Fox Rothschild Podcast

The Presumption of Innocence Podcast Series: Episode 5

Doing Business Overseas: The Foreign Corrupt Practices Act:

Featuring Matthew Adams and Joseph DeMaria of Fox Rothschild LLP

Adams: Hi everyone, and welcome to "The Presumption of Innocence," a podcast brought to you by the White-Collar Criminal Defense and Regulatory Compliance Practice Group at Fox Rothschild. I'm your host, Matt Adams, and I'm one of the co-chairs of the practice.

Today, I have the great pleasure of being joined by my friend and fellow Fox partner Joseph DeMaria. Joseph is based out of our Miami, Florida office. He's a former federal prosecutor and a member of our practice group. Today, we're talking about the things you need to know, if you do business overseas, about the Foreign Corrupt Practices Act (FCPA).

There's a lot to unpack, Joe, so let's dive right into it. What exactly is the FCPA? As I see it, it's unique among federal statutes in the fact that it gives federal prosecutors jurisdiction over conduct that happens offshore. But talk to us about it in a general sense.

DeMaria: In essence, you're right, but let's back it up. First of all, what is the FCPA? It's a bribery statute, or what we call a bribery and a kickback statute. So, let's talk about bribery in general. It's the oldest crime in the books. It's back in the Old Testament, the New Testament, you name it. It's been here for as long as humankind has existed.

The FCPA came on board in 1977, and it's important to understand what led to the FCPA. The United States is no different than any other society. It's been subject to issues of bribery ever since we've existed. At a state and federal level, over time, the governments put in laws to criminalize bribery to try to put a stop to it because of the anti-competitive aspect of bribery. If two different companies are trying to obtain a government contract, for example, or a health care contract, and one of the companies pays a bribe and gets an advantage, then that's an unfair field. They want to make it an equal field for all competitors. That, in general, is where you get the notion of anti-bribery laws.

You also have it as part of public corruption. A lot of government money comes out of government contracts, and the notion is, you shouldn't be paying a government official to get a contract. So, we get to the late 1970s, and after the Nixon administration ended and during the Watergate investigation, they found that among many other crimes during that administration was the crime of foreign bribery. American companies were paying bribes primarily to foreign governments, because in the foreign spectrum that's where the contracts come from. Whether it's energy or mineral extraction or construction or transportation, those big contracts worth a lot of money were being bid out by the foreign governments and the American companies – at least some American companies – were paying bribes. The notion was that was anti-competitive, and that one American company was getting a leg up on another American company by paying a bribe.

Congress during the Ford administration passed the FCPA law to prohibit foreign bribery. It focused on two aspects. First, the actual criminalization of bribery, which is prosecuted by the Department of Justice, focuses on what's called a domestic concern. Either a domestic company or an individual – an American or a person with a green card – somebody who has a domestic touch into the U.S. If it was a foreigner bribing a foreign government, that's not going to be an FCPA. It's got to be something that touches the United States. The other aspect of the FCPA was that if you were a company on a stock exchange or otherwise had to file public reports regulated by the SEC, if you had a foreign bribery and you didn't report it, that would be a violation. So, the FCPA has both direct violations for those who participate in foreign bribery as well as reporting violations. That's how it started.

Adams: Can you think of another federal statute that criminalizes conduct that happens offshore?

DeMaria: The only other ones, I think, are in the post-9/11 era, which are the anti-terrorism laws, because there is a notion in our Constitution of extraterritoriality. The Supreme Court, in particular, has been careful to say that we don't want Congress criminalizing or even legislating outside the borders of the United States because of rules of what they call the Commerce Clause. If we do it to a foreign country, then the foreign countries are going to want to do it to us. So, in general, we tend to try to limit our criminal legislation to within our borders. However, there are circumstances where they cross the borders. I think the clearest case is after 9/11 and the fight on terrorism, which then also led to an expansion of money laundering laws, which, as you'll see in our conversation, has an effect on the FCPA. I think in those two areas, we've gone beyond the territory of the United States.

Adams: Now, talk to us a little bit about the penalty structure. The FCPA is a civil and a criminal statutory mechanism. Talk to us about what kind of penalties the government has at its disposal for enforcement.

DeMaria: Let's first talk about it from the standpoint of the SEC and the Department of Justice. If they're looking at a company that has violated their reporting requirements, you're going to get significant fines against the company and possibly even the imposition of what's called a monitor if they think that the conduct is so egregious that they need to have an independent person monitoring the activities of the company.

What happened was, during the Bush administration, there was an infamous case arising out of the Enron crisis where an accounting firm, Arthur Andersen, was prosecuted and that company failed. That was one of the Big Four, and it failed. The government since then has been reluctant to go directly after companies and take them down for this kind of activity. Instead, what they'll do is, they'll end up imposing significant fines at the company level. That's one level, a company.

At the individual level, you have two aspects. They don't typically come after the individual from the SEC level. They come after him from the Department of Justice level, and that's where they're going to prosecute you. Then, the prosecution has two components: You have the going to jail component – the incarceration – and then you have a very aggressive use of the forfeiture laws to basically disgorge the money that was earned through the payment of the bribe, as well as the extra profit that was earned through the payment of the bribes. There's both a financial

consequence as well as the incarceration consequence for the individual. At the company level, it tends to be the money. There have actually been some federal judges who have been critical of that, because they say it's the shareholders who end up paying because the value of the company gets diminished. Whereas the bad guys who committed the acts need to be prosecuted individually.

We can get into that a little bit later and you'll see how the Biden administration has addressed that. But for the most part, individuals face incarceration and forfeiture, and companies face a substantial fine and potential for a corporate monitor.

Adams: I do want to touch on, Joe, some of what you just hit on about the use of this tool by the current administration. But I want you to just unpack, for a moment, the concept of bribery. What's the difference between paying a bribe, the illegal conduct, versus, for example, something less than a bribe?

DeMaria: It's a very good question. The law distinguishes between bribery and kickbacks on the one side, which are illegal, and gratuities, which are not. So, let's start with that. Under the FCPA, the payment of a gratuity is not illegal. What is a bribe or a kickback? It has to be, with the notion of the Latin words, *quid pro quo*: this for that – which is why I tell you this is the oldest crime known and goes back to the Romans. What it meant was, "I'm giving you something in return for you giving me something." There has to be at least a tacit or an implicit agreement. It doesn't have to be expressed.

Let's say you're the government official who is going to be awarding a transportation contract in a foreign country. I go to you and I'm wanting that contract, and I happen to give you something for it. I give you a payment for it. If there's that tacit agreement, the quid pro quo, that's what turns it into a bribery.

Now, the Department of Justice has detailed FCPA guidelines for taking somebody on a trip, taking somebody to dinner, giving somebody tickets to a show. There's a whole industry of compliance now under the FCPA of what one can do and what one cannot do without crossing a line. But there is a difference between a gratuity, which is not illegal, and a bribe or a kickback – quid pro quo – which is illegal.

Adams: Sounds to me like when you're looking at this this issue, you're definitely going to be looking at a lot of circumstantial evidence as opposed to direct evidence of quid pro quo. As opposed to, "Hey, we went to dinner and it just so happened we talked about business and thereafter the deal got done."

DeMaria: That's true, except you would be amazed how many people convict themselves through their emails. I'm involved in an FCPA case presently where the government basically made the case based on the WhatsApp messages. WhatsApp is one of those apps where you're supposed to be able to have encrypted conversations and can be used foreign and domestically. The whole idea is you don't save your conversations. You don't archive them. On the case I'm involved in, which has to do with bribery in Latin America, the individuals involved in the bribery kept their WhatsApp messages. When they came into the United States at Miami International Airport and Fort Lauderdale Airport, customs used a pretext to get access to their phones. Then they downloaded the phones and they had the messages, and they made the

case based on the messages. You'd be surprised at how many people save messages that implicate them in a bribery scheme. So, it's not purely circumstantial.

Adams: You've given us a great overview of the FCPA as well as some of the penalties that can flow from it. Talk to us a little bit now about what you're seeing in terms of this shift. We're a little over a year into the Biden administration. How is the Biden administration using the FCPA as part of its overall enforcement goals and approach? Is it unlike prior administrations, or is it sort of a continuation and outgrowth of what we saw in the past administration?

DeMaria: To understand what the Biden administration is doing you have to understand what preceded the Biden administration. Prior to the W. Bush administration, the FCPA was a dormant statute. It was used, but it was not a significant prosecution tool. The fraud section was a small group of lawyers.

In the Bush administration, you had some major financial crises in the WorldCom and the Enron debacles. Then, it started to expand beyond that into foreign bribery. You also had some pretty notorious countries like Venezuela, for example, which became very prominent when the government basically turned into a kleptocracy, as well as some other governments. So, starting in the Bush administration, the fraud section was built up to focus on FCPA, a combination of some individual prosecutions, but much more corporate fines and corporate monitors. In the Clinton administration, which preceded Bush, they realized that in prosecuting only American companies, they were anti-competitive versus the foreign companies that were bribing a foreign government. The Clinton administration put a lot of pressure on the U.N. to expand the anti-bribery laws so that other countries would have anti-bribery laws. The problem is, they weren't really enforcing them.

Now we get to the Bush administration, and they start enforcing them more, and they build up the fraud section by the end of the administration. The Obama administration follows that. The Obama administration became very aggressive at the company level in seeking really significant fines – hundreds of millions, billions of dollars in fines. But here's the lead up to the Biden administration: with the Trump administration in between, FCPA went down again. The criticism of the Trump administration is that they weren't really prosecuting white-collar crime as much.

Now you get to the Biden administration. Biden, of course, was part of the Obama administration and saw the criticisms of only getting money from companies and that there should be a focus on individuals. And that's where the Biden administration has come in. The Deputy Attorney General announced at a recent ABA function that the focus is not only going to be on a company. They don't want to destroy the company like Arthur Andersen was destroyed. What they want to do is put pressure on the company to put pressure on the individuals to get guilty pleas and prosecutions. So, the Biden administration is now taking it a step beyond what the Obama administration had done. They want to focus on putting individuals in jail. That's the current paradigm of FCPA.

Adams: Let's talk about the regional dynamics at play when it comes to the FCPA. You talked a little bit about Latin America. You're based in Miami, so there are just natural synergies that flow from Latin America to your practice. But when I think about the world economy, I think about Latin America, I think about China, and I think about Russia.

How do we compare and contrast the use of the FCPA as it relates to Latin America versus China and Russia?

DeMaria: The biggest problem with the FCPA… and let's not forget the use of the money laundering statutes as a component of an FCPA prosecution. Let me address that. The FCPA allows you to prosecute a domestic individual who pays the bribe, but it doesn't allow you to prosecute the foreign individual who accepts the bribe. The foreign government official was not subject to FCPA prosecution. However, most of these foreign individuals, one way or the other, implicate the U.S. banking system. They either get the bribe in dollars and it runs through the U.S. banking system, or they send some money up to Miami and buy some real estate, or they buy some companies. So, the government decided some years ago that the way we're going to get the foreign officials is for money laundering.

So, if you're paying a bribe in pesos or in euros or in other currencies and you don't come to the United States, the foreign officials can't be prosecuted. But, if you use dollars or put your money in the United States, you can be. You now have the FCPA and the money laundering statutes working hand in hand, and you need the cooperation of the foreign governments, to some extent, to be able to make these prosecutions work.

In Latin America, they've been successful in the Southern District of Florida, the Eastern and Southern Districts of New York and the Southern District of Texas with Venezuela, Ecuador and other Latin American countries. Because of the U.S. relationship in South America, they get the cooperation they need.

They've not had the same success when it comes to China or Russia. What tends to happen is, they don't really get them so much for the FCPA in those countries, but they get them for money laundering. Once the Russian oligarch starts to move his money around and it comes to the United States, that's when they get him on the money laundering. But they don't get him as much on the FCPA because they're not getting the cooperation they need from those governments.

Adams: And an interesting development: I saw reported that the Department of Justice stated its first FCPA opinion procedure in two years. For those listening, the FCPA opinion procedures allow U.S. companies to basically get the Attorney General's judgment on whether certain conduct is in line with the enforcement policies or not. An unknown requester wrote to the Department of Justice in October of 2021. They sought an opinion from the Justice Department as to whether the agency would intend to bring an enforcement action under the anti-bribery provisions of the FCPA if the requester was to make a “ransom-like payment” to a third-party intermediary.

When I read this development, Joe, my mind went immediately to Russia. It went immediately to cybersecurity issues. It went immediately to ransom attacks that are very prevalent and largely initiated out of China and Russia. Much to my surprise, the department concluded, “Based upon the specific facts presented by the requester, the proposed payment would not trigger enforcement action under the anti-bribery provisions of the FCPA because the requester would not be making a payment ‘corruptly’ or to obtain or retain business.”

This gets right at the heart of that analysis that we were talking about at the outset with the difference between a gratuity and a bribe. This is necessary to keep going with your business because you have to free up your resources that may have been attacked in a ransomware attack or something like that. But what are your thoughts on that guidance from the DOJ?

DeMaria: Well, I was involved in a case in which the Chiquita Banana Company had its banana farms in Colombia, and the territory that it was in was being overrun at certain points from the leftist guerillas known as the FARC. At other times, they were overrun by the rightist guerillas known as the AUC. Each time they were overrun, the guerrillas would come in and make a demand for ransom and would say, “If you don't pay us ransom, we're going to burn your banana plantation and we're going to kill your people.”

So, at one point, Chiquita, an American company out of Ohio, went to the Department of Justice. This was back in the Bush administration. They said, “Look, we're being squeezed to pay ransom. This is extortion. If we pay this, are you going to prosecute us?” Kind of similar to the scenario you just described, but with a little bit more twist to it. It wasn't just financial: They were threatening to kill Chiquita employees. The Department of Justice and the Bush administration said, “We cannot give you clearance to do that.” Well, Chiquita went on and did it anyhow. And then, lo and behold, the Department of Justice prosecuted them for doing it and got a $75 million fine out of them. Then they got sued here in Florida by the victims of all these killings in Colombia and they've been involved in litigation for the last 10 years.

So, the moral of that story is, I don't know how confident I would be, especially with an FCPA opinion, because maybe it doesn't violate the Foreign Corrupt Practices Act technically, but there are a host of other laws that might be violated by the payment of a ransom payment, which could support a money laundering prosecution. Because if you violate a foreign law with a ransom payment and then you move the money to the United States, which is, of course, where the money comes after you sell your bananas, you now have a money laundering prosecution. I wouldn't be really confident if I were general counsel for a company that the Department of Justice tells me it's okay to pay a ransom. They have changed their mind in the past and then you end up getting in the crosshairs of the DOJ investigation and/or civil lawsuits.

Adams: Well, it just goes to show, Joe, that these areas are far from black and white. There's lots of shades of gray, lots of factual analysis, that needs to be carefully considered when companies doing business overseas are making decisions about how to conduct themselves in those foreign environments.

Let's shift gears for a second to the prevention and compliance. Now, with recent guidance from DOJ about the existence of compliance programs as a way to mitigate against criminal prosecution, it strikes me as something that's critically important in this area. I know at our firm we do a lot of work on the compliance side as a proactive approach to trying to curb enforcement action against our clients. What are the keys to effective prevention and compliance as it relates to FCPA for U.S. companies doing business overseas?

DeMaria: The key is, if you're going to implement a compliance program, then you have to follow the compliance program. There's nothing better than implementing a good compliance program and following it. That will give you great protection with the Department of Justice.

There's nothing worse than acting as if you implemented a compliance program, but then turning the blind eye to the bribery when your compliance program picks it up.

The devil is really in the details of compliance. It's easy to get a compliance program. There's a whole industry out there of law firms and experts that can come to your company. I've put in compliance programs for companies, and they can do that. But then the question is, once the program is in place and now all of a sudden compliance picks up that some salesperson in a foreign country or some consultant is involved in a shady deal, do they look the other way, or do they really follow their compliance? The key is, if you're going to do it then you've got to really do it, or don't do it at all because the Department of Justice thinks nothing is worse than claiming that you do it and then not really doing it.

Adams: It strikes me, too, that when it comes to the companies that are large enough to be operating internationally, you probably have lots of levels of employees. How do you most directly and effectively communicate to your sales force, your rank-and-file, your people who are boots on the ground, to ensure…It's assumed, I guess, that the executives may not be making these decisions, and if they are, they probably belong in jail. But if you have tentacles that spread internationally and that rank-and-file workforce is out there on the ground, what's the best and most effective way to communicate to them so as to insulate the company from potential liability down the road?

DeMaria: Well, first of all, there are multinational companies that are involved in a lot of foreign business activity, and they have very sophisticated compliance programs. They have very sophisticated internal counsel and compliance directors and external firms. The first hint they get of an FCPA issue, they know how to jump on it, get the documents, interview the people. Through that process, they know how to educate their people and their workforce and their consultants.

You'd be surprised at how many small companies are involved in foreign investments. For example, Miami is a very entrepreneurial town, and we have a lot of small companies that are involved in foreign investments. They may be a 100-employee company. They're the ones that are probably in more danger than the multinational companies because they don't have the budgets, nor do they have the experience, in having a sophisticated compliance program. What I've seen is, the multinationals … they pretty much know the rules. It is the smaller companies that are involved in foreign business activity that need to be educated and protect themselves.

Adams: Let's take another hard pivot to: The response. Assume for a moment that, inevitably, this type of issue is going to pop up for a company doing business overseas. What does the response look like from the company, its counsel, in the immediate aftermath of being informed that there's an investigation underway?

DeMaria: Well, the one thing that the company should not be doing is running off to the Department of Justice. There's always this notion that if we get to the Department first and tell them we did wrong, they're going to treat us well. Here's the problem: If you haven't done your internal investigation first, if you haven't really found out what the true facts are, you could be hurting yourself much more by running in too soon.

So, the very first thing is, you don't want to be running to the Department of Justice. Let's say you get information that somebody in the sales force was involved in illegal activity in a foreign country. The very first thing you have to do is jump on it. Get the facts, get the documents and get the emails and analyze it. Have somebody who's qualified to analyze do that analysis and not just run off to the Department of Justice and self-report.

I would say that after you've done the analysis and found out how far up the chain it went, then I think you would decide what your next strategy is and make that decision about when to go to the Department of Justice and self-report. That is a big factor in how it ends up getting resolved. But don't run off too quickly. Do your investigation the right way, at first.

Adams: Joe, I can't thank you enough for being with us today. I think one of the key takeaways is that the modern global economic structure really requires some sophisticated legal guidance. We at Fox Rothschild have the resources and the experience to be able to help companies of all sizes navigate these global challenges.

My main takeaways from our conversation today, Joe, are that there really are shades of gray when it comes to what is a bribe versus a gratuity; that having a compliance program is great, but actually carrying it out and actually following it is the real struggle; and finally, when the response to the investigation comes around, if inevitably that does knock on your doorstep, you really need to dig in and do your homework before you run in and try to self-report. There could be hidden landmines that exist within the company that could really come back and hurt you badly.

With that, I want to thank you once again. Thank you all for joining us today. See you next time on the “Presumption of Innocence.” If you do encounter any of these types of issues with your foreign activities, please give us a call. I think today's conversation just demonstrates the global reach of our practice and our ability to navigate the most sophisticated challenges of modern commerce.