FCPA + Anti-Corruption Developments: End of Summer Round-Up

With fall suddenly here, we find ourselves reflecting on the bounty of anti-corruption guidance in recent months. This guidance came from the judiciary, the United States Department of Justice, the SEC, and from overseas.

Here are some highlights:

Greater Judicial Guidance on the Contours of the FCPA

Historically, defendants have settled virtually all FCPA actions, leaving pivotal legal questions unanswered by the courts. But individuals facing prison terms—and, for the first time ever, a company—have started to fight. These recent fights yielded challenges by litigants and valuable new judicial guidance on who constitutes a "foreign official" and on the jurisdictional reach of the FCPA.

1) Reining in the Definition of Foreign Official

As we reported in prior client alerts, defendants launched attacks on the government's expansive definition of "foreign official" in the closely-watched cases, *United States v. Carson* and *United States v. Noriega* (the "Lindsey" case).[1] Although defendants' challenges were ultimately unsuccessful, they resulted in important judicial guidance, and perhaps assistance for future defendants, on the contours of the definition. Rejecting the notion that all employees of state-owned enterprises (SOEs) will automatically be considered foreign officials, the court in *Carson* held that the "nature and characteristics" of the SOE must be taken into consideration.[2] *Carson* calls into question the expansive application federal regulators have given to the "foreign official" element of the FCPA because, in the case of SOEs, *Carson* requires a showing of more than mere government control or ownership. Moreover, *Carson* unequivocally placed the evidentiary burden to establish that an entity constitutes a government instrumentality on the government. Relying on *Carson*, it is possible that future defendants may challenge FCPA enforcement actions on the basis that the government failed to meet this burden.

However, it remains to be seen what impact, if any, *Carson* or *Lindsey* will have on the government's aggressive enforcement stance. Even as judicial challenges appear to be escalating, the government continues to employ an expansive definition of "foreign official" in the enforcement actions it brings. This fact was illustrated by Diageo's recent settlement with the SEC, in which the SEC alleged Diageo's subsidiary made improper payments to employees of India's state-owned liquor stores. The SEC posited the liquor store clerks were foreign officials, and Diageo did not challenge the SEC's reach.[3]

2) Narrowing the Jurisdictional Reach of the FCPA

The government suffered a setback in its prosecution of defense contractors' alleged bribes to the defense minister of Gabon when a deadlocked jury led the court to declare a mistrial of the first defendants in the "Shot Show" cases earlier this summer. But the government experienced a more far-reaching setback before the case even went to the jury. In response to a challenge by one of the individual defendants, Judge Leon of the United States District Court for the District of Columbia ruled that an entity that is neither a U.S. issuer nor a domestic concern cannot be held liable for violating the FCPA unless the allegedly corrupt act was performed *while the defendant was inside* the United States. The Court thus rejected the expansive jurisdictional reach for the FCPA that was asserted by the DOJ, as discussed below.

Historical Overreaching

The FCPA has always applied to U.S. issuers and domestic concerns, and in 1998 was amended to expand its reach to persons who, "*while in the territory of the United States*" engage in any act in furtherance of a bribery scheme.[4] The government has since used this provision, § 78dd-3, to broadly assert jurisdiction over non-U.S. companies and individuals. The government has even used §78dd-3 to target foreign companies whose allegedly corrupt acts were directed towards the United States, but which were performed elsewhere.

For example, in 2006 the government alleged a South Korean company violated §78dd-3 when it transmitted wire transfer approval requests *to* the United States, even though the requests were made from overseas. DOJ asserted the transmission *to* the United States constituted "act[ing] within the territorial jurisdiction of the United States."[5] The government asserted a similar theory in its 2010 indictment of a foreign company that was accused

of sending wire transfers from German bank accounts to financial institutions in the United States in furtherance of a bribery scheme.[6] As these—and indeed virtually all—FCPA cases have settled, DOJ's aggressive jurisdictional theories have not been tested, until now.

Judge Leon's Rejection of the Government's Expansive View

In the present case, the government alleged one individual defendant, a UK citizen, violated §78dd-3 and became subject to the jurisdiction of the FCPA when he mailed a package containing a corrupt purchase agreement from the United Kingdom to the United States.[7] The individual moved for acquittal on this count, arguing that the act of mailing could not give rise to FCPA liability under §78dd-3 because he was in London when he mailed the package, and did not engage in the challenged act "while in the territory of the United States."[8] Judge Leon agreed with the defendant and dismissed the count, noting the plain language of §78dd-3 requires that each act giving rise to liability take place within the United States.[9]

This ruling is significant because it is the first time a court has curtailed the government's expansive interpretation of the FCPA's jurisdictional reach. It remains to be seen whether it will prompt similar jurisdictional challenges in the future or whether it will affect the types of cases the government chooses to bring.

3) Challenge to Convictions

For anyone keeping score, it has become clear that defendants that go to trial on FCPA charges do not fare well. Other than the mistrial in the Shot Show case, juries have been unanimously unsympathetic to defendants accused of FCPA violations. For example, in the *Lindsey* case, the jury convicted the defendants after a single day of deliberations and without any direct proof of the bribery. Rather, the conviction was based largely on circumstantial evidence such as the size of a commission paid to the company's agent relative to past commissions paid by the company.

But it remains to be seen whether the government's scorecard will remain intact. This summer, the *Lindsey* defendants filed a motion to dismiss on the basis of prosecutorial misconduct, joining a growing list of convicted defendants (*i.e.* Frederic Bourke) vigorously challenging their convictions.

DOJ Reaffirms Travel Hosting Guidelines in the First OPR of 2011

Companies request FCPA Opinion Procedure Releases ("OPR") from the Department of Justice in order to receive guidance on how to minimize their risk of running afoul of the FCPA. And although OPRs are binding only on the requesting party, other companies closely watch for the release of OPRs, given the limited case law interpreting the FCPA and otherwise providing such guidance.

On June 30, the DOJ issued its very first OPR of 2011.[10] This OPR provided little new guidance, but served to affirm that there is a way to host government officials for travel in a manner that lessens FCPA risk.

The requestor—an adoption service provider—sought guidance regarding its proposal to host foreign officials' travel to the United States. The proposed trip was to be just two days (exclusive of travel time), and economy class airfare, lodging, local transportation, and meals would be provided. The requestor made the following representations regarding the travel hosting arrangements:

- The officials who would travel would be chosen by the foreign government agencies and not by the requestor.
- Any souvenirs provided would be of nominal value and would bear the requestor's logo.
- All costs would be paid directly by the requestor and no payments either as compensation or reimbursement would be paid to the officials. There would be no stipends or spending money.
- The proposed trip did not include any entertainment or leisure activities for the foreign officials, and spouses were not invited.
- The requestor had no non-routine business pending before the agencies that employ the officials.

In line with prior OPRs, the DOJ indicated that it did not intend to take any enforcement action, as the proposed expenses to be paid were "reasonable," and the trip was related to the promotion or demonstration of products or services. The DOJ cited two recent, similar opinions in reaching its conclusion.[11] While the new OPR did not provide any new insight into the DOJ's enforcement priorities, it did affirm what are considered to be best practices.

UK Bribery Act Took Effect July 1, 2011

On July 1, 2011, the long-awaited UK Bribery Act finally took effect. The Act, which has been described as "one of the most draconian anti-corruption measures in the world," was originally scheduled to come into force in late 2010, was postponed to April 2011, and yet again to July 1, 2011. The British government explained that the postponements were necessary to allow businesses sufficient time to align their practices with the Act's requirements, and to allow for the publication of guidance as to what would constitute an "adequate procedures" defense. The Ministry of Justice released this guidance on March 30, 2011.[12]

The Act has drawn criticism for its criminalization of not just bribery, but also the failure to prevent bribery. The Act has a sweeping extra-territorial reach and applies to individuals and companies that carry out any part of their business in the UK, regardless of where the person or business is domiciled, and regardless of where the alleged offense was committed. Unlike the FCPA, the UK Bribery Act outlaws facilitation payments and applies to commercial bribery as well as the bribery of government officials. A company may assert a defense against the Act if it can show that it had "adequate procedures" in place to prevent bribery.

The first prosecution under the Act followed its enactment by just two months. Commentators were surprised by the prosecution's humble—and decidedly local—target: a London court clerk who was accused of receiving a £500 bribe to fix a traffic offense.[13] Regardless of the Act's modest beginnings, companies that have not already done so should conduct internal risk assessments and review their anti-corruption programs to ensure they are in compliance with the Act.

Taiwan Targets "Red Envelopes" in Anti-Corruption Statute Amendment

Reflecting a growing trend of foreign nations strengthening their own anti-corruption enforcement programs, on June 6, the Taiwanese legislature passed an amendment to its Anti-Corruption Statute, aimed at addressing Taiwan's deep-rooted "red envelope culture."[14] It is common practice in Taiwan and throughout Greater China to provide money in red envelopes to public servants as thanks for performing their official duties, for making appearances at events, or for expediting routine services. "Red envelopes" are frequently provided to public officials such as civil servants, professors, doctors, and journalists at state-owned media sources.

Before Taiwan's Anti-Corruption Statute was amended, giving a "red envelope" was illegal only if it resulted in a violation of the public official's duties or the performance of an act that was not legally allowed.

With the new amendment, any gift of money, goods, or services to a government official or employee is punishable by up to three years in jail and/or a fine of up to NT$500,000 (approximately US $17,000), even where there is no intent to influence, or where the government official has not violated his or her duties.[15] Both the giver and receiver of a bribe or gift are liable under the amended law.[16]

The scope of the new law may be quite broad, and the extent of its enforcement remains to be seen. However, this new law may be another sign that the tide is turning away from some of the practices that are considered "customary" in Greater China.

Conclusion

Summer 2011 has made it clear that the government's aggressive enforcement of the FCPA is on pace to keep track—if not surpass—that of recent years. But the summer has also witnessed courts stepping in and finally defining some limiting contours to the government's expansive interpretation of the FCPA.

With the growing focus on the global fight against corruption, companies are well advised to make anti-corruption compliance a top priority.

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Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

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1. For a summary of these cases, please refer to our Client Alerts, *FCPA Update: Another Challenge to DOJ's Expansive "Foreign Official" Definition Fails, But Clarifies DOJ's Burden* (June 2, 2011), and *FCPA: Regulators' Expansive 'Foreign Official' Definition Under Attack* (May 20, 2011).
2. *See* Criminal Minutes—Order Denying Motion to Dismiss Counts 1 through 10 of the Indictment, at 12, *United States v. Carson*, No. 8:09-cr-00077 (C.D. Cal. May 18, 2011), Docket No. 373.
3. See our Client Alert, *Diageo's Settlement with the SEC: A Stocked Bar of FCPA Trends and Pitfalls* (August 5, 2011).
4. 15 U.S.C. § 78dd-3 (emphasis added).
5. Indictment, *United States v. SSI Int'l Far East, Ltd.* (D. Or. Oct. 10, 2006), ¶¶ 4-5.
6. Indictment, *United States v. DaimlerChrysler Auto Russia SAO* (D.D.C. March 22, 2010) ¶ 23.
7. First Superseding Indictment, *United States v. Goncalves et al.* (D.D.C. April 16, 2010) ¶ 33; *see also* Indictment, *United States v. Patel* (D.D.C. Dec. 11, 2009) ¶ 12.
8. Relevant portions of the hearing transcript are available at http://www.fcpaprofessor.com/significant-dd-3-development-in-africa-sting-case (June 9, 2011).
9. *Id.*
10. DOJ Opin. Proc. Rel. No. 11-01 (June 30, 2011).
11. *Id. citing* DOJ Opin. Proc. Rel. No. 07-01 (July 24, 2007) and No. 07-02 (Sept. 11, 2001).
12. For a summary of the Ministry of Justice's guidance, please refer to our Client Alert, *UK Bribery Act to Come into Force on 1 July 2011: Ministry of Justice Releases Guidance on the Application of the UK Bribery Act* (March 31, 2011); *see also*, *Ministry of Justice Publishes Consultation Paper on the UK Bribery Act 2010* (Sept. 30, 2010).
13. The Crown Prosecution Service's press release may be accessed at: http://www.cps.gov.uk/news/press_releases/123_11/
14. Taiwan Government Information Office, "Law Amended to Fight 'Red Envelope Culture'" (June 7, 2011).
15. *Id.*
16. *Id.*