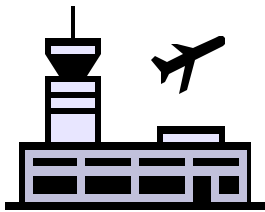


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USE THE INTERNET, GO TO JAIL:

SOME NEW PROBLEMS ARISING FROM THE TECHNOLOGY OF THE INTERNET IN INTERNATIONAL BUSINESS TRANSACTIONS: *THE FEDERAL CORRUPT PRACTICES ACT*



Most business people are already aware that their use of the internet creates unique problems as to the issue of legal jurisdiction. Assuming someone in Germany opens your web page you created in your main office in San Francisco and orders a product for delivery in their branch office in Egypt, and assuming you ship your product from your warehouse in Mexico and it arrives defective in Cairo...what law applies and where can you be sued?

Indeed, what law will apply to determine if you have breached your contract or violated some warranty? If the product is illegal to purchase in Egypt but perfectly legal in Germany and the United States, have you violated the law by shipping it? Is the fact that your web page can be read anywhere in the world enough to subject you to the jurisdiction and protective laws of wherever it is opened?

These are not minor problems. Criminal penalties can be faced as well as religious and ethical problems that go to the very core of national belief. For example, alcohol may not be purchased in some countries but is perfectly legal here. Your web page may offer a Saudi teenager the ability to order products that would have him arrested if you fill the order. Equally troubling, your own teenager could conceivably order hashish from some of the former Soviet Republics by clicking on a mouse. Have they broken the law? Has he?

The internet has made every business person with a website a business engaged in international business, like it or not. You have a website? Rest assured that someone in India and China, Peru and Indonesia will be reading your business promotional pieces within the year...and possibly wanting to buy. Indeed, your web page probably reaches more people in India than the local merchant in New Delhi can reach with his newspaper ad but without a website! It is appropriate if not realistic for the local government to attempt to police your

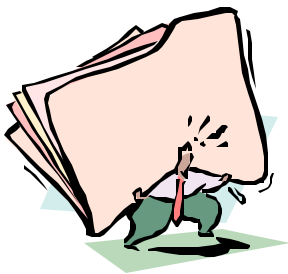
actions since you are now reaching their citizens directly...but equally appropriate for you to resist their attempt to control your business since you have never "entered" their country nor is their government one you have elected. Clearly a conflict between contrary interests has arisen which must be resolved as the internet is available to more and more people.

But while these issues will take decades to work out as the various jurisdictions from New York to Kenya, from Lithuanian to China hammer out how to develop universal criteria, there is one remarkable area of the law in which the reach of the internet and consequent international implications of transactions now brings to American business people a critical problem that has confronted international business lawyers for decades: **The Federal Corrupt Practices Act ("FCPA" or "The Act")**.

The Act imposes upon American citizens both criminal and civil liability. If certain proscribed acts are undertaken *abroad* to influence a governmental official, either directly or indirectly.

What makes it dangerous for the American business person is that the FCPA is *sui generis*. It is a domestic criminal law that applies extraterritorially to United States citizens and companies to prohibit bribery of foreign government officials in a foreign country. It does not apply to the foreign national who may or may not be violating their domestic law: *but it does apply to you, in your office, back in California if your foreign colleague, consultant or agent acts in the proscribed manner. You, not the agent, are liable for his or her acts.*

You have to know the Federal Corrupt Practices Act.



THE LONG ARM OF UNITED STATES LAW

Enacted in the seventies due to the various scandals that arose when local governments were bribed by various international corporations anxious to obtain contracts, the Act was at first far more extreme than it now is. Once, even if it was legal to make a payment in the foreign locale, one could be charged with a crime in the United States. Indeed, even if one specifically directed one's agent not to make the payment, one could be liable.

Congress backed off from the extremes in the various amendments to the Act but the Act still can punish you severely if you or your local agent or local “consultant” or “expert” in a foreign locale “helps” your matter along by any form of benefit transferred to a local government official.

The penalties are severe. Penalties for nonintentional violation of the antibribery provisions for an individual can be a fine of two hundred and fifty thousand dollars or double the gross gain or loss from the unlawful activity, whichever is greater. (For a corporation, the fine is much higher.) Further, a company cannot indemnify its individual agent for the fines levied.

For Intentionally violating the Act, an individual can be fined up to \$100,000 per violation, face a civil penalty of ten thousand dollars for each such violation, *and be imprisoned for five years.*



The antibribery provisions seem quite simple: They make it unlawful for any entity which is a domestic concern, or person acting within the United States to “corruptly” make any offer, promise, or payment, or “authorize” the payment of anything of value to a foreign official or his or her family, or to use a local agent who you have reason to know will make such a payment or promise, for the purpose of influencing official action or inaction. See the FEDERAL CORRUPT PRACTICES ACT. (Pub.L. No.95-213, 91 Stat. 1494 (1977) as amended by Title V of the Omnibus Trade & Competitiveness Act of 1988 Pub. L. No.100-418 Sections 5001-03, 102 Stat. 1415 (codified as amended at 15 U.S.C. Sections 78m(b)(2), 78m (b)(3), 78dd-2, 78ff), as amended by the International Antibribery and Fair Competition Act of 1998, Pub. L. No.105-366, 112 Stat. 3302 (Nov. 10, 1998.)

Note that the Act does not apply to the foreign officials or to the local agent who are, of course, outside the jurisdiction of the law. It applies to you and your company if the company is in the United States. Thus, your local agent can be acting without threat of sanction while you, perhaps not even knowing that the bribe is being offered, may be facing severe penalties.

The problem arises due to the fact that what may be good, indeed, necessary business methodology to have a transaction proceed in Nigeria may be considered a crime in the United States. And you may face substantial civil and criminal penalties even if you did not directly authorize the act...indeed, even if

you did not know the action was going to be undertaken. Your business license, your reputation...even your freedom may be at risk.

What is “knowing” that a violation of the Act is occurring such that you are liable? The amended statute provides that a “person’s state of mind” is “knowing” if “such person is aware that such person is engaging in the proscribed activity or that such proscribed activity is “substantially certain to occur” or if such person “has a firm belief” that such circumstances exists or that such a result is substantially certain to occur.” So if you know the bribe is going to occur or if you believe it is probably going to occur...you have probably violated the Act.

The “official” bribed must be either governmental or part of an international agency and the Act does not apply to low level bribes for the low level types of bureaucratic facilitation so often required in many nations. What is low level? While the FCPA provides no per se limitations on the size of the low level payments, if you or your agent are paying over one hundred dollars, you are probably in trouble.



A present to the family of an administrator who is likely to hear your bid in Xian or Nairobi is not only a good idea, it may be necessary to have your bid heard at all. Absent such a present, your bid will languish while your Korean or South African competitor will get a hearing. Your local agent will automatically arrange such a gift and is likely not even to mention such an obvious task to you. It would be equivalent to you attending a retirement dinner for a local official. “No big thing,” and “It’s done all the time; the way we do business.” While local Chinese or Kenyan law may “prohibit” the gift, such prohibitions are seldom if ever enforced and Chinese or Kenyan agents who fail to make such a gift will have a very unsuccessful career in business in that country.

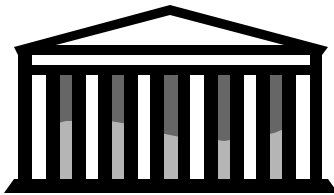
But assuming that someone such as this author told you that in China or Kenya such gifts are usually required (thus you “know”) and assuming the gift was not di minimus, such a gift is a crime in the United States and you are guilty of it if you knew or should have known that your agents (to wit your local sales agents) were likely to do it...even if you did not directly authorize the action and even if you did

not know it was being done. Even payments to a family member of the government official are banned by the Act.

How likely is prosecution?

Most cases stem from complaints by ex employees or competitors to the Department of Justice. The Department of Justice has thus far prosecuted three dozen cases but it has, at any one time, approximately sixty five to eighty active cases under investigation. Recently there has been an upsurge in investigations as companies had to lay off executives and they have become “whistle blowers.”

United States companies, vying in competition against foreign competitors who routinely bribe their way into lucrative contracts, have desperately lobbied Washington to force other governments to enact similar laws with varying success. While many nations have finally passed the laws (not all) most have yet to enforce them with any vigor and in certain jurisdictions, to enforce the restrictions would stop all bid process all together given the paltry compensation that governmental administrators receive from their own governments. The sad fact is that many departments abroad exist by this defacto “tax” on the businesses that are applying for market share...a “tax” that it is illegal for you to pay...or to even allow your agent to pay even if he has not told you.



WHAT YOU CAN DO?

The government has created excellent checklists and guidelines for businesses to use to attempt to limit their liability by instructions to their local agents. These “safe harbors” are created to assist businesses in avoiding the ramifications of the Act. Equally useful are “red flags” that the government has listed which, if present, are usually held to constitute notice to you. The web site for the Department of Justice can lead you to those checklists and the web address is: www.usdoj.gov/criminal/fraud/fcpa

But the real problem lies with understanding the unique nature of the legal and business system that you are working in and having some frank and careful discussions with experienced legal counsel and experts.

Our own office often confronts such issues in our international matters and we have made it a practice to create an instruction letter that both confirms the types

of acts that locals will engage in and specifically lists the restrictions of the Federal Corrupt Practices Act and instructs local agents that under no circumstances are they to violate the Act. A copy of the letter is kept in the file and placed in our office safe.

That solves the problem for your exposure, perhaps, and avoids the FCPA danger. But what does that do to the bid? Can you still get the business without following the local custom of bribery?

You really have no choice...for to violate the law exposes you to such penalties that no business can be worth the price. The challenge you face is to develop a business plan that complies with the law. The United States government is working day and night to convince other nations to actually pass and enforce their own version of the law and has had remarkable success precisely because of its power in the world...Most nations now have passed such laws...but whether they will enforce them is another matter indeed...but at least you now have the option of reporting violating foreign competitors to their own governments! And if their government takes no corrective action, the Department of Justice wants to hear about it...check out their website above.