

Foreign Corrupt Practices Act and International Anti-Corruption Developments 2015 What Do You Need to Know When Representing Individuals

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Overview of FCPA's Anti-Bribery Provisions

- The FCPA's anti-bribery provisions are set forth in Sections 30A, 30B, and 30C of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78dd-1, 78dd-2, and 78dd-3
- In a nutshell, the statute prohibits covered persons and entities from:
 - “corruptly”
 - offering, promising, providing, or authorizing the provision of money or anything of value
 - directly or indirectly
 - to a “foreign official,” a foreign political party or official thereof, or a candidate for foreign political office
 - to obtain or retain business, or to direct business to any person. *See* §§ 30A(a), 30B(a), 30C(a).
- Under the statute, the government has three separate bases for asserting jurisdiction over a person or entity:
 - Section 30A applies to:
 - issuers;
 - foreign issuers that are required to file reports under Section 15(d) of the 1934 Act (*i.e.*, foreign issuers with ADRs trading on U.S. exchanges);

¹ The 2014 Year-End and Mid-Year FCPA Updates, prepared by the firm of Gibson Dunn & Crutcher LLP, were helpful to the author of this outline and provide a comprehensive overview of developments in FCPA law and practice during 2014.

- and their officers, directors, employees, and agents
 - Section 30B applies to “domestic concerns” and their officers, directors, employees, or agents. A “domestic concern” is defined as:
 - a business that is organized under the laws of any state or has its principal place of business in the United States; and
 - any individual who is a U.S. citizen, resident, or national
 - Section 30C applies to any person or entity – even those who are not issuers or domestic concerns – if the person or entity violates the statute “while in the territory of the United States”
- The statute does not apply to “any facilitating or expediting payment . . . the purpose of which is to expedite or to secure the performance of a routine governmental action.” *See, e.g.*, § 30A(b). “Routine government action,” in turn, is defined to include low-level matters such as obtaining permits or licenses, processing visas and work orders, providing police protection or mail services, and providing phone, power, water, and cargo unloading services. *See, e.g.*, § 30A(f)(3).
- The statute recognizes an affirmative defense if:
 - The payment “was lawful under the written laws and regulations” of the foreign country; or
 - The payment was “a reasonable and bona fide expenditure, such as travel and lodging expenses . . . and was directly related to” either “the promotion, demonstration, or explanation of products or services” or “the execution or performance of a contract with a foreign government.” *See, e.g.*, § 30A(c).
- Under the statute, a “foreign official” is defined as any officer or employee of:
 - “a foreign government or any department, agency, or instrumentality thereof”; or
 - a “public international organization” (itself a defined term). *See e.g.*, § 30A(f)(1).
- The FCPA is enforced jointly by the SEC and the Department of Justice.
 - The Department of Justice has sole authority to bring criminal charges for violations of the FCPA; the SEC is limited to bringing civil enforcement actions.
 - In practice, it is common for both agencies to conduct parallel investigations of the same conduct. In a parallel investigation, the agencies typically conduct joint interviews of witnesses and may hold joint meetings with defense counsel.

Although the Department of Justice is prohibited from giving the SEC access to documents that it has obtained through a grand jury subpoena, *see* Fed. R. Crim. P. 6(e), the SEC will generally share documents that it has obtained with the Department of Justice.

- Under longstanding DOJ policy, the Fraud Section in Washington must participate in any case in which criminal FCPA charges are filed. A U.S. Attorney's Office cannot independently bring an FCPA case without participation by the Fraud Section.

Focus on the Role of Attorneys in FCPA Investigations and Prosecutions

- In many FCPA scenarios, it has become common for investigators to examine the role of in-house compliance officers and lawyers. This is perhaps not surprising given the proliferation of compliance programs and the fact that business people may seek to defend themselves by arguing that they were following the advice of compliance or legal professionals. Moreover, in situations where there was a breakdown in the compliance or control environment, the government is often interested in understanding where and why the problems occurred. The focus on lawyers and compliance officers can create legal and strategic challenges, including issues regarding attorney-client privilege.
- In several notable cases from 2014, lawyers were involved in aspects of the conduct that fell under DOJ and SEC investigation.

United States v. Sigelman – defendant's personal counsel becomes a cooperator and secretly videotapes a meeting with the defendant

- In May 2014, the DOJ indicted Joseph Sigelman, the former co-CEO of PetroTiger Ltd., on FCPA charges arising from a scheme to bribe Colombian officials to secure a valuable oil services contract there. *See* Indictment, *United States v. Joseph Sigelman*, Crim. No. 14-263 (JEI) (D.N.J.). As alleged in the indictment, Sigelman conspired with two other PetroTiger executives, Gregory Weisman and Knut Hammarskjold, to pay \$333,500 in bribes to an official of Colombia's state-owned oil company, disguising the payments by directing them to the official's wife based on a purported consulting agreement. *See id.* ¶¶ 7-9. Sigelman was also charged with fraud in connection with a separate scheme to skim moneys from a corporate transaction at the expense of several of PetroTiger's board members.
- One of Sigelman's co-conspirators, Weisman, served as PetroTiger's general counsel and had acted as Sigelman's personal attorney in various matters over the years. During the investigation, Weisman secretly began cooperating with the government. In December 2012, at the FBI's direction, Weisman arranged to meet Sigelman at the latter's Miami apartment to discuss the investigation. Unbeknownst to Sigelman, Weisman was wearing a concealed video camera and the meeting was recorded. During the meeting, Weisman said that he had been visited by the FBI and was frightened. Sigelman responded by asking Weisman to lift his shirt (an unsuccessful effort to see if Weisman was wearing a

wire) and then made a number of relevant statements, including downplaying the allegations and urging Weisman to remain aligned with him. *See* Docket Entry 144, *United States v. Sigelman* (transcript of videotaped meeting).

- After he was indicted (and learned that Weisman was a cooperator), Sigelman moved to suppress the video recording, arguing that its contents were protected by the attorney-client privilege and that the government had violated his due process rights by improperly invading the attorney-client relationship. *See* Docket Entry 75, *United States v. Sigelman* (motion to suppress). At a hearing on December 30, 2014, Judge Joseph Irenas denied the motion to dismiss. *See* 12/30/14 Transcript, *United States v. Sigelman*. In his ruling, Judge Irenas accepted the proposition that Weisman had served as Sigelman’s counsel in the past. *Id.* at 39. However, having carefully reviewed the transcript of the videotaped meeting, the judge found that the communications were not covered by the attorney-client privilege. In Judge Irenas’ words, “I cannot find a shred of indication that Weisman is there with the intention of giving legal advice to Sigelman, or the converse, that Sigelman was seeking legal advice from Weisman.” *Id.* at 40. Judge Irenas also rejected Sigelman’s due process argument, finding that the government did not seek to use Weisman’s “position as having once been attorney for Sigelman to get some advantage in proving the government’s case.” *Id.* at 43.
- The recording of the meeting between Sigelman and Weisman is quite colorful and was the subject of a *Wall Street Journal* article, complete with a still image of Sigelman from the covert video recording. *See* Joel Schechtman, “Secret Videos: Not Just For Drug Busts,” *Wall St. J.* (Feb. 5, 2015).

In re Grand Jury Subpoena – Third Circuit holds that attorney must testify about advice he gave to client about FCPA risks

- In *In re Grand Jury Subpoena*, 745 F.3d 681 (2014), the Third Circuit affirmed a district court decision that ordered an attorney to testify before the grand jury about advice that he had given to his client about FCPA risks associated with a pending transaction. The grand jury was investigating the efforts of a Pennsylvania consulting firm (the “Corporation”) to secure financing from a London-based bank owned by foreign countries (the “Bank”) for oil and gas projects. The Corporation ultimately earned more than \$8 million in success fees for obtaining the financing. In order to obtain approvals for several of the loans, the Corporation allegedly paid more than \$3.5 million to the sister of a Bank official. The sister did not perform any meaningful work for the Corporation. *Id.* at 685.
- When the payments came to light, U.K. authorities arrested the Bank official and his sister, and the FBI commenced a parallel investigation of the Corporation in the United States. During the U.S. investigation, the DOJ served a subpoena on an attorney (the “Attorney”) who was consulted by the President of the Corporation (the “Client”) about the proposed payments to the Bank official’s sister. The DOJ subsequently moved to enforce the subpoena, arguing that the attorney-client privilege did not apply because of the crime-fraud exception. *Id.* at 685-86.

- The district court took *ex parte* testimony from the Attorney in order to determine the applicability of the crime-fraud exception. In the testimony, the Attorney stated that Client told him that he was planning to pay the Bank official in order to ensure that the project progressed swiftly. As described the Third Circuit, the Attorney:

“conducted preliminary research, found the FCPA, and asked Client whether the Bank was a government entity and whether Banker was a government official. Although Attorney could not ascertain given his limited research whether the planned action was legal or illegal, he advised Client not to make the payment. Despite this advice, Client insisted that his proposed payment would not violate the FCPA, and informed Attorney that he would go ahead with the payment. Attorney gave Client a copy of the FCPA. After this communication, Attorney and Client ended their relationship.”

Id. at 685. The Client went ahead and made the payment shortly after the Bank approved the project financing. *Id.* at 692.

- On appeal, the Third Circuit noted that in order to overcome the attorney-client privilege, the party seeking disclosure “must make a prima facie showing that (1) the client was committing or intending to commit a fraud or crime, and (2) the attorney-client communications were in furtherance of that alleged crime or fraud.” *Id.* at 687. Although characterizing the case before it as “close,” the Third Circuit affirmed the district court’s finding that the Client’s communications were not privileged because they were in furtherance of a crime or fraud.
- Addressing the first prong of the crime-fraud test, the Third Circuit emphasized the critical importance of the time at which the client forms the intent to commit a fraud or crime. As the court stated, “[f]or the crime-fraud exception to apply, the client ‘must be committing or intending to commit a crime or fraud’ *at the time* he or she consults the attorney.” *Id.* at 691 (quoting *In re Grand Jury*, 705 F.3d 133, 153 (3d Cir. 2012)) (emphasis added). “The exception does not apply where the client forms the intent to engage in criminal or fraudulent conduct *after* the consultation.” *In re Grand Jury Subpoena*, 745 F.3d at 691-92 (emphasis added). Applying this standard, the court held that the record supported the district court’s finding that the Client intended to commit a crime at the time of the consultation with the Attorney. The court relied on Client’s immediate statement to the Attorney that he was going to make the payment, along with the fact that the Client went ahead and made the payment soon after the financing was approved. *Id.* at 692.
- With respect to the second prong of the analysis, the court noted that “the legal advice must be used ‘in furtherance’ of the alleged crime,” emphasizing that it had previously “rejected a more relaxed ‘related to’ standard.” *Id.* (citing *In re Grand Jury Investigation*, 445 F.3d 266, 277 (3d Cir. 2006)). Elaborating, the court stated that “the advice must advance, or the client must intend the advice to advance, the client’s criminal or fraudulent purpose. The advice cannot merely relate to the crime or fraud.” *Id.* Turning

to the facts of the case before it, the Third Circuit upheld the district court's finding that the Client used the Attorney's advice "in furtherance of" a crime. The court noted that the attorney's questions about whether the Bank was a government entity and the Bank official was a government employee "would have informed Client that the governmental connection was key to violating the FCPA. This would lead logically to the idea of routing the payment through Banker's sister, who was not connected to the Bank, in order to avoid the reaches of the FCPA or detection of the violation." *Id.* at 693. The Third Circuit acknowledged that the record did not reveal whether in fact the Attorney's advice did in fact inform the Client's actions, but stated that the district court's finding was not an abuse of discretion.

- In January 2015, after the Third Circuit's decision became final, the grand jury indicted defendant Dmitriy Harder on FCPA and other charges. Indictment, *United States v. Dmitriy Harder*, 15-cr-00001-PD (E.D. Pa.). The indictment identifies some of the entities described in the Third Circuit opinion and provides additional detail about the alleged bribery scheme. For instance, the indictment identifies the "Bank" as the European Bank for Reconstruction and Development ("EBRD") a public international organization, and the "Corporation" as Chestnut Consulting Group, Inc.²

Avon Products – DOJ/SEC focus on lapses by in-house counsel and other control functions

- The recent settlement of DOJ and SEC enforcement actions against Avon Products illustrate the risk that investigators will focus on breakdowns in legal and other internal control functions as they examine the facts that give rise to an FCPA violation. In the *Avon* case, the government alleged (and Avon stipulated) that China-based officials of the company "engaged in a routine practice of giving things of value to Chinese government officials" and falsifying records of these transactions, all in furtherance of Avon's business objectives. *See United States v. Avon Products, Inc.*, Deferred Prosecution Agreement at A-7 - A-8 (Dec. 15, 2014).
- The government further alleged that Avon employees, "including high-level executives, attorneys, and internal auditors," learned about this conduct and did not take steps such as "ensuring that the practice was halted, disciplining the culpable individuals, and implementing appropriate controls." *Id.* at A-9. Instead, according to the stipulated statement of facts, the employees "took steps to conceal the significant concerns raises about the accuracy of Avon China's books and records and its practice of giving things of value to government officials." *Id.* The statement of facts goes on to describe, in detail, the omissions and failings of the lawyers and other internal control functions at Avon after they learned about the practices in China. *Id.* at A-19 - A-23.

² For further detail on the Third Circuit decision, *see* Joseph Boryshansky, Nicole Sprinzen and Stanley Woodward, "Circuits are Split on Crime-Fraud Exception's Reach," *New York Law Journal* (Feb. 9, 2015).

DOJ's Use of Alternative Legal Theories in Cases Presenting Corruption Issues

- Notwithstanding the breadth of the FCPA's statutory language, the DOJ occasionally encounters a fact pattern that raises anti-bribery concerns but falls outside the boundaries of the statute. In several cases in 2014, the DOJ demonstrated its ability to prosecute such conduct by making use of other portions of the federal criminal code.

United States v. Elgawhary – mail fraud, money laundering, and tax offenses

- In 2014, the U.S. Attorney's office for the District of Maryland charged Asem Elgawhary with receiving bribes from several companies, including Alstom S.A., to steer them business from Egypt's state-owned electricity company. Indictment, *United States v. Elgawhary*, 14-cr-0068-DKC. As alleged in the indictment, Elgawhary was an employee of Bechtel, the U.S.-based conglomerate, and was assigned to work as the General Manager of an Egyptian entity called PGESCO. PGESCO, a joint venture involving Bechtel and Egypt's state-owned electricity company, played a key role in soliciting bids and awarding contracts for the Egyptian electricity company.
- According to the Indictment, Elgawhary solicited and received more than \$5 million in bribe payments from several different industrial companies, including Alstom. However, because Elgawhary worked for Bechtel, his conduct would appear to fall outside the FCPA and the government did not charge him with violations of the FCPA. Instead, the government pursued several different theories against Elgawhary, including: (a) mail fraud, on the theory that Elgawhary deprived Bechtel of its right to his honest services; (b) money laundering in relation to machinations that Elgawhary undertook to hide the bribe payments; and (c) tax offenses relating to Elgawhary's false declarations to the IRS regarding his overseas bank accounts. *See id.* In December 2014, Elgawhary pled guilty to all three of these crimes. Docket, *United States v. Elgawhary*, 14-cr-0068-DKC.

United States v. Portillo – money laundering conspiracy

- In 2009, the U.S. Attorney's Office for the Southern District of New York indicted Alfonso Portillo, the former President of Guatemala, on money laundering charges. As alleged in the indictment, Portillo embezzled millions of dollars that belonged to Guatemala and laundered the money through complex financial transactions so that he was able to use it for his own benefit. Indictment, *United States v. Portillo*, 09 Cr. 142 (RPP). Some of the money was said to have been a bribe payment from the government of Taiwan in exchange for Guatemala's continuing diplomatic recognition of Taiwan. As a foreign government official, Portillo was not subject to the FCPA; money laundering afforded the U.S. Attorney's office an alternative theory of prosecution.
- In 2010, Portillo was taken into custody in Guatemala. Three years later, he was extradited to the United States to face the charges in the S.D.N.Y. In 2014, he pled guilty to money laundering conspiracy and was sentenced to 70 months' imprisonment. Docket, *United States v. Portillo*, 09 Cr. 142 (RPP).

United States v. China and DeMeneses – conspiracy to violate the FCPA and the Travel Act

- In 2014, the U.S. Attorney’s Office for the S.D.N.Y. indicted two individuals – Benito China and Joseph DeMeneses – on charges arising from their work at a New York-based broker dealer that provided fixed income trading services to BANDES, the state economic development bank of Venezuela. Indictment, *United States v. China et al.*, 14 Cr. 240 (DLC). In the indictment, the government alleged that the defendants participated in a scheme to pay millions of dollars in bribes to an official of BANDES to obtain securities trading business for the broker-dealer. On December 17, 2014, China and DeMeneses pled guilty to conspiracy to violate the FCPA and the Travel Act. Docket, *United States v. China et al.*, 14 Cr. 240 (DLC).
- Although the allegations in the indictment would seem to establish a fairly straightforward violation of the FCPA, the government chose to indict the defendants on additional theories including the Travel Act, 18 U.S.C. § 1952. Over the years, the Travel Act has occasionally been used to prosecute commercial bribery (i.e., situations where the bribe is paid to a representative of a private company as opposed to a foreign government official), but the structure of the statute is complex and the proof requirements can be onerous. In the *China* and *DeMeneses* case, it is not clear why the government invoked the Travel Act, as the conduct seems to fall within the FCPA.