



Course program and reading list

Semester 2 Year 2024

School: Harry Radzyner Law School LL.B.

Fundamentals and Emerging Issues of the U.S. Foreign Corrupt Pra

Lecturer:

Adv. Joel Slawotsky jslawotsky@runi.ac.il

Course No.:	Course Type :	Weekly Hours :	Credit:
4424	Elective	1	1

Course Requirements :	Group Code :	Language:
Final Paper	242442400	English



Course Description

This course will explore the fundamentals, enforcement, and emerging issues related to the U.S. Foreign Corrupt Practices Act ("FCPA"), an important statute encompassing anti-bribery as well as record-keeping/internal controls provisions. Almost fifty years old, the statute was not used frequently after its initial enactment but has become an increasingly-resorted to law with a wide array of businesses and individuals prosecuted for violating the FCPA. Billions of U.S. Dollars in fines and penalties are often assessed each year against both foreign and U.S. based businesses and a command of the FCPA is increasingly crucial for counsel. We will focus on the FCPA's anti-bribery provisions exploring the elements of a bribery violation and defenses to claims of a bribery offense. In addition, the course will address other important aspects of the FCPA such as the strategic use of opinion letters, the significance of the SEC whistleblower rewards program, and resolutions. Moreover, as an inherent necessity, the course will also discuss U.S. Federal courts and procedure. Furthermore, the course will delve into cutting edge emerging legal issues of FCPA enforcement which have developed over the last several years such as non-U.S. actor primary liability (depending on how courts define "agent"), split of opinion regarding secondary liability (conspiracy/aiding and abetting) if the non-U.S. defendant cannot be charged with a primary violation, issues of extraterritoriality, and

the use of digital currencies.



Course Goals

Learning Outcomes

By the end of the course, students will have: (1) a comprehensive understanding of the provisions of the FCPA's anti-bribery provision; (2) learn the ability to identify potential bribery violations; (3) gain knowledge related to U.S. courts and procedures and the structure of legal authority in the U.S. Federal court system; (4) comprehend the significance of extra-territoriality generally and specifically with respect to the FCPA; (5) become familiar with the FCPA's SEC Whistleblower provision and how to utilize an Opinion Letter to pro-actively avoid a bribery violation; (6) understand the emphasis on corporate cooperation, individual responsibility and the DOJ and SEC resolution vehicles relevant to both entities and individuals including distinctions between declinations, NPAs and DPAs; and (7) appreciate the potential issues arising from the use of digital currencies with respect to FCPA enforcement.



Grading

100% Essay



Teaching Assistant

Ria Gilboa - ria.gilboa@runi.ac.il



Reading List

Fundamentals and Emerging Issues of the U.S. Foreign Corrupt Practices Act Reichman University, Spring 2024 Joel Slawotsky

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Teaching methods

Each lecture will be based on the readings as outlined in the syllabus and possibly supplemented by relevant developments in FCPA law (these are not anticipated to be extensive, if any). The readings will form the basis of knowledge to understand the topics for each class and the lecture. The main "text" is the DOJ and SEC Resource Guide to the U.S. Foreign Corrupt Practices Act and will be supplemented by other sources as indicated in the syllabus such as major FCPA rulings and law journal articles. While I will provide the salient points in the lecture, it is my teaching philosophy to encourage vigorous classroom participation. We will discuss various hypotheticals as well as "real-life" examples. Vigorous discussion helps ensure comprehension of the reading material, promotes exchanging (and defending) views with classmates, and strengthens critical thinking and skills that are crucial in representing clients (i.e., analyzing legal claims and defenses).

Final Exam

The final exam will consist of an essay question and you will have 4 weeks from the last class to upload. The exam should be an essay of approximately 1000 words but there is no exact minimum or maximum.

Questions

I will be available to answer all questions during class and will remain available after class as well.

Feel free to email me at jslawotsky@runi.ac.il You can ask me before the course as well if you have any questions.

Prerequisites

None

Detailed Course Schedule

This syllabus is ambitious and is subject to modification based on the flow of the course.

Class One April 3

Topics: Introduction - Genesis of the FCPA, Current Anti-Corruption Environment, Architecture of FCPA Enforcement, The Anti-Bribery Provision: Elements of A Bribery Violation and Who is Subject to FCPA Enforcement

Enacted to fight corruption arising from the bribery of foreign public officials, the United States Foreign Corrupt Practices Act ("FCPA") was initially adopted in 1977 (amended in subsequent years). (Note, an additional goal was to defeat the Soviet Union in the context of the U.S.-Soviet rivalry). Initially, numerous U.S. businesses complained that the FCPA proximately caused a competitive disadvantage to U.S. businesses since foreign businesses were not prohibited from engaging in overseas bribery. However, intense lobbying from the U.S. eventually led the Organization for Economic Co-operation and Development ("OECD") to adopt The Convention on Combatting Bribery of Foreign Public Officials, and a majority of the leading global economies incorporated domestic anti-foreign bribery laws. In the ensuing years, prosecutions of corporations for foreign bribery has developed into a major component of regulatory enforcement in numerous jurisdictions such as the UK, Brazil, France, and elsewhere.

In the U.S., FCPA enforcement has become a priority for the Department of Justice ("DOJ") and Securities & Exchange Commission ("SEC"), and recent years have demonstrated a commitment to vigorously pursuing FCPA violations. In our first class, we will introduce the FCPA and delve into the potential utilization in the context of the U.S.-China competition and the presumption against extraterritoriality (themes which will be discussed later in the semester). Indeed, as noted above, a primary motivator of the FCPA was the Soviet-U.S. competition and the current China-U.S. dynamic may impact FCPA enforcement (we will further discuss this aspect later in the course).

We will explore the FCPA's core Anti-Bribery Provisions, i.e., the elements of an FCPA bribery violation. There are three categories of potential defendants:

- 1 Issuers (companies who must file disclosures which encompasses companies whose shares trade on a U.S. stock exchange - including ADRs);
- 2 Domestic Concerns (citizens, businesses, etc.); and
- 3 Territorial (acting to further the FCPA violation within the territory of the U.S.).

The FCPA's reach is broad and includes agents of issuers and domestic concerns (including consultants, employees), and U.S. subsidiaries of foreign businesses. The territorial prong is particularly important for non-U.S. persons and entities. Significantly, it is the position of the U.S. enforcement agencies that the use of the U.S. financial system – from anywhere globally – constitutes acting within U.S. territory thus vesting jurisdiction in U.S. courts.

The basic elements of a bribery violation are a benefit conferred on a foreign governmental official (as opposed to a private individual or employees of private businesses). To constitute a violation, payment to a government official must be made corruptly to obtain a business advantage (contract renewal, lower taxes, obtain insider information) and not subject to one of the FCPA defenses. Payments can take many forms and include non-cash gifts such as vacations, jewelry, promises of employment, etc. There are many details regarding the above which we will cover in class. We will examine and review hypotheticals.

Readings:

Resource Guide to the U.S. Foreign Corrupt Practices Act. Second Edition

<https://www.justice.gov/criminal-fraud/file/1292051/download> pages 1-16

Rachel Brewster, Enforcing the FCPA: International Resonance and Domestic Strategy, 103 Virginia Law Review 1611 (2017) pages 1613-1631; 1644-1676

The Chinese Communist Party's Ideology and Global Ambitions

<https://trumpwhitehouse.archives.gov/briefings-statements/chinese-communist-party-ideology-global-ambitions/>

Oil and Gas Trader and Brazil-Based Intermediary Charged in Bribery and Money

Laundering Scheme, <https://www.justice.gov/opa/pr/senior-oil-and-gas-trader-and-brazil-based-intermediary-charged-bribery-and-money-laundering>

Glencore sentenced to pay \$700 million in US after bribery guilty plea, <https://www.reuters.com/legal/glencore-sentenced-pay-700-mln-us-after-bribery-guilty-plea-2023-02-28/>

Class Two April 7

Topics: The Anti-Bribery Provision: State Controlled or State Linked Entities, Sending Payments to Third-parties such as Charities, The FCPA's Reasonable Expenses, Facilitating Payment Exception, Written Law Defenses to Bribery Allegations and Duress, The Anti-Bribery Provision: Corporate Liability (including for being an agent), Successor Liability, Secondary Liability (aiding and abetting, and conspiracy), and Statute of Limitations

While the FCPA anti-bribery laws only apply to government officials and not private persons, employees of foreign government controlled businesses such as SOEs or state-

linked businesses are considered foreign government officials. We will explore the issues of government officials and under what circumstances private entities' employees are considered government officials for purposes of the bribery provisions of the FCPA. For China, the state-centric capitalism model gives rise to many such entities. However, this is also important generally in an era of increasing economic nationalism and embrace of industrial policies since an increasing array of ostensibly private businesses might be considered as governmental actors and their employees therefore government officials. We will also explore paying third-parties such as charities and examining the criteria enforcement agencies evaluate to determine whether the payment constituted a bribe.

We will discuss the various defenses to an FCPA bribery violation which include reasonable expenditures, small one-time facilitation payments, and the unlikely to be invoked but potentially relevant – “written law” defense. Pursuant to the FCPA, reasonable marketing expenses, entertainment, and travel expenses for government officials are legitimate but must be properly recorded. In addition, small one time payments to expedite approval for obtaining a governmental service (which the government official has no discretion whether or not to grant) is not considered an FCPA violation. Finally, should a written law (not custom) exist in a foreign jurisdiction allowing bribery, the law would serve as a “written law” defense.

We will also discuss significant issues relating to corporate liability such as being liable as an agent as well as secondary liability. In recent years this has become more of an issue particularly for non-U.S. citizens who are alleged to be liable as an agent either directly or secondarily. The question also intersects with the presumption against extraterritoriality, whether non-U.S. persons can be liable for conspiracy, and whether this is a question to be decided by the court earlier in litigation or later. These issues will be the focus of class 4.

Reading:

Resource Guide to the U.S. Foreign Corrupt Practices Act. Second Edition

<https://www.justice.gov/criminal-fraud/file/1292051/download> pages 16-37

Class Three April 10

Topics: Resolutions DPAs, NPAs, and Declinations DOJ Focus on Individual Responsibility, “Extraordinary” Cooperation, Whistleblower Provision, Opinion Letters, and Digital Currencies and Evasion of Enforcement

Most enforcement actions are resolved before trial. We will review the various potential resolutions in FCPA litigation. Deferred Prosecution Agreements (DPAs and Non Prosecution agreements (NPAs) constitute a compromise between indictment/guilty plea/ trial and the other extreme – declination to prosecute/enforce. Pursuant to DPAs and NPAs, the DOJ/SEC agrees not to prosecute and the defendant agrees to pay a penalty, admit responsibility, to cease such conduct, disclose violations, and to cooperate with the

DOJ/SEC. Declinations are written agreements signed by the company and require disgorgement, may require admissions as well as cooperation and compliance requirements. Declinations with Disgorgement emanate from the DOJ's FCPA Pilot Program (Justice Manual 9- 47.120). Generally, such agreements also preserve the DOJ's right to reopen investigations if the company fails to comply with the declination terms.

We will explore the Whistleblower provision of the FCPA anti-bribery provision. Anyone with knowledge of an FCPA violation that provides new information to the SEC leading to a settlement or fine of at least \$1 million is entitled to between 10% and 30% of the sum the U.S. enforcement agencies receive. Non-U.S. persons are also entitled to such a reward. Who is eligible to recover under the whistleblower program and what is the procedure? We will also discuss the strategy of using Opinion Letters to gauge whether planned activity is appropriate and the advantages of perusing the database to examine how the DOJ evaluates conduct.

We will also discuss digital currencies such as "cryptos" (e.g., Bitcoin), stable coins, or Central Bank Digital Currencies ("CBDCs") which represent the digitalization of money. What if a digital payment is used to commit a bribery violation – Bitcoin or a Chinese CBDC – how does that intersect with territorial jurisdiction for U.S. enforcement agencies? The question may hinge on whether a U.S. exchange or a U.S. institution (or messaging service) is used in the transfer. We will discuss the use of digital currencies not using a U.S. exchange or wallet and the impact on territorial jurisdiction for non U.S. entities and persons. We will also discuss the FCPA and Chinese entities, how the China-U.S. competition may impact FCPA enforcement, and how the question of extra-territoriality might be influenced by national security factors.

Readings:

<https://www.justice.gov/criminal-fraud/file/1292051/download> pages 75-85

<https://www.justice.gov/criminal-fraud/file/838416/download>

<https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law>

<https://www.justice.gov/opa/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-schemes>

Glencore Plea Agreement

<https://www.justice.gov/opa/press-release/file/1562391/download>

<https://www.justice.gov/criminal-fraud/opinion-releases-index>

<https://www.justice.gov/criminal-fraud/page/file/1466596/download>

<https://www.wsj.com/articles/record-279-million-whistleblower-award-went-to-a-tipster-on-ericsson-5af40b98>

Joel Slawotsky, The FCPA: Conducts and Effects in an Age of Hegemonic Rivalry

12 Tsinghua China Law Review 260, 276-286 (2020).

Joel Slawotsky, U.S. Extraterritorial Jurisdiction in an Age of Strategic Competition

52 Georgetown Journal of International Law 427, 455–468 (2021).

Class Four April 14

Topics: Topic: Emerging Issues and Current Federal Rulings: Major Federal Appeals Court Rulings on Non-U.S. Persons, Conspiracy and Secondary Liability and Defining "agent"

We will compare and contrast significant Federal court decisions discussing FCPA cases against non-U.S. defendants which focuses primarily on whether such defendants can be charged for secondary liability if they cannot be prosecuted for being primary offenders. The general rule is yes but there are exceptions and there is a split in the courts in the FCPA context. The Second and Fifth Circuits took opposite sides on whether the question of the FCPA's extraterritorial reach is a merits issue to be litigated at trial or a question to be resolved earlier to determine whether a court can hear the case. However, the Fifth Circuit evaded ruling on one of the questions raised, namely, whether FCPA enforcement cases can be brought against non-US persons on the basis of a secondary liability theory such as conspiracy.

Readings:

U.S. v Hoskins, 902 F.3d 69 (2d Cir. 2018) (Hoskins I)

Specific pages: page 71 to start of page 74, page 76 (starting with II. The FCPA and the First Object of the Conspiracy) to page 104 (end)

U.S. v Firtash, 392 F.Supp.3d 872 (N.D. Ill. 2019).

Specific pages: 876–879, 881 (starting with II. The FCPA and the First Object of the Conspiracy) to page 886, page 888 (start with III. Failure to State an Offense – Counts Two, Three, and Four) to bottom of page 892 (up to Due Process)

U.S. v Rafoi-Bleuler, 2021 WL 9884704 (S.D. Tex. Nov. 12, 2021)

Specific pages: 6 (starting with III. Failure to State an Offense – Counts Two, Three, and Four) to page 7 (up to D. Jurisdictional Reach Under the MLCA), page 8 (starting from E. Vagueness Renders the Term Agent Unconstitutional) to page 9 (up to Conclusion)

U.S. v Hoskins, 44 F.4d 140 (2d Cir. 2022) (Hoskins II)

Specific pages: 145– 152 (up to E. Vagueness Renders the Term Agent Unconstitutional), page 158 starting with LOHIER, Circuit Judge, concurring in part and dissenting in part: until end on page 163

U.S. v Rafoi, 60 F.4th 982 (5th Cir. 2023)

Specific pages: page 991–997 (on page 997 up to IV. The money-laundering statute)