

The Gabon Mistrial: DOJ Prosecution of Individuals Puts Aggressive FCPA Theories Under Fire

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In a blow to the U.S. Department of Justice's (DOJ's) efforts to increase enforcement of the Foreign Corrupt Practices Act (FCPA) against individuals, Judge Richard J. Leon of the U.S. District Court for the District of Columbia declared a mistrial on July 7 in a case against four defendants charged in connection with an extensive undercover sting operation executed by the FBI. The trial was against four of 22 defendants charged with conspiring to pay bribes to the Defense Minister of Gabon in order to secure a \$15 million equipment contract.

The mistrial has been largely attributed to weaknesses in the sting operation itself, including alleged outrageous behavior by the key informant and suggestions that the defendants were entrapped by government operatives who concealed the illegal nature of the transaction. The Gabon mistrial represents a setback in efforts by the DOJ to prosecute individuals for FCPA violations. However, its greater significance lies in highlighting that prosecutions of individuals will likely backfire on the DOJ's enforcement efforts against companies and result in a narrowing of the DOJ's jurisdiction to enforce the FCPA. For example, one of the DOJ's aggressive jurisdictional theories under Section 78dd-3 failed last month when Judge Leon dismissed an FCPA count against defendant Pankesh Patel.

Pankesh Patel is a citizen of the United Kingdom. Under Section 78dd-3 of the FCPA, in the absence of some other basis of jurisdiction, a party must have committed an act within the United States in furtherance of the improper payment or offer. After oral argument, Judge Leon determined that the DOJ failed to establish jurisdiction based on allegations that Patel had mailed an agreement relating to the alleged illegal deal from the United Kingdom to Washington, D.C. since Patel's conduct of mailing the package occurred in the United Kingdom, not "while in the territory of the United States." 15 U.S.C. § 78dd-3(a).

The DOJ's effort to charge Patel for sending a DHL package into the United States was not the first time the DOJ had prosecuted an FCPA case based on an aggressive interpretation of Section 78dd-3 when the conduct occurred outside the United States. In July 2004, foreign company ABB Vetco Gray UK, Ltd. (ABB Vetco) pled guilty to an FCPA violation; the information filed against the company alleged that the company had "caused a wire transfer . . . to be made by a Nigerian Agent from a bank account in London, England, to a bank account in Houston, Texas." In October 2006, SSI International Far East, Ltd. (SSI), a South Korean company, pled guilty to violating the FCPA. The indictment against SSI alleged that the company had acted within the territorial jurisdiction of the United States by "transmitt[ing] requests to the United States for approval and wire transfer of funds."

In other cases, DOJ prosecutors have gone so far as to suggest that they could assert jurisdiction over foreign companies based on the conduct of non-U.S. nationals taking place entirely outside the United States if emails sent from one person to another within a foreign country went through a U.S.-based server. Because ABB Vetco and SSI pled guilty, the DOJ's arguments regarding jurisdiction under Section 78dd-3 were not subject to challenge or judicial scrutiny. However, the plain language of the statute and Judge Leon's recent ruling in the case against Patel raises questions about the DOJ's jurisdiction to prosecute FCPA violations in those cases.

While many companies are unwilling to face the risks associated with taking an alleged FCPA violation to trial, individuals facing a loss of liberty may have more motivation to fight and push back against the DOJ's interpretations of the FCPA. When the DOJ brings cases against these opponents, it risks having its jurisdiction narrowed as some of its aggressive interpretations will fail under judicial scrutiny.

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