Bloomberg Law Reports®

January 11, 2012

Corporate and M&A Law

Federal Crimes & Offenses

Bribery & Conflicts

Foreign Commercial Bribery and the Long Reach of U.S. Law


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In 2009, the U.S. Department of Justice charged several U.S. executives of California-based Control Components, Inc. with violating the Travel Act[1]—a somewhat obscure U.S. law originally intended to combat organized crime—for bribing employees of private businesses overseas.[2] In late September of this year, a federal district court rejected arguments by the executives in the case, *United States v. Carson*, that the Travel Act could not be applied to conduct outside the U.S., eliminating, at least for now, a possible stumbling block to further prosecution of foreign commercial bribery under the Travel Act.[3]

The Travel Act is one of the more promising instruments available to U.S. authorities to pursue private bribery overseas. While the entry into force earlier this year of the new UK Bribery Act[4] has focused considerable attention on the prohibition of foreign commercial bribery by companies "carrying on a business, or part of a business, in the United Kingdom," the possibility that foreign commercial bribery could be held to violate several U.S. statutes often has been overlooked. Besides the Travel Act, these include, among others, the mail and wire fraud statutes[5] and the Robinson-Patman Act.[6]

Significantly, the accounting provisions of the Foreign Corrupt Practices Act (FCPA)—as distinct from the anti-bribery provisions of the FCPA—also can be utilized to prosecute private sector bribery. The anti-bribery provisions of the FCPA apply only to corrupt payments made to foreign government officials.[7]

To be sure, foreign commercial bribery is not yet a primary focus of U.S. enforcement activity. U.S. authorities have tended in the past to file foreign commercial bribery charges only when conduct that is arguably of a public nature does not fall squarely within the anti-bribery provisions of the FCPA or when commercial bribery occurs in conjunction with the bribery of foreign government officials.

But a move by U.S. authorities to target commercial bribery robustly is, in our view, a distinct possibility. Such a move logically would follow from the recent upsurge in prosecutions for public sector bribery under the FCPA. In explaining the rationale for the crackdown on bribing foreign government officials, a Justice Department official noted that "bribery in international business transactions weakens economic development; it undermines confidence in the marketplace; and it distorts competition."[8] This policy rationale applies equally to commercial bribery.

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We discuss below the laws that could be used by U.S. authorities to prosecute foreign commercial bribery, beginning with the laws that are most likely to be at the center of any U.S. foray into the area: the Travel Act and the accounting provisions of the FCPA. After also considering the mail and wire fraud statutes and the Robinson-Patman Act, we offer some "take aways" for companies to consider when shaping their anti-bribery compliance policies.

The Travel Act

The Travel Act prohibits using an instrumentality of interstate or foreign commerce to commit a criminal act under U.S. state or federal law. The elements of a Travel Act violation are "(1) travel in interstate or foreign commerce or use of the mail or any facility in interstate or foreign commerce, (2) with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and (3) performance of or an attempt to perform an act of promotion, management, establishment, or carrying on of the enumerated unlawful activity."[9]

The Travel Act specifies that "unlawful activity" includes bribery in violation of state or federal laws.[10] The Travel Act thus enables U.S. authorities to use state laws prohibiting commercial bribery to prosecute commercial bribery overseas.

Such laws exist in at least 29 states, including New York, California, Illinois, Florida and Texas.[11] These laws generally prohibit giving anything of value to an individual for the purpose of influencing the individual's conduct in work-related matters without the consent of the recipient's employer or in breach of a duty–in particular a duty that the recipient owes to his or her employer.[12]

The penalty for violating the Travel Act is up to five years in prison, a fine, or both.[13] Multiple violations of the Travel Act (or the mail and wire fraud statutes) also could lead to charges under the Racketeer Influenced and Corrupt Organizations Act (RICO). RICO's penalties include fines double the value of the proceeds of a crime, forfeiture of related property and up to 20 years imprisonment.[14]

As already noted, the U.S. government currently is pursuing Travel Act charges against executives of Control Components, Inc. for commercial bribery overseas. The company itself has pled guilty to conspiracy to violate the Travel Act in connection with bribes paid to officers and employees of private companies in a number of countries to obtain or retain business. The bribes included monetary payments, "extravagant vacations" and "lavish" entertainment.[15] The charges were based on California's anti-bribery statute.[16]

While the Control Components case is potentially significant for its use of the Travel Act to prosecute foreign commercial bribery, it is important to note that a major portion of the case, and in monetary terms the more significant portion, concerned bribery of foreign government officials. The company was charged and pled guilty under the anti-bribery provisions of the FCPA for this conduct.[17] Whether the U.S. government would have pursued the Control Components case in the absence of public sector bribery is not clear.

In another prominent case, *United States v. Welch*, the Department of Justice lodged Travel Act charges against members of the Salt Lake City Olympic Bid Committee for allegedly bribing members of the International Olympic Committee–a non-governmental, non-profit organization–to rig the consideration of Salt Lake City's bid for the 2002 Winter Olympics. The case was based on Utah's commercial bribery statute.[18]

In a second case concerning a non-profit organization, *United States v. Thomson*, the Department of Justice charged executives of HealthSouth Corporation with violating the Travel Act for allegedly bribing the director general of a Saudi non-profit foundation, funded by members of the Saudi royal family, to secure business in a hospital owned by the foundation. The case was based on Alabama's commercial bribery statute.[19]

The implications of the *Welch* and *Thomson* cases for commercial bribery are not entirely clear because they concerned non-profit organizations that arguably were performing public or quasi-public functions. As a consequence, these cases might be viewed not as commercial bribery cases but as instances of the U.S. government using the Travel Act to address the bribery of persons similar to foreign officials who might not qualify as such under the FCPA.[20]

Whatever the Department of Justice's motivation in bringing the Control Components case, we believe that case–and the continuing prosecution of Control Components executives–highlight the risk of Travel Act charges for foreign commercial bribery. Clearly, the U.S. government is willing to prosecute such conduct under the Travel Act. The U.S. government's record of bringing actions under the Travel Act for bribery not covered by the FCPA also suggests that the Travel Act could be employed more frequently in the future against foreign commercial bribery.

The FCPA Accounting Provisions

The FCPA's accounting provisions require companies with publicly-traded securities in the U.S. to maintain "books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[21]

Such companies also are required to maintain a system of internal controls sufficient to provide reasonable assurance that (1) transactions are executed in accordance with management's general or specific authorization, (2) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements and to maintain accountability for such assets, (3) access to assets is permitted only in accordance with management's general or specific

authorization and (4) recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.[22]

While charges for violations of the FCPA accounting provisions often have been brought in tandem with charges under the FCPA anti-bribery prohibitions, the Securities and Exchange Commission (SEC) has brought charges solely on the basis of the accounting provisions.[23]

Notably, the text of the FCPA does not limit the accounting provisions to conduct relating to the bribery of foreign government officials. This is supported by the legislative history of the FCPA, which indicates that the accounting provisions are intended to deter the use of corporate assets "for corrupt purposes," as well as ensure accurate recordkeeping and appropriate disposition of corporate assets.[24] With that broad sweep, there would not seem to be any bar to using the FCPA accounting provisions to target commercial bribery.

So far the U.S. government has brought accounting charges relating to commercial bribery only in conjunction with other charges. For example, in *Thomson* the Department of Justice accused HealthSouth executives of violating the FCPA books and records provisions in addition to the Travel Act. The accounting charges were for failing to record accurately alleged bribes in HealthSouth's accounting records.[25]

In another significant case, SSI International Far East LTD. (SSI) pled guilty to aiding and abetting its issuer parent–Schnitzer Steel Industries, Inc. (Schnitzer)–in violating the FCPA accounting provisions in connection with private and public sector bribery in South Korea and China. According to the plea agreement, Schnitzer "failed to maintain any program or procedures to monitor its employees . . . for compliance with the FCPA and *commercial bribery laws*," and also failed to train its employees concerning the "*prohibitions on the payment of commercial bribes or 'kickbacks.*'"[26] Schnitzer was required to appoint a "compliance consultant" with authority to review and make binding recommendations concerning Schnitzer's compliance program, including in relation to compliance with U.S. commercial bribery laws.[27]

The FCPA accounting provisions are thus potentially powerful tools for combating commercial bribery. The broad requirements of the FCPA accounting provisions have been applied to commercial bribery and the U.S. government has shown that it is willing to bring charges under the accounting provisions even in the absence of charges under the FCPA's anti-bribery provisions or other laws. Penalties for violating the FCPA accounting provision are stiff: individuals can face a prison sentence of up to 20 years and a fine of up to $5 million, while companies can face a fine of up to $25 million.[28]

The Mail and Wire Fraud Statutes

Other potential instruments for the U.S. government to combat private bribery are the federal mail and wire fraud statutes, which, like the Travel Act, enable the federal government to prosecute crime that might otherwise be of a local nature, provided that an instrumentality of interstate commerce is employed. Unlike the FCPA, application of the mail and wire fraud statutes is not limited to U.S. listed companies. Penalties include up to 20 years in prison (30 years in matters involving financial institutions) and fines.[29]

The elements of mail and wire fraud are (1) knowing participation in a scheme or artifice to defraud and (2) the use of the mails or wires in carrying out such a scheme or artifice.[30] Courts generally have read the mail and wire fraud statutes broadly, with "fraud" being interpreted to encompass actions that are inconsistent with "moral uprightness . . . fundamental honesty, fair play and right dealing in the general and business life of members of society."[31]

In instances of commercial bribery, the victim of the "fraud" most likely would be the company whose employees were bribed. For example, in the SSI case discussed above, SSI pled guilty to wire fraud charges in connection with bribes paid to managers of both private and government-owned companies as part of a "scheme and artifice to obtain property by means of materially false and fraudulent pretenses . . . ." The wire fraud charges were based on allegations that the funds for the "commissions" were paid via wire transfers from the U.S.[32]

The U.S. government took a different tack in a case concerning the chairman and former CEO of KBR, Inc., Albert Jackson Stanley. A joint venture involving KBR had entered into contractual arrangements with consulting firms to channel bribes to Nigerian government officials, for which Mr. Stanley was charged with conspiracy to violate the FCPA. Mr. Stanley also received kickbacks from a consultant that was awarded contracts in connection with the Nigerian project and other matters, for which he was prosecuted for conspiracy to commit mail and wire fraud. The U.S. government's theory was that Mr. Stanley had conspired to defraud his own employer. Mr. Stanley pled guilty.[33]

The U.S. government has not used the mail and wire fraud statutes to prosecute foreign commercial bribery wholly unrelated to the bribery of government officials. Like the Travel Act, the potential of the mail and wire fraud statutes in this respect remains unrealized.[34]

The Robinson-Patman Act

The Robinson-Patman Act is a 1936 law intended to combat price discrimination. Section 2(c) of the act prohibits a seller from paying commissions or brokerage fees, or granting discounts in lieu of such fees, to the agents or brokers of a purchaser for the purpose of inducing the purchaser to enter into a transaction with the seller.[35] Many courts have interpreted this provision as a general prohibition on commercial bribery,[36] although other courts have questioned the application of the prohibition outside an antitrust context.[37]

The use of Section 2(c) of the Robinson-Patman Act against foreign bribery has been rare. In 1978, the Federal Trade Commission (FTC) found that The Boeing Company and Lockheed Corporation had made payments to foreign government officials or employees of foreign commercial companies to influence their decision to purchase aircraft.[38] The payments effectively excluded other domestic aircraft manufacturers from selling their products to the governments and companies that had received such payments. As a result, the FTC issued identical consent orders against Boeing and Lockheed, prohibiting them from making such payments "where the purpose of such payments is to influence the recipient of the payment or the customer to favor [Boeing or Lockheed] at the expense of one or more domestic competitors . . . ."[39]

The U.S. courts recently have been disinclined to extend Section 2(c) of the Robinson-Patman Act to conduct outside of the U.S.[40] In light of this and the limited use that has been made of Section 2(c) by U.S. authorities in relation to foreign commercial bribery, we do not believe that the Robinson-Patman Act is likely to play a prominent role in any future effort by the U.S. government to target such conduct. At the same time, however, the risk of the Robinson-Patman Act being used against commercial bribery should not be overlooked.

Conclusion

Although U.S. authorities have ample legal means to prosecute foreign commercial bribery, such cases have been relatively rare thus far. That may not last, however, in view of the fact that the policy rationale for prosecuting foreign public bribery seems equally applicable to foreign commercial bribery. Increased attention on commercial bribery as a consequence of the UK Bribery Act also could prod the U.S. authorities into action.

That means that companies developing compliance policies with U.S. laws in mind must ensure that they cover private sector or commercial bribery in addition to the public sector bribery that traditionally has been addressed in FCPA-focused programs. Private commercial bribery is illegal in many jurisdictions around the world and a risky activity in most circumstances. The possibility of targeted enforcement by U.S. authorities provides a compelling reason to make sure that compliance procedures address all forms of bribery. Indeed, the U.S. Department of Justice indicated in the *SSI* case that company compliance policies should cover commercial bribery.

Companies should ensure that employees and agents are prohibited from giving anything of value to anyone for the purpose of improperly influencing the recipient in the performance of his or her work. As with public officials, expenditures for meals, entertainment, travel and gifts are all high risk areas with respect to which companies should develop well-considered policies and procedures. Crucially, relevant persons also must receive training on these policies. By taking these steps, companies should be able to avoid running afoul of U.S. laws prohibiting foreign commercial bribery and also avoid the costs–in legal fees and reputational damage–that can arise from enforcement actions in this area.

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The authors would like to thank summer associate Brian K. Fitzpatrick for research assistance relating to this article.

[1] 18 U.S.C. § 1952 (2006).

[2] Indictment ¶¶ 34-35, *U.S. v. Carson*, No. 8:09-cr-00077-JVS (C.D. Cal. Aug. 4, 2009).

[3] Criminal Minutes – General, Order Denying Defendant's Motion to Dismiss Counts 1, 11, 12 and 14 of the Indictment, *Carson*, No. 8:09-cr-00077-JVS (C.D. Cal. Sept. 20, 2011).

[4] UK Bribery Act 2010 (c.23).

[5] The mail fraud statute is 18 U.S.C. § 1341 (2006), *amended by* Act of Jan. 7, 2008, 18 U.S.C. § 1341 (2011). The wire fraud statute is 18 U.S.C. § 1343 (2006), *amended by* Act of Jan. 7, 2008, 18 U.S.C. § 1343 (2011).

[6] 15 U.S.C. § 13 (2006).

[7] The accounting provisions are 15 U.S.C. § 78m(b) (2006). The anti-bribery provisions are 15 U.S.C. §§ 78dd-(1)-(3) (2006).

[8] *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 4-5 (2010) (statement of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Department of Justice).

[9] *U.S. v. Welch*, 327 F.3d 1081, 1090 (10th Cir. 2003). *See also U.S. v. Childress*, 58 F.3d 693, 719 (D.C. Cir. 1995); *U.S. v. Salameh*, 152 F.3d 88, 152 (2d Cir. 1998); *U.S. v. Hayes*, 775 F.2d 1279, 1282 (4th Cir.1985).

[10] 18 U.S.C. § 1952(b)(2) (2006).

[11] Ala. Code § 13A-11-120; Alaska Stat. Ann. § 11.46.670; Ariz. Rev. Stat. Ann. § 13-2605; Cal. Penal Code § 641.3; Colo. Rev. Stat. Ann. § 18-5-401; Conn. Gen. Stat. Ann. § 53a-160; Fla. Stat. Ann. § 838.16; Haw. Rev. Stat. § 708-880; 720 ILL. Comp. Stat. Ann. 5/29A; Iowa Code Ann. § 722.10; Kan. Stat. § 21-4405; Ky. Rev. Stat. Ann. § 518-020; La. Rev. Stat. Ann. § 14:73; Mass. Gen. Laws Ann. ch. 271, § 39; Minn. Stat. Ann. § 609.86; Miss. Code Ann. § 97-9-10; Mo. Ann. Stat. § 570.150; Neb. Rev. Stat. § 28-613; Nev. Rev. Stat. Ann. § 207.295; N.H. Rev. Stat. Ann. § 638:7; N.J. Stat. Ann. 2C:21-10; N.D. Cent. Code § 12.1-12-08; N.Y. Penal Law § 180.03; 21 Okla. St. Ann. § 380; 18 Pa. Cons. Stat. Ann. § 4108; S.D. Codified Laws § 22-43-1; Texas Code Ann. § 32.43; Utah Code Ann. § 76-6-508(1)(a); Wash. Rev. Code Ann. § 9A.68.060.

[12] *See, e.g.,* N.J. Stat. Ann. 2C:21-10; Texas Code Ann. § 32.43. Such laws can include minimum monetary thresholds for the value of the bribe or harm to the employer, but such thresholds are so small they are unlikely to be of any practical consequence for foreign commercial bribery. For example, California law outlaws corrupt payments in excess of $250. *See* Cal. Penal Code § 641.3(b). New York's law outlaws corrupt payments in excess of $1,000 that cause in excess of $250 in damage to the employer. *See* N.Y. Penal Law § 180.03.

[13] 18 U.S.C. § 1952(a)(3)(A) (2006).

[14] 18 U.S.C. § 1961(1)(B) (1962). The U.S. government has used RICO to

prosecute bribery of foreign public officials based on multiple alleged violations of the Travel Act. *See U.S. v. Young & Rubicam, Inc.*, 741 F.Supp 334 (D. Conn. 1990). RICO also has a private cause of action enabling a party injured by conduct prohibited by RICO to recover treble damages. *See* 18 U.S.C. § 1964(c).

[15] Plea Agreement ¶ 1 and Exhibit 1 ¶¶ 11-18, *U.S. v. Control Components, Inc.*, 8:09-cr-00162-JVS (C.D. Cal. July 24, 2009).

[16] Information ¶ 2, *Control Components*, 8:09-cr-00162-JVS (C.D. Cal. July 22, 2009).

[17] Plea Agreement, *Control Components*, *supra* note 16. Altogether, Control Components admitted to paying some $4.9 million in bribes to officers and employees of state-owned businesses, foreign officials within the meaning of the FCPA, and $1.95 million to officers and employees of privately-owned companies. *Id.*

[18] *Welch, supra* note 9.

[19] Superseding Indictment, *U.S. v. Thomson*, 2:04-cr-00240-IPJ-HGD (N.D. Ala. July 28, 2004).

[20] This also might have been the U.S. government's rationale for bringing Travel Act charges against executives of ITXC Corporation for bribing employees of several state-owned or affiliated telecommunication companies in Africa in 2007, a case in which FCPA bribery charges were simultaneously brought for the same conduct. One of the companies where executives were bribed was arguably not a state instrumentality, as the Senegalese government did not hold a controlling interest. *See* Information ¶ 19, *U.S. v. Ott*, No. 3:07-cr-608 (D.N.J. July 25, 2007). For general information on the ITXC case and its resolution, *see* Press Release, U.S. Department of Justice, *Two Former Executives of ITXC Corp Plead Guilty and Former Regional Director Sentenced in Foreign Bribery Scheme* (July 27, 2007).

[21] 15 U.S.C. § 78m(b)(2)(A) (2006).

[22] *Id.* § 78m(b)(2)(B).

[23] *See, e.g.*, Complaint ¶¶ 13-21, *SEC v. Con-Way Inc.*, C.A. No. 1:08-cv-01478 (D.D.C. Aug. 27, 2008); Complaint ¶¶ 30-38, *SEC v. El Paso Corp.*, C.A. No. 1:07-cv-00899 (S.D.N.Y. 2007); *In re Oil States International Inc.*, Exchange Act Rel. No. 53732 (ALJ Apr. 27, 2006) (order).

[24] S. Rep. No. 95-114, at 7-8 (1977).

[25] Superseding Indictment at 10-11, *Thomson*, *supra* note 19.

[26] Plea Agreement Exhibit 1 ¶ 35, *U.S. v. SSI Int'l Far East LTD.*, 3:06-cr-06-398 (D. Or. Oct. 10, 2006) (emphasis added). *See also* Deferred Prosecution Agreement with Schnitzer Steel Indus., Inc. ¶ 1 (Oct. 16, 2006), http://www.justice.gov/criminal/fraud/fcpa/cases/ssi-intl/10-16-06schnitzer-agree.pdf (last visited Jan. 3, 2012).

[27], Deferred Prosecution Agreement ¶¶ 8-14, *supra* note 26.

[28] 15 U.S.C. § 78ff(a) (2006).

[29] 18 U.S.C. §§ 1341, 1343 (2006).

[30] *See id.*

[31] *Gregory v. U.S.*, 253 F.2d 104, 109 (5th Cir. 1958); *U.S. v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980). *But see In re EDC, Inc.*, 930 F.2d 1275, 1281 (7th Cir. 1991) (criticizing this broad formulation as "extravagant rhetoric" and "hyperbole").

[32] Information ¶¶ 15-19, *SSI*, CR-06-398 (D. Or. Oct. 6, 2006); Plea Agreement, *SSI*, *supra* note 26.

[33] Information ¶¶ 18-24, *U.S. v. Stanley*, No. 4:08-cr-00597 (S.D. Tex. Aug. 29, 2008); Plea Agreement, *Stanley*, No. 4:08-cr-00597 (S.D. Tex. Sept. 3, 2008).

[34] In another interesting similarity with its Travel Act practice, the U.S. government has used the mail and wire fraud statutes to prosecute public bribery that cannot be reached by the FCPA anti-bribery provisions. This occurred in the UN Oil-for-Food scandal, where the Iraqi government, rather than individual officials, received kickbacks. *See, e.g.*, Information, *U.S. v. Agco Ltd.*, 1:09-CR-249-RJL (D.D.C. Sept. 30, 2009).

[35] *See* 15 U.S.C. § 13(c) (2006). The text of the provision is as follows: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

[36] *See, e.g., Harris v. Duty Free Shoppers Ltd. P'ship*, 940 F.2d 1272, 1274 (9th Cir. 1991); *Envtl. Tectonics v. W.S. Kirkpatrick Inc.*, 847 F.2d 1052, 1066 (3d Cir. 1988); *Grace v. E. J. Kozin Co.*, 538 F.2d 170, 173 (7th Cir. 1976); *Fitch v. Kentucky-Tennessee Light & Power*, 136 F.2d 12, 15-16 (6th Cir. 1943).

[37] *See, e.g., Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367, 371-72 (3d Cir. 1985).

[38] *In re Lockheed Corp.*, 92 F.T.C. 968 (1978); *In re Boeing Corp.*, 92 F.T.C. 972 (1978).

[39] *Id.*

[40] *See, e.g., Rotec Indus., Inc. v. Mitsubishi Corp.*, 348 F.3d 1116 (9th Cir. 2003), *cert. denied*, 541 U.S. 1063 (2004); *NewMarket Corp. v. Innospec, Inc.*, No. 3:10-cv-503-HEH (E.D. Va. May 20, 2011).