



ETHICAL STANDARDS IN BUSINESS AND LEGAL REPRESENTATION OF UNITED STATES CORPORATIONS IN SUB-SAHARAN AFRICA: AN EXPOSÉ OF THE FOREIGN CORRUPT PRACTICES ACT

Herbert A. Igbanugo, Esq.

Presented at the 2nd Annual World Business Congress

6 - 9 November 2005

Accra, Ghana

INTRODUCTION

In many parts of Africa, and in the United States, companies and governments alike have recognized that corruption raises the costs and risks of doing business. Governments and the private sector are working together to combat this problem and to enhance clean governance and transparency in global economies. Corruption has a corrosive impact on market opportunities in Africa and the broader business climate. It also deters foreign investment, stifles economic growth and undermines legal and judicial systems.

As we proceed through the 21st Century, more people throughout the world are rejecting the notion that corruption is an inevitable part of doing business. Promoting integrity in government and the marketplace improves a global governance climate, nurtures long-term growth, and extends the benefits of prosperity to all people that have for long been affected by the spurious character of corruption.

One way to achieve increased participation of the private sector in the fight against corruption is through promoting business integrity as well as accountability, and transparency in commercial relations between private firms and government authorities. Our implementation of codes of conduct and professional standards, and imparting such to our corporate clientele leads to greater public awareness and

support of ethical behavior, and encourages the development of a business culture that is based on ethical values.

In the world marketplace, business thrives on competition. U.S. companies and workers can compete with the best in the global marketplace because of their drive, innovation, and quality of their products and services. Corporate and institutional companies with Sub-Saharan Africa business relationships are affected by, and subject to, the U.S. Foreign Corrupt Practices Act. Corruption has been a part of the playing field in Africa, much to the detriment of the Continent. Corruption does not bode well for Africa, nor for U.S. businesses operating in that region. Although corruption is against the law both in the United States and in Africa, the consequences for corporations are much more severe in the United States, and is a point of emphasis in our legal counseling to corporate clients doing business in Africa.

However, success in these endeavors depends quite heavily on ability to compete on a “level playing field.” Bribery and corruption tilt the playing field and create unfair advantages for those willing to engage in unethical and illegal behavior. Corrupt practices penalize companies that play fair and seek to win contracts through the quality and pride of their products and services. It is this realization that led the United States in 1977 to enact the Foreign Corrupt Practices Act (FCPA), which effectively outlawed offers, promises, and payments by U.S. firms to foreign officials, political parties, party officials and candidates to secure business advantage.

The United States and international legal, business and accounting associations and non-governmental organizations (NGOs) such as the American Bar Association (ABA), the U.S. Chamber of Commerce, the International Chamber of Commerce (ICC), the Ethics Officers Association (EOA), the Committee of Sponsoring Organizations (COSO), and Transparency International (TI) have played key advisory roles in the development of various anti-corruption initiatives. In this active anti-corruption environment, many multi-national organizations have been making strides in addressing international bribery in business transactions, official public corruption, and transparency issues.

With respect to the emerging international anti-corruption environment, the unifying concept in all the global and regional playing fields is that effective action to prevent, detect and punish corruption must be undertaken by each individual government. In February 1999, under the auspices of the Global Coalition for Africa (GCA), 11 African countries adopted 25 anti-corruption principles that encourage implementation of common standards at the national level, as well as joint action

between and among countries. These principles could also form the basis for more formal cooperative frameworks at the regional and sub-regional levels within the African Continent.

Since the enactment of the Foreign Corrupt Practices Act of 1977, the United States has provided indispensable leadership so that business enterprises can compete fairly in the global economy. Anti-corruption initiatives are key foreign policy elements that promote integrity and confidence in both governmental institutions and in the global marketplace.

The Foreign Corrupt Practices Act (FCPA) continues to be actively enforced by the U.S. government. Generally, the Department of Justice enforces the anti-bribery part and the Securities and Exchange Commission (SEC) enforces the record-keeping and accounting part of the law.

The FCPA makes it a crime for any U.S. person or company, in the U.S. or abroad, to directly or indirectly corruptly pay or promise anything of value to any foreign official to obtain or retain business. Payments for routine government administrative actions, permits or inspections, or to provide for demonstration of a company's products, are permissible. Record-keeping provisions of the SEC impose some responsibility on U.S. parent corporations for the accounting practices of their foreign subsidiaries.

Transparency International (TI) says Africa is by far the most corrupt continent on earth. Corruption along with misappropriation of assets and fraudulent financial statements are the three elements of occupational fraud. The Association of Certified Fraud Examiners has broken corruption down into four schemes, namely, conflict of interest, bribery, illegal gratuities, and economic extortion.

- ✧ Conflict of interest is where a public official or a company employee has an undisclosed interest in another company and is either selling to or buying from his employer at inflated prices or at much reduced rates, respectively.
- ✧ Bribery is where an official or company employee accepts money or some other consideration to engage in a particular course of conduct.
- ✧ Illegal gratuities, often seen as a thank-you or reward, is similar to bribery since the public official or company employee knows that he would be getting the gratuity if they do business with the particular vendor.

- ✧ Economic extortion is where an official or company employee demands money or some other consideration to engage in a particular course of conduct, or to look the other way when inappropriate conduct or transaction is taking place.

These forms of occupational fraud plague Africa. However, it must be pointed out that corruption in international business transactions consists of first world givers of many third-world bribes. "It always takes two to tango." The key to minimizing the risk of fraud lies in understanding why it occurs, identifying business areas that are at risk, and implementing procedures to address those vulnerable areas.

THE FOREIGN CORRUPT PRACTICES ACT (FCPA): OVERVIEW

U.S. firms seeking to do business in foreign markets **must** be familiar with the FCPA. The FCPA has two substantive parts: (1) the foreign payments provisions, which make it illegal for any U.S. company or U.S. citizen, national, or resident to bribe a foreign official for the purpose of obtaining or retaining business; and (2) the accounting provisions, which impose certain accounting and record-keeping requirements upon publicly held U.S. companies.

The FCPA prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business. The anti-bribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person.

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. These accounting provisions, which were designed to operate in tandem with the anti-bribery provisions of the FCPA, require corporations covered by the provisions to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls.

ANTI-BRIBERY PROVISIONS

The FCPA makes it unlawful to bribe foreign government officials to obtain or retain business. With respect to the basic prohibition, there are five elements that must be met to constitute a violation of the Act:

1. The FCPA potentially applies to any individual, firm, officer, director, employee, or agent of a firm and any stockholder acting on behalf of a firm. Individuals and firms may also be penalized if they order, authorize, or assist someone else to violate the antibribery provisions or if they conspire to violate those provisions. Under the FCPA, U.S. jurisdiction over corrupt payments to foreign officials depends upon whether the violator is an "issuer," a "domestic concern," or a foreign national or business. An "issuer" is a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC. A "domestic concern" is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States. Finally, U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question, as can U.S. citizens or residents, themselves "domestic concerns," who were employed by or acting on behalf of such foreign-incorporated subsidiaries.
2. Corrupt intent -- The person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to any other person. The FCPA does not require that a corrupt act succeed in its purpose. The FCPA prohibits any corrupt payment intended to influence any act or decision of a foreign official in his or her official capacity, to induce the official to do or omit to do any act in violation of his or her lawful duty, to obtain any improper advantage, or to induce a foreign official to use his or her influence improperly to affect or influence any act or decision.
3. Payment -- The FCPA prohibits paying, offering, promising to pay (or authorizing to pay or offer) money or anything of value.
4. Recipient -- The prohibition extends only to corrupt payments to a foreign official, a foreign political party or party official, or any candidate for foreign political office. A "foreign official" means any officer or employee of a foreign government, a public international organization, or any department or agency thereof, or any person acting in an official capacity. The FCPA applies to payments to any public official, regardless of rank or position.

5. Business Purpose Test -- 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 FCPA prohibits corrupt payments through intermediaries. It is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. Intermediaries may include joint venture partners or agents.

PERMISSIBLE PAYMENTS AND AFFIRMATIVE DEFENSES

The FCPA contains an explicit exception to the bribery prohibition for "facilitating payments" for "routine governmental action" and provides affirmative defenses that can be used to defend against alleged violations of the FCPA.

FACILITATING PAYMENTS FOR ROUTINE GOVERNMENTAL ACTIONS

There is an exception to the anti-bribery prohibition for payments to facilitate or expedite performance of a "routine governmental action." The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country. Actions "similar" to these are also covered by this exception.

AFFIRMATIVE DEFENSES

A person charged with a violation of the FCPA's antibribery provisions may assert as a defense that the payment was lawful under the written laws of the foreign country or that the money was spent as part of demonstrating a product or performing a contractual obligation. Whether a payment is lawful under the written laws of the foreign country may be difficult to determine. Moreover, because these defenses are "affirmative defenses," the defendant is required to show in the first instance that the payment met these requirements. The prosecution does not bear

the burden of demonstrating in the first instance that the payments did not constitute this type of payment.

SANCTIONS AGAINST BRIBERY

The following criminal penalties may be imposed for violations of the FCPA's antibribery provisions: corporations and other business entities are subject to a fine of up to \$2,000,000; officers, directors, stockholders, employees, and agents are subject to a fine of up to \$100,000 and imprisonment for up to five years. Moreover, under the Alternative Fines Act, these fines may be actually quite higher -- the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment. You should also be aware that fines imposed on individuals may not be paid by their employer or principal.

CIVIL ENFORCEMENT

The Attorney General or the SEC, as appropriate, may bring a civil action for a fine of up to \$10,000 against any firm as well as any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm, who violates the antibribery provisions. In addition, in an SEC enforcement action, the court may impose an additional fine not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation, or (ii) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from \$5,000 to \$100,000 for a natural person and \$50,000 to \$500,000 for any other person. The Attorney General or the SEC, as appropriate, may also bring a civil action to enjoin any act or practice of a firm whenever it appears that the firm (or an officer, director, employee, agent, or stockholder acting on behalf of the firm) is in violation (or about to be) of the antibribery provisions.

OTHER GOVERNMENTAL ACTION

A person or firm found in violation of the FCPA may be barred from doing business with the Federal government. Indictment alone can lead to suspension of the right to do business with the government. The President has directed that no executive agency shall allow any party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded that party from participation in a procurement or non procurement

activity. In addition, a person or firm found guilty of violating the FCPA may be ruled ineligible to receive export licenses; the SEC may suspend or bar persons from the securities business and impose civil penalties on persons in the securities business for violations of the FCPA; the Commodity Futures Trading Commission and the Overseas Private Investment Corporation both provide for possible suspension or debarment from agency programs for violation of the FCPA; and a payment made to a foreign government official that is unlawful under the FCPA cannot be deducted under the tax laws as a business expense.

PRIVATE CAUSE OF ACTION

Conduct that violates the antibribery provisions of the FCPA may also give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), or to actions under other federal or state laws. For example, an action might be brought under RICO by a competitor who alleges that the bribery caused the defendant to win a foreign contract.

ACCOUNTING PROVISIONS

The FCPA's accounting provisions requires every issuer registered with the SEC keep accurate books and records and to establish and maintain a system of internal accounting controls. Specifically, the accounting provisions under the FCPA require every issuer that has a class of securities registered pursuant to Section 12 or that is required to file reports pursuant to Section 15(d) of the Securities Exchange Act to (A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and (B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that--

- (i) transactions are executed in accordance with management's general or specific authorization;
- (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
- (iii) access to assets is permitted only in accordance with management's general or specific authorization; and
- (iv) the recorded accountability for assets is compared with the existing assets at reasonable levels and appropriate action is taken with respect to any differences.

The accounting requirements extend far beyond the conduct of overseas bribery. It applies to all issuers, whether or not they have operations abroad and to all aspects of accounting and record keeping, whether or not bribery is involved. Third, it establishes requirements of corporate record keeping and accountability that extend beyond the concepts of materiality and disclosure generally required for securities transactions or filings with the SEC. Inadvertent record-keeping mistakes would not give rise to an enforcement action.

The concept of devising and maintaining a system of internal accounting controls codified existing auditing standards. If the internal control procedures are reasonable under the circumstances, they will not be second-guessed by enforcement authorities. The size of the business, diversity of operations, degree of centralization, financial and operating management, and other such factors will determine the shape of an internal control system. The test of an adequate accounting control system is not that mistakes and errors never occur. Rather, the test is a system's ability to uncover and correct such mistakes in a timely manner.

Criminal liability under the accounting provisions requires that a person "knowingly" falsify its books and records and knowingly circumvent a system of internal accounting controls. This makes clear that criminal liability will be imposed only for intentional actions.

Where an issuer owns more than 50% of the voting shares of a foreign firm, it has an obligation to ensure that the subsidiary complies with the accounting requirements of the FCPA. Where an issuer owns 50% or less of a foreign entity, the issuer has an obligation "to proceed in good faith to use its influence" to cause the affiliate to devise and maintain a system of internal accounting controls consistent with requirements of the FCPA. If the issuer demonstrates good-faith efforts, it will be conclusively presumed to have met its obligations.

ENFORCEMENT

The Department of Justice is responsible for all criminal enforcement and for civil enforcement of the anti-bribery provisions with respect to domestic concerns and foreign companies and nationals. The SEC is responsible for civil enforcement of the anti-bribery provisions with respect to issuers.

~~~~~

Igbanugo Partners Int'l Law Firm, PLLC designed its anti-corruption advisory and training services to withstand the whirlwind of corrupt practices that the present enabling environment on the Continent of Africa promotes. We support the Global Sullivan Principles that provide a guide to businesses of all sizes on corporate social responsibility. We are an information source for companies intent on operating in an environment free of corruption and/or corruptive practices.

250 Marquette Avenue, Suite 1075  
Minneapolis, MN 55401  
Email: [higbanugo@igbanugolaw.com](mailto:higbanugo@igbanugolaw.com)  
Telephone: 612-746-0360  
Facsimile: 612-746-0370

~~~~~

Herbert A. Igbanugo, Esq. (Professional Biography)

Herbert A. Igbanugo is the founding shareholder of Igbanugo Partners Int'l Law Firm, P.L.L.C. and was a founding partner of the former law firm of Blackwell Igbanugo P.A. Born in Nigeria (West Africa), he received his undergraduate degree in International Relations and Economics from the University of Minnesota in 1983 and 1984 respectively, and his Juris Doctor Degree from Hamline University School of Law in 1987. He heads the International Trade Law practice group focusing exclusively on Sub-Saharan Africa. In year 2000, he was invited to participate as a delegate in former President William Jefferson Clinton's historic trip to Sub-Saharan Africa. Over the past decade, he has regularly traveled to Africa developing crucial relationships in both the governmental and private sectors and studying economic trends in the region.

He is a member of the Minnesota and New York State Bar Associations and is admitted to practice before numerous U.S. Federal District Courts, Second, Third, Fourth, Fifth, Seventh, Eighth, and Ninth Circuit Courts of Appeals, the U.S. Court of International Trade, and the U.S. Supreme Court. Mr. Igbanugo practices in the areas of International Business Law (Sub-Saharan Africa) and U.S. Immigration & Nationality Law. He is known and respected in the legal community, and has been an adjunct professor of law at Hamline University and guest lecturer at the William Mitchell College of Law (St. Paul, Minnesota). He is also a frequent faculty participant and author for the Minnesota Institute of Legal Education (MILE) and American Immigration Lawyers Association (AILA). His bar memberships include the Minnesota State Bar Association (MSBA), American Bar Association (ABA), U.S. Customs and International Trade Bar Association (CITBA), International Bar Association (IBA), National Bar Association (NBA) (he co-chairs this national organization's Immigration Law Section), and the American Immigration Lawyers Association. He is a member of the executive committee of the International Leadership Institute (ILI), a Sub-Saharan Africa focused non-profit organization (NGO) and Igbanugo Partners is dedicated to championing the worthwhile endeavors of the Institute on the Continent of Africa. The Institute, under the leadership of Minnesota state District Court Judge, LaJune Lange, with substantial assistance from Mr. Igbanugo, played a prominent role as

steering committee member in the October and November 2001 gatherings in Washington, DC and Philadelphia, required under the African Growth and Opportunity Act (AGOA) legislation.

Mr. Igbunugo also has substantial experience with the complex maze of U.S. Immigration and Customs legislations and regulations. He possesses a mastery of the intricate laws, complex procedures, and difficult bureaucracy created by the Homeland Security Act of 2002, and the plethora of regulations of the U.S. Department of Homeland Security's Citizenship and Immigration Services, Department of State and Department of Labor. Mr. Igbunugo assists law firms, corporations, healthcare organizations, universities, entertainment/sports agents, and executive search firms with a myriad of immigration matters associated with the hiring and intra-company transfers of foreign nationals for temporary or permanent assignments in the United States and the countries of Sub-Saharan Africa. In addition to traditional international trade practice areas, Igbunugo Partners' Sub-Saharan Africa Group also boasts consulting capability and anti-corruption training and advisory services. Mr. Igbunugo is also well versed in African-governmental relations development, lobbying and/or interest advocacy as well as U.S. government relations and public policy, including issue advocacy (e.g., debt relief, normalization of trade before federal and state decision makers, legislative drafting and analysis, legislative and executive branch monitoring on behalf of African governments, industries and business organizations). He also aids corporations and other non-governmental entities with the interpretation, implementation and application of the African Growth and Opportunity Acts (AGOA) legislative provisions.