

DOING BUSINESS IN SUB-SAHARAN AFRICA: WITH NEW OPPORTUNITIES COMES RISKS AND PITFALLS UNDER THE FOREIGN CORRUPT PRACTICES ACT (FCPA)

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I. INTRODUCTION

Now, more than ever, enforcement of the U.S. Foreign Corrupt Practices Act (FCPA) is a top priority for the U.S. Department of Justice (DOJ) and U.S. Securities and Exchange Commission (SEC) as they strive to prevent U.S. companies, employees, and agents from engaging in bribery of foreign government officials to obtain or retain business in overseas markets. By any measure, 2008 was a brutal year in FCPA enforcement and the trend has continued upward in 2009. This surge is especially problematic for U.S. companies seeking to expand their business and grow their target market in Sub-Saharan Africa (SSA), where fresh and unique opportunities abound, but an endemic culture of bribery, illegal gratuities, economic extortion, and other corrupt practices continue to flourish.

In today's global market, U.S. companies interested in foreign business opportunities can no longer afford to ignore the SSA region, particularly when the African Growth and Opportunity Act (AGOA) and other initiatives have spawned new investment and infrastructural development in the African continent.¹ But with the U.S. government's aggressive enforcement

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¹ See African Growth and Opportunity Act (AGOA), Summary of AGOA I, available at http://www.agoa.gov/agoa_legislation/agoa_legislation.html

of the FCPA and the global media's eagerness to report on corporate corruption scandals, it has become more imperative for companies to establish strong and well-calibrated anti-corruption policies before they venture into this region to conduct business. *Nonetheless, strict FCPA compliance policies are likely to prove ineffective if they fail to account for the cultural factors enabling corruption in SSA in the first place. Local custom is perhaps the greatest challenge in avoiding liability under the FCPA.* To open and close a business deal in SSA, there is tremendous pressure on investors and local subsidiaries of multinationals to play the local game: that is, follow practices and customs that are engrained throughout the region, but are often downright illegal under the FCPA and the domestic laws of the SSA countries.

As the international community strengthens its commitment to stricter enforcement of international trade laws and policies outlawing corruption, the DOJ is expected to hold accountable the U.S. companies that engage in international bribery. Focusing corporate expansion into new remote markets whose business cultures historically may have condoned, and in some instances, encouraged paying bribes, has likely contributed to the renewed attention to FCPA enforcement. Equally important is the hindsight afforded by almost three decades of FCPA enforcement activity, which has tended to point to some industries, such as government procurement, big pharmaceuticals, defense, construction, oil, etc., as having had more than their fair share of problems relating to corruption. This is at least partly because of their size, high manpower, dependency on government contracts, and their inclination or infinite desire to operate in emerging markets.

II. FCPA OVERVIEW

The FCPA is a product of the Watergate years, when the U.S. government started to grow increasingly uncomfortable with some U.S. companies' practice of bribing foreign officials to "grease the wheels" of commerce. Specifically, the U.S. Congress enacted the FCPA in 1977 in response to an SEC investigation that uncovered illegal payments by certain U.S. companies to foreign politicians, political parties and officials. The SEC found that the payments were made to secure unfair advantage over other competing entities for contracts and provision of certain services in the foreign countries. Stated bluntly, bribes were being paid to foreign government officials to facilitate favorable action.

The FCPA was designed to level the playing field and for American businesses to be seen by the rest of the world as fair, transparent and imbued with the ability to achieve their goals internationally on merit rather than through corruption. The legislation also gave the U.S. the high moral ground to implore and push other countries to put in place similar anti-bribery legislation.

A. Anti-Bribery Provisions of the FCPA

In general, the anti-bribery provisions of the FCPA prohibit U.S. companies and their officers, directors, employees, agents and any stockholder acting on behalf of the company, from bribing foreign officials for the purpose of influencing decisions to obtain business contracts or business advantage.² Bribery involves paying, offering, promising to pay (or authorizing to pay or offer) money or anything of value to a foreign official, a foreign political party or party

² Foreign Corrupt Practices Act 1977, 15 U.S.C. § 78, *available at* <http://www.usdoj.gov/criminal/fraud/docs/statute.html>

official, or any candidate for foreign political office.³ The term “foreign official” in the FCPA includes officers or employees of a foreign government, officials of a public international organization, or any person acting in an official capacity.⁴ Indirect payments that pass through overseas intermediaries (agents, consultants and distributors) and then end up with the foreign official for a corruptive purpose also violate the FCPA.⁵

Individuals who are citizens, nationals, or residents of the United States are also considered “domestic concerns.”⁶ Finally, officers, directors, employees, agents and stockholders of issuers and domestic concerns are subject to the FCPA as well.

Foreign corporations and foreign subsidiaries of U.S. corporations are not subject to the FCPA unless they are issuers, have their principal place of business in the United States or commit acts in violation of the FCPA while in the U.S.⁷ In contrast, issuers and domestic concerns may be vicariously liable for the acts of foreign corporations and subsidiaries.⁸ Furthermore, foreign individuals who act as agents or employees of issuers or domestic concerns are subject to the FCPA.⁹ Finally, U.S. citizens or residents who violate the FCPA on behalf of foreign corporations may be liable as domestic concerns.¹⁰

In order to prove a violation of the anti-bribery provisions of the FCPA, the government must establish:

³ U.S. Department of Justice, Lay-Person’s Guide to FCPA, Foreign Corrupt Practices Act, Antibribery Provisions (hereinafter referred to as DOJ Lay-Person’s Guide, *available at* <http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html>).

⁴ *Id.*

⁵ *Id.*

⁶ *See* 15 U.S.C. § 78dd-2(h)(1)(A).

⁷ *See* R. Witten and K. Parker, *Complying with the Foreign Corrupt Practices Act*, § 2.02 (Matthew Bender 2007)

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

- (a) a payment of (or an offer, authorization, or promise to pay) money or anything of value, directly, or through a third party;
- (b) to (i) any foreign official, (ii) any foreign political party or party official, (iii) any candidate for foreign political office, (iv) any official of or a public international organization, or (v) any other person “knowing” that the payment or promise to pay will be passed on to one of the above;
- (c) the use of an instrumentality of interstate commerce (such as telephone, telex, facsimile, email, or the mail) by any person (whether U.S. or foreign), or an act outside of the U.S. by a domestic concern or U.S. person, or an act in the U.S. by a foreign person in furtherance of the offer, payment or promise to pay;
- (d) for the corrupt purpose of influencing any official act or decision of that person, inducing that person to do or omit to do any act in violation of his/her lawful duty, securing any improper advantage, or inducing any person to use his/her influence with a foreign government to affect or influence any government act or decisions; and
- (e) in order to assist the company in obtaining or retaining business or in directing business to any person or to secure an improper advantage.¹¹

The FCPA also carves out narrow permissible payments and contains two affirmative defenses to liability under the anti-bribery provisions. It is important to note, however, that these ameliorative measures do not prevent the allegations and/or charges from being brought in the first instance, which your organization does not need at all. It simply means you may interpose them as affirmative defenses after you have been targeted.

B. Permissible Payments and Affirmative Defenses

1) "Facilitating" Payments Exception (e.g., Grease Payments, Gifts or Tips):

One limited exception to the anti-bribery provision is payments to foreign officials to facilitate or expedite performance of a “routine governmental action,” which are actions

¹¹ See 15 U.S.C. § 78dd-1(a); 15 U.S.C. 78dd-2(a); 15 U.S.C. § 78dd-3(a).

ordinarily and commonly performed by a foreign official.¹² The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing telephone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or actions of a similar nature.¹³ Routine governmental action does not include a decision by a foreign official to award new business or to continue business with a particular party.¹⁴

2) Promotional or Marketing Expenses Affirmative Defense (e.g., Entertainment)

A company or person charged with violating the anti-bribery provisions may assert as a defense that the payment or promise of payment was a reasonable and bona fide expenditure, incurred by or on behalf of a foreign official, to promote or demonstrate a product or to execute a contractual obligation.¹⁵

3) Payments Lawful Under Foreign Laws Affirmative Defense

A company or person charged with violating the anti-bribery provisions may assert as a defense that the payment or promise of payment was lawful under the written laws and regulations of the foreign country.¹⁶

C. The Accounting Provisions

The FCPA also contains two interrelated accounting provisions; one requiring the keeping of accurate books and records, and the other requiring the maintenance of adequate internal controls. The record-keeping and internal controls provisions of the FCPA only apply to

¹² 15 U.S.C. § 78dd-1 (b).

¹³ 15 U.S.C. § 78dd-1 (f) (3) (A)(i)-(v). *See also* DOJ Lay-Person's Guide.

¹⁴ 15 U.S.C. § 78dd-1 (f) (3) (B).

¹⁵ 15 U.S.C § 78dd-1 (c)(2)(A)-(B).

¹⁶ 15 U.S.C § 78dd-1 (c)(1).

issuers. Issuers and their employees or agents are required to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions” of their assets.¹⁷ The accounting provisions apply to issuers, regardless of whether they have foreign operations and whether bribery is involved. Reasonableness, rather than materiality, is the threshold standard.

In addition, issuers are required to “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances” that transactions and assets are properly maintained.¹⁸ The FCPA defines the term “reasonable assurances” to mean “such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.”¹⁹

Several factors are considered when determining the adequacy of a system of internal controls, including: (i) the role of the board of directors; (ii) communication of corporate procedures and policies; (iii) assignment of authority and responsibility; (iv) competence and integrity of personnel; (v) accountability for performance and compliance with policies and procedures; and (vi) objectivity and effectiveness of the internal audit function.²⁰

Criminal liability under the accounting provisions may only be imposed where a person “knowingly” circumvented or failed to implement a system of internal accounting controls or “knowingly” falsified any book, record or account. Civil liability, however, may arise for issuers if their books fail to adequately represent an improper payment, even though the falsification, for

¹⁷ See 15 U.S.C. § 78m(b)(2)(A).

¹⁸ See 15 U.S.C. § 78m(b)(2)(B)(i)-(iii).

¹⁹ See 15 U.S.C. § 78m(b)(7).

²⁰ See SEC Statement of Management on Internal Accounting Controls, Exchange Act Release NO. 34-16877, 1980 WL20857, *12-13 (6 June 1980).

example, occurred at a subsidiary with no evidence of involvement by the parent.²¹ The test used by the SEC as to whether to impose civil liability on the parent is that of control.²²

III. OTHER ANTI-CORRUPTION LEGISLATION TO LEVEL THE PLAYING FIELD

In the world marketplace, business thrives on competition. Corruption has been a part of the playing field in Africa, much to the detriment of the Continent and it does not bode well for Africa or for U.S. businesses operating in that region. Bribery and corruption tilt the playing field and create unfair advantages for those willing to engage in unethical and illegal behavior. Corrupt practices penalize companies that play fair and seek to win contracts through the quality and pride of their products and services. As we proceed through the 21st Century, more people throughout the world are rejecting the notion that corruption is an inevitable part of doing business.

To ensure that companies from other countries are held to the same standards over the years, the U.S. has sought to push their trading partners to institute similar legislations. The U.S. and its thirty-three major trading partners comprising the *Organization of Economic Cooperation and Development* (OECD) signed the OECD Convention to combat bribery of foreign public officials in international business transactions in 1997. The primary reason for the U.S. to push for this agreement was to avoid handcuffing American businesses and allow them to compete fairly on a level playing field with businesses from other countries where businesses had no such controls or restrictions. Before the convention to combat bribery, some businesses from the OECD countries were allowed to deduct some payments made to foreign officials and politicians as legitimate business expense.

²¹ *Id.*

²² *Id.*

Because most of the signatories to the convention are predominantly European, the level playing field sought by the U.S. globally was limited. To expand the reach of this worthwhile anti-corruption campaign, the U.S. and member states of the Organization Of American States entered into an agreement in March 29, 1996 called the *Inter-American Convention Against Corruption*.

On a global level, the United Nations entered the anti-corruption crusade with its own *United Nations Convention Against Corruption* on December 14, 2005.²³ While the United Nations Convention had universal acceptance, there were still countries that voiced objections to certain provisions of the convention on political, sociological and economic grounds. Most countries including, the United States, could not agree to enforcement issues such as which court would have jurisdiction for enforcement of the convention. Other objections hinted on loss of territorial integrity of the member states. While all members agreed corruption was a problem and something needed to be done to eliminate or reduce its spurious impact in global business, there was not a universal voice on how to attack the problem.

The 1998 Amendments implemented the OECD Convention and made five conforming changes to the FCPA: First, payments made to secure "any improper advantage" -- language used in the OECD Convention -- were added to the FCPA's prohibitions. Second, the FCPA's coverage was extended to include all foreign persons who commit an act in furtherance of a foreign bribe while in the United States. Third, the FCPA's definition of foreign officials was expanded to include employees and representatives of public international organizations. Fourth, jurisdiction was extended over the acts of U.S. businesses and nationals involved in illegal payments that take place wholly outside the United States. Finally, the distinction was eliminated

²³ UN Convention Against Corruption, Oct. 31, 2003.

between U.S. nationals and non-U.S. nationals, making all employees or agents of U.S. businesses subject to both civil and criminal penalties under the FCPA.

Corruption costs Africa some \$175 billion per year and adds significantly to import/export costs for U.S. companies in terms of costs of transportation, production, labor, regulation and all other aspects of doing business.²⁴ Other foreign countries' high tolerance for corruption makes it extremely difficult for U.S. companies to compete in SSA, while complying with stringent FCPA requirements. U.S. companies must compete with, for example, Chinese and Indian companies, which are among the worst culprits for paying bribes in developing countries. Transparency International (TI) places China and India at the top of its Bribe Payers' Index of 30 exporting nations.²⁵ These companies are more likely to pay bribes in less developed countries where anti-corruption institutions are weak, such as Africa, than in highly industrialized ones.²⁶

As a condition of joining the World Trade Organization (WTO), China was required to become a signatory to the UN Convention Against Corruption and pass new anti-corruption laws that, to a large extent, are similar to the FCPA. Nevertheless, Chinese companies' involvement in corrupt business practices in this region as well as others worldwide is well documented since China's complex anti-bribery laws are not usually enforced. For example, the Royal Institute of

²⁴ Corporate Council on Africa: *The U.S. and Africa – Business Partners in Development* (Policy recommendations from the American Private Sector for the Obama Administration) (presented March 4, 2009).

²⁵ BBC News, *China and India 'top bribe list'*, <http://news.bbc.co.uk/2/hi/business/5405438.stm> (last visited October 20, 2008).

²⁶ Global Policy Forum, *China's Rise: Hope or Doom for Africa*, June 16, 2007, <http://www.globalpolicy.org/security/natres/generaldebate/2007/0611chinaresources.htm> (last visited October 20, 2008).

International Affairs in London estimates that 70 percent of China's timber imports from SSA is illegal.²⁷

The U.S. government's strong enforcement of anti-corruption laws, in contrast to the Chinese and Indian governments' high tolerance for corruption, means that U.S. companies are not operating on a level playing field when it comes to doing business and investing in SSA. At the same time, U.S. companies cannot use the prevalence of corruptive practices by other foreign companies as a defense against FCPA violations.

Moreover, the recent increase in anti-corruption initiatives in China will likely fuel FCPA enforcement actions. In a major change that began in 2006, the enforcement of anti-bribery laws in the private sector is now a major government enforcement priority.²⁸ For example, three senior directors in the State FDA were prosecuted after they accepted bribes in excess of \$800,000, primarily from Chinese companies, to approve fake or inadequately tested drugs, resulting in the deaths or severe illnesses of many people. The head of the Chinese Food & Drug Administration was executed for his role in the scheme. Still, for the most part, firms from other countries are more prepared to pay bribes to obtain business opportunities, which in turn fuels the temptation for U.S. companies to engage in corrupt practices in order to compete with other foreign companies.

²⁷ *Id.*

²⁸ Jeffrey Harfenist, UHY Advisors FLVS, Inc, *U.S. Companies Could Be Implicated As China Aggressively Prosecutes Bribe Recipients - Part I*, The Metropolitan Counsel, <http://www.metrocorpounsel.com/current.php?artType=view&artMonth=October&artYear=2007&EntryNo=7280> (last visited October 28, 2008).

IV. FCPA RISKS AND PITFALLS IN SUB-SAHARAN AFRICA (SSA)

Whether a company is entering a new market, contemplating an international joint venture, investing in a foreign business, or acquiring a company abroad, an appropriate level of due diligence on the foreign entity, its agents, business partners and intermediaries is universally acknowledged as crucial.

The first question facing U.S. domestic entities operating in SSA is the depth of due diligence to be undertaken. Various factors determine what is required within this due diligence equation to satisfy the FCPA, including: the reputation of the foreign entity and of the country in which it operates; how the U.S. and SSA entities were introduced, especially if a foreign official was involved; the U.S. domestic entity's own reputation for compliance and good standing with the relevant regulatory agencies; and whether the SSA entity is, or has ever been, on the radar screen of any risk level indicated by these factors.

Next, the U.S. entity must develop a plan for its own due diligence investigation. At a minimum, it ought to include database research, industry inquiries, and contacts with the U.S. Embassy and other American government agencies within the SSA entity's country. These should include: document reviews, source inquiries, and more intensive, in-country interviews with current and former employees of the SSA entity, its business partners, and relevant government officials. The investigation should seek to: determine the expertise, competence and reputation of the SSA entity, as well as relationships with foreign officials and their family members; develop an understanding of the company's business and/or corporate social responsibility models and compliance culture; and develop background information regarding corporate management and its structure.

Another challenge is locating essential or pertinent information. Unlike in the U.S., detailed information may not be a matter of public record. Knowing what information or data is available and where it is kept can, unfortunately, dictate the thoroughness of the effort. This makes skilled culturally fluent investigators all the more important. International due diligence can be challenging, but it need not deter investments abroad or entry into new SSA markets. In fact, even if compliance-driven, these investigations can provide decisive information on important investment considerations, thereby providing lasting business benefits.

Corruption has adversely affected the economic and social development of African states more than any other group of countries or region of the world. The continent's leaders "concerned about the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African people," led to the African Union's adoption of the *Convention on Preventing and Combating Corruption*.²⁹ Although individual countries, political and trading blocks have enacted anti-corruption legislations, the United Nations Convention against Corruption is the first that involved all UN member states including SSA nations.

The combination of cultural, historical, economic, and social factors in SSA will continue to create a "perfect storm" for FCPA violations, underscoring the crucial need for U.S. companies doing business in that treacherous region to proactively assess their risks and institute compliance measures calculated to effectively mitigate those risks. The objections to the UN Convention against Bribery and Corruption show that while most SSA countries view corruption as a problem in global business, each country's views and attitudes towards the practice are different.

²⁹ African Union Convention on Preventing and Combating Corruption, 2nd Ordinary Session Assembly of the Union, Maputo, July, 2003.

Against this background, the question then becomes how do United States businesses operate in SSA and stay true to the mandate of the FCPA? The answer appears or seems simple because the United States could point to the FCPA as controlling U.S. businesses. They could also point to the UN and the AU Anti-Corruption Conventions as similar initiatives that run parallel to the FCPA. The limitation of the UN convention, however, is that there were too many objections by member countries on specific articles and there was no consensus for instance on Article 44 regarding extradition.³⁰ In addition, objections regarding dispute resolution, specifically arbitration and the jurisdiction of the International Court of Justice as the venue for disputes, has limited the effectiveness of the Convention.³¹

Furthermore, Article 21 of the AU Convention specifically states that the AU Convention (10) “shall in respect to those State Parties to which it applies, supersede the provisions of any treaty or bilateral agreement governing corruption and related offenses between any two or more State Parties.” This considerably muddies the water for businesses from countries doing business in SSA who are not part of the AU. The limitations of the UNCAC and the AU Convention makes enforcement of the FCPA difficult as it relates to businesses with local agents in SSA countries who do not have extradition treaties with the US or objected to Article 44 of the UNCAC or adheres to the AU Convention on corruption.

It is not a defense to FCPA enforcement, however, to argue that a business cannot be done in the foreign country without bribing officials or that competitors from other countries are engaging in bribery. But what is considered a bribe in the U.S. may be considered a customary requirement or showing gratitude in SSA. International investors must recognize that customary practices are different in SSA and that an intimate knowledge of the local culture and customs is

³⁰ United Nations Convention Against Corruption Article 44.

³¹ United Nations Convention Against Corruption Article 66.

key to understanding the grey areas and walking across them with an extra set of eyes in the back of your head.

Difficult socio-economic conditions have, for the most part, caused what may be described as corruption in the U.S. to become the “ordinary course of doing business” in most African countries. The pervading concept and/or justification being that as the *“right hand washes the left hand, the left hand must also necessarily wash the right hand.”* For example most land transactions involving “stool lands” in Ghana require that a traditional ruler (local chief) have to approve the sale. To do that what is described as a “knocking fee,” “drinks” or “gift” to introduce the buyer to the chief is required. In most situations these gifts are rounded to an amount of money. A verbal “thank you” sometimes is not enough for services rendered or to be rendered. For instance, one may be required politely to “buy a pen” in Nigeria if you need a signature from a government official to move the ball along. And offering the pen in your pocket, even if a Montblanc, will not suffice. The question then becomes where must the line be drawn in such instances. The U.S. business may be handcuffed by the provisions of the FCPA and may lose out or face road blocks on the deal if it appears that they are even questioning the appropriateness of such a custom, creating a conflict between socio-economic rudeness and the rule of law.

As the U.S.’s fifth largest source of imported oil and blessed with other plentiful natural resources, Nigeria should be one of the most successful developing countries, but in reality it is one of the poorest. The pervasive culture of corruption in Nigeria has crippled the economy and stunted its growth. The military governments of the 1980’s and 1990’s contributed to the

common belief among ordinary citizens that they must use any means necessary to reach their economic goals.³²

If corruption is engrained in a society and very much part of the cultural norm, it is easier for individuals to engage in corrupt behavior. A Global Poverty Research Group (GPRG) study on Culture and Corruption states:

[W]hen the private returns to corruption are high or, due to weak institutions, the likelihood or consequences of detection are limited, individuals are more inclined to act corruptly. Further, because finding a partner with whom to engage in a corrupt transaction and escaping detection or punishment becomes easier as the proportion of individuals who are corrupt increases, multiple equilibria involving different levels of corruption are likely to exist.”³³

Many economists believe that cross-cultural differences (social, psychological and cultural factors) play a minor role in corruptive practices and that the key to reducing corruption is redesigning the country’s formal institutions, but as applied to the high-context cultures of SSA countries, I do beg to disagree.³⁴ The GPRG study, however, notes that different levels of corruption across countries are at least, to some extent, attributable to internalized social norms and that “corruption is, in part, a cultural phenomenon.”³⁵

Political atmosphere may also create difficulty for American companies doing business in SSA under the FCPA. Unfortunately, political instability is still rampant in many areas of SSA. The negative effects of political corruption are particularly strong in the African continent

³² See Smith, Daniel Jordan, *A Culture of Corruption: Everyday Deception and Popular Discontent in Nigeria*, Princeton University Press.

³³ Abigail Barr & Danila Serra, Center for the Study of African Economies, University of Oxford, *Culture and Corruption*, March 1, 2006, Economic and Social Research Council (ESRC), Global Poverty Research Group (GPRG), at 4, available at <http://www.gprg.org/pubs/workingpapers/pdfs/gprg-wps-040.pdf>.

³⁴ *Id.* at 5.

³⁵ *Id.* at 24.

because of the pervasive nature of corrupt practices in the political arena coupled with the abject poverty across the region.³⁶

There are improvements in this area, but wherever there is instability, the rule of law is an after-thought, and corruption becomes part of the culture. While businesses from other countries, especially Europe and Asia, operate relatively successfully in this environment, it may be difficult, if not impossible for American businesses to do the same due to the provisions and restrictions of FCPA. That is not to say European and Asian countries do not have anti-corruption legislations; they may just be comfortable or familiar with the custom and social issues in that part of the world.

V. NEW OPPORTUNITIES IN SUB-SAHARAN AFRICA (SSA) & RECENT FCPA ENFORCEMENT ACTIVITY

Despite the problems stated, there is a wind of change blowing across SSA that is now creating a promising atmosphere for American businesses. There is unprecedented relative peace and political stability in most parts of SSA and there has been relatively peaceful democratic change of governments in Ghana, Nigeria, South Africa, Senegal, Uganda, Botswana, and Tanzania, to mention a few. But that is not to say that elections creating these changes were considered highly free and fair.³⁷

In almost all cases, opposition parties complained that there were massive corruption and vote rigging. Regardless, the fact that there were elections at all is considered an improvement from the past where military and civilian dictatorships, coupled with one party system of government, was the order of the day. Almost all SSA countries have signed on or ratified the UNCAC and the AU Convention. The mandate for the AU to set up what is called the African

³⁶ Roy, Saberi, Corruption and Culture – Part 1, *Global Politician*, 2/26/2008, available at <http://globalpolitician.com/24180-culture>.

³⁷ United States Dept. Country Report on Human Rights Practices, (2007)

Peer Review Mechanism's (APRM) Country Review has now been honored.³⁸ In addition to the UNCAC, some of these countries have actually enacted legislation and created agencies to combat corruption.

For instance, the criminal code in Ghana criminalizes bribery, and there is a Whistleblower Act to protect whistleblowers from reporting corruption. The Ghana Commission on Human Rights and Administrative Justice (CHRAJ), The Office of Accountability, and The Serious Fraud Office (SFO) are the agencies established to enforce corruption legislation in Ghana. Nigeria enacted the Corrupt Practices and Related Offenses Act of 2000 to police corruption. The Independent Corrupt Practices and Other Related Offenses Commission (ICPC) oversees corruption enforcement in Nigeria. South Africa also enacted legislations to combat corruption. There is The Prevention and Combating of Corruption Act, which criminalizes corruption. There is the "Whistleblower Act" or Protected Disclosure Act; Promotion of Access to Information Act and others. The Anti-Corruption Agency, The National Prosecution Authority (NPA) and The Auditor-General of South Africa (AGSA) are the agencies that oversee and enforce corruption legislation in South Africa. Senegalese President Abdoulaye Wade was elected in 2000 based on a strong anti-corruption stance.³⁹ Corruption is criminalized in Senegal, and the Commission nationale de lutte contre la non-transparence, la corruption et la concussion (CNLCC) is an agency of the Senegalese government that was created in 2003 to investigate corruption complaints. Customs officials in Senegal are rotated every 3 years to limit the possibility of corruption. Simply put, almost all Sub-Saharan African governments have some sort of anti corruption legislation and related agencies to enforce these laws.

³⁸ 37th Summit of the Organization of African Unity (OAU), July 2001.

³⁹ Global Advise Network, Senegal Country Profile.

Despite these efforts, the public perception of corruption in SSA is very high. Very few influential people or top officials have been prosecuted under any of the anti-corruption legislations. Even when prosecuted and incarcerated, top officials and influential private figures tend to successfully slither away from confinement after the dust settles, and people no longer watching with interest, again via corrupt practices. Cultural issues, overlapping authority, discrimination within and outside the complex quota system for public offices have left the governments in SSA with little power to govern, and they are systematically undermined by corrupt public officials, the military and the patronage networks.

Against this background, it is very difficult for U.S. companies to effectively operate in SSA countries and stay true to the FCPA. When local or even some expatriate employees of U.S. entities and their affiliated concerns in SSA are placed in situations where their very integrity is tested by the offer of a significant bribe, they will almost always ask themselves two basic questions – (1) will I get caught? and (2) does the bribe in question trump my job? Another ethical dilemma emanates in situations where employees may believe that improper payments are essential for them to make their quota or achieve stated bottom tier corporate goals.

Briefly described below are relatively recent FCPA enforcement matters arising out of the SSA region:

□ On February 6, 2007, three subsidiaries of Vetco International agreed to pay a combined \$26 million in criminal fines to settle charges that they had paid \$2.1 million to Nigerian customs officials to avoid payment of customs duties and obtain the release of goods and equipment.⁴⁰

The companies made 378 separate payments over two years in relation to work providing

⁴⁰ Press Release, Dept. of Justice, Aibel Group Ltd. Pleads Guilty to Foreign Bribery and Agrees to Pay \$4.2 Million in Criminal Fines (Nov. 21, 2008), available at <http://www.usdoj.gov/opa/pr/2008/November/08-crm-1041.html>.

engineering services and subsea construction equipment for a Nigerian deepwater drilling project.⁴¹

□ In February 2007, Baker Hughes paid the largest combined criminal and civil fine, up to that date, to resolve a Justice Department criminal investigation and SEC enforcement action involving improper payments to officials in Nigeria, Kazakhstan, Angola, Indonesia, Russia and Uzbekistan. Baker Hughes entered into a deferred prosecution agreement, which required the appointment of a monitor and agreed to pay an \$11 million criminal fine, disgorgement, and prejudgment interest of \$23 million together with a \$10 million civil penalty.⁴²

□ On July 25, 2007, two former executives of ITXC pleaded guilty to charges that they had conspired to make corrupt payments to employees of foreign-state owned and foreign-owned telecommunications carriers in Nigeria, Rwanda, and Senegal.⁴³

□ In July 2007, Jason Steph, a former manager of a Nigerian based subsidiary of Willbros Group, Inc., an oil and gas service corporation, was indicted in connection with payments to a Nigerian official at the Nigerian National Petroleum Corporation and the Peoples Democratic Party.⁴⁴

□ In September 2007, Stephen Head, a former president of Titan Corporation's operations in Africa, was sentenced to six months incarceration and a \$5,000 fine after pleading guilty to charges in connection with a \$3.5 million payment to officials in Benin.⁴⁵

⁴¹ See http://www.usdoj.gov/opa/pr/2007/February/07_crm_075.html.

⁴² Press Release, SEC Charges Baker Hughes with Foreign Bribery and With Violating 2001 Commission Cease-and-Desist Order (April 16, 2007), available at <http://www.sec.gov/news/press/2007/2007-77.htm>.

⁴³ See <http://www.usdoj.gov/opa/pr/2008/September/08-crm-772.html>

⁴⁴ Press Release, Dept. of Justice, Former Executive of Willbros Subsidiary Pleads Guilty to Conspiring to Bribe Nigerian Government Officials (Nov. 5, 2007), available at http://www.usdoj.gov/opa/pr/2007/November/07_crm_888.html.

⁴⁵ See *United States v. Head*, No 3:06 Crim. 01380-BEN (S.D. Cal. Sept. 28, 2007).

- In September 2007, Paradigm B.V. entered into a non-prosecution agreement in connection with payments to officials in Nigeria and four other countries pursuant to which it agreed to “pay a \$1 million penalty.”⁴⁶
- On September 3, 2008, a former officer and director of Kellogg, Brown & Root, Albert Stanley, pleaded guilty to DOJ charges that he had conspired to violate the FCPA over a ten-year period. As the head of a KBR predecessor company, Stanley helped manage a joint venture that build liquefied natural gas production facilities in Nigeria. Between 1994 and 2005, Stanley approved payments of over \$180 million to outside consulting firms with the intention that the funds be used to bribe Nigerian government officials to obtain engineering, procurement and construction contracts valued at more than \$6 billion.⁴⁷

VI. MUNDANE CONSEQUENCES OF FCPA VIOLATIONS

Violations of the FCPA’s antibribery provisions may result in the following substantial penalties:

- Criminal penalties of up to \$2 million for corporations and other business and up to \$100,000 for officers, directors, stockholders, employees, and agents. Actual fines may be much higher under the Alternative Fines Act – up to twice the benefit the corrupt payment was intended to elicit. Criminal penalties also include imprisonment for up to five years.
- Financial penalties, brought by the U.S. Attorney General or the SEC, of up to \$10,000 against any firm as well as any officer, director, employee, or agent of the firm, or stockholder acting on behalf of the firm. Additional penalties, including disgorgement of

⁴⁶ Press Release, Dept. of Justice, Paradigm B.V. Agrees to Pay \$1 Million Penalty to Resolve Foreign Bribery Issues in Multiple Countries (Sept. 24, 2007), available at http://www.usdoj-gov/opa/pr/2007/September/07_crm_751.html.

⁴⁷ See <http://www.usdoj-gov/opa/pr/2008/September/08-crm-772.html>.

profits obtained through corrupt business practices, may also be levied in an SEC enforcement action. The U.S. Attorney General or the SEC may also bring a civil action to enjoin any act or practice of a firm that appears to violate the antibribery provisions.

- Debarment from doing business with the Federal government, ineligibility to receive export licenses, and suspension or debarment from the securities business or from certain federal agency programs.
- Private causes of action under the Racketeer Influenced and Corrupt Organizations Act (RICO), or actions under other federal or state laws, which could inflict treble damages.

The brutal cost of the Siemens case is a very good example that must be committed to memory for the proposition that companies that ignore this law only do so at their own peril. No matter what light is held to it, the consequences to Siemens are catastrophic at best. Siemens agreed to pay fines totaling \$1.34 billion to settle the bribery probe.

- Includes \$800 million find for FCPA violations payable to the U.S. Department of Justice and SEC.
- Appointment of a Monitor to sit at Siemens headquarters and oversee its operations and compliance.
- Conducting an extensive internal investigation directed by outside legal counsel.
- Replacing nearly all of its top leadership team, including the CEO and General Counsel.
- Expanding its compliance program to include more than 500 full-time compliance personnel.

- Implementing a process of improvements and remediation efforts costing hundreds of millions.
- Agreeing to an outside Monitor for a period of four years.
- Paying more than \$300 million to outside legal counsel and accounting fees.
- Paying more than \$100 million on documentation collection, review, processing and storage.
- Paying more than \$150 million for remediation efforts by outside PwC consultants.
- Paying \$1.34 billion in fines plus the salaries of 500 compliance personnel.

VII. TIPS TO REDUCE RISKS AND EXPOSURE UNDER THE FCPA IN SUB-SAHARAN AFRICA.

1. **Liaise with culturally competent personnel in the worthwhile endeavor to combat corruption.** U.S. based corporations must first arm themselves with internal controls and be very cautious about local agents and the roles that they are permitted to play. Continuous education of SSA employees in FCPA and other anti-bribery regimes is critical to the effort. Said education must also take place in their native languages in order to bear fruit. A foreign language compliance-training regime may not sufficiently focus on the special problems of SSA and is likely to be doomed from the start.
2. **Pay foreign national employees by U.S. wage standards, which will certainly kill the incentive to engage in corrupt practices.** Additionally, companies operating in SSA need to have in place a proactive, top-down, bottom-up anti-corruption control policy involving tailored to audience training, how employees are rewarded, and their general behavior to address any vulnerability to bribery.

3. **With respect to U.S. expatriates, do not tie financial incentives and bonuses to striking business deals as this represents the “kiss of death” in so many ways.** Seek to develop wages or a pay structure that is based on the amount of work performed and not the size of the prime contract. U.S. based companies doing business in the region must make allowances for constraints inflicted on their associates in SSA and acknowledge that they are playing in an uneven field so that accommodations should be made realizing that they may lose business opportunities to remain compliant with the FCPA.
4. **The U.S. government should work closer with the United Nations to put much more pressure on other foreign governments to enforce anti-corruption laws, etc.** In this regard, the U.S. must add anti-corruption conditions to U.S. trade preference programs, work with the AU to install a full set of shark’s teeth in its convention against corruption, place increased focus in U.S. foreign assistance on anti-corruption technologies, encourage creation of independent organizations with enforcement and prosecution authority (e.g. Economic & Financial Crimes Commission [EFCC] very much feared in Nigeria) and provide additional funding for USAID’s 2005 initiative to empower the local media and civil society in SSA to play a “watch dog” role.
5. **Be watchful or alert to the following “unusual suspects” of fraudulent schemes prevalent in many parts of SSA:**
 - Cash payments or “greasing the wheels” with cash to expedite business transactions has been standard practice in SSA since the colonization of African nations by the Europeans. It is often justified by a saying that the “left and right hand must necessarily wash one another.” Even though most SSA countries are

now attempting to reverse this custom by enacting anticorruption laws and seeking to prosecute violators, the problem remains endemic, posing a high risk for companies doing business there.

- Bribes can be disguised in payments to shell companies – entities with limited or no operations, or limited or no assets that generally lack a bona fide business purposes. Invoices for fictitious services are typically generated and the payments are made to the shell entities in order to pass money to government officials.
- Bribery payments can also be disguised as payments to agents, distributors, vendors, and other third-party intermediaries, who then channel the funds to government officials. Common schemes include payments that exceed the “stated” or “normal” commission rate for similar goods and services, upfront commissions, and “success fees.”
- Bribery schemes can also be masked as charitable contributions. Payments are typically “contributed” to a charity that lacks a bona fide charitable purpose, with the funds later funneled to government officials, or made to a legitimate charity, with some benefit later directed to government officials.
- Bribery can also be masked through fraudulent accounting entries in which payments may appear legitimate in a company’s books and records (for example, as invoices for consulting projects, environmental studies, etc.), though no product or service is actually provided.
- Payments or other benefits offered to relatives, friends and acquaintances of foreign officials in an effort to gain special benefits or obtain new business also violate the FCPA and must be avoided.

VIII. CONCLUSION

The recent increase in FCPA enforcement has been widely noted and available data on trends in FCPA regulatory settlements show conclusively that settlements with a monetary component are much higher beginning in 2008 - present as compared to the period 2004 – 2008.⁴⁸ Enhanced FCPA enforcement is not expected to slow down under the Obama Administration and compliance is now truly a matter of corporate life and death for U.S. and foreign corporations that are subject to the FCPA. Speaking recently at a conference in Frankfurt, Germany, Mark F. Mendelsohn, Deputy Chief of the Fraud Section at the DOJ, provided a list of the Top Ten Trends for 2009:⁴⁹

1. The level of enforcement is at an all-time high and is likely to remain there.
2. Prosecuting senior company executives in their individual capacities will be a priority.
3. The U.S./ will investigate U.S. and foreign issuers equally, as well as companies operating within U.S. territory.
4. Multi-jurisdictional investigations are on the rise.
5. Informal international cooperation will continue to improve, together with increased mutual legal assistance.
6. The DOJ and FBI are committing more resources to FCPA enforcement, including eight full-time, dedicated FBI Investigators.
7. The DOJ will coordinate, where appropriate, sector-wide investigations, as it has in the oil and gas, medical devices and freight-forwarding industries.
8. The pace of voluntary disclosures is likely to continue.
9. FCPA due diligence will be a regular feature of mergers and acquisitions and transactional work.

⁴⁸ FCPA Settlements: It's a Small World After All, available at http://www.nera.com/publication.asp?P_ID=3710

⁴⁹ See <http://wrageblog.org/2009/01/28/fcpa-enforcement-top-ten-trends-for-2009/>.

10. Increased enforcement of other crimes, alongside FCPA violations, is expected, including money laundering, export controls violations and false accounting.

Although SSA presents considerable business opportunities, it also poses tremendous risks to U.S. companies operating in the region of running afoul of the FCPA. Strict FCPA compliance policies are necessary to prevent and/or correct corrupt practices that are likely to result in severe penalties, including huge corporate fines and prison time for individuals who violate the law. An intimate knowledge of the cultural nuances and economic factors impacting the tendency of employees to succumb to the usual temptations in SSA countries, however, is ultimately the key to navigating “grey areas” that pose the most challenges in FCPA compliance in the region.

Despite the growing number of legislative and policy initiatives designed to attract more international investors and developers to SSA, corruption remains epidemic throughout the region. To take advantage of exceptional business opportunities in SSA, while complying with the anti-bribery provisions of the FCPA, U.S. companies must consider the cultural values and economic factors that contribute to the high level of corruption in this region. Without tackling the root causes of corruption, U.S. companies will find it extremely difficult to explore and capitalize on business opportunities in SSA while complying with FCPA requirements. The companies that will ultimately stay out of trouble in this enforcement regime are those much in tune with the localized aspects of the corruption equation. In SSA, corrupt practices are clearly not unconnected to the overall socio-economic variables and related cultural phenomena. Although quite acceptable in SSA, they are nevertheless serious violations of the FCPA, which in the final analysis is what really matters.