting about the SEC’s new enforcement weapons said in part:

“A primary mission of this Unit is to devise ways for us to be more proactive in our enforcement of the FCPA. . . . We will also conduct more targeted sweeps and sector-wide investigating alone and with other regulatory counterparts, both here and abroad.”

Enforcement Trends

- On February 2, 2010, the U.S. signed a new MLAT and Extradition Treaty Agreement with the EU.

- It is applicable to all members states.



- MLAT requests can be made by fax and email, thus significantly shortening the time frame within which the DOJ can secure information abroad.

- MLAT requests can be made by administrative agencies seeking to make criminal referrals, as well as the DOJ.

- Financial accounts and transactions are discoverable.

Enforcement Trends

- Bank secrecy is no defense to production.
- Data protection laws are no defense to production, except in very limited circumstances.
- Joint investigative teams can be created to operate in both the U.S. and EU countries.
- The Extradition portion of the agreement provides for:
 - Modern dual criminality standard
 - Measures to streamline information exchanges
 - Prioritizing competing requests
 - Conditional extradition based on non-applicability of the death penalty

Enforcement Trends

- **Investor Protection Act of 2009 (H.R. 3817)**
 - Whistleblowers who report federal securities violations, including insider trading and FCPA, will be entitled to bounty payments.
 - If civil fines and penalties in a securities law case exceed \$1 million, a bounty payment can be made of up to 30% of the monetary sanctions imposed in [an enforcement action] or related actions to one or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the action. (H.R. 3817, 11th Cong. § 21F (2009)).

Enforcement Trends

- **Trends or Aberrations?**
 - DOJ prosecution of the foreign official who accepts the FCPA bribe payment (passive bribery).
 - FCPA Prosecution under the control person liability Section 20(a) of the Securities and Exchange Act of 1934.

Enforcement Trends

- ***Patricia and Gerald Green.***
 - The Greens paid \$1.8 million in bribes to the then Governor of Tourism Authority in Thailand (Juthamas Siriwan), whose daughter (Jittisopa Siriwan) was also involved, in exchange for \$14 million in contracts to manage and operate the yearly Bangkok International Film Festival and provide an elite tourism card to wealthy tourists visiting Thailand.
 - These bribes were paid through numerous accounts in Singapore, the U.K. and the Isle of Jersey, in the name of the former Governor's daughter and a friend.

Enforcement Trends

- The DOJ indicted the Siritwans for conspiracy to launder money, transporting funds to promote unlawful activity and criminal forfeiture because the FCPA does not provide for punishment of passive bribery.
 - Chuck Duross, Assistant Chief of the Fraud Section at the DOJ, noted this prosecution is evidence of the government's new focus: prosecuting bribe-takers under the money laundering statutes.
- The Greens were convicted in a jury trial in California in 2009 of one count of conspiracy to violate the FCPA, eight counts of FCPA substantive violations, and seven counts of money laundering. Patricia Green also was convicted on two counts of subscribing to false tax returns. Their sentencing is set for later in 2010.

Enforcement Trends

- ***Nature's Sunshine Products.***
 - The SEC alleged that CEO Douglas Faggioli and CFO Craig Huff, directly or indirectly, in their capacities as control persons under Section 20(a), violated the FCPA in connection with their company's Brazilian subsidiary's cash payments to Brazilian customs officials, because they failed to adequately supervise compliance under the FCPA books and records and internal controls provisions.
 - To conceal the payments, the Brazilian subsidiary incorrectly recorded them in their books as "importation advances," in violation of GAAP and the internal controls provisions of the FCPA.

Enforcement Trends

- The SEC never alleged Faggioli or Huff affirmatively violated the FCPA, or that either had knowledge of their subsidiary's cash payments, only that they failed to adequately supervise personnel in charge of ensuring FCPA compliance.
- The Brazilian subsidiary paid a civil penalty of \$600,000 while Faggioli and Huff paid civil penalties each of \$25,000.
- The DOJ declined prosecution.

FCPA Cases Involving Mexico

- Overview

- At least 8 FCPA cases have involved alleged improper payments in Mexico.
- Earliest Mexico-related case, Crawford, involved bribes paid to PEMEX officials between 1977 and 1980, the first years of the FCPA.
- While several Mexico-related cases involve PEMEX officials (Crawford, Paradigm, Siemens), other cases involve improper payments to:
 - CFE officials (state-owned utility company) (ABB and Silicon Contractors)
 - Doctors at state-owned hospitals (Syncor)
 - Customs officials (Pride)

FCPA Cases Involving Mexico

- **O'Shea and Basurto (ABB subsidiary) (2009)**

- Country: Mexico
- Facts: O'Shea, former GM of an ABB subsidiary, conspired with Basurto, a Mexican sales rep., and others to obtain lucrative contracts with CFE, Mexico's state-owned electrical utilities company. O'Shea and coconspirators made payments to CFE officials through Basurto, several foreign intermediary companies, and family members of Basurto and a CFE official. CFE officials and other coconspirators attempted to cover up the scheme by fabricating backdated documents.
- Outcome:
 - O'Shea arrested and charged with conspiracy, twelve counts of substantive anti-bribery violations, falsifying documents, and four counts of money laundering.
 - Basurto (a Mexican national) pleaded guilty to one count of conspiracy to violate the FCPA.

FCPA Cases Involving Mexico

- **Benton (former Pride VP) (2009)**
 - Country: Mexico and Venezuela
 - Facts: In Mexico, Benton authorized a third party to make a \$10,000 payment to a Customs official to overlook deficiencies identified during inspection of a supply boat. Benton also allegedly knew of another \$15,000 bribe paid to a different Customs official to ensure that the export of a rig would not be delayed because of apparently non-conforming equipment on the rig.
 - Outcome:
 - Benton charged with violating the anti-bribery and accounting provisions of the FCPA, aiding and abetting FCPA violations, and making false representations to accountants.

FCPA Cases Involving Mexico

- **Siemens (2008)**

- Countries: Mexico and numerous other countries.
- Facts: Siemens, a German multinational, made payments of approximately \$1.36 billion to officials in numerous countries to secure high profile government contracts, including large infrastructure projects. The company typically made the payments through third parties, using “slush funds,” false documentation, and other mechanisms to conceal the true nature of payments. In Mexico, Siemens paid \$2.6m to a business consultant who routed a portion of the funds to a senior PEMEX official to settle cost overruns in refinery modernization projects.
- Outcome:
 - \$450 million criminal fine, \$350 million disgorgement, required to retain compliance monitor for four years and implement robust compliance program. (Over \$1.6 billion in total penalties imposed in U.S. and Germany.)
 - Over \$1 billion in investigation costs (e.g., legal fees, forensic accounting)

FCPA Cases Involving Mexico

- Paradigm (2007)

- Country: Mexico, China, Kazakhstan, Indonesia, Nigeria.
- Facts: In Mexico, Paradigm, a software provider to the oil and gas industry, made payments to an agent in connection with a contract to perform work for PEMEX. Paradigm performed no due diligence on the agent or the five different entities through which the agent requested payment, and had no written contract with the agent. Paradigm also spent at least \$22,000 entertaining a PEMEX decision-maker on a trip to Napa Valley, hired the decision-maker's brother as a driver, and leased a house from the wife of a tender official.
- Outcome:
 - Various improper payments discovered during pre-IPO due diligence, Paradigm voluntarily disclosed to the DOJ, and agreed to a \$1m fine and other compliance commitments as part of an NPA.

WHAT THIS MEANS FOR MEXICO



FOREIGN OFFICIALS

- The term “foreign official” has not been comprehensively defined or tested by case precedent.
- In the absence of such, the enforcement agencies interpret the term in an extremely broad manner:
 - Traditional (e.g., policemen, customs workers, government officials, bureaucrats)
 - State-owned Entities (e.g., employees of national oil companies - PEMEX)
 - State Entities (doctors, professors)
 - Political Parties (candidates, officials)



Caution with: Agents

1. Customs brokers / freight forwarders
 1. Requires registering a physical person
 2. Requires dealing with authorities with a high degree of (actual) discretion
2. Professional consultants (lawyers, accountants, licensing / permit experts)
 1. difficult to determine whether they act in a representative capacity
3. Generally
 1. Invoices are often not specific
 - Could hide improper payments
 - Could hide excessive fees



Solution: Due Diligence, Invoice Review

DUE DILIGENCE

- K Reps and Covenants
 - FCPA Certification
 - Audit Rights
- Comprehensive Analysis of Agent
 - site visit
 - interviews
 - comprehensive business justification & multiple approvals
 - 3rd party investigation
- Mandatory FCPA Training
- Routine Re-certification

INVOICE REVIEW

- Question, e.g.:
 - lack of specificity or unclear terms
 - Lack of supporting documentation
 - Lack of consistency between duties/reimbursement and invoice line items
 - Invoices not in client's name
 - Separate invoices for services rendered and customs clearance

Caution with: Municipal / Regional Authorities



- Lack of transparency generates incentives for corruption
- Lack of resources (both economic and intellectual) generates incentives for corruption
- Extreme bureaucracy generates incentives for corruption

Solution: Policies, Invoice Review

- If possible, remove the “official” from the transaction and work directly with the entity
- Be sure to follow stringent gifts and entertainment &/or donations policies:
 - Well documented
 - Prior legal and operations approval
 - Obtain receipts from government entity
- Use appropriate suppliers (if relevant)
- Conduct invoice review



Caution with: Gifts and Entertainment



- VERY social culture
- Traditional gifts and treatment may appear inappropriate to gringos
- Routine or consistent gifts, meals, etc. take on the appearance of impropriety
- Receipts are often not specific by “cultural default”

Solution: Policies, Invoice Review

- Limits/thresholds should be clear.
- Prior approval should be required.
- Local law must be considered (e.g., 540 MXP limit / year for gifts to Mexican public officials).
- Force the applicant to prove the legitimate business purpose and connection.
- Never pay the official directly.
- Refuse reimbursement without a detailed receipt.



Caution with: Suppliers and Service Providers

(or, “Everybody has a cousin who...”)



- Family connections are very common in business, e.g.
 - Housing (Pemex houses)
 - Transportation (family business)
- Sometimes, no alternatives exist (e.g. Poza Rica)

Solution: Policies, Due Diligence

- For real estate:
 - FMV analysis
 - FCPA Certification
 - Legal Advice
- For other suppliers and providers:
 - Prior due diligence
 - Invoice review
 - Avoid using relatives of foreign officials if practicable

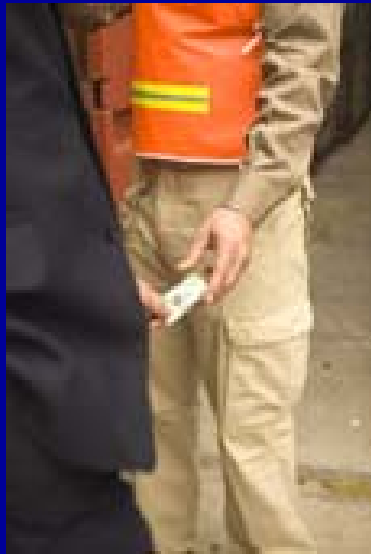


Caution with: Mergers



- If a target has operations in Mexico (or indeed anywhere outside of the US), the FCPA must be a concern during Due Diligence
- Perform deep DD prior to merger, and obtain (if practicable) and advance agreement with the enforcement authorities re past potential violations

Caution with: Facilitating Payments (??)

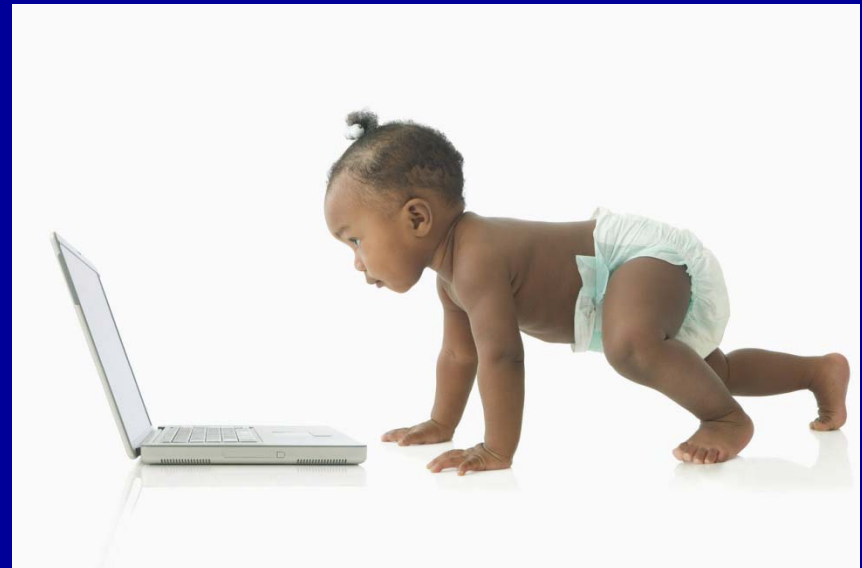


- Many companies now prohibit them (with exceptions for personal safety and security)...because:
 - Hard to define
 - Red flag for US enforcement agencies (when recorded)
 - Can still violate the FCPA (if not properly recorded)
 - May be illegal both in host country (Mexico) and under international laws and standards (e.g. OECD)

So how to start...

(at Baker Hughes)

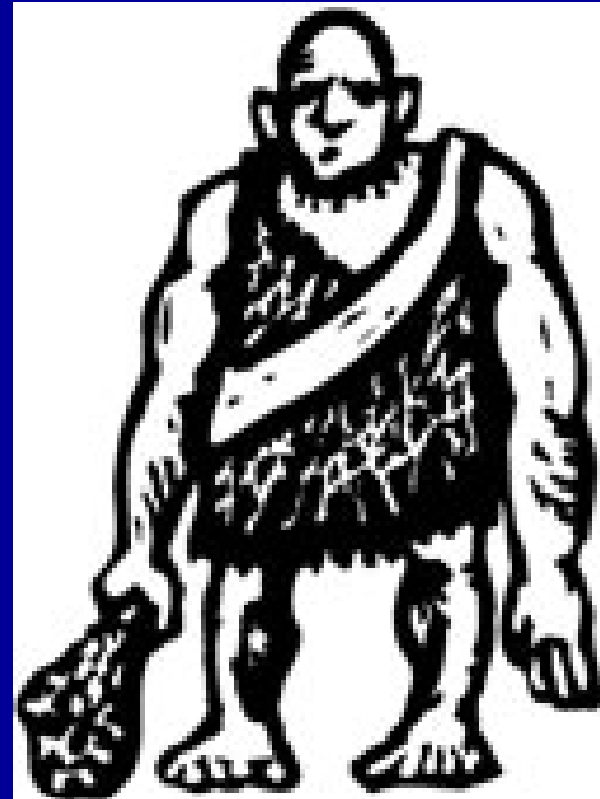
- All policies and guidelines are on our intranet site
- Each policy or guideline includes instructions and an approval form



MEXICO: OTHER SAFETY CONCERNS

Guidelines: Access Fees (and other types of extortion)

- Is extortion. (in our case, by private parties at well site entrances)
- Almost never implicates the FCPA's anti-bribery provisions.
- Can appear suspect if it becomes routine.
- Must be properly recorded.
- Our Policy:
 - Obtain receipt if practicable
 - Document with an expense report
 - Where, when, how much, circumstances
 - Witnesses



Extortion as a Defense?

- Does the FCPA provide an affirmative defense of extortion or duress when a corporate employer believes it must pay a bribe to a foreign official in order to protect the safety and well-being of its employees?
 - No, but “true extortion” situations would not be covered by the FCPA’s anti-bribery provisions since payment under coercion or duress vitiates the requisite element that payment be made with a corrupt purpose.¹

¹S. Rep. No. 95-114, at 11 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108.

Extortion as a Defense?

- **The Frederick Bourke case also involved the possible defense of extortion.**
 - In one of the trial court’s opinions and orders in the Bourke case², the U.S. District Court for the Southern District of New York confirmed that the legislative history of the FCPA makes clear “true extortion” situations are not covered by the FCPA.

Extortion as a Defense?

- The court stated that actions taken under duress do not ordinarily constitute crimes.³
- The court stated that if one was to argue they lacked the requisite criminal intent necessary under the FCPA because they were forced to make the payment under duress, they would need to be able to satisfy the three elements of duress.

Extortion as a Defense?

- The three elements of duress are:
 - A threat of force directed at the time of the defendant's conduct;
 - A threat sufficient to induce a well-founded fear of impending death or serious bodily injury; and
 - A lack of a reasonable opportunity to escape harm other than by engaging in the illegal activity.⁴
- Bourke did not request a jury instruction on extortion.

Extortion as a Defense?

- **What if the bribes were extorted?**
 - NATCO Group Inc. faced this problem in Kazakhstan.
 - NATCO's wholly owned U.S.-based subsidiary, TEST Automation & Controls, Inc. ("TEST"), won a contract to provide instrumentation and electrical services in Kazakhstan.
 - Kazakh immigration authorities were conducting periodic audits of TEST's expatriate employees' immigration documentation.
 - The officials claimed the expats lacked proper documentation.

Extortion as a Defense?

- They threatened to fine, jail or deport these workers if TEST refused to pay them cash fines.
- TEST workers believed these threats were real and consulted U.S. senior management on what they should do. U.S. senior management authorized its TEST employees to use their personal funds to make the cash payments. They made two payments of \$25,000 and \$20,00 to Kazakh officials through a consultant.
- TEST reimbursed its employees using false documentation. It recorded one payment as an advance against an employee bonus and the other as a visa fine.

Extortion as a Defense?

- The SEC alleged in its complaint against NATCO that TEST knew the consultant that was receiving these cash payments had close ties to the Kazakh Ministry of Labor.
- The SEC charged NATCO with failing to maintain a system of internal accounting controls to ensure that TEST recorded the true purpose of the payments and with maintaining inaccurate consolidated books and records.
- NATCO settled these charges without admitting or denying guilt.
- NATCO paid a small civil penalty of \$65,000.

Extortion as a Defense?

- **NATCO did not face anti-bribery charges, only books and records and internal controls violations.**
 - Was this perhaps because of the threats of injury and deportation to the expats?
 - How to record such extortionate payments on a company's books and records so they are accurately and truthfully recorded under the FCPA's books and records provisions would have to be evaluated on a case-by-case basis.
 - Extortion payments could be problematic in Mexico, given the drug gangs, kidnappings and high levels of corruption there.

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