
Commercial Bribery: What GCs Should Know About the Achilles Heel of Anti-Bribery Law

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In recent years, the Department of Justice has paid little attention to domestic commercial bribery, instead focusing its efforts on bribes paid to foreign officials in violation of the Foreign Corrupt Practices Act. But that tide is changing at DOJ. Commercial bribery, both domestic and international, is illegal in most states and is also a violation of federal law under the Travel Act. Although companies maintain vigorous compliance programs to detect and prevent bribes to foreign officials, those same programs frequently fail to protect against commercial bribery. Anti-corruption policies and internal controls that fail to consider commercial bribery expose an Achilles heel that can result in substantial criminal exposure.

Strategic Advantages Prosecuting Commercial Bribery Under the Travel Act

The Travel Act affords prosecutors several strategic advantages. First, it provides long-range, cross-border jurisdiction, but unlike the Foreign Corrupt Practices Act, it does not require prosecutors to establish the often ambiguous "foreign official" nexus. Consequently, prosecutors can use the Travel Act as a "stopgap" in an FCPA case, eliminating the need to show that the bribe recipient was a government official in order to bring criminal charges.

Second, the Travel Act assimilates state commercial bribery laws, potentially affording prosecutors the ability to "forum shop" to find the state law that most closely fits the government's theory of the case (since most acts of commercial bribery will touch on multiple states). Third, and most subtly, the Travel Act gives prosecutors a tool to expand the sweep of a conspiracy charge. Prosecutors can bring a "hybrid" conspiracy theory, by charging, under 18 U.S.C. § 371, that the defendant conspired to violate the FCPA and the Travel Act—allowing prosecutors to wrap all of the defendant's alleged bad acts into one count. This makes it much easier for prosecutors to string together seemingly unlinked fact patterns, and also affords prosecutors additional advantages with respect to statutes of limitations, as the statute is tolled until the last act in furtherance of the conspiracy.

Commercial Bribery Under the Travel Act – An Old Tool Recently Reinvigorated

"Commercial bribery" is commonly understood as the payment or offer of something of value to induce the recipient to provide an improper commercial benefit to the payer. Under federal law, the Travel Act, 18 U.S.C. § 1952 et seq., makes it a crime to travel in interstate or foreign commerce or to use "the mail or any facility in interstate or foreign commerce" with intent to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity." The definition of "unlawful activity" broadly includes "extortion [and] bribery ... in violation of the laws of the State in which committed or of the United States."

This definition assimilates state commercial bribery law (as well as the District of Columbia and federal territories) and provides a hook for federal criminal liability where an individual violates state commercial bribery laws and uses, for example, a phone, fax, wire transfer or e-mail to further the commercial bribe, or traveled across state lines in furtherance of the scheme. Given modern modes of communication and travel, almost any act of commercial bribery in the U.S.—something as simple as an e-mail, a phone call, or a meeting—likely can be pursued by federal prosecutors under the Travel Act. This has not been lost on the Department of Justice.

For example, in *United States v. Control Components, Inc.* ("CCI"), federal prosecutors have used the Travel Act to expand the government's anti-corruption arsenal. Prosecutors successfully charged a section 371 conspiracy theory where the object of the conspiracy was to violate the FCPA and the Travel Act. Federal prosecutors turned to California state commercial bribery law as the basis for Travel Act liability. The former executives were charged in connection with a conspiracy for paying bribes to secure contracts from both foreign governments and private companies that allegedly resulted in net profits of more than \$46 million. The company and certain executives pled guilty to one count of violating the FCPA, and to conspiracy to violate the FCPA and the Travel Act. On September 20, 2011, the court denied the defendants' motions to dismiss the Travel Act counts in the indictment, holding that they were constitutional and properly predicated on violations of California's anti-bribery law.

Tips For Updating the Company's Anti-Corruption Program to Detect and Prevent Commercial Bribery

In light of federal prosecutors' recent emphasis on the Travel Act, in-house counsel should ensure that the company's anti-corruption program provides sufficient protection against commercial bribery risks. Any program should be tailored to the commercial activities of the company, the industry in which it competes, its customers, and the geographic regions where the company does business. While each situation is unique, and no two compliance programs should be the same, certain recommendations for an effective Travel Act compliance update will include the following:

- **Audit the Company's Anti-Corruption Policy.** In-house counsel should review the company's anti-corruption policy, and related materials (e.g., code of conduct), to ensure that company policy explicitly prohibits commercial bribery. In our experience, many companies' compliance policies may have been written several years ago, when the FCPA was the sole point of emphasis for U.S. regulators. An updated policy should define commercial bribery, and make clear that commercial bribery is just as improper and illegal as government bribery.
- **Consider the Company's Gifts and Entertainment Policies.** A key difference between the FCPA and the Travel Act lies in what conduct is permissible. Under the FCPA, most gifts and entertainment, above a nominal value, to government officials may be improper if they are offered to help obtain or retain business. The Travel Act, however, is more stringent. Because the Travel Act assimilates state law, which in most instances more narrowly focuses on explicit quid pro quo commercial bribery, mere gifts or entertainment are usually legal in the absence of a quid pro quo in which the recipient agrees to

violate a fiduciary duty to his or her employer. Put simply, the company has significantly more latitude with gifts and entertainment vis-à-vis its private sector customers than with the government, and its policies can properly reflect this.

- **Update the Training Materials.** A well-educated work force is a highly cost-effective and key line of defense against commercial bribery. In-house counsel should identify and discuss, in layman's terms, the Travel Act and relevant state statutes in the same module or anti-corruption materials discussing the FCPA. A concise, well-tailored training program that emphasizes commercial bribery as well as government bribery is essential. Such training should include what the employee cannot do, but should also reinforce what the employees can do to market to private customers.
- **Review the Internal Controls.** In-house counsel should review their company's internal controls to ensure that they are sufficient to detect and prevent commercial bribery. If the company is an "issuer" under the FCPA (i.e., if its securities are publicly traded, or sold as American Depositary Receipts), a commercial bribe will expose the company under the FCPA's criminal and civil books and records and internal controls provisions, because the FCPA's accounting provisions, unlike its anti-bribery prohibition, apply regardless of whether the accounting violation relates to a government or a commercial bribe. Whether the company is an FCPA "issuer," effective internal controls protect against a potential rogue employee's commercial bribery. To afford maximum Travel Act insurance, the company's controls should provide checks and balances on transactions occurring with other private companies, particularly with respect to significant, high-dollar transactions. Depending on the size of the company, industry, and geographic region, in-house counsel should consider multiple signature/ approval requirements for all transactions above a certain threshold, or with a certain customer, or for a certain region, or for a certain purpose (e.g., marketing or business intelligence). In addition, the controls should treat third-party agents or consultants the same, regardless of whether they were retained for a government or private customer. Lastly, in-house counsel should consider an audit to confirm whether the company accurately records gifts, entertainment and travel expenses for private sector customers in the company's books and records.

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