

Zen & The Art of Legal Networking

INSIGHTS & COMMENTARY ON RELATIONSHIP BUILDING WITHIN THE INTERNATIONAL LAWYERS NETWORK

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Corporate Breakout Session - Anti-Corruption Laws - the FCPA

[Yesterday](#), I shared with you this post re-capping Alishan Naqvee's introduction to the topic of anti-corruption at our 2011 Annual Meeting.

To follow up on that, we'll review [Stuart Gerson's \(Epstein Becker & Green\)](#) comments during the session regarding the Foreign Corrupt Practices Act (FCPA) and its implications for those in the room.



Stuart provided the attendees with both [an article he and a colleague authored on the FCPA](#), and [an overview that their healthcare group](#) had developed. Stuart said that as Alishan had mentioned, both the FCPA and the new UK Anti-Bribery law are extraterritorial - but not only are they applied overseas throughout the world, but they are also applied against non-US citizens, as long as the commerce that they're supporting is in the stream of interstate commerce within the US.

So non-US citizens who have never stepped foot in the US are subject to the FCPA, which is a criminal statute that has long jail sentences associated with it. Additionally, they have fines up to \$2 million per offense - and an offense is an individual act, so there could be a long series of them that results in the fines adding up to immense sums. And this is applicable all around the world.

Stuart said that in terms of US companies, their operations are increasingly international, and there are whole new sectors that are going international. For example, healthcare is an area that is increasingly going international, where companies are dealing with officials in foreign countries all over the world, because most countries have state-owned or operated healthcare systems to a complete, or somewhat less, degree.

What do you Need to Know About the FCPA?

For US companies, there are two agencies involved:

- The criminal division of the Department of Justice is the enforcement agency.
- For public companies, they are responsible for filing reports with the SEC

Stuart said there is a tremendous due diligence engine that goes along with this, and will be replicated in the UK as their statute takes hold. There's a need to investigate the forwarders and middle men that companies use to facilitate business on the ground in other countries. That's where there will be opportunities for ILN members to work together.

Stuart also wanted to dispel some of the myths that the US law is somehow more lenient than other laws. The fact that it's being applied against not only companies, but also against directors and officers, who are going to jail, ought to dispel much of the rumor that the US may be a little more lenient. However, there is no regulatory body to determine what the law means, so it's left in the hands of criminal prosecutors to determine, as well as litigation to determine what this statute means. This is very high risk litigation for the companies and individuals who are the defendants.

There are several areas where this is important:

- Stuart alluded to Alishan's mention of the Safe Harbor section of the FCPA that is nominally provided for so-called facilitating payments, or grease. These are small, in theory, payments intended to get some official to do his job - not to give you anything extra or get you favoritism. However, in recent cases, the defense that the company was only paying facilitating payments has been rejected by the courts.
- The other area of litigation and dispute under the FCPA is who is a "foreign official?" The answer is that it's virtually anyone - if a person is an inspector at an airport, or an office worker who works for a private entity that contracts to the government of a third country, the US courts are going to hold that that person is a foreign official, subject to being bribed under the FCPA.

What Does it All Mean & What Do You Need to Do?

First, there is obviously great risk - there's a statute that can be applied and is being applied throughout the entire world. We're coming into a new legal moral climate, which started in the US. Stuart commented that the attendees had seen the numbers of how many entities feel that they've been hosed by others through bribery and corruption. During the Carter administration in

the 1970's, the questionable payments issue came to the fore with regard to helicopters being purchased by Middle Eastern countries. The US Congress put its foot down and amended the FCPA to be more stringent. But it's only in the last few years that the Department of Justice has been going full bore. So there's huge risk.

Stuart said that because of the risk, attorneys should be paying attention. Epstein Becker is urging their clients and spending a lot of time with them to put compliance programs in place. They're doing a lot of due diligence for companies in the mergers & acquisitions area to determine the kind of risk, who they're employing overseas, and what they've looked at, to try to gain the ability to have a defense.

He used the example of a medical device client of his who was recently selling to various Middle Eastern companies. The client was using a facilitator who was a relative of the king, and they thought they were safe. They paid him a salary, because he had a job, but he was rewarding members of his family and got the company in a great deal of trouble because their due diligence wasn't thorough enough.

So Epstein Becker & Green is often working with consultants, putting together due diligence background investigation programs, doing things to minimize risk and educate their clients and the people that they're contracting with overseas.

Stuart added that when you get into litigation, under US law and likely under the UK Bribery Act, there is document discovery. So you have to think about where your documents are located, and why they're located there. There is an increasing amount of document creation work and electronic discovery and document processing being done offshore in India - the labor costs are cheap and the labor force is competent, so a lot of work is done there. Stuart also mentioned that Japan is a very good country to do document processing in, because the laws of Japan as to obtaining information are very good from the standpoint of withholding information.

These are the sorts of things that lawyers should be thinking about in advance on behalf of their clients - where are their documents located, what are their risks, how do they plan for those risks, and in the worst case, how do you alert companies to call an attorney when they get in trouble to negotiate with the authorities in the respective countries.

Following Stuart's comments, the group heard more about the new UK Bribery Act from Charles Wander, which I'll cover in a separate post.

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