Deconstructing "Agent" under the USA Foreign Corrupt Practices Act and its impact on doing business in Nigeria.

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The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business[1].

Introduction and Background

Corruption is a global problem. The Organisation for Economic Co-operation and Development (OECD) estimates that the cost of corruption equals more than 5 percent of the global Gross Domestic Product (GDP), with some US$1 trillion paid in bribes each year.[2] The World Economic Forum reports that corruption increases the cost of doing business by up to 10 percent.[3]

Paying foreign officials for expediting legal processes or obtaining contracts was not unheard of amongst American businesses for many years and even well

[1] The United States House of Representatives, 1977. Retrieved from <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/houseprt-95-640.pdf> on 13-09-21.
[2] Opening Remarks at the International Bar Association (IBA) Anti-Corruption Conference 2013 delivered by the OECD Secretary General, Angel Gurria
Retrieved from: <https://www.oecd.org/about/secretary-general/11th-annual-international-bar-association-anti-corruption-conference.htm> on 4 October 2021
[3] Retrieved from: <https://www.oecd.org/competition/50350066. pdf> on 4 October 2021

into the 1970s with a number of Corporations writing off bribes as regular business expenses when filing annual returns. This did not however make the practice either desirable or ethical.

The aftermath of the Watergate Scandal led to several political reforms within the United States. The allegations of corruptions surrounding US officials connected with the administration of President Richard Nixon spurred the US' Securities and Exchange Commission to conduct an investigation into the allegations of foreign corruptions involving US businesses and persons. The investigations revealed that U.S. Officials had spent hundreds of millions of dollars bribing foreign officials to secure businesses abroad. These circumstances led to the enactment of the US Foreign Corrupt Practices Act.

Overview of the Foreign Corrupt Practices Act of 1977 (FCPA)[4]

The purport of the FCPA is to prohibit the making of corrupt payments of money or giving of 'anything of value' to foreign public officials in exchange for obtaining or retaining business or directing business to a third party. Companies may also violate the FCPA if they give money or gifts to third parties, such as an official's family members, as an indirect way of corruptly influencing a foreign official. The objectives of the FCPA include safeguarding the reputations of US businesses abroad and maintaining public confidence in the integrity of markets.

The term "*anything of value*" in the FCPA has been broadly construed to include not only cash or a cash equivalent, but also gifts, use of materials, facilities or equipment, training and education, entertainment, meals and drinks, transportation and cancellation of debt.

The involvement of intermediaries does not insulate companies from FCPA violations, since it is a violation of the FCPA to make a payment to *a third party* knowing or firmly believing that all or part of the payment or thing of value will be offered or provided to a foreign official. Knowing is defined under the Act to include a conscious disregard and wilful blindness.

The Key Provisions of the FCPA

The FCPA has both Anti-Bribery and Accounting Provisions. The Anti-Bribery provisions apply to issuers of publicly traded securities registered pursuant to *Section 12(b) of the Securities Exchange Act of 1934*, US citizens or residents and businesses that have their principal place of business in the US or foreign entities who engage in any act in furtherance of a corrupt payment while in the US territory.

The FCPA defines a foreign official to be an officer or employee of a foreign government, whether high or low in rank. It also includes employees of any foreign state-owned enterprise and a foreign political party, party official or candidate, as well as officials or employees of

[4] 15 U.S.C. §§ 78dd-1

public international organizations or any person acting in an official capacity on behalf of any department, agency, or instrumentality of a foreign government.

A defendant must act corruptly to fall under the provisions of the Act with an intent to wrongfully influence the recipient or to assist any person in the company in obtaining or retaining a business. The bribe does not need to have been completed to be in violation of the Act, so long as it was offered or authorized, then it can be surmised that there was a corrupt intent behind it.

The Act provides a narrow exception for '*grease payments*' made to facilitate or expedite the performance of a routine governmental action[5]. Often, there is always a thin line between facilitation or grease payment and bribe. The thin line could be blurred even when such payment is routine. The size of the payment is not determinative of whether it is a facilitation payment, but the law views larger payments as more likely to have a corrupt intent. In 2004, a Swiss offshore drilling company, recorded payments to customs agent in the subsidiary's 'facilitating payment' account even though company personnel believed the payments were, in fact, bribes. The company was charged with violating both the FCPA's anti-bribery and accounting provisions.[6] Every payment made must be accurately recorded in the company's books and records.

The FCPA provides two affirmative defenses. The 'local law defense' and the 'reasonable and bona fide expenditure defense'. Under the local law defense[7], a defendant may prove that the bribe was legal under the foreign country's written laws. The reasonable and bona fide expenditure defense applies to business-related expenses, such as a foreign official's travel and lodging, if directly related to the demonstration or performance of a company's services. The defendant must establish that the payment was lawful under the foreign country's written laws and regulations at the time of the offense. The fact that bribes may not be prosecuted under local law is not generally sufficient to establish the defense. In practice, the local law defense arises infrequently, as the written laws and regulations of countries rarely, if ever, permit corrupt payments. Nevertheless, if a defendant can establish that conducts that otherwise fall within the scope of the FCPA's anti-bribery provisions was lawful under written, local law, s/he would have a defense to prosecution.

The FCPA's accounting provisions require issuers to keep accurate books and records in a reasonable level of detail and to devise and maintain adequate internal accounting controls sufficient to provide reasonable assurance that the company's policies are followed and that

[5] For companies also doing business in the United Kingdom, the making of facilitation payments is barred by the UK Bribery Act.

[6] *United States vs. Vecto Gray Control Inc and anor*. 15 U.S.C. §§ 78dd-2, 78dd-3.

[7] In the *United States vs. Kozeny*, the defendant unsuccessfully sought to assert the local law defense regarding the law of Azerbaijan. The court ruled that the defendant could not invoke the FCPA's affirmative defense because Azeri law did not actually legalize bribe payment.

the company's books and records are accurate. This way, corporations are unable to conceal bribes in their accounts or use corporate funds for wrongful purposes.

The Securities and Exchange Commission (SEC) and Department of Justice (DOJ) have the responsibility of enforcement under the Act. While the DOJ has criminal enforcement authority, the SEC has civil enforcement authority. In practice, most FCPA investigations are settled and do not usually lead to a court conviction. FCPA settlements often require the subject corporation to pay criminal and civil penalties amounting to millions of dollars. The DOJ and SEC consider several factors when deciding whether to initiate or resolve corporate investigations under the FCPA.

Applications of the FCPA

Every U.S. company that operates abroad must have a compliance program that reinforces anti-corruption standards and seeks to prevent violations of the FCPA before they occur. Performing due diligence on business partners, agents and other third parties for whom a U.S. company or issuer could be held vicariously liable is one of the most import aspects of an FCPA compliance program. A breach of the provisions of the FCPA will lead to the imposition of heavy fines. Companies that violate the FCPA also run the risk of being prohibited from doing business with the US government. FCPA investigations often drag on for years and may consume the resources of key company personnel, disrupt a company's operations, and cause serious reputational harm to the company[8].

'Agents' Under the FCPA: Who Are They And What Are Their Roles?

Certain persons – both artificial and natural – are subject to the FCPA jurisdiction. The US' Congress limits the categories of entities and individuals subject to the jurisdiction of the FCPA. The following entities or individuals are liable to penalties for wrongful conduct(s) under the FCPA: (1) U.S. citizens/nationals and residents; (2) foreign persons who violate the provisions of the FCPA while in the US; (3) companies that have issued publicly traded securities in the United States or have reporting obligations under the US' Securities Exchange Act; (4) companies organized under the laws of, or with their principal place of business in, the United States. In the last two of the categories, the FCPA jurisdiction is extended to U.S companies' officers, directors, employees, **agents** and stockholders acting on the companies'

[8] On the 8 January 2021 the Securities and Exchange Commission announced charges against Deutsche Bank AG for violations of the FCPA. It was found that Deutsche Bank had engaged foreign officials, their relatives, and their associates as third-party intermediaries, business development consultants, and finders to obtain and retain global business. As part of coordinated resolutions with the SEC and the Department of Justice, Deutsche Bank agreed to pay more than $120 million, which includes more than $43 million to settle the SEC's charges. Release No. 90875 and Release No. 4201 of January 8, 2021. Case Number 04-cv-06909

behalf. It does not matter where the violation of the FCPA provisions occurred – it could be within or outside the US.[9]

Unfortunately, the FCPA does not provide a definition for "agent". However, the DOJ and SEC appear to have incorporated the doctrine of agency in the interpretation of the term since the legislative history of the FCPA appears to suggest that the Congress might have intended third-party intermediaries engaged to pay bribes to foreign officials. The determination of who an agent is through the prism of agency examines the presence or purported presence of **control** by parent companies over their oversea subsidiaries and their officials or persons hired by the subsidiaries to deliver in their names and/or parents. The Resource Guide to the US' FCPA (second edition) notes that:

> "The fundamental characteristic of agency is control. Accordingly, DOJ and SEC evaluate the parent's control — including the parent's knowledge and direction of the subsidiary's actions, both generally and in the context of the specific transaction — when evaluating whether a subsidiary is an agent of the parent."[10]

The implication of the above is that once a subsidiary is found to be an agent of its parent, the subsidiary's conduct and knowledge are imputed to the parent under the doctrine of *Respondeat Superior*.[11] Also, the conducts of the subsidiary's staff, consultants and/or agents in the course of their employments or engagements which violate the provisions of the FCPA are attributable to the subsidiary and by extension to the parent under the doctrine.[12] Thus, agents under the FCPA include subsidiaries of US Companies, consultants, distributors, joint-venture partners, lawyers and any other intermediary between a parent company or subsidiary and a third party. A corporation will be held vicariously liable for any crimes their employees or agents commit anywhere in the world while acting within the scope of their employments. It does not matter if the employee or agent was high ranking and/or was specifically instructed not to engage in the wrongful conduct.

In October 2020, the Securities and Exchange Commission (SEC) announced charges against the Goldman Sachs Group Inc. for violations of the Foreign Corrupt Practices Act (FCPA) in connection with the 1 Malaysia Development Berhad (1MDB) bribe scheme[13]. According to the SEC's order, beginning in 2012, former senior employees of Goldman Sachs used a third-party

[9] 15 U.S.C. §§78dd-1, 778d-2.
[10] The United States' Department of Justice, "The Resource Guide to the US' FCPA, Second Edition", online: US Department of Justice < download (justice.gov) > at page 28 (accessed on 30 September 2021)
[11] Ibid at 27 to 28.
[12] See, *In the Matter of Alcoa, Respondent,* Release No. 3525, (Jan. 9, 2014).
[13] Retrieved from: <https://www.sec.gov/enforce/sec-enforcement-actions-fcpa-cases> on 13-09-2021.

intermediary to bribe high-ranking government officials in Malaysia and the Emirate of Abu Dhabi. The company agreed to pay $2.9 billion to settle the SEC's charges.[14]

Companies doing business in a foreign country usually engage a local individual or company to help them conduct businesses. Though these agents provide legitimate advice on local procedures and, perhaps, help facilitate business transactions, both parent companies and their subsidiaries should be aware of the risks involved in engaging third-party agents or intermediaries. The fact that a bribe is paid by a third party does not eliminate the potential for criminal or civil liability under the FCPA. In January 2021, Charles Cain, the Chief of the SEC's FCPA Enforcement Unit stated that: *"while third parties may assist in legitimate business development activities, it is critical that companies have sufficient internal accounting controls in place to prevent payments to third parties in furtherance of improper purposes"*[15]. A vast majority of FCPA enforcement actions have involved, in some way, improper conduct by third parties acting on behalf of the targeted companies.

In recent years, there have been a number of FCPA cases involving the Nigerian authorities. Between 2008 and 2012, TSKJ, a four-company joint venture consisting of Technip S.A.[16], Snamprogetti Netherlands B.V.[17], Kellogg Brown & Root Inc. (KBR)[18] and JGC Corporation[19], was found guilty of using two agents – a British lawyer[20] and a Japanese trading company—Marubeni Corporation, to bribe Nigerian government officials in order to win a series of liquefied natural gas construction projects[21]. The companies and their agents were all found guilty of FCPA violations. The companies, the lawyer and the Japanese corporation together paid $1.7 billion in civil and criminal sanctions for this violation[22].

In *United States vs. Bilfinger*[23], Bilfinger's Nigerian subsidiary entered into a consortium agreement with entities affiliated with Willbros Group Inc. to bid and execute the Eastern Gas Gathering System (EGGS) project, a natural gas pipeline system in the Niger Delta designed to

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[14] Retrieved from: https://www.sec.gov/news/press-release/2020-265 on 4 October 2021. The company also agreed to pay more than $4 billion to financial regulators in Malaysia, the UK, Hong Kong and Singapore to settle the charges.

[15]Retrieved from: < https://www.accountancydaily.co/deutsche-bank-pays-120m-settle-bribery-charges> on 11 September 2021.

[16] United States vs. Technip S.A., No. 10-cr-439 (S.D. Tex. June 28, 2010), SEC v. Technip, No. 10-cv-2289 (S.D. Tex. June 28, 2010)

[17] United States vs. Snamprogetti Netherlands B.V., No. 10-cr-460 (S.D. Tex. Jul. 7, 2010).

[18] United States v. Kellogg Brown & Root LLC, No. 09-cr-71 (S.D. Tex. Feb. 6, 2009)

[19] United States vs. JGC Corp., No. 11-cr-260 (S.D. Tex. Apr. 6, 2011).

[20] The United States Department of Justice, "UK Solicitor Pleads Guilty for Role in Bribing Nigerian Government Officials as Part of KBR Joint Venture Scheme" < https://www.justice.gov/opa/pr/uk-solicitor-pleads-guilty-role-bribing-nigerian-government-officials-part-kbr-joint-venture>

[21] Retrieved from: <https://fcpablog.com/2011/12/29/tskj-the-fcpas-whale/#:~:text=In%20April%20this%20 year%2C%20the,FCPA%20cases%20of%20all%20time.> on 11 October 2021.

[22] SEC vs. Technip No. 12- cr-22 (S.D. Tex. Jan. 17, 2012 (15 U.S.C. § 78dd-2/ 18 U.S.C. § 371), United States v. JGC Corp., No. 4:11-cr00260 (S.D. Tex. 2011).

[23] SE, No. 4:13–cr– 00745 (S.D. Tex. 2013).

relieve existing pipeline capacity constraints. Between 2003 and 2005, Bilfinger used contractual payments, fraudulent loans, and petty cash obtained by fraudulent invoices to funnel money to two 'consultants' for the purposes of bribing Nigerian officials to obtain and retain the EGGS contracts. As a consequence of this, Bilfinger was fined the sum of of $32 million. In addition to the monetary penalty, Bilfinger agreed to retain an independent compliance monitor for 18 months.

In *United States vs. Parker Drilling Co.*[24], Parker Drilling (Nigeria) Limited, a wholly owned subsidiary of Parker Drilling Co. failed to pay some custom tariffs and duties. The Nigerian custom authorities imposed a fine on the company. Parker Drilling allegedly retained a Nigerian agent to help resolve the customs issues. The company authorized payments to this Nigerian agent totalling $1.25 million. The Nigerian agent used those funds, in part, to 'entertain Nigerian government officials' involved with the customs issues. Subsequently, the fine was reduced by about 80%. The company was charged with violating the anti-bribery provisions of the FCPA and the company had to pay a monetary penalty of $11,760,000. In *United States vs. Shell Nigeria Exploration & Production Company Limited (SNEPCO)*[25], SNEPCO was found to have paid bribes to its subcontractors and agents for customs clearance services with the knowledge and intent that some of the money was to reimburse the subcontractors for moneys paid to Nigerian customs officials to import materials and equipment into Nigeria. The bribes were falsely characterized by SNEPCO in its internal books and records as legitimate customs clearance charges and these charges were in turn consolidated into Shell's books, records, and accounts. SNEPCO agreed to pay a penalty of $30 million.

It is understandable that US companies may need agents' local knowledge to navigate through the murky waters of business in new and challenging markets; but the engagement of such agents for the furtherance of improper purpose(s) will fall short of the expectations of the FCPA; and, therefore, will be penalised under the Act. Most of the FCPA violations in Nigeria did involve the use of agents - such as consultants, intermediaries, advisers, joint-venture partners, distributors and other third-parties. These agents, on behalf of US companies or their local subsidiaries, usually facilitate bribing of Nigerian government officials, politicians[26], political parties[27] and government agencies for the benefits of parent companies or subsidiaries. The consequences for FCPA violations could be dire and high. It may include both criminal and civil fines running into billions of US dollars. The amounts may represent disgorgement, interest and penalties followed by cease-and-desist order. Criminal

[24] No. 1:13-cr-00176 (E.D. Va. 2013).
[25] No. 4:10-cr 767 (S.D. Tex. 2010).
[26] In re Paradigm B.V. (2007).
[27] In the case of United States of America vs. Halliburton & Kellogg Brown and Root LLC, 15 U.S.C. § 78dd-2, the U.S. regulators held that a 'donation' made to a Nigerian political party had been paid to influence the award of a government contract. The company used its agent to pay $5 million to a Nigerian political party. The payments were made to the agent in suitcases of cash and, in one instance, the trunk of a car when the cash did not fit into a suitcase.

violations of the FCPA can also attract imprisonment for company officials and/or agents of the defaulting company.

Any third-party performing work on behalf of a company must be fully vetted and continually monitored for FCPA red flags. Some of the common red flags associated with the use of third-party agents include:

1. the third-party is paid from improperly accounted funds of the company.
2. the third party is often given excessive commissions;
3. unreasonably large discounts to third-party distributors;
4. third-party 'consulting agreements' that include only vaguely described services;
5. the third-party consultant is in a different line of business than that for which it has been engaged;
6. the third-party is related to or closely associated with a foreign official;
7. the third-party is merely a shell company incorporated in an offshore jurisdiction; and
8. the third-party requests payment to offshore bank accounts.

The degree of third-party vetting will depend on the nature of the services provided, the amount of expected government interaction, and the jurisdictions the third party will operate. At the least, pre-engagement due diligence should be conducted while anti-bribery and anti-corruption language should be incorporated into the terms of the contracts. As long as the US company is aware that the agent is engaging in the wrongful conduct or has a belief that such circumstance exists or is substantially certain to occur, then the company will be said to have violated the FCPA.

To avoid the FCPA violations, especially as it relates to Nigerian subsidiaries and agents who may think it is business as usual, a US parent company must take affirmative steps to avoid FCPA infractions. For instance, a parent company must ensure that its subsidiaries, officials and agents of the subsidiaries in Nigeria receive trainings on FCPA requirements; establish for the subsidiaries effective FCPA compliance programs; and training on maintenance of accurate books and records. Doing this, with prior due diligence conducted on prospective agents, will save US companies and their subsidiaries lots of troubles that could arise as consequences of FCPA violations.

Conclusion

The US Congress enacted the FCPA in 1977 to prohibit and/or halt corrupt or improper payments to foreign officials in exchange of obtaining or retaining business(es). This Act is designed to restore public confidence in commercial transactions involving US businesses by promoting reliable and corrupt-free environments both within and outside the US – provided that in cross-border transactions, a US business or its agents, thereof, is involved. It is convenient to say that this 44-year-old Act is one piece of a legislation that has fostered fair

business practices within and outside the United States. Till date, the Act is the main legal instrument used by the American Government to address issues of unethical conducts and corrupt practices perpetrated in jurisdictions outside the US involving American businesses, their subsidiaries and/or agents. Precedents show that most parent companies and their subsidiaries resort to the use of third-party agents, who often are hired as consultants, to conceal their (the parents') outward involvement in bribing or compromising foreign officials.

Fortunately, the use of agents as proxies to perform acts or conducts parent companies or their subsidiaries would ordinarily not do, have been attributed to parent companies who are prohibited from relying on ignorance of the activities of subsidiaries or agents – provided the agents acted within the scope of their engagements. Therefore, parent companies are advised to ensure that its subsidiaries and/or agents are sufficiently trained on FCPA compliance; and due diligence on the knowledge of the FCPA by agents carried out before engagement. Nigerian agents who engage in activities prohibited by the FCPA – when they act for US companies or their subsidiaries – should know they could be open to criminal or civil liabilities in the US.