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A quandary for U.S. companies: Who to bribe?

By David S. Hilzenrath

American companies doing business abroad have a problem: They don't know who to bribe.

Federal law prohibits the bribery of some people but not others. And the business world argues that the rules of the road are not clear. One guy's bribe, as it turns out, is another guy's cost of doing business.

Take, for example, the case of Lindsey Manufacturing — a saga the U.S. Chamber of Commerce loves to cite as it lobbies to change the law.

After having a hard time winning contracts from a Mexican utility company, the California firm shifted tactics, according to the U.S. government .

Using an intermediary, Lindsey Manufacturing allegedly bribed employees of the electric company. Among the sweeteners: a \$297,500 Ferrari Spyder sports car, bought in 2007 at a dealership in Beverly Hills, Calif., and a \$1.8 million yacht named Dream Seeker, paid for in part with money wired from a Swiss bank account.

Over several years, Lindsey Manufacturing did millions of dollars of business with the Mexican utility, the government said.

This year, after Lindsey Manufacturing and its president, Keith E. Lindsey, were indicted on charges of violating a federal anti-corruption law, they asked that the case be thrown out. Their argument was this: The Foreign Corrupt Practices Act (FCPA) makes it a crime to bribe officials of foreign governments, but employees of a state-owned Mexican utility aren't government officials.

The U.S. Chamber of Commerce, one of Washington's most powerful business lobbies, says the Lindsey case shows that the law is bad for business and that the way the government is interpreting it has gotten out of hand.

"You'd laugh at the absurdity of it — unless you were Keith Lindsey and you were defending yourself in a trial in which how one defines 'foreign official' could mean jail and millions of dollars in fines," Lisa A. Rickard, president of the Chamber's Institute for Legal Reform, wrote in a May online commentary.

"The Lindsey case and others like it have brought attention to the need to reform an outdated law that many believe is hurting American businesses' ability to compete fairly in the global market," Rickard wrote.

The FCPA was signed into law in 1977 amid revelations that hundreds of U.S. corporations had made illegal or dubious payments to foreign politicians, parties and government officials.

Congress explained the law in economic as well as moral terms.

Bribery "short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products," a House report on the legislation said. The practice "puts pressure on ethical enterprises to lower their standards or risk losing business," the report added.

The FCPA can be a headache for companies operating in countries where payoffs are expected. It can also create hazards when a U.S. corporation buys another company. The new owner acquires any advantages obtained through past bribes — along with the legal liability.

Raising the stakes

The stakes have grown in recent years as the government has stepped up efforts to enforce the law. Major corporations have paid hundreds of millions of dollars in settlements and legal expenses, and some executives have stood trial.

In recent civil or criminal settlements involving alleged FCPA violations, Tyson Foods agreed to pay \$5.2 million, IBM agreed to pay \$10 million and Johnson & Johnson agreed to pay \$70 million. And then there were the big cases. Siemens agreed to pay the government \$800 million — after spending about \$950 million on a global internal investigation.

The alleged bribes in FCPA cases have included laptops, first-class travel to Hawaii and Las Vegas holidays masquerading as business trips. Companies have provided no-show jobs for officials' wives and college tuition for their kids. According to the government, cash has been delivered in shopping bags, in briefcases and by the carload.

In recent days, as Rupert Murdoch's News Corp. has faced allegations that its reporters bribed British law enforcement officials for tabloid fodder, U.S. politicians have urged the Justice Department and the Securities and Exchange Commission to open an FCPA probe.

The Chamber, which received a \$1 million contribution from News Corp., has mounted a lobbying campaign to amend the FCPA, arguing that it is too vague and that even innocuous entertainment expenses can lead to trouble.

The scope of the bribery ban is a central issue. Although the statute makes it illegal for U.S. companies to bribe foreign government officials to win business, bribing employees of private firms in other countries is another matter; the FCPA doesn't address that.

The Chamber says that federal prosecutors have taken an extremely broad view of who is a "foreign official" by including employees of state-owned enterprises — a potentially wide swath of the market in such important countries as China.

In recent congressional testimony, Greg Andres, a senior Justice Department official, offered corporations a rule of thumb: If "companies aren't paying bribes, they have nothing to fear with respect to enforcement."

Beyond the debate about the law, the Lindsey Manufacturing defendants disputed the government's account of the facts. The company did not know what the middleman did with the money they paid him, defense attorney Jan L. Handzlik argued. The Mexican utility bought Lindsey's wares as needed, and it was doing business with Lindsey before any alleged bribes, he said.

Since the Chamber's Rickard issued her commentary on the Lindsey Manufacturing case, the Lindsey defendants have been convicted on all counts.

In the Lindsey case, and in others involving the "foreign official" question, courts have recently ruled that on that issue the law is clear enough and that the Justice Department was on firm ground.

A question of definition

The Chamber cites such rulings as further reason for Congress to intervene.

Former employees of Control Components, a California company that makes industrial valves, were accused of making wire transfers of tens of thousands of dollars to officials at such entities as Korea Hydro and Nuclear Power and China National Offshore Oil Co. Like the Lindsey defendants, they argued that charges against them should be dismissed because the FCPA does not extend to employees of state-owned companies.

In another case, Joel Esquenazi, former president of Florida-based Telecom Consulting Services, was accused of conspiring with others to funnel hundreds of thousands of dollars through shell companies to officials of Haiti's state-owned telecommunications company.

Esquenazi argued in court that the indictment "fails to state a criminal offense" because the alleged recipients of the payments were not foreign officials.

The courts rejected those arguments. In the Haiti case, a federal judge ruled that "persons of common intelligence" should be able to understand what the FCPA means by foreign official.

Former U.S. attorney general Michael B. Mukasey sees it differently.

Mukasey, who signed on this year as a lobbyist for the Chamber, made the case at a June congressional hearing.

It "is often difficult for companies to determine when they are dealing with 'foreign officials,' particularly in markets in which many companies are at least partially state-owned," Mukasey said in written testimony.

As a result of the uncertainty, "it becomes impossible for companies to determine in advance what conduct may and may not present a meaningful risk of violating the FCPA," he said.

The government's approach "creates barriers to U.S. businesses seeking to sell their goods and services in foreign markets," he added.

In an interview, Mukasey, a former federal judge, said everybody agrees that U.S. companies should not be bribing anybody abroad.

"Nobody is talking about having doubts about who they can bribe," he said. "People are talking about who they can entertain, who they can't entertain, at what level."

Legendary cab ride

For example, Mukasey said, a company might want to pay for an official of a foreign company to visit the United States to look at a product.

Or as he told members of the House Judiciary Committee, incredibly something as simple as a taxi ride could invite scrutiny.

Andres, the Justice Department official, told the lawmakers at the June hearing that the government does not prosecute anyone for something as trivial as a martini, a lunch or a taxi ride.

But Mukasey pressed ahead, insisting, "the taxi-ride example is for real."

"Somebody worked overtime, was given a taxi because the trains had stopped running. And then some nervous counsel found out about it, reported it to the Justice Department, and was told . . . to go back and investigate the entire circumstances of the relationship with that company, " he said, according to a transcript.

“A couple of hundred thousand dollars later, it was determined that, in fact, there had been no violation.”

The story is perhaps the most vivid one Chamber officials offered in support of their argument. But it is not so clear-cut.

Mukasey said in the interview he did not know the name of the company involved. He said he got the story from Sen. Amy Klobuchar (D-Minn.).

A Klobuchar spokesman said someone told the story briefly when the senator held a routine meeting with 15 or 20 business leaders in her home state last year. The implication was that the company spent money investigating, spokesman Linden Zakula said, but Klobuchar’s office has no idea how much.

The senator’s office does not know the name of the company involved, whether there was any communication between that company and the Justice Department or whether whoever told the story was speaking from firsthand knowledge, Zakula said.

What the Chamber wants

Clarifying the meaning of “foreign official” is one of several FCPA changes the Chamber is seeking. Another would seem to solve the taxicab problem all by itself: If the suspected bribe is worth no more than \$250, the government should give companies the benefit of the doubt, the Chamber says.

The Chamber also says that if companies have strong compliance programs designed to prevent violations, they should be shielded from liability when employees break the law.

In addition, the Chamber says that companies should be insulated from civil liability for the actions of subsidiaries and that they should not inherit all the liabilities of companies they acquire.

As for state-owned corporations, the FCPA should apply to those for which the foreign government holds at least half of the ownership or voting power, the Chamber says.

In a statement to The Washington Post, Rep. F. James Sensenbrenner Jr. (R-Wis.), the chairman of the House Judiciary subcommittee that held the June hearing, said he plans to introduce a bill to amend the FCPA.

“We need to bring clarity to what is and what is not illegal,” Sensenbrenner said. “American companies are at a competitive disadvantage until they can ensure they will not be punished unjustly.”

What that bill will say remains to be seen.

While sympathizing with the Chamber’s general complaint, Sensenbrenner has asked whether the Justice Department would be willing to “forget about this debate on who a foreign official is” and support legislation that says “bribery is bribery.”

In interviews, Justice officials declined to comment on that point. Harold Kim, a senior vice president at the Chamber’s Institute for Legal Reform, said that is not what his group had in mind.

“Nobody here favors bribery,” he added.