

ENFORCEMENT OF FCPA ABROAD

Juan M. Arocena¹ and Gonzalo Oliva-Beltrán²

FCPA

As reported by the US Department of Justice, during some SEC investigations in the mid-1970's, over 400 US companies admitted having made questionable or illegal payments in excess of \$300 million to foreign government officials, politicians, and political parties.³ Some identify the Watergate scandal as the event that triggered these and other investigations and resulted in the enactment of the Foreign Corrupt Practices Act (FCPA). In 1977, the US Congress passed the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system.

The FCPA criminalizes payments made to foreign officials to secure business, and applies to: (i) issuers (i.e., companies with securities registered with, or required to make filings with, the SEC); (ii) domestic concerns (US companies and US citizens or residents); and (iii) foreign persons acting within US territory. In particular, the FCPA prohibits the payment, offer or authorization of payment of money or anything of value to a foreign official for purposes of influencing any act or decision or securing an improper advantage to obtain or retain business.

As the Department of Justice clearly explains, following the passage of the FCPA Congress became concerned that American companies were operating at a disadvantage compared to foreign companies who could pay bribes and even deduct the cost of such bribes as business expenses on their taxes. For that reason, in 1988, Congress directed the Executive to negotiate in the Organization of Economic Cooperation and Development (OECD) the agreement of other countries to enact legislation similar to the FCPA. In 1997, almost ten years later, the United States and thirty-three other countries signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁴

The OECD Anti-Bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions. It is the first and only international anti-corruption instrument focused on the person paying the bribery instead of receiving it.⁵

Although Argentina is a signatory to the OECD Anti-Bribery Convention, has specific legislation

¹ Partner at Rattagan Macchiavello Arocena & Peña Robirosa (Argentina)

² Senior associate at Rattagan Macchiavello Arocena & Peña Robirosa (Argentina)

³ Available from: <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> [Accessed June 2, 2010]

⁴ Available from: <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> [Accessed June 2, 2010]

⁵ Available from: http://www.oecd.org/document/20/0,3343,en_2649_34859_2017813_1_1_1_1,00.html [Accessed June 2, 2010]

dealing with Ethics in the Public Function and even has an Anti-Corruption office depending on the Federal Government, its record in this aspect is quite poor. Corruption cases are investigated for years and very few end up in actual convictions.

According to the Transparency International Progress Report 2009, there is only one major foreign bribery case in Argentina brought in 2006 and still under judicial investigation; and eight pending prosecutions or judicial investigations allegedly related to domestic bribery (the first of which was filed in 1994).⁶

The OECD has produced Phase 1 and Phase 2 review reports on Argentina regarding implementation of the Anti-Bribery Convention (www.oecd.org), after which they declared that *"The Working Group is also seriously concerned about systemic deficiencies in the overall framework for the investigation and prosecution of foreign bribery and related offences. This is in particular because of lengthy delays in getting to a decision due to, among other things, the applicable rules of procedural law"*.⁷

Outside counsel's aid in compliance

Outside counsel based in the foreign country where a US Company is acting, or where the issuer subject to the FCPA is located, could play a very important role in avoiding FCPA sanctions.

In most cases, offences to the FCPA take place when employees of branches, subsidiaries or issuers interact with local government officials, in the belief that they are acting in accordance to "local" practices (that could not possibly be understood by US regulators or their US parent companies) and beyond any possible control from US authorities due to the remoteness of their location.

Local outside counsel representing the US companies shall be very active in training local employees, translating FCPA concepts, and helping in-house counsels to identify red flags in their activities in the foreign jurisdiction.

The following are only some examples of how some FCPA concepts should be read in the light of Argentina's business reality:

(i) Foreign Official

The FCPA definition of the term "public official" is very broad. It includes any officer or employee of

⁶ Transparency International, 2009. *Progress Report 2009 – OECD Anti-Bribery Convention*. 3rd edition. Berlin: Transparency International.

⁷ Available from: http://www.oecd.org/document/62/0,3343,en_2649_34859_40938494_1_1_1_1,00.html [Accessed 2 June 2010]

a foreign government or any department agency, or instrumentality thereof, including private companies owned by the state, or any other person acting in an official capacity⁸.

In this respect, it should be noted that the Argentine private and public sectors are deeply intertwined.

Reversing the privatization, de-regulation trends and market-oriented policies of the 1990s, since 2002-2003 the Argentine government has played an ever increasing role in the economy, both by incrementing regulatory and subsidy activity and by taking direct ownership of enterprises. Companies that had been privatized or given in concession returned to governmental control, such as the Argentine Post Office (*Correo Argentino*), the water utility company for the city of Buenos Aires (AYSA) and the flag carrier airline (*Aerolíneas Argentinas*). The nationalization of the pension system in late 2008 brought about the disappearance of private pension funds administrators (known as AFJPs), and the stock portfolios held by those companies on behalf of future pensioners were transferred to an agency of the Argentine Government dealing with pensions (ANSES). Therefore, all of a sudden the Argentine government became an important (although not controlling) shareholder in a number of companies throughout many industries.

As many tariffs were frozen since about 2001, companies in the electricity, gas and public transportation sectors started to depend heavily on subsidies granted by the government. As the government became concerned with inflation, the subsidy scheme was also extended to non-regulated sectors, in exchange for commitments not to increase market prices of products.

The Argentine government has undertaken a number of infrastructure works with international private contractors (such as pipeline and energy plant construction). Many of these works were managed and financed through trust funds under governmental control, and involved the intervention of government-owned banks (such as *Banco de la Nación Argentina*, which acted as trustee) and regulatory agencies. These structures came under question when a large tax-evasion and overpricing scandal came to light regarding construction of major gas pipelines.

In 2007 a new agency of the federal government was created (ONCCA), in order to supervise and control the flux of agricultural exports from Argentina.

Merger control processes have become much more bureaucratic and cumbersome, and the average time to obtain approval for a transaction from the federal merger control agency (*Comisión Nacional de Defensa de la Competencia*) has grown several-fold. Moreover, through legislative changes this agency has been placed under closer control of the Executive, and in some cases

⁸ This definition is, by and large, coincident with the definition of “public official” under Argentine administrative and

political influence seems to have played a decisive role in the merger approval process, outweighing strictly technical analyses.

The above are but a few examples of the large influence of the Argentine government and its agencies over the economy in general and, in particular, of the many points of contact with foreign companies doing business in Argentina, which may give rise to FCPA concerns.

(ii) Anything of value

The FCPA very broadly prohibits giving "anything of value" to a foreign official to obtain an unfair competitive advantage.

No matter what is normally believed, in Argentina there is no institutionalized gift-giving practice that could in any manner justify delivery of valuable goods or services to government officials.

(iii) Obtain or Retain Business

The FCPA prohibits payments made in order to assist the firm in "obtaining or retaining business" for or with, or "directing business" to, any person. The term encompasses more than the mere award or renewal of a contract and it should be noted that the business to be obtained or retained does not need to be with a foreign government.⁹

Formally, relatively few industries depend on governmental permits or authorizations to operate, such as the broadcasting industry, airlines, banks and financial institutions. However, the existing bureaucracy makes it almost impossible to carry out any business between private parties, without the need to deal at least to some extent with government.

(iv) Improper payments by Third Parties

Another area of aggressive FCPA enforcement concerns improper payments by third parties; and business leaders can not shield their companies and themselves from FCPA liability by relying on foreign subsidiaries, agents and business partners if they knew or should have known that all or a portion of the payment will be passed on to a foreign official.

Although in Argentina there is no particular industry where the use of "consultants" can be considered significantly more common than in others, such intermediaries have been found in several corruption cases where they were used to channel bribery payments or to create artificial expenditures through false invoices, among other fraudulent schemes.

(v) Mergers & Acquisitions

public law, as interpreted by legal scholars and by opinions of Argentina's Attorney General.

When conducting a due diligence of acquisition in an international transaction, the acquiring party should bear in mind that the mere change of ownership is not considered a waiver of any liability under the FCPA. Thus, specialized advisors, knowledgeable of local practices, may be critical in identifying possible contingencies.

Conclusion

Local outside counsel, with experience in dealing with FCPA claims, may provide valuable input as to how local employees should be trained and local “business practices” should be dealt with, in order to reduce any FCPA risk of the US company entering a foreign market. Based on their experience and familiarity with local law, business environment and practices, this counsel may also be instrumental in identifying FCPA-sensitive areas in connection with a particular country, industry, local market or even within a specific company, and therefore provide precious help to the foreign company in its assessment of new business or with its day-to-day compliance efforts.

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⁹ Available from: <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> [Accessed June 2, 2010].