CCI: Background and Criminal Allegations-Part II

We are reviewing the background facts and some of the criminal allegations involved in the Control Components Inc., (CCI) matter. Yesterday we reviewed the background facts and guilty pleas to date. Today we will visit criminal allegations brought against the remaining defendants.

As we noted in yesterday's post on April 8, 2009, six former CCI executives were charged in a 16-count indictment with violating the FCPA and the Travel Act (here). They are: Stuart Carson, CCI's former chief executive officer, Hong (Rose) Carson, CCI's former director of sales for China and Taiwan, Paul Cosgrove, CCI's former director of worldwide sales, David Edmonds, CCI's former vice president of worldwide customer service, Flavio Ricotti, CCI's former vice-president and head of sales for Europe, Africa and the Middle East, and Han Yong Kim, the former president of CCI's Korean office. Hong (Rose) Carson was also charged with one count of destruction of records in connection with a matter within the jurisdiction of a department or agency of the United States. These defendants are alleged to have made corrupt payments for the purpose of influencing the recipients to award contracts to CCI or skew technical specifications of competitive tenders in CCI's favor.

I. The Travel Act

One of the unique aspects of this Foreign Corrupt Practices Act (FCPA) prosecution is that in addition to criminal charges based upon the FCPA, the Department of Justice (DOJ) has brought the defendants up on charges under the federal US law commonly known as the "Travel Act" (8 U.S.C. § 1952).

The Travel Act is aimed at prohibiting interstate travel or use of an interstate facility in aid of a racketeering or an unlawful business enterprise. It prohibits the use of communications and travel facilities to commit state or federal crimes, but until now was mostly known for its use in prosecutions for domestic crimes. Its impact to the FCPA is that the Travel Act applies to foreign as well as interstate commerce; it can be also used to prosecute US companies and individuals which engage in bribery and corruption of foreign officials AND commercial bribery and corruption of private foreign citizens.

The Travel Act elements are: (1) use of a facility of foreign or interstate commerce (such as email, telephone, courier, personal travel); (2) with intent to promote, manage, establish, carry on, or distribute the proceeds of; (3) an activity that is a violation of ***state or federal bribery***, extortion or arson laws, or a violation of the federal gambling, narcotics, money-laundering or RICO statutes. This means that, if in promoting or negotiating a private business deal in a foreign country, a sales agent in the United States or abroad offers and pays some substantial amount to his private foreign counterpart to influence his acceptance of the transaction, and such activity may a violation of the state law where the agent is doing business, the DOJ may conclude that a violation of the Travel Act has occurred. For example in the state of Texas there is no minimum limit under its Commercial Bribery statute (Section 32.43, TX. Penal Code), which bans simply the agreement to confer a benefit which would influence the conduct of the individual in question to make a decision in favor of the party conferring the benefit.

The Travel Act came into play for these defendants as the DOJ alleged they violated or conspired to violate California's anti-bribery law (California Penal Code section 641.3), which bans corrupt payments anywhere of more than $1,000 between any two persons, *including private commercial parties.* In the indictments, the Travel Act charges relied on alleged violations of California's anti-corruption law. The CCI matter was not the first case to use the Travel Act in conjunction with the FCPA. As reported in the FCPA Blog, the matter of *U.S. v. David H. Mead and Frerik Pluimers*, (Cr. 98-240-01) D.N.J., Trenton Div. 1998, defendant Mead was convicted following a jury trial of conspiracy to violate the FCPA and the Travel Act (incorporating New Jersey's commercial bribery statute) and two counts each of substantive violations of the FCPA and the Travel Act. In its 2008 article entitled, "The Foreign Corrupt Practices Act: Walking the Fine Line of Compliance in China" the law firm of Jones, Day reported the case of *United States v. Young & Rubicam, Inc.*, 741 F.Supp. 334 (D.Conn. 1990), where a Company and individual defendants pled guilty to FCPA and Travel Act violations and paid a $500,000 fine. In addition to the *Mead* and *Young and Rubicam* cases, the DOJ's website on "A Lay Person's Guide to the FCPA, specifically states that "other statutes such as the mail and wire fraud statutes, 18 U.S.C. § 1341, 1343, and the Travel Act, which provides for federal prosecution of violations of state commercial bribery statutes, may also apply..." to US companies doing business overseas.

All of these machinations brought about by the DOJ bringing a claim under the Travel Act would not be relevant under the UK Bribery Act. The UK Bribery does not make a distinction between public and private actors so that bribery of a private citizen by a UK company to further its business interests is just as illegal as bribery of a foreign governmental official.

II. Rose Carson and the "Big Flush"

In a separate criminal allegation against the individual defendant Hong "Rose" Carson, the DOJ alleged that she engaged in conduct which constituted obstruction of justice. This an additional count and it carries a maximum penalty of 20 years in prison. The criminal complaint alleges that after she learned that CCI had hired lawyers to conduct an internal investigation into corrupt payments overseas and sometime prior to her interview, Ms. Carson tore up documents relevant to the internal investigation and flushed them down a toilet in CCI's ladies room. Thus she was charged "with obstructing an investigation within the jurisdiction of a federal agency when she destroyed documents relevant to CCI's internal investigation of the corrupt payments by flushing them down the toilet of CCI's ladies' restroom."

So you might wonder how someone who flushes documents down a toilet and then is interviewed by *company lawyers* not *federal agents* can be charged with obstruction of justice. This brings up a host of questions. One posed by the FCPA Blog was whether Ms. Carson was warned by any company employee "that concealing information from company lawyers conducting an internal FCPA investigation could be a federal crime?" Even if the company attorneys handling the investigation provided the now standard corporate attorney *Upjohn* warnings, how does a company attorney asking questions morph into a *de facto* federal agent during an internal company investigation regarding alleged FCPA violations and is the attorney thereby required to provide a *Miranda* warning to employees during a FCPA investigation?

As we have previously noted, in a recently released paper entitled "*Navigating Potential Pitfalls in Conducting Internal Investigations: Upjohn Warnings, "Corporate Miranda," and Beyond*" Craig Margolis and Lindsey Vaala, of the law firm Vinson & Elkins, explored the pitfalls faced by counsel, both in-house and outside investigative, and corporations when an employee admits to wrong doing during an internal investigation, where such conduct is reported to the US Government and the employee is thereafter prosecuted criminally under a law such as the FCPA.

Employees who are subject to being interviewed or otherwise required to cooperate in an internal investigation may find themselves on the sharp horns of a dilemma requiring either (1) cooperating with the internal investigation or (2) losing their jobs for failure to cooperate by providing documents, testimony or other evidence. Many US businesses mandate full employee cooperation with internal investigations or those handled by outside counsel on behalf of a corporation. These requirements can exert a coercive force, "often inducing employees to act contrary to their personal legal interests in favor of candidly disclosing wrongdoing to corporate counsel." Moreover, such a corporate policy may permit a company to claim to the US government a spirit of cooperation in the hopes of avoiding prosecution in "addition to increasing the chances of learning meaningful information."

Where the US Government compels such testimony, through the mechanism of inducing a corporation to coerce its employees into cooperating with an internal investigation, by threatening job loss or other economic penalty, the in-house counsel's actions may raise Fifth Amendment due process and voluntariness concerns because the underlying compulsion was brought on by a state actor, namely the US Government. Margolis and Vaala note that by utilizing corporate counsel and pressuring corporations to cooperate, the US Government is sometimes able to achieve indirectly what it would not be able to achieve on its own – inducing employees to waive their Fifth Amendment right against self-incrimination and minimizing the effectiveness of defense counsel's assistance.

So, what are the pitfalls if private counsel compels such testimony and it is used against an employee in a criminal proceeding under the FCPA? Margolis and Vaala point out that the investigative counsel, whether corporate or outside counsel, could face state bar disciplinary proceedings. A corporation could face disqualification of its counsel and the disqualified counsel's investigative results. For all of these reasons, we feel that the FCPA Blog summed it up best when it noted, "*the moment a company launches an internal investigation, its key employees -- whether they're scheduled for an interview or not -- should be warned about the "federal" consequences of destroying or hiding evidence. With up to 20 years in jail at stake, that seems like a small thing to do for the people in the company*."

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