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Foreign Corrupt Practices Act: 'Defenses' That Don't Work

By Aaron G. Murphy

Every U.S. company — or foreign company listed on a U.S. exchange — has to comply with the Foreign Corrupt Practices Act ("FCPA"). In its least nuanced form, the FCPA prohibits giving anything of value to a foreign official for the purpose of obtaining or retaining business or securing an unfair business advantage.

Many business people complain that the rules are often different in foreign countries. They say that many places are inherently corrupt, that officials have certain expectations and that failure to meet those expectations can damage their business. While this may be true, companies subject to the FCPA have no choice but to avoid corrupt practices. The U.S. government has collected billions of dollars in FCPA fines over the past few years, with no let up in sight. Protecting your clients requires saying "no" to certain practices that your clients might argue are routine.

Here are several of the most common FCPA "defenses" clients offer that are not defenses at all, and how you can quickly deflect them:

"Everyone else does it. What are we supposed to do-just shut down our business?"

The simple answer may be: "Yes." A more clever corollary to this defense goes something like this: "Every competitor pays bribes just to be able to bid or have a fair shot at getting business. And if everyone pays, how is it that I am getting an 'unfair advantage' as required by the FCPA? All I'm doing is leveling the playing field." Clever perhaps, but too cute

by half. You can gut this argument with the old preschool adage that "two wrongs don't make a right."

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Indeed, one of the leading FCPA cases states: "The fact that other companies were guilty of similar bribery...does not excuse [the company's] actions; multiple violations of a law do not make those violations legal or create vagueness in the law." *U.S. v. Kay*, 513 F.3d 432, 442 (5th Cir. 2008).

The whole purpose of the FCPA is to fight international corruption. Using the fact of systemic corruption as a basis to excuse compliance with the FCPA turns the law on its head. Don't let your clients talk themselves into this inverted way of thinking.

"But we've always done it that way. I assumed someone must have signed off on it."

This excuse is offered by the new manager who arrives overseas to find a practice already in place. When it turns out the practice violates the FCPA, the manager simply says she was just following protocols already in place when she got there. But failing to cast a critical eye on

existing processes and procedures is no excuse.

In these cases, the best a manager can hope for is that she will be seen as negligent or ignorant of the business and the law in such a way as to excuse her from criminal responsibility. But being viewed as a negligent manager does not do a lot for a manager's long-term career, nor does it help the company, which is responsible for the conduct of the business in any event.

Even worse is the situation where a manager suspects the practice is problematic, but does nothing to look into it. In that case, a manager may be charged with "willful blindness."

Willful blindness is the careful - essentially intentional - avoidance of information that would confirm what is already suspected. Efforts to maintain plausible deniability by refusing to "learn" the last fact or two that would confirm that



Aaron G. Murphy is a partner in the Los Angeles office of Latham & Watkins. This article is adapted from his recent book "Foreign Corrupt Practices Act: A Practical Resource for Managers and Executives," published by John Wiley & Sons.

an illegal act is occurring will not insulate a manager or her company from liability. Willful blindness is the same as knowledge for FCPA purposes. Tell your clients to be critical, even of processes and procedures that predate them.

“The [foreign] government knew what was going on and approved it. How can that be a violation of U.S. law?”

This is a loose corollary to actions that are actually permitted by the FCPA. The FCPA allows any act permissible under the written laws of the country where the act occurs. But this “written laws defense” is of almost no real value because no country has written laws that permit bribery. It should go without saying that if the actual exclusion written into the statute is of no practical value, its much looser, unwritten cousin is of even less value.

The idea that a bribe is legal because a foreign official accepted a payment overlooks the fundamental nature of bribery transactions: It takes two to tango.

You cannot have a successful bribery transaction without a foreign official accepting the bribe, but the fact that the official accepted does not mitigate the liability for the bribe. This defense conflates the corrupt official with the foreign government writ large. Officials who accept bribes are not making a policy statement on behalf of their government. Indeed, in most cases the official’s actions are illegal in their country, and they know it. That they may not get caught or that such transactions are widespread, does not render them any less illegal.

“It wasn’t bribery-it was extortion!”

This defense is usually offered when an official issues a threat along with a request for a bribe. Generally, the threat is aimed at the business and not at the personal safety or health of the employee.

Claims of extortion in the bribery context are essentially claims that the business was a victim of a foreign official’s criminal conduct (“He told me he would throw our bid in the trash if I didn’t pay him. I had no choice!”). But such claims confuse the crime of extortion with the more general criminal defense of “duress.” In almost all FCPA cases, neither extortion nor duress will work as defenses. To use either, the bribe payer will generally have to show that the threat from the government official was so significant that the payment amounted to an involuntary act. That will never be easy to do.

The duress defense requires the threat or use of physical force sufficient to cause death or serious bodily injury. This is why the bank teller who unlocks the safe when there is a gun to his head and allows the bank robber to escape with the money is not himself guilty of bank robbery. The teller’s actions were made under duress-that is, without free will-and he cannot be held responsible for them. Similar facts rarely arise in the bribery context.

Similarly, few threats in the extortion context will be so severe or immediate that they will operate to excuse bribery. Put another way, you may well be the victim of some mild form of extortion by a government official, but that fact alone does not excuse you from your own criminal act of violating the FCPA.

“Extortion” of a bribe can happen many ways. Perhaps you already have a contract to sell goods to a foreign government and just before the contract comes up for renewal an official comes to you and says he will choose your competitor unless you agree to refund three percent of the contract price to him. Or perhaps your factory is having tax problems and a local tax official tells you that your tax problems will be dealt with informally (rather than being elevated to the enforcement bureau in the capital), but only if you agree to purchase certain raw materials from a

business she (or her relative) happens to own.

Obviously, neither example involves a threat of sufficient immediacy and severity that a payment to either official could be described as involuntary. Moreover, in both examples, the individual employee is not extorted because the employee can simply walk away. There might be a business consequence to the company, but there is no consequence to the employee.

The only historical example where extortion is discussed as a possible defense is in the FCPA’s legislative history. In that example, a foreign military unit threatens to blow up an oil rig unless it is paid off. But so few real-world bribes are paid on an oil rig faced with dynamite, or under similar circumstances, that extortion and duress are of no practical value as FCPA defenses.

Cutting through the hyperbole that surrounds the FCPA will allow you to focus clients on the much more difficult issues raised by the FCPA. The world is an uneven playing field and U.S. businesses are held to a higher standard. The quicker you can focus your clients on that, the quicker you can find solutions and defenses that do work.