INTERNATIONAL REGULATORY AND ENFORCEMENT

Princelings – Expanding Definition of "Value" Under FCPA

By Jonathan "Jack" Harrington

Congress enacted the Foreign Corrupt Practices Act ("FCPA") in 1977 in the wake of the Watergate investigation and in response to reports of widespread bribery of foreign officials by U.S. companies. The FCPA prohibits U.S. persons, companies, and issuers from, among other things, bribing or attempting to bribe a foreign official in order to secure an improper business advantage. In basic terms, the elements of an FCPA bribery charge include: offering, paying, or authorizing "anything of value" directly or indirectly, to a foreign official, to improperly gain a business advantage.

For decades, the FCPA laid relatively dormant. In recent years, however, the Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") have dramatically stepped up enforcement of the act. For instance, since 2008, the top 10 FCPA enforcement actions have cost those 10 companies a total of $4.4 billion in fines and disgorgement. During the FCPA's renaissance, the government has actively sought to extend the jurisdictional reach of the act, as well as expand the definition of the five elements of a bribery charge. The evolving definition and interpretation of each element, let alone all five, is beyond the scope of this article.

Jonathan Harrington

Since 2013, however, one of the most interesting developments has been the meaning of "anything of value" in relation to U.S. financial services institutions hiring children of influential foreign officials, or so-called "princelings" as they are referred to in China. In August 2013, JP Morgan Chase disclosed an investigation into a hiring program targeting the children of top Chinese officials. For years, it has been standard practice for western banks to hire relatives or close friends of senior Chinese officials in order to build up "guanxi" (meaning "networks" or "connections").

As you might expect, the government's theory is that the job or internship constitutes something of value under the FCPA and that it is being offered to improperly gain a business advantage. The interesting question becomes, however, does network-building or even blatant nepotism rise to the level of an FCPA violation? The answer appears to be "maybe."

What constitutes something of value is not always easy to answer. Sometimes the answer is very clear. The proverbial suitcase full of unmarked bills delivered in a dark alley to a foreign minister in exchange for a lucrative government contract is a clear violation. Cash is certainly something of "value." But what if the thing of value is not promised or delivered directly "to" the official? For instance, in *SEC v. Schering-Plough Corp.*, No. 04-CV-00945 (D.D.C. June 16, 2004), the Commission argued that gifts given to a third-party charity were intended to influence the charity's founder, a senior Polish official. The charity was legitimate and the donation never went into the personal coffers of the official, but the government staked a clear position as to what it considers to be something of "value" for the purposes of the FCPA.

Returning to the recent princeling cases, can a job (even an unpaid internship) offer to a relative of a foreign official inure to the benefit of the official himself? If the job is lucrative, then arguably the salary received by the relative is a savings to the official, but that assumes some level of financial dependence. One could also argue that there is an intrinsic or prestige value associated with working at a reputable financial services firm, but it is very hard to gauge such benefits.

Hiring a family member of a government official is not necessarily a violation of the FCPA's anti-bribery provisions. But if a company does so with the intent to induce the official to do something in their official capacity, such as award a contract or approve a deal, that hire would potentially cross the line. Reporting has indicated that JP Morgan referred to the hiring pipeline as the "sons and daughters" program, and had created a spreadsheet linking specific princeling hires to specific deals being pursued by the bank. JP Morgan and its officials have not been charged with any wrongdoing.

In prosecuting this recent line of princeling cases, the DOJ and SEC are sending a very clear signal that it is continuing to seek ways to expand the reach and scope of the FCPA. The princeling investigations to date have been settled, so there is no case law to help companies determine the left and right bounds when it comes to hiring the relatives of foreign officials. The U.S. government's public statements on these cases, however, are certainly instructive.

First, companies that might hire a relative of a foreign official should not

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REAL PROPERTY

Foreign Ownership of Real Property in the United States

By Robert B. Moy

There has been tremendous growth in foreign investment in real property, both residential and commercial, located in the United States in the past five to ten years. Some states, such as New York and California, have seen a large number of investors from Asia, especially from China, purchasing real property and investing in real estate development projects. Florida and other southern states have seen a large influx of investment dollars from South America pouring into real estate.

Although there are many reasons for this growth, perhaps the key factor is that real estate in the United States is perceived to be a safe and stable investment by foreign investors. Foreign investment flowing into the United States from China has been fueled by the incredible wealth created by the Chinese economy and stock market, and the easing of restrictions on currency controls, which has allowed the free flow of money out of China. The increased popularity and use of the EB-5 Immigrant Investor Program to allow foreign investors to obtain permanent residency status in the United States has also helped to increase the flow of foreign , investment into United States real estate.

Robert B. Moy

There are many tax and liability implications applicable to foreigners buying real property in the United States, which should be addressed with some advanced planning prior to the signing of a contract and/or the closing of the purchase. One of the key considerations for foreign buyers is structuring the ownership of the real property to minimize taxation and to maximize protection from personal liability arising out of ownership.

Ownership structure

The simplest form of real property ownership in the United States is ownership in a foreign buyer's individual name. There are, however, significant disadvantages to individual ownership, such as the potentially onerous estate tax in the event that the individual dies while the owner of real property located in the United States. In addition, an individual owner is exposed to personal liability for any obligations arising out of the ownership of the real property.

One form of ownership available to foreign buyers to shield themselves from personal liability is a limited liability company ("LLC"). Ownership of real property in an LLC provides liability protection for the LLC's owners or "members," and an LLC is a pass through entity that is taxed only to each of its members. Thus, LLC's avoid the double taxation of other entities such as C corporations, which are taxed once at the corporate level and again at the shareholder level. An LLC does not necessarily provide estate tax savings to individual foreign owners of the entity, but it has become a popular entity to use for owning real estate.

Another option available to foreign buyers is to own real property through a foreign corporation. In addition to the limited liability offered by foreign corporations, individual owners of foreign corporations are not subject to United States estate taxation upon the death of the individual shareholders. There are some disadvantages, as foreign corporations may be subject to more income tax since they are not entitled to any reduced capital gains tax rates upon sale of the real property, a benefit that is available to individuals. In addition, there might be an additional income tax imposed upon foreign corporations known as a "branch profits tax."

Perhaps the most advantageous structure for foreign buyers to own real property in the United States is a hybrid structure whereby a foreign citizen owns a foreign corporation, which in turn, owns an LLC set up in the United States. A foreign citizen in this dual structure will have liability protection, and avoids the possibility of United States estate taxes upon death. The tradeoff is the potential for higher income taxes and capital gains tax rates upon sale of the real property.

It is also worth noting that upon the disposition of any real property, all foreign individuals and foreign corporations are subject to withholding under the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA). Under FIRPTA, the buyer of real property from a foreign owner is required

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Foreign Ownership of Property in the United States (Continued from page 10)

to withhold 10 percent of the gross purchase price at the closing. The foreign investor may apply for any refund at the end of the tax reporting year once any applicable taxes have been paid from the withholding.

Estate and gift tax considerations

As noted above, there is generally an estate tax imposed on the estate of a foreign citizen who owns real property situated in the United States at the time of death. A foreign citizen receives only a $60,000 exemption on estate taxes for any property owned in the United States at the time of death (compared to the $5,430,000 exemption from federal estate taxes that United States citizens currently receive), and an estate tax return must be filed for the estate if the gross estate exceeds $60,000 in assets located in the United States. These assets would include direct ownership of real property in the foreign individual's name or the foreign citizen's ownership interest in an LLC set up in the United States.

If a foreign citizen owns real property in the United States through a foreign corporation, or through the hybrid structure discussed above, there is no estate tax upon the death of the individual because shares in a foreign corporation are not considered assets located in the United States, even if the real property owned by that entity is located in the United States. Similarly, a gift by a foreign citizen of stock in a foreign corporation is not subject to gift tax in the United States. If, however, a foreign citizen wishes to gift real property located in the United States directly, the donor of the gift would be subject to a gift tax on the value of the gift and the recipient would be subject to reporting requirements to the United States government if any such gifts exceed $100,000 in the aggregate in any given year.

Other considerations

There are many other issues for foreign buyers that arise in connection with purchasing or investing in real property in the United States. Title insurance is a concept that is new to many foreigners, but it insures that the purchaser is receiving clear title. At closing, it is imperative that the foreign buyer secure title insurance and have adequate homeowners and/or liability insurance.

Land use and zoning issues frequently arise with real estate and it is important to determine whether the property is properly zoned for the intended use of the foreign buyer, preferably before a contract is signed. Local zoning laws and regulations may permit only certain uses for the real property or place restrictions on expansion or development of the property. If a purchaser wishes to change the use of the property for another purpose or to expand or develop the property, great care must be taken to determine whether that new use or expansion is permissible.

Due diligence, financing options, property management issues, USA Patriot Act considerations and even whether the foreign buyer needs to be physically present at the closing are all issues that arise and need to be addressed by a foreign buyer. Thus, it is vital that foreign buyers assemble a team of trusted advisors, including real estate brokers, engineers, appraisers, bankers, attorneys, accountants, contractors and property managers to guide them through the process.

Note: Robert B. Moy is a partner in the Tax, Trusts and Estate and Corporate departments of Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana LLP.

Confronting the Expert Under the Sixth Amendment (Continued from page 18)

mine whether the prosecution could admit a DNA report only by calling to testify each of the many criminologists who participated in preparing the report for the Office of the Chief Medical Examiner, as the defense argued, or he could rely solely on the testimony of the supervising analyst who made the final assessment of the data, which is the only witness the prosecution intended to call to testify. The defense argued that the testimony of each lab analyst was necessary because of the risks of contamination and the presumptions technicians make, and because the defendant's right to confront them outweighed any practical difficulties of trial. The court agreed in part with the defense. It found that the work performed by the initial analyst who took the sample from the victim, and the final analysis and conclusions of the supervising analyst, were testimonial in nature and therefore, could be admitted only by the testimony of the very individuals who conducted that work. The court found however, that "machine driven" testing which was performed by various technicians was not testimonial and evidence thereof could be admitted through the prosecution's proffered supervising analyst.

In making this decision, the court noted a significant factor, which distinguished the case from *Williams*: the identification of the defendant. In *Williams*, the DNA profile was made when the defendant was not a suspect. Thus, it was not prepared for the purpose of identifying the defendant as the perpetrator. The victim had made a personal identification of the defendant as her attacker. In the case before the Bronx Supreme Court however, the sole evidence linking the defendant to the crime was the DNA profile, which resulted from laboratory analysis. Finding that "the original profile developed to identify a suspect is critical," the court held that "more scrutiny is necessary of the initial steps taken by the analyst who received the specimen and conducted the first stage protocols." With this heightened "scrutiny" in mind, the court was persuaded that the first analyst did not merely apply a formula, but rather engaged in "assertive conduct" which rendered her section of the report "testimonial" and required her testimony at trial.

Note: Hillary A. Frommer is counsel in Farrell Fritz's Estate Litigation Department. She focuses her practice in litigation, primarily estate matters including contested probate proceedings and contested accounting proceedings. She has extensive trial and appellate experience in both federal and state courts. Ms. Frommer also represents large and small businesses, financial institutions and individuals in complex business disputes, including shareholder and partnership disputes, employment disputes and other commercial matters.

[1] 2016 NY Slip Op 26012 (Sup Ct, Bronx County Jan. 20 2016).
[2] 132 S Ct 2221 (2012).
[3] 2016 NY Slip Op 26012.
[4] 124 S Ct 1354 (2004).
[5] *Id.*
[6] He was joined by the Chief Justice, Justice Kennedy, and Justice Breyer. Justice Thomas concurred in the judgment. Justice Kagan, Justice Scalia, Justice Ginsburg, and Justice Sotomayor dissented.
[7] *Id.* at 235.
[8] This article does not examine all aspects of the dissent.

"Best Practices" at a Wade Hearing (Continued from page 14)

not appear in the photo array; 2) not to assume that the officer/detective knows who the perpetrator is; and 3) not to ask anyone for guidance during the viewing process.

According to the best practices guidelines (again, promulgated by the NYS prosecutors' association) the identifying witness' words should be written down or recorded somehow. This is important because a witness saying: "If I had to pick someone, I would pick number three" is a very different response than merely indicating that the "witness identified number three."

Another tactical consideration is whether you want your client to be present at the Wade hearing. Although it is beyond cavil that your client has a right to be there, there is a strategic element to perhaps keeping the seat next to you empty. This is so especially where the testifying witness is not a law enforcement agent but, for example, the complainant or the victim, since once they are on the stand, they have essentially "doubled down" that your client is the person who did it. Human nature tells us that even if the complainant/victim is mistaken, they are less likely to recant their story once they have taken the witness box; in fact, they are much more likely to embellish their original narrative.

Although the prosecution may object to your decision, the CPL is unequivocal: the defendant is only required to be present at trial, and even then there are two exceptions: if she/he has waived that right in writing; or if she/he is so disruptive to the proceedings that the trial cannot continue, see CPL 340.50.

The *Wade* court stated that "[a] major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification;" a properly done *Wade* hearing ensures more grist for the justice mill.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100% devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.