

LEGAL UPDATE

CLIENT NEWSLETTER OF CARR, MORRIS & GRAEFF, P.C.

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30 TIPS FOR IMPROVING COLLECTIONS

What's worse than not winning new customers? Winning or keeping customers who use up your resources and don't pay! The downturn in the economy has brought home to many business owners the devastating effects of failing to tightly manage their receivables, as customers large and small close their doors or file for bankruptcy, or simply, stretch out their vendors to the breaking point.

Outside of the bankruptcy context, we are often called upon to try to help our clients collect outstanding balances owed by their customers. It's not the most rewarding part of practicing law. Here's a sample, fictional assignment: see if you can count the mistakes made. We are asked to collect \$10,000 owed by an out-of-town customer headquartered in Scottsdale, Arizona. No customer contract was signed; our client just has an invoice and a statement, made out to a tradename (we don't know if the customer is incorporated). The reason for nonpayment is unknown; all the client has is a series of broken promises.

The attorney starts by mailing a strong letter, also known as a *nastygram*, threatening legal action if the debt is not paid. Since we're 2,000 miles away, that doesn't intimidate the customer, so the client hires a collection firm in Scottsdale to file suit. The first responsive pleading from the customer is a counterclaim, alleging (for the very first time) that the work wasn't good, that it exceeded the estimate, that the services weren't as promised, etc. Months later, the client is mired in quicksand, spend-

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BUSINESS/CRIMINAL FOREIGN CORRUPT PRACTICES ACT: INCREASED ENFORCEMENT, INCREASED EXPOSURE

Over the past several years, specifically post-9/11, government investigative and enforcement efforts have changed in many ways. Changes have been fostered by fears of international terrorism coupled with realities of an expanding global economy providing increased international business opportunities for U.S. businesses and expanding international currency flow. This confluence, coupled with an overriding desire to curtail corruption and unfair dealing in the international business community, has led to enhanced enforcement of various federal statutes that provide both civil and criminal penalties. One such statute, which will be the first discussed in a series of *Legal Update* articles directed at regulatory statutes that impact businesses in today's international community, is the Foreign Corrupt Practices Act of 1977 (FCPA), codified at 15 U.S.C. § 78DD-1, *et seq.*

As is obvious from its enactment date—although currently a “hot button” statute in terms of enforcement—the FCPA is not a new act. Enforcement responsibility and authority is shared by the Department of Justice and the Securities and Exchange Commission. Generally, Justice deals with conduct covered by the anti-bribery provisions of the act, while the SEC enforces the act's record keeping requirements. In this *Legal Update* issue we will be dealing with only with the anti-bribery provisions, as the records provisions are geared to companies whose securities are listed in the United States and will be inapplicable to most of our readers.

FCPA enforcement clearly has been on the upswing in recent years, in part, because enforcement agencies were afforded a window into the corruption in the United Nations' *Oil-for-Food* program in Iraq after the removal of the Saddam Hussein regime. In 2007 the Department of Justice or SEC pursued 38 enforcement cases. In 2008, 33 enforcement actions were brought, and the Department

of Justice has stated that approximately 100 companies are currently under investigation for possible FCPA violations.

Although somewhat complicated in its interpretation and application, the FCPA essentially prohibits a United States individual or company from making a *corrupt payment* to a foreign official for the purpose of obtaining or retaining business or for the purpose of directing business to a third party. Concerning this basic prohibition, without going into the fact-specific legal nuances of each, there are five distinct elements which the government must establish to prove a violation of the act. Briefly, those five elements are:

(1) The first element concerns to whom the act applies. In its simplest form the FCPA applies to any United States individual or company or authorized agent of such company.

(2) The second element concerns a payment being made. The FCPA prohibits paying, offering or promising to pay (or authorizing to pay or offer) money or anything of value. The “anything of value” concept is important as it is broadly interpreted; and, government officials look beyond specific financial payments and target value provided in the payment of travel expenses, meals or anything else providing a benefit or value to the receiving party.

(3) The third element concerns the recipient, or *to whom* the payment is made or *to whom* value is provided. The FCPA prohibits corrupt payments to a foreign official, a foreign political party or party official or any candidate for foreign political office. In this area it is important to note that, again, government investigators broadly interpret the phrase “foreign official.”

(4) The fourth element involves intent. The individual or company making or authorizing payment of anything of value to a foreign official must have a corrupt intent. *Corrupt intent* requires proof that the payment was intended to induce the recipient to misuse an official position to wrongfully direct business to the payer or to a designated third party.

(5) The last element concerns what the payment is to accomplish. The FCPA prohibits payments made to assist an individual or

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CORPORATE **INTERNATIONAL FINANCIAL** **REPORTING STANDARDS**

On August 27, 2008, the Securities and Exchange Commission (SEC) voted to publish for public comment a proposed "Roadmap" which could lead to the use of International Financial Reporting Standards (IFRS) by U.S. issuers of securities in 2014. At this time U.S. issuers use Generally Accepted Accounting Principles (GAAP). The Commission would make a final decision in 2011 on whether adoption of IFRS is in the public interest and would benefit investors. The proposed multi-year plan sets forth milestones which would lead to use of IFRS by U.S. issuers in their Commission filings.

The SEC is considering changing from GAAP to IFRS because 67% of U.S. investors own securities issued by foreign companies which report their financial statements using IFRS. Thus, establishment of a single set of accounting standards is viewed by the SEC as of growing importance. The Commission believes a common accounting language would give U.S. investors greater comparability and greater confidence in the transparency of financial statements of all companies.

Although technically the change would only affect publicly-held companies, privately-held companies would inevitably need to come into compliance with the new standards for three reasons: first, in case they ever go public; second, in case they are acquired by a public company; third, in order to be able to compare their financial results with similar public companies. Moreover, the accounting profession will wish to train its practitioners in only one system, rather than running parallel systems for different types of companies.

IFRS is simpler than GAAP and is based on general principles rather than specific rules. Business Week has reported GAAP contains 25,000 pages, whereas IFRS contains only 2,500. Thus, IFRS gives accountants and their auditors more room for judgment. After the financial scandals of the late twentieth century and early twenty-first, this characteristic is an advantage only with tightened auditing standards. The Sarbanes-Oxley Act of 2002, about which we have written in previous issues of this publication, has done just that. Still this room for judgment could cause problems in the future. For example Business Week has also reported that among the 137 companies reporting 2006 financial results under both GAAP and IFRS, 63% showed higher earn-

ings with IFRS. The median increase in earnings was 11%.

The possible changeover from GAAP to IFRS for U.S. companies is still at an early stage, and we will cover developments in these pages. At this time it appears many accountants and government officials concerned with accounting, such as SEC Commissioners, are inclined towards IFRS because of the comparability advantage. Once the U.S. jumps into IFRS it is likely the U.S. will insist on changes that will reduce the role of judgment in reporting net income. After all comparability will suffer if companies in the same line of business are allowed widely different means to reach the all-important figure of earnings per share. Reducing the role of judgment, however, will result in increasing the number of rules in IFRS, which is the problem sought to be avoided by discarding GAAP. As usual there is no free lunch. Rules-based systems such as GAAP are inherently complex but theoretically produce more uniform results. Principles-based systems such as IFRS are inherently simple but do, in fact, provide less uniformity. If the U.S. does join IFRS the end result will probably be a mixed system with more rules than IFRS has right now, but fewer than GAAP.

One final policy point. Whatever one thinks of the merits of the financial institution bail outs enacted by Congress in 2008 and 2009, part of the problem had to do with accounting for mortgage-backed securities on bank and other balance sheets. Specifically, the issue was whether or not certain financial assets should be "marked to market" periodically. The valuation of those assets had a direct impact on the capital of banks and, therefore, on their capacity to extend credit. Thus, accounting issues again come to the fore in the latest chapter of the financial saga of the past ten years. Which system is more accurate in measuring bank financial statements is an open question but one which will be extremely important in the SEC's evaluation of IFRS given our current financial predicament.

NÉSTOR CRUZ

BUSINESS/CRIMINAL

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company in obtaining or retaining business or in directing business to another party. Again, consistent with the other elements, the government interprets the "obtaining or retaining business" element broadly.

Significant to consider, when evaluating the

FCPA's impact on your business and the cost of compliance, is the fact that penalty provisions for both civil and criminal violations have recently been enhanced. A civil violation can lead to a fine of up to \$10,000 for each violation. Criminal conduct can be punished by a business fine of up to \$2,000,000 and a fine of up to \$100,000 for an individual along with up to five years incarceration.

For companies that deal internationally, what risks are presented by the FCPA? There are two common sources of FCPA risks that we will highlight in this issue. First, in certain countries, payment of bribes is a common, even expected, occurrence in commercial dealings. Commercial transactions in countries that have a reputation for bribery or unethical behavior pose greater risks. Second, when dealing through sales agents or representatives, a gift or payment made by an agent could potentially violate the FCPA, and the actions of that agent could be imputed to your company.

What actions should a prudent company take to guard against the possibility of an FCPA violation? As a first step, we recommend that any company that deals internationally have in place an FCPA Corporate Compliance Policy. Such corporate policies and statements are an important tool in preventing violations; they can also be an element in an FCPA defense, should an FCPA investigation target the company. In addition, companies should review their arrangements with third-party agents and sales representatives to ensure that they contain adequate provisions to protect the company against any allegation of improper conduct under the FCPA.

The above is just a brief description of the increased enforcement efforts, the elements and the risks concerning the FCPA. Because they are so fact-specific, we do not address the various nuances of the elements constituting a civil or criminal violation. Nor do we address payments that under certain circumstances may be deemed permissible or analyze recognized affirmative defenses that may exist. For purposes of this article, suffice it to say, it is important for any U.S. business engaged in commerce abroad to be aware of the FCPA, to consider implementing an FCPA Corporate Compliance Policy and to work closely with corporate, regulatory and, where necessary, criminal counsel as issues arise in this area.

If your company is currently conducting business internationally and if you have any questions or concerns regarding the FCPA's real or potential impact, we invite you to contact us.

STEPHEN GRAEFF

30 TIPS FOR IMPROVING COLLECTIONS

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ing money taking depositions, beating back this bogus counterclaim, going out of town for discovery, and generally wishing he had never brought the case. Eventually, the case is settled as a walk-away, and the client is out of pocket not only the cost of providing the goods or services, but his legal fees with the Scottsdale collection lawyer.

What can a business do to prevent becoming mired in this type of unwinnable exercise? Here are 30 tips, not all of them applicable to every business, but there is something here for everyone.

Implement Systematic Credit Policies

Follow Rule One: get the money up front. Make sure your first order from a customer is prepaid; take a deposit; charge it to credit card, anything but making the sale on credit. This not only improves your cash flow but separates out people who were going to stiff you. Yes, you will lose sales and be grateful for that!

You can sweeten the application of Rule One by giving the customer a discount for payment in advance. Reduce the price an additional 2% on the first order because you require payment in advance. Anyone who doesn't take that deal wasn't going to pay timely anyway.

Your own salespeople should not earn their commission until the customer pays in full.

Credit extension decisions

Use credit reports, D&B, public information, industry information sharing or chat groups, blogs, anything you can access, to investigate a customer's creditworthiness in advance. At a minimum you should Google every new customer; you never know what you might find.

Obtain a credit application giving pertinent information about the business.

Check credit references; especially, call customer's bank branch manager. Just having to give credit references is going to weed out some shaky customers.

Customer contract

Get a customer contract signed in every instance. Especially that little \$2,000 job that you are doing as a favor.

Specify payment terms, including 18% annual interest on overdue accounts (readily waived in return for payment). You can look like a nice guy when you waive the interest.

Impose time limits on objecting to quality of work or products and set up a process for promptly adjusting any complaints that arise.

Limit damages that you may be liable for under the contract, *e.g.*, to an amount no greater than the amount paid by the customer in the last 12 months.

Exclude consequential and punitive damages.

Provide for arbitration in your own home jurisdiction. Benefits of arbitration include privacy, speed of resolution (relatively), choice of venue, and discouraging (some-what) frivolous counterclaims.

Provide for payment of attorneys' fees and arbitration costs by losing party.

Sometimes you can get a personal guaranty, especially if the business is a young one.

Ask for pre-authorization of credit card charge if possible. Again, if they decline that, it's a warning sign.

Billing

Have customers pay by invoice, not by statement.

Render statements twice a month (boosts cash flow by 1/24 of annual revenues).

Place a due date on every bill.

Offer discount to early payers, *e.g.*, 2% for payment within 10 days.

Use stamped or prepaid self-addressed envelopes, or electronic funds transfers, to speed payments.

Collection efforts

We teach people how to treat us. Your collection efforts should be uniform and relentless.

Appoint a permanent collection manager with responsibility and authority. Outsource if necessary. Commission the collection manager.

First, find out why you are not being paid.

If the reason is a billing or service quality dispute, resolve it promptly. Doing so may save the relationship and get you paid at the same time.

Monitor customer payment history so you can spot trends and intervene early.

Stop shipping to/working for customers who are not in good standing. It's amazing how reluctant most vendors are to pull the trigger on suspending shipments.

Use the telephone vs. email or regular mail; you may need to be persistent, but you can present the urgency of your request much more effectively in a real time communication.

Use a promissory note and/or security agreement to document any negotiated accommodations, especially, a confession of judgment note. A negotiable note negates counterclaims; security agreements give you preferential treatment in a sale or bankruptcy scenario.

Offer expedited payment means to secure immediate payment, such as a credit card or direct debit. That way you don't have to accept "I'll put a check in the mail."

Obtain specific commitment for a payment date and amount and then, follow up.

Hold a limited-time sale on accounts receivable. If you offer the customer half off for immediate payment, isn't that better than collecting nothing?

Barter may be a way of getting some value from the customer, if their services or products are something you can use.

Even if bankruptcy is looming, and you suspect that a payment might be preferential, go ahead and take the payment, but be prepared to return it if the customer files bankruptcy within 90 days.

Collection Lawsuits- the last resort

Use customer contract to position yourself to best advantage as discussed above.

Consider cutting your losses whenever amount is under \$10,000, and just accepting the fact that it's very difficult to cost-effectively litigate any case where less than \$10,000 is at stake.

Managing credit and the collection process effectively is more important than ever. By the time a business finds itself in litigation with its customer, it has already made a multitude of mistakes in extending and managing its credit, and the lawsuit is primarily a salvage operation. Or as we sometimes say, tuition in the school of hard knocks. Here's hoping that you never have to call us to help collect a customer account receivable!

ROY MORRIS

CARR, MORRIS & GRAEFF, P.C.

Carr, Morris & Graeff, P.C., was established in 1982 by the named principals—Lawrence Carr, Roy Morris and Stephen Graeff. It is a diversified firm structured primarily to meet the legal needs of businesses and their principals.

The firm strives to provide full service representation to its corporate and individual clients. It is designed to provide such service by organization and presentation of an array of attorneys with diverse backgrounds in specialized areas of the law as well as a generalized background which enables them to look beyond a narrow specialty or need. The academic and cultural backgrounds of the attorneys of the firm are as diverse as their experience and specializations.

Carr, Morris & Graeff, P.C., specializes in the following areas: Corporate/General Business; Taxation/Estate Planning; Civil/Commercial litigation; Employment/Labor; Discrimination and Wage-Hour; Criminal; and Alternative Dispute Resolution.

The firm maintains its office in Tysons Corner, Virginia—the business hub of the metropolitan region. It has attorneys admitted to all of the local judicial jurisdictions.

STAFF NOTES

There will be blood. Justin Banford's indoor soccer season came to an abrupt end recently when he broke a bone in his hand while playing goalie. This was Justin's first time in goal—and likely his last. Yes, Justin finished the game before visiting the ER.

Beach 'n books. It's Summer, so where is everyone headed, and what are their reading recommendations?

- Nestor Cruz: Two weeks in Boca in July
The General Theory of Employment, Interest, and Money by John Maynard Keynes
The Great Contraction: 1929 - 1933 by Milton Friedman
The Romans: From Village to Empire by Mary T. Boatwright
- Tom Berger: Deckhand on the SS John W. Brown out of the Port of Baltimore.
Appeal by John Grisham.
- Larry Carr: A week at Bethany Beach
Easy Company Soldier by Sgt. Dan Malarkey
They Have Killed Papa Dead! by Anthony S. Pitch
- Roy Morris: Bicycle tour of Costa Azul, Portugal. Having only read the Classic Comics edition of *Moby Dick*, Roy is going to work his way through what many say is the finest novel in the English language.
- Steve Graeff: Coast of Maine
Indignation by Philip Roth
Three Cups of Tea by Greg Mortenson
The Girl With The Dragon Tattoo by Stieg Larsson
- Phil Schwartz: continues to call radio DJ's hoping to win a free vacation...failing that, may re-designate parents weekend at the kids' camp as a "vacation"...will read whatever book he boosts from Steve Graeff's office
- Dana Theriot: Routine Lake Anna visits, a weekend at a beach in Connecticut and a week at the Outer Banks
The Lost Hours by Karen White
Firefly Lane by Kristin Hannah
- Justin Banford: visiting expat friends in Scotland in September
Walden by Henry David Thoreau
The Great Inflation and Its Aftermath by Robert J. Samuelson

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