

I Can't Drive 55: The Uselessness of a 'Custom and Practice' Defense under the FCPA

For anyone who learned to drive before 1975, the bane of our driving existence thereafter was the 55 mile per hour (mph) speed limit. About the only thing that I can say it did was increase the budgets of state highway patrols through all the tickets they gave out to persons who were driving closer above that hallowed highway speed limit. But as much as we did not like the new speed limit, it was the law and if you drove over it and were clocked by radar, you were eligible for a ticket and it did not matter how many other speeders there were buzzing by that day.

I thought about that old Sammy Hagar song while reading about the forlorn attempt by the remaining *US v. Carson* defendants, Paul Cosgrove and David Edmonds. As reported by the **FCPA Blog**, in a post entitled "*Feds: Widespread Corruption Is No Defense*", these defendants have sought a jury instruction that mimics that old Sammy Hagar classic. According to the FCPA Blog, the defendants "want an [jury] instruction about 'industry practices' in some of the countries where CCI did business. And they want to introduce evidence about corruption in those countries, including China." The FCPA Blog goes on to site the Department of Justice (DOJ) response which properly recites a nearly 50 year old legal standard that "Neither custom nor the widespread nature of an illegal act is a defense to a criminal charge. 'Custom, involving criminality, cannot justify a criminal act.'" *Smith v. United States*, 188 F.2d 969, 970 (9th Cir. 1951)."

Perhaps the defendants became confused about the inclusion of a local law defense in the Foreign Corrupt Practices Act (FCPA) under which payments to foreign governmental officials that are otherwise prohibited are permitted if the "payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's...country." The local law defense is an affirmative defense which was added to the FCPA in 1988 as part of a series of amendments designed to address criticisms of the statute. As noted by Kyle Sheehan, in his article "*I'm Not Going to Disneyland*", one such criticism of the FCPA was that through it the United States was more interested in exporting its cultural biases than its products"; may have placed "unreasonable restrictions on American corporations operating in foreign countries"; and that payments to foreign government officials rendered unlawful by the FCPA may have been legal in many countries. The Fifth Circuit Court of Appeals spoke to this issue in its decision in *United States v. Castle*, where it noted that "the [FCPA] drafters acknowledged, and the final law reflects this, that some payments that would be unethical or even illegal within the United States might not be perceived similarly in foreign countries, and those payments should not be criminalized."

However, Sheehan also noted that Congress made it clear that in order for the local law defense to apply, the alleged corrupt payment must be legal under the written laws of the foreign country. The conference report on the 1988 amendments states "that the absence of written laws in a

foreign official's country would not by itself be sufficient to satisfy this defense." Consequently, FCPA defendants planning to invoke the defense must know that the written law of the foreign official's country expressly permits the payment. It cannot simply be that the "payments rendered illegal by the FCPA are part of the unwritten custom and practice of doing business in foreign countries."

So how about Sammy Hagar and his iconic song? Just as the remaining Carson defendants have no hope of claiming some sort of 'custom and practice' defense to the FCPA because, after all, everyone else is doing it, the recent spate of new commentators to the FCPA who have made the same argument that the US has no business enforcing the FCPA because others are breaking the law are similarly forlorn. Simply reflect upon that defense to your speeding ticket for driving 70 mph in a 55 mph zone. It will not work in Traffic Court, it will not work in a federal District Court and it will not work in arguing that the DOJ should not enforce the FCPA.

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