

MARK K. NEVILLE, JR.

Foreign Corrupt Practices Act

Ask First?

Last month's column discussed the "pay first" program—importers must ordinarily pay all duties and fees before they can challenge a Customs and Border Protection (CBP) determination in the U.S. Court of International Trade (CIT).¹ This column looks at why it may be smart to "ask first" before embarking on a business venture that could run afoul of the Foreign Corrupt Practices Act (FCPA).²

The FCPA has been in the news a great deal over the past several years, most recently regarding allegations that surfaced in November-December 2013 that some U.S. banks and others may have violated the FCPA by hiring the sons and daughters of prominent Chinese government officials. However, even before the issue of hiring of these "princelings"

arose, the FCPA came into prominence because of the staggering amount—hundreds of millions of dollars in several cases—of various settlements entered with or penalties assessed against persons subject to the FCPA. In the past four years alone, fines assessed have exceeded \$3 billion. Taken together, the increase in (1) number of penalties assessed, (2) their size, and (3) the likelihood that prosecutors will look to individuals suggests to most prudent businesspersons that the FCPA is a potential trap.

FCPA

The FCPA was first enacted in 1977, in a post-Watergate world, with Congress making it unlawful for certain classes of persons and entities to pay foreign government officials to

help them obtain or retain business.³ The FCPA casts a wide net, catching not only all U.S. persons and certain issuers of foreign securities but also, since 1998, all foreign firms and persons if they cause, directly or through agents, an act in furtherance of a corrupt payment to take place within the territory of the United States. In addition to the anti-bribery provisions, the FCPA also imposes strict accounting (i.e., make and keep books and records)⁴ and internal controls⁵ regimes on issuers of publicly traded securities.

The FCPA is a statutory construct the enforcement of which has been so onerous and extreme that only the foolish would rush ahead pell mell without proper reflection. Facing the possibility that conduct might be scrutinized after the fact, what should the businessperson who is looking to enter into commerce with foreign governments do?

Take Advice

First, it makes great sense to consult with an attorney who is experienced in this area of the law. But a practical note is necessary here—most experienced FCPA lawyers are either white-collar criminal defense counsel or SEC enforcement lawyers. Of course, attorneys who are dual qualified in tax and accounting will be able to assist on the accounting questions. This is not an area in which to consult a corporate lawyer or even a trade and customs lawyer, even though some would place the FCPA within the international trade law syllabus.

Institute a Compliance Program

Second, implement an adequate compliance program. Having advised numerous companies on import and export compliance efforts over the years, I am personally all too aware that many companies see the time, expense, and

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effort required to build effective compliance programs as too costly a burden, and one to be either avoided altogether or postponed until the 11th hour when a last-ditch effort is required to salvage an otherwise disastrous turn of events. However, this approach of “we’ve never had a problem and will deal with it when and if it arises” is usually not a smart move.

Any compliance program should be built around the fundamentals in the U.S. Sentencing Guidelines Manual and should include (1) standards and procedures reasonably designed to prevent and detect criminal conduct; (2) senior management and board of directors involvement; (3) exercise of reasonable care to exclude individuals from being in a position to engage in illegal activities; (4) communication of standards and procedures to all relevant personnel and agents; (5) monitoring and auditing procedures; (6) promotion and use of incentives to encourage adherence and discipline violations; and (7) reasonable steps to ascertain

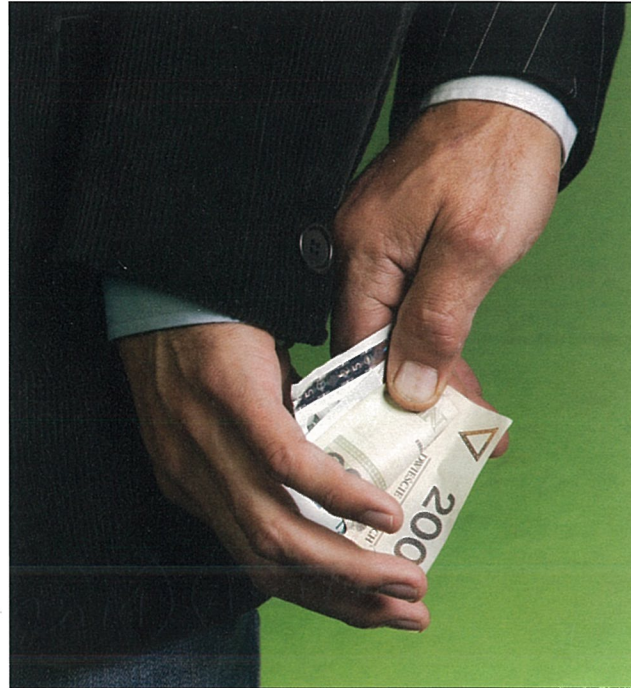
the extent of compliance violations and prevent a recurrence after criminal conduct is detected.⁶

Ask First

With respect to FCPA, where the standards tend to be especially murky, one is often searching for clarity and for a straightforward answer. “Can I go ahead with my deal? Can I hire that person?” Of course, the answer may be, “it depends.”

One option for those searching for an answer to a debatable point is to file an application with the relevant federal agency. Tax professionals are familiar with the process of filing ruling requests with the IRS and other tax authorities. In international trade and customs, requests for rulings or licenses are routinely filed with the administering agencies including CBP, the Office of Foreign Assets Control (OFAC), or the Bureau of Industrial Security (BIS).

Can one formally seek clarity on an FCPA question, i.e., can one actually seek



clearance from the Department of Justice (DOJ)? In the same sense that other agencies allow persons to seek rulings, the DOJ has an administrative program under which a formal opinion can be sought from its Criminal Division.⁷

The DOJ provides for an FCPA Opinion to be issued in response to a request based on specified, prospective—and not hypothetical—conduct. The submission must be in writing and the requesting party must be a person who is a party to the transaction and is subject to the FCPA. The request must be specific and all relevant and material information must be provided. The request must be certified as a true, correct, and complete disclosure of the proposed conduct and the circumstances of the conduct. The effect of an FCPA Opinion is to create a rebuttable presumption that the described conduct is in compliance with DOJ’s enforcement policy.

Although no other agency is bound, and there is an

express carve-out of any effect on an issuer’s accounting requirement, the effect of having a DOJ “pass” is a powerful incentive. The good news for the requesting party is that an FCPA Opinion will eliminate confusion. There is potentially good news at another level in the sense that a “go ahead, no enforcement” clearance will allow the transaction to proceed. But there is also potentially bad news since DOJ may say that some enforcement action cannot be ruled out.⁸

For the public, there is also good news, as the Criminal Division publishes press releases of the Opinions,⁹ just as other agencies (e.g., IRS and CBP) publish their rulings. The body of FCPA Opinion Releases (averaging about three per year) can—and should—be consulted, as they provide a measure of administrative guidance. With that last thought, we come back to the point—on FCPA matters, as in other areas, a wise strategy may be to ask first. ●

¹ See Neville, Jr., “Court of International Trade: Pay Me the Money!,” 25 JOIT 27 (January 2014).
² Codified at 15 U.S.C. sections 78dd-1 *et seq.* For a much more comprehensive discussion of the FCPA, see chs. 19 and 20 of *International Trade Laws of the United States: Statutes and Strategies* (Thomson Reuters/WG&L, 2012), written by Gregory Husisian of Foley & Lardner.
³ Specifically, the anti-bribery provisions of the FCPA prohibit the willful use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to a foreign official to (1) influence the foreign official in his official capacity,

(2) induce the foreign official to do or omit an act in violation of his lawful duty, or (3) secure any improper advantage to assist in obtaining or retaining business for or with, or directing business to, any person.
⁴ 15 U.S.C. section 78m(b)(A).
⁵ 15 U.S.C. section 78m(b)(B).
⁶ Section 8B2.1(b), www.uscc.gov/Guidelines/2013_Guidelines/Manual_PDF/Chapter_8.pdf.
⁷ The Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. sections 80.1 *et seq.*, www.justice.gov/criminal/fraud/fcpa/docs/frgn-crpt.pdf.
⁸ This was true in Opinion 2008-02 (June 13, 2008) when Halliburton was advised that certain conduct relating to an acquisition might be the subject of enforcement activity.
⁹ Opinion Releases are available in both summary (www.justice.gov/criminal/fraud/fcpa/summaries/) and full-text versions.