Understanding the Reach of U.S. Jurisdiction Under the Foreign Corrupt Practices Act

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Over the past 5 years, many barrels of ink have been spilled describing the sharp increase in enforcement activity under the U.S. Foreign Corrupt Practices Act (FCPA). Among the topics typically addressed, however, one important aspect of FCPA practice often goes overlooked: analyzing the jurisdictional basis for an enforcement action. This article will examine how the FCPA permits the United States to assert jurisdiction, focusing in particular on how the FCPA may reach beyond U.S. borders and apply to non-U.S. companies and citizens.

Imagine that you are a citizen of the United Kingdom working in Shanghai for a Chinese company with no operations in the United States, but your employer operates numerous joint ventures with U.S. companies. You might assume that you stand outside the reach of the FCPA because you are not a citizen of the U.S., because your employer is not a U.S. company, and your operations are outside the U.S., however, the reality may be surprising. Is the company listed on a U.S. exchange (over forty Chinese companies currently list shares on the New York Stock Exchange)? Does the company interact with the U.S.-based joint venture partner via email communications to the U.S.? These are only two of the ways the FCPA may operate to permit jurisdiction over a non-U.S. company.

Recent enforcement activity has made clear that United States regulators are now looking beyond U.S. shores to extend enforcement of the FCPA to non-U.S. persons. As one top official at the Department of Justice (DOJ) has said: "We are enforcing the FCPA to root out global corruption and preserve the integrity of the world markets." The recent enforcement activity sounds a wake-up call to international businesses operating in high-risk jurisdictions, in particular the more than 750 non-U.S. companies listing shares on U.S. exchanges.

By developing a clear understanding of how U.S. jurisdiction under the FCPA operates, counsel will be able to anticipate the potential for FCPA risks and mitigate those risks, before they develop into enforcement problems.

Jurisdiction Under The Amended FCPA

Originally passed in 1977, the FCPA has been amended twice: first in 1988, and again in 1998. The 1998 amendments were enacted to conform the FCPA to the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).[1]

The 1998 amendments expanded the jurisdictional reach of the anti-bribery portion of the FCPA by adding the so-called "alternative jurisdiction" provisions to the existing statutory sections, and by adding a new section that made the anti-bribery provisions of the FCPA applicable to non-U.S. individuals and corporations. The books and records and internal accounting controls provisions of the FCPA, applicable only to issuers, remained the same.[2]

Alternative Jurisdiction

The 1998 "alternative jurisdiction" provisions expanded the reach of the FCPA to cover actions outside the U.S. by all United States persons and all issuers organized under the laws of the United States, even absent "use of the mails or any means or instrumentality of interstate commerce...."[3] Thus, if a United States person or an issuer organized under the laws of the United States engages in any violative conduct *outside* the United States, irrespective of whether

the person used the mails or any means or instrumentality of interstate commerce, the FCPA permits the U.S. government to assert jurisdiction.

The touchstone of these provisions is so-called "nationality" jurisdiction: one must be a United States person or an issuer organized under the laws of the United States. These "alternative jurisdiction" provisions would thus not reach an issuer that is not organized under the laws of the United States, an individual who is not a United States person, or any other business not organized under the laws of the United States. Note that "use of any means or instrumentality of interstate commerce" would bring an issuer – even if not organized under the laws of the U.S. – within the scope of the FCPA.[4]

Jurisdiction over Non-U.S. Citizens and Companies: 'While in the Territory of the United States'

The 1998 amendments added a new statutory provision, 15 U.S.C. § 78dd-3, permitting the U.S. government to assert jurisdiction over non-U.S. companies and individuals. Prior to this, there was no provision addressing non-U.S. citizens or companies, so the addition both closed "the gap left in the original FCPA and implement[ed] the OECD Convention's requirement that Parties criminalize bribery by 'any person.'"[5]

The new statutory section expanded jurisdiction to cover "any person other than an issuer... or a domestic concern...," as defined in the applicable statutory sections, where "such person, while in the territory of the United States, corruptly [makes] use of the mails or any means or instrumentality of interstate commerce," or does "any other act in furtherance of" an improper payment.[6] While the touchstone of the "alternative jurisdiction" provision is the nationality of the person in question, the issue pursuant to section 78dd-3 is "territoriality" jurisdiction, i.e. the location of the conduct in question. If the conduct occurs "while in the territory of the United States," it is covered by the FCPA, permitting the U.S. to assert jurisdiction.

In addition to this bright line test of being physically present inside the U.S., there will be circumstances when a non-U.S. citizen or company remains *outside* the territory of the United States, but would still fall within the scope of U.S. jurisdiction under the FCPA. When a non-U.S. person remains outside the territory of the U.S., but *causes another* to act in furtherance of an improper payment inside the U.S., the FCPA may permit the U.S. to assert jurisdiction over the non-U.S. person.

How can a non-U.S. person (think again of the U.K. citizen working in Shanghai) find itself subject to U.S. jurisdiction without setting foot in the U.S.? A number of factors lead to this circumstance. First, the legal theory of aiding and abetting permits prosecution where a person willfully causes a violation by another person. Under 18 U.S.C. § 2(b), "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." Thus, where a non-U.S. person acts outside the U.S., but "willfully causes an act to be done" in violation of the FCPA and within the territory of the U.S., the U.S. may be able to assert jurisdiction.

Second, the manual guiding prosecutions by the U.S. Department of Justice states that "the Department interprets [15 U.S.C. § 78dd-3] as conferring jurisdiction whenever a foreign company or national *causes* an act to be done within the territory of the United States by any person acting as that company's or national's agent."[7] This is consistent with 18 U.S.C. § 2(b), described above. The manual acknowledges that this position has not been tested in court, but the Department has been able to secure guilty pleas on this legal theory, and recently indicted a number of individuals on this theory. By indicting non-U.S. citizens for conduct caused inside the U.S., the Department is putting this theory to the test.

Finally, the legislative history of the 1998 amendments appears to contemplate such a position, noting both that "this section limits jurisdiction over foreign nationals and companies to instances in which the foreign national or company takes some action while physically present within the

As in the *Syncor* matter, Vetco Gray UK engaged in extensive conduct in the U.S., and thus the elements required for jurisdiction were readily satisfied.

The most reaching jurisdictional assertions thus far have been the two recent indictments of individuals, charging non-U.S. citizens as *agents* of a U.S. person, so that their status as agents permits jurisdiction.

On February 17, 2009, a federal grand jury in Houston indicted two British nationals, Jeffrey Tesler and Wojciech Chodan, and charged each with one count of conspiracy to violate the FCPA and ten counts of violating the FCPA; the indictment also charged violations of 18 U.S.C. § 2.[12] The action follows the $402 million settlement over FCPA violations between the U.S. government and the engineering firm Kellogg, Brown & Root LLC (KBR). The indictment alleges that Tesler and Chodan were agents of KBR, a U.S. "domestic concern," and that Tesler and Chodan used, and caused to be used, the means and instrumentalities of interstate commerce when, among other acts, they caused wire transfers via U.S. banks, when Chodan sent a facsimile from the United Kingdom to the United States, and when they caused two emails to be sent to and through the United States. The indictment also alleged that Tesler was acting as the agent of certain non-U.S. persons, as defined by 15 U.S.C. § 78dd-3. As to Tesler and Chodan, there are no allegations that they were physically present in the U.S. when they engaged in acts in furtherance of the improper payments. By characterizing Tesler and Chodan as agents and not alleging that either was physically present in the U.S. when acting in furtherance of an improper payment, this indictment, if litigated, seems likely to draw a challenge on jurisdictional grounds.

In an indictment dated April 8, 2009, the DOJ charged a number of U.S. and non-U.S. citizens with FCPA violations, in connection with the ongoing investigation of an un-named company involved in the design and manufacture of control valves for use in the nuclear, oil and gas, and power generation industries.[13] Two of the people named in the indictment, Flavio Ricotti and Han Yong Kim, are not U.S. citizens, but were charged as agents of a "domestic concern," pursuant to 15 U.S.C. § 78dd-2(a). Neither was charged under the provision of the FCPA tailored to non-U.S. persons, but the indictment includes a charge of aiding and abetting under 18 U.S.C. § 2. This indictment, if litigated, also seems likely to be challenged on the grounds that FCPA jurisdiction does not reach to these two as agents of a "domestic concern," when neither was physically present "within the territory of the United States."

Conclusion: Understanding How FCPA Jurisdiction Applies To Your Company Allows You To Mitigate Your Risks

When faced with a potential FCPA concern, the first step in analyzing the concern must always be a review of how jurisdiction applies. Identify each person and each corporate entity at issue, and analyze each separately to confirm the application of U.S. jurisdiction. A rigorous analysis of jurisdiction enables a firm understanding of the overall risk and potential legal exposure.

Currently, there are more than 750 non-U.S. companies that list on U.S. exchanges. Each of these companies is considered an issuer pursuant to the FCPA, and thus covered in some manner by the FCPA. As this article has demonstrated, it may not take much of an interaction with the U.S. – perhaps merely an email or wire transfer – to trigger jurisdiction under the FCPA.

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[1] Information regarding the OECD Convention may be located at this web site: www.oecd.org/daf/nocorruption/convention.

[2] 78 U.S.C. § 78m(b).

[3] 78 U.S.C. § 78dd-1(g)(1) covers: "any issuer organized under the law of the United States, or a State, territory, possession, or commonwealth of the United States or political subdivision thereof and which has a class of securities registered pursuant to section 12 of [the Securities Exchange Act] or which us required to file reports under section 15(d) of [the Securities Exchange Act], or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer." 78 U.S.C. § 78dd-2(i)(1) covers "[A]ny United States person..."
Both "alternative jurisdiction" provisions define "United States person" as "a national of the United States ... or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof." 78 U.S.C. §§ 78dd-1(g)(2), 78dd-2(i)(2).
[4] 18 U.S.C. 78dd-1(a).
[5] H.R. Rep. 105-802 (1998).
[6] 15 U.S.C. § 78dd-3(a).
[7] United States Attorneys' Manual, Title 9, Criminal Resource Manual § 1018 "Prohibited Foreign Corrupt Practices."
[8] H.R. Rep. 105-802 (1998).
[9] *SEC v. ABB Ltd.*, No. 1:04CV01141 (RBW) (D.D.C. filed July 6, 2004).
[10] *United States v. Syncor Taiwan, Inc.*,Cr . No. 02-01244 (C.D. Cal. filed Dec. 12, 2002).
[11] *United States v. ABB Vetco Gray (UK) Ltd.*, Cr. No. H-04-279 (S.D. Tex. filed July 6, 2004).
[12] *United States v. Jeffrey Tesler and Wojciech Chodan*, Cr. No. H-09-098 (S.D. Tex. filed Feb. 19, 2009).
[13] *United States v. Carson* (C.D. Ca. filed Apr. 8, 2009).