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The Travel Act – The FCPA's Red-Haired Stepchild

By Mike Emmick on February 2nd, 2012

With all the attention being paid to the Justice Department's aggressive prosecution of the Foreign Corrupt Practices Act, companies might be tempted to celebrate if an internal investigation revealed that no bribes had been paid to foreign officials (as might give rise to an FCPA violation), even though there had been *commercial* bribes paid to *non-government* foreign business representatives.

Before the celebration begins, however, there are some additional rocks to flip over. While the FCPA's anti-bribery provisions may not apply, DOJ can still charge foreign *commercial* bribes under an alternative, non-FCPA theory. Most prominent of these is the Travel Act, which DOJ has occasionally used to charge foreign bribes.

First, let's first get clear on how the Travel Act works, because it's somewhat unusual. The Travel Act is found at 18 U.S.C. § 1952, which is part of the anti-racketeering chapter. The Travel Act makes it a crime to engage in any interstate or foreign travel, or to use any mail or facility in foreign or interstate travel, with the intent to "carry on" or "facilitate" any "unlawful activity."

In turn, "unlawful activity" is defined to include the usual organized-crime activity (gambling, narcotics, drugs, and arson), and it also includes "bribery … in violation of the law of the State in which committed or of the United States." Oddly, under the Travel Act, the crime is not the bribe itself; it's the international travel, telephone call, or wire transfer done to carry out the bribe.

The kicker is that the Travel Act only applies if state or federal law would make the bribe illegal. In the context of a bribe of a foreign *official*, that rule is usually easy to apply, because the bribe would often be a violation of the FCPA.

But the Travel Act can also be based on *state* bribery laws, and those state laws sometimes criminalize *commercial* bribery, where no government officials are involved at all. That Travel Act analysis can get complicated, though, because only about three-fifths of the states have laws prohibiting commercial bribery. Among them are California (Cal. Penal Code § 641.3), New York (NY Penal Code § 180.00), Massachusetts (G.L. c. 271 § 39), and Delaware (Del. Code Ann. Title 11, § 881(1)). Thus, a trip or call or wire transfer from California to a foreign country to carry out a commercial bribe would be a Travel Act violation, but such activity involving another state may or may not be, depending on that state's bribery laws.

Although the Travel Act is used primarily in purely domestic cases, DOJ has also used the Act to charge foreign bribery in about ten prior cases. In fact, the DOJ's "Layperson's Guide to the FCPA" explicitly mentions the Travel Act as a possible alternative charge.

To its credit, DOJ has not "pushed the envelope" in using the Travel Act in foreign bribery cases. Most often, the Travel Act is merely a second object of the conspiracy, or perhaps the basis for adding a few counts that are directly related to the charged FCPA violations – effectively "double-" or "triple-counting" the actual bribes by charging some of the international bribe-related activity.

DOJ has occasionally used the Travel Act to charge a commercial-only foreign bribe. Still, for companies reviewing an internal investigation of foreign bribery, the possibility of Travel Act charges must be considered.

Let's first consider what might motivate a prosecutor to bring charges under the Travel Act at all. Despite the technical tone of such charges, each count carries a five-year maximum sentence, so adding those counts would substantially increase the case's overall maximum sentence.

Travel Act charges can also make the case seem bigger and more sophisticated, and subtly emphasize the U.S. activity rather than the foreign bribes.

Charges under the Travel Act might also help ensure that evidence of purely commercial bribery is admitted at trial, because in an FCPA case without such charges, a judge might exclude the evidence of the commercial bribery as merely "prior similar acts" under Federal Rule of Evidence 404(b).

Travel Act charges may also provide some flexibility in reaching a disposition, as defendants may be more willing to plead guilty to counts that do not involve bribes to government officials, or counts that appear to be merely-technical "interstate travel" violations.

A Travel Act charge might also serve as a “fall-back” or alternative charge if the facts and evidence are unclear about whether the bribe recipient was a “foreign official” under the FCPA or a mere business representative, although such “alternative charging” is frowned upon.

For a particularly aggressive prosecutor, charges under the Travel Act might even be used as “predicate acts” to form a “pattern of racketeering” under RICO, which would substantially increase the maximum sentence, the likely actual sentence, and the public’s negative impression of the defendants.

Returning to our hypothetical company’s internal investigation, discovering a violation of the Travel Act may have even further implications. Ordinarily, bribe payments to foreign business representatives are, like their FCPA counterparts, accompanied by some degree of concealment in the company’s accounting records. That can give rise to liability under the FCPA’s “books and records” provisions, which require accurate record-keeping, even where there is no bribe to a foreign official at all.

Similarly, there may be a Sarbanes-Oxley violation, depending what was known by the company official who signed the Sarbox financial certifications. There may also be tax consequences. Bribe payments are not deductible as business expenses, so a company that paid commercial bribes and deducted them on its tax returns may face civil, administrative, or even criminal tax liability.

Most importantly, if the company’s internal investigation has identified one or more foreign bribes – even if the bribes were purely commercial – the company should move quickly to “clean house” and to improve its anti-corruption compliance program.

The arena of foreign-bribery prosecutions is highly discretionary in terms of both charging and sentencing. Prosecutors will not be impressed if a company did little or nothing upon learning of prior foreign bribes, regardless of whether the ultimate bribe recipient was a foreign official or a mere business representative.

So, where does that leave the hypothetical company whose internal investigation has uncovered a “merely” commercial foreign bribe? Well, as Dorothy said, “we’re not in Kansas anymore,” and there is a lot of work to be done before any celebrating can begin.