



The extraterritorial reach of US anti-bribery law

Companies based outside the US are well aware that US prosecutors and the Securities and Exchange Commission (SEC) are increasingly seeking to enforce the US Foreign Corrupt Practices Act (FCPA) against non-US entities and individuals. The prosecutors and SEC have adopted very broad interpretations of the FCPA and their jurisdiction over persons and business activities outside the US. At the same time, many other countries have adopted or increased their enforcement of similarly broad laws prohibiting foreign bribery. This briefing outlines the key facts and recent developments of which non-US entities need to be aware in relation to US anti-bribery law and its enforcement.

The broad reach of the US Foreign Corrupt Practices Act (FCPA) is by now well known among non-US entities engaged in transnational business. The mounting wave of FCPA enforcement in recent years, by the US Department of Justice (DOJ) and Securities and Exchange Commission (SEC), has been impossible to overlook. Many other countries have adopted similarly broad prohibitions on foreign bribery, including the 37 state parties to the Organisation for Economic Co-operation and Development (OECD) anti-bribery convention.

What may be less widely appreciated is that, in successive enforcement actions, the DOJ and SEC have adopted very broad interpretations of the FCPA and their related jurisdiction over non-US entities and individuals. Non-US entities would be well advised to be aware that their US enforcement risk may be greater than previously understood.

What is prohibited and required under the FCPA?

The FCPA comprises two sets of prohibitions and requirements, known as the 'anti-bribery' provisions and the 'books and records' provisions.

Anti-bribery provisions

The FCPA anti-bribery provisions prohibit:

- any offer, payment or promise of anything of value;
- made 'corruptly' (ie with an intent to obtain an improper quid pro quo);

- directly, or through one or more intermediaries, to (i) any *foreign official*, defined to include any official, functionary or employee of a non-US government, state-owned enterprise or public international organisation, or (ii) any non-US political party or candidate;
- for the purpose of influencing any act or decision of such person, or inducing such person to exercise their influence with a non-US government; and
- to assist in obtaining or retaining business, directing business to any other person or securing any improper advantage.

Each of the elements above is broad in scope and some key terms (such as 'foreign official') are interpreted more broadly than a first reading may suggest.

Books and records provisions

The FCPA books and records provisions require certain FCPA issuers (defined below) to:

- 'make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer'; and
- maintain 'a system of internal accounting controls sufficient to provide reasonable assurances that', among other things, 'transactions are executed in accordance with management's... authorisation' and transactions are recorded as necessary to prepare financial statements.

These provisions have increasingly formed the basis for broad-ranging enforcement actions against US and non-US issuers. Any improper payment or gift will

typically not be fully and accurately reflected in the books and records of the issuer, or in those maintained by its local operations, thus triggering a violation. Even if the DOJ or SEC suspects, but cannot prove, that funds were used to pay a bribe, failure to account fully and accurately for those funds could be a violation of the books and records provisions. For this reason, it is typically much easier for the government to establish a books and records violation than an anti-bribery violation.

Facilitation payments

The anti-bribery provisions of the FCPA contain an exception for ‘any facilitating or expediting payment... the purpose of which is to expedite or to secure the performance of a routine governmental action’ by a foreign official. However, the US government has recently attempted to narrow the scope of this exception, which was never as broad as it might have appeared at first glance. Based on recent enforcement actions and statements by senior DOJ prosecutors, it appears that the only clearly protected type of payment would be one satisfying all of the following criteria:

- the payment is small, non-repeated and made to obtain routine and minor governmental action within normal processing times;
- the payer has already met all the requirements for the routine governmental action; and
- if the payer is an FCPA issuer, the facilitation or expediting payment is expressly and accurately recorded as such in the payer’s books and records.

As a result, many multinational entities have in recent years instituted a global prohibition on any facilitating payment that is not centrally approved in advance (sometimes excepting emergencies involving risk to life or health).

Who must comply with the FCPA?

The books and records provisions apply to any ‘issuer’ that has registered US securities or is required to file certain periodic reports with the SEC (an FCPA issuer).¹ Any other individual or entity is subject to civil or criminal

¹ This includes issuers with American depository receipts listed on a US securities exchange. It does not include issuers that have no US-listed securities and have qualified for rule 12g3-2(b) or another registration exemption under section 12 of the US Securities Exchange Act of 1934.

enforcement if it causes, or is involved with, any violation by an FCPA issuer of its books and records obligations.

The anti-bribery provisions of the FCPA apply to:

- any US citizen or US resident located anywhere in the world;
- the worldwide operations of (i) any FCPA issuer or (ii) any entity, partnership, business trust or organisation formed under US law or having its principal place of business in the US (a domestic concern);
- any person who is an officer, director, employee, ‘stockholder’ or agent of, and is ‘acting on behalf of’, an FCPA issuer or domestic concern; and
- any other person ‘while in the territory of the United States’, a concept with surprisingly broad application, as noted below.

The application of the FCPA to any officer, director, employee, agent or stockholder of an FCPA issuer or domestic concern is frequently overlooked. Non-US persons acting outside the US have been subject to FCPA enforcement solely on the basis of being employed by an FCPA issuer or domestic concern. Christian Sapsizian, a French citizen, was sentenced in September 2008 to 30 months in prison for bribes arranged and paid outside the US. He was arrested at a Miami airport while on layover, en route to Paris. Jurisdiction was based on the fact that his former employer had American depository receipts listed in the US and he caused related payments to be wired from US banks.

Expanding extraterritorial jurisdiction

Under the anti-bribery provisions, the words ‘in the territory of the United States’ are given an extremely broad interpretation by the DOJ. An internal DOJ manual notes that, ‘[a]lthough this section has not yet been interpreted by any court, the [DOJ] interprets it 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’.² In October 2006, SSI International Far East, a non-US company whose relevant employees were located outside the US, pleaded guilty to criminal anti-bribery charges and paid a \$7.5m penalty. The sole basis for US jurisdiction was the fact that the company ‘transmitted requests’ to persons located in the US to

² Title 9 of the DOJ Criminal Resource Manual, § 1018 (November 2000).

make improper payments to non-US persons. Similarly, two UK nationals were recently indicted in a US federal court for allegedly assisting Kellogg, Brown and Root in bribing Nigerian officials with some of the payments being made through US bank accounts.

In many cases, prosecutors have applied general US criminal law principles of ‘conspiracy’ and ‘aiding and abetting’ to bolster their jurisdiction over non-US persons, who are not US issuers and who may not have taken any substantial action within the US. The DOJ has also made use of criminal money laundering laws to expand its jurisdiction and effective ability to prosecute FCPA violations (and to increase the range of available penalties). Another approach used by the DOJ is to prosecute a non-US affiliate of a US company as an ‘agent’ of the US company, even if the non-US affiliate took no action within the US. The DPC (Tianjin) case (described below) is an example of this approach.

Note that the anti-bribery provisions will apply to a non-US company or non-US citizen located outside the US only if that person makes use of a ‘means or instrumentality of [US] interstate commerce’. The government will assert that this jurisdictional requirement is easily satisfied and that action as minor as sending mail or email to a recipient within the US will suffice.

Bottom line for non-US entities with US operations

An entity that is not formed under US law, is not based in the US and has not issued registered US securities is not generally required to comply with the FCPA. However, any US affiliates of that entity, and their officers, directors and employees, are required to comply. Any officers, directors and employees of the non-US entity who are US nationals are also required to comply, wherever in the world they are located.

As noted above, even a non-US entity (that is not an FCPA issuer) and its non-US personnel could be caught by the FCPA if the entity or personnel take action or cause action to be taken within the US in connection with any arguably improper conduct. Whenever a non-US entity takes action with or through a US person or a US affiliate, its jurisdictional exposure to FCPA enforcement risk may be increased.

FCPA enforcement actions

The following is a selection of major enforcement actions that have involved a particularly novel approach by the DOJ or SEC over jurisdiction, the scope of prohibited conduct or the severity of the penalties imposed.

ABB Ltd

In July 2004, Swiss corporation ABB Ltd settled an SEC civil enforcement action and two of its subsidiaries pleaded guilty to criminal anti-bribery charges, resulting in civil and criminal penalties totaling \$16.4m for payment of bribes to government officials in Nigeria, Angola and Kazakhstan. ABB Ltd voluntarily disclosed the matter and co-operated fully with prosecutors, disclosing the results of an extremely broad (and costly) FCPA internal investigation involving over 115 lawyers (billing 44,700 hours, conducting 165 interviews and reviewing four million pages of documents) and over 100 forensic accountants (who carried out work in 21 countries). The DOJ asserted jurisdiction over ABB Ltd’s UK subsidiary on the basis that it was a foreign company acting in furtherance of a bribe of a foreign official while in the US.

DPC (Tianjin)

In May 2005, DPC (Tianjin), the Chinese subsidiary of a US company, pleaded guilty to criminal anti-bribery charges and agreed to engage an independent monitor for three years and to disclose its conduct to the Chinese government in a manner satisfactory to the DOJ. The parent company also agreed to a cease-and-desist order to settle an investigation by the SEC. The charges related to the payment of approximately \$1.6m in bribes in the form of ‘commissions’ (recorded in company books as ‘selling expenses’) to personnel employed by government-owned hospitals in China. DPC (Tianjin) and its parent company paid \$4.8m in penalties to the DOJ and SEC. The sole asserted basis for US jurisdiction was that the subsidiary company acted as the agent of its US parent, sending related financial information via email and fax to the parent in the US.

Statoil ASA

In October 2006, Norwegian company Statoil ASA settled civil and criminal FCPA charges, paying a total of \$21m in fines and disgorgement and agreeing to engage an independent monitor for a three-year period. Statoil ASA had entered into a consulting contract, and paid

bribes totaling more than \$5m through a New York bank account, to induce an Iranian official to use his influence to assist Statoil ASA. This was the first major FCPA criminal enforcement action against a non-US issuer for conduct that took place predominantly outside the US. Jurisdiction was based on the fact that Statoil ASA was listed on the New York Stock Exchange.

Siemens AG

In December 2008, Siemens AG pleaded guilty to criminal internal controls and books and records charges, and three of its subsidiaries pleaded guilty to conspiracy charges. Siemens AG's circumvention (or absence) of internal controls led to corrupt payments of at least \$805m being made. The charges also related to kickbacks involving the UN Oil For Food programme and to corrupt payments made to secure favourable treatment for projects in Argentina, Venezuela and Bangladesh. The companies agreed to pay combined fines of \$450m to settle DOJ enforcement proceedings. Separately, Siemens AG agreed to disgorge \$350m in profits to resolve an SEC action and to pay fines and disgorgement of €395m to resolve a related investigation by the Munich public prosecutor's office (in addition to €201m already paid in respect of an earlier settlement). Like Statoil ASA, Siemens AG was a non-US issuer listed on the New York Stock Exchange.

Multi-jurisdictional enforcement

In recent years, largely at the instigation of US business interests eager to level the international playing field, several international treaties and conventions have been concluded to combat bribery of foreign public officials. These include, most importantly, the OECD anti-bribery convention and the United Nations Convention Against Corruption. Today, multinational entities based in most developed countries are required to comply with laws criminalising foreign bribery that are similarly broad to the FCPA (though often not enforced as aggressively or with as broad an extraterritorial scope).

Partly as a result of these treaties, many countries including the US have recently shown a new willingness to assist one another in anti-bribery enforcement actions. This includes informal sharing of leads and tips in current or potential enforcement actions and gathering evidence for investigations. For example, the DOJ's recent

investigation of Halliburton/KBR involved co-operation from authorities in France, Italy, Switzerland and the UK.

In the past two to three years, there has been a remarkable increase in the number and scale of anti-bribery investigations launched by developed countries against their own companies. The UK's Financial Services Authority recently imposed a £5.25m fine on Aon Ltd, the principal UK subsidiary of US-based Aon Corporation, for failure to establish effective anti-bribery controls. In addition, there has been an increasing number of anti-bribery investigations and enforcement actions brought by developing countries, under their domestic laws, for improper payments made to their government officials by foreign companies.

Non-US entities therefore face a growing risk of a multiplicity of investigations and sanctions in several jurisdictions from what is arguably a single instance of improper conduct. The growing trend for multi-jurisdictional enforcement actions brings compounded risks and challenges that call for the engagement of experienced international counsel.

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