

III

The Foreign Corrupt Practices Act: What To Do When There's A Problem -- Who Should You Be Talking To and When?

Three Things:

1. Immediately upon receipt of a Letter of Inquiry (either from the foreign country or an agency in this country) conduct an internal investigation;

Note: Place a “litigation hold” on all relevant documents including computer and e-mail files and all hard copy correspondence and memos; collect, organize, and hold all accounts and financial records.

Note: Identify and interview all involved persons – attempt to discern any individual conflicts that might necessitate that an individual obtain separate counsel representation – may be that corporation will be obligated to pay for counsel fees. It



would be useful, however, to try and stay on the same page with individual's counsel i.e., corporate counsel and individual counsel should work in concert when possible.

2. Confirm Specific Conduct and Applicability of Any/Every Affirmative Defense.

Note: As stated above, the FCPA is a “specific intent” crime, so before a violation can be found, there has to have been a determination that a payment was knowingly made to a government official with the intent to influence a business decision.

Note: The FCPA allows for several limited, specific exceptions and affirmative defenses. If the facts of any such defense applies to the conduct that occurred, the match can be highlighted for government's counsel, and need for further investigation may be able to be obviated. The affirmative defenses are:

- A. “Facilitating” payments exception (so-called “grease” payments) – to expedite or secure performance of routine governmental action – unconnected to the award of new business or extension/re-authorization of pre-existing contract – specific facts here are critical.
- B. Promotional or marketing expenses (i.e., money spent to demonstrate and introduce company products) are acceptable, – but issues re: how much, when, and where the “marketing” was done become important.
- C. Payments lawful under Foreign laws. As noted above, if the country that you're in says that you can make a specific payment to one of that country's government

officials, then you can do so without violating the FCPA. Walk that line carefully – instances are few, and when present, must be part of *written law* of the country to qualify, (i.e., “standard/common” practice – even if true, won’t qualify)

Note: In addition to those affirmative defenses, political contributions can also be made – without violating the FCPA – but only where the *written law* of the country specifically allows for such contributions.

True charitable donations are also allowed, but such will almost certainly be carefully scrutinized by investigators to assure bona fides.

Note: Upon completion of Internal Inquiry, review initial findings and conclusions with General Counsel and consider raising with your Board to determine next best step for corporation (i.e., approach and attempt resolution with government, seek assistance of outside counsel) and most appropriate course(s) for any affected officer, employee, and board member (i.e., necessity of separate counsel).

3. If Internal Inquiry Identifies Apparent Problem or Grand Jury Subpoena/Target Letter Is Issued, It’s Time to Talk To Outside Counsel

Note: Receipt of subpoena/target letter is trigger event that starts important clock ticking. Confirms empanel of Grand Jury and focus of investigation on corporation – obviously significant (e.g., requires disclosure in public disclosure reports). Timely, proper response to inquiry and initiation of discussions with government counsel critical so if you

haven't decided to go outside before, this would be a good time to do so.

Note: Fresh eyes with sensitivity to your business issues, familiarity with federal statutes and experience/background in federal criminal investigations are critical necessities. There are lots of smart lawyers, but if your inhouse people don't have that specific experience – e.g., negotiating and dealing with the government in this area of law enforcement, you won't benefit the corporation by having them do this work.