

Non-U.S. Companies May Also Be Subject to the FCPA

DANIEL MARGOLIS AND JAMES WHEATON

This article provides an overview of the Foreign Corrupt Practices Act and discuss various ways in which non-U.S. companies may be subject to the provisions of the FCPA. It also highlights recent enforcement activities against non-U.S. companies and individuals.

The Foreign Corrupt Practices Act (“FCPA”)⁸ is a U.S. statute that criminalizes the bribery of foreign officials anywhere in the world by companies subject to its provisions. To date, most prosecutions under the FCPA have been against U.S. publicly traded companies or U.S. companies doing business abroad. However, foreign companies may be subject to the FCPA’s provisions as well, and U.S. criminal law enforcement authorities have stated their intention to cast a wide net in enforcing the FCPA.

ANTI-BRIBERY PROVISIONS

Overview of the Anti-Bribery Provisions

The FCPA¹ is divided into two sections, commonly known as the Anti-Bribery Provisions and the Company Record and Internal Control Provisions. The Anti-Bribery Provisions prohibit payments of any “thing of value” to an individual knowing that it will be paid to a foreign official in order to corruptly influence the official in some official act or secure any improper advantage in an attempt to obtain or retain business.

The U.S. Department of Justice (“DOJ”), which is primarily responsible for enforcing the Anti-Bribery Provisions, and the United States Securities and

Exchange Commission (“SEC”) interpret these provisions broadly. For example, a “thing of value” can include such items as travel expenses, donations to charity, loans and gifts given at business meetings. Similarly, the term “foreign official” may apply to any official of any rank, and could include a member of a legislative body, a member of a royal family or officials of state-owned business enterprises.

Violations of the Anti-Bribery Provisions can lead to substantial fines for business entities and imprisonment of up to five years and fines of up to \$100,000 for individuals.

Parties Subject to the Anti-Bribery Provisions

Enforcement of the FCPA has traditionally focused on foreign activities of U.S.-based companies. With the globalization of the business community, however, the U.S. Government has sought to enforce the FCPA against foreign companies as well. Certainly not every company and individual around the world is subject to the FCPA, but the DOJ and SEC’s positions about which companies and individuals are subject to the FCPA may be surprising to non-U.S. companies. Below we review the various categories of individuals and entities subject to the Anti-Bribery Provisions and provide examples of how a non-U.S.

Daniel Margolis is a partner in Pillsbury’s Litigation practice and a member of the firm’s Foreign Corrupt Practices Act Task Force. He has extensive experience conducting criminal and regulatory investigations in foreign countries, including Japan, Switzerland, India, Colombia, United Arab Emirates and England. James Wheaton is a senior associate in Pillsbury’s Litigation practice. Both authors are based in New York.

To date, most prosecutions under the FCPA have been against U.S. publicly traded companies or U.S. companies doing business abroad. However, foreign companies may be subject to the FCPA's provisions as well, and U.S. criminal law enforcement authorities have stated their intention to cast a wide net in enforcing the FCPA.

company might come within its reach.

First, the Anti-Bribery Provisions apply to “domestic concerns,” and “United States persons.”² Both terms include companies organized under the laws of the United States. Therefore, any U.S. subsidiary of a non-U.S. company that is incorporated under U.S. law may be subject to the Anti-Bribery Provisions. Further, if a non-U.S. company employs a U.S. national in any of its offices or subsidiaries around the world, that individual is also subject to the FCPA.

Second, the Anti-Bribery Provisions apply to any “Issuer” who has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (the “’34 Act”) or who has to file periodic reports under Section 15(d) of the ’34 Act.³ The DOJ and the SEC have asserted the position that, in general, non-U.S. companies that issue stock in the U.S. or trade their home country’s stock through certain types of ADRs sold on U.S. exchanges that require the filing of periodic reports with the SEC (i.e., ADRs commonly known as “Level II” and “Level III” ADRs) are subject to the FCPA.⁴ There are several hundred non-U.S. companies whose shares are traded on U.S. exchanges.⁵

Third, the Anti-Bribery Provisions apply to any officer, director, employee, or agent of an Issuer or a domestic concern.⁶ Therefore, the U.S. government would likely argue that if a U.S. subsidiary of a non-U.S. company operates a joint venture with a foreign company or utilizes an agent in a foreign country, the subsidiary may be liable for the actions of the joint venture partner or agent.

Finally, the Anti-Bribery Provisions may apply to any person who does not fit within the categories listed above but violated the FCPA within the territory of the United States.⁷ This provision could apply where a non-U.S. company expends significant sums of money on a foreign official for non-business related travel in the U.S. or where unlawful payments are made (or approved) while in the United States.

COMPANY RECORDS AND INTERNAL CONTROL PROVISIONS

Overview of the Company Record and Internal Control Provisions

Separate and distinct from the Anti-Bribery Provisions, the Company Records and Internal Control Provisions require certain companies whose securities are traded on the U.S. markets to institute and maintain an accounting system that controls and records all dispositions of company assets. Congress originally designed these provisions to prohibit “slush funds” — accounts that are frequently used to make illegal payments — and to stop the mislabeling or misrepresentation of payments and expenses. The SEC and DOJ jointly enforce the Company Records and Internal Control Provisions, though the SEC has taken a more active role. The SEC primarily enforces the Company Records and Internal Control Provisions through the imposition of substantial monetary penalties. In certain circumstances, the DOJ may impose criminal sanctions, including fines and imprisonment.

Parties Subject to the Company Records and Internal Control Provisions

The Company Records and Internal Control Provisions apply only to Issuers as defined above.⁸ The SEC has applied this provision to foreign companies that trade in the U.S. through ADRs.⁹ Section 102(b) of the FCPA, however, limits an Issuer’s responsibility for FCPA violations by its subsidiaries in situations where the Issuer holds 50 percent or less of the voting power of the subsidiary and acts in good faith to comply with the FCPA.¹⁰ However, because the SEC and the DOJ have tried in recent years to expand the scope of their jurisdiction, it may be prudent for Issuers who hold less than fifty percent of the voting

power of a subsidiary to nonetheless ensure compliance with the FCPA.

RECENT EXAMPLES OF FCPA CASES INVOLVING FOREIGN COMPANIES AND THEIR EMPLOYEES

Jurisdiction Based on Status as Issuer

The DOJ and SEC have recently announced a number of FCPA actions in which they asserted jurisdiction over a foreign company based on its status as an Issuer. Most significantly, on December 16, 2008 Siemens AG, a German company, pleaded guilty to violating both the Anti-Bribery and Company Records and Internal Control Provisions of the FCPA, agreeing to a settlement with the DOJ and the SEC that included a criminal fine of \$450 million and \$350 million in disgorgement.¹¹ Siemens also agreed to pay approximately \$800 million to German criminal authorities.¹² The DOJ alleged that the German company had engaged in a global pattern of bribery, and had made over 4,000 payments to non-U.S. government officials totaling over \$1.4 billion in connection with a number of projects around the world.¹³

The U.S. asserted jurisdiction in the Siemens case under both the Anti-Bribery and Company Records and Internal Control Provisions because Siemens' ADRs were traded on the New York Stock Exchange. The Company, therefore, was subject to both provisions. U.S. Government officials emphasized the importance of the fact that Siemens was listed on a U.S. exchange, noting in a December 15, 2008 announcement at the time of the settlement that "it is a federal crime for U.S. citizens and companies traded on U.S. markets to pay bribes in return for business."¹⁴

The DOJ has pursued similar actions against foreign companies in the recent past. In 2006, the DOJ announced a settlement with Statoil, ASA, an international oil company headquartered in Norway (but which traded through ADRs on the New York Stock Exchange) for bribing Iranian officials. In announcing a settlement that included a \$10.5 million penalty and a three year deferred prosecution agreement, the DOJ noted: "Although Statoil is a foreign issuer, the Foreign Corrupt Practices Act applies to foreign and domestic public companies alike, when the company's stock trades on American exchanges."¹⁵

Similarly, both the SEC and DOJ settled cases against the Willbros Group — a Panamanian company listed on a U.S. exchange and with U.S. offices — involving a series of FCPA violations, including those committed by Willbros Group affiliates in Bolivia, Nigeria, and Ecuador.¹⁶ In addition to alleging jurisdiction based on Willbros Group's status as an Issuer, the criminal information alleged that Willbros Group employees in the U.S. were directly involved in arranging payments to government officials by Willbros affiliates overseas.

There can be no question that enforcement of the FCPA is at an all-time high. It is therefore unsurprising the U.S. Government has spread its enforcement wings to individuals and entities outside the United States.

Jurisdiction Based on Acts Committed on U.S. Soil

The DOJ has also brought actions against foreign employees of foreign companies for acts that took place in the U.S. On December 10, 2008, a former manager of a large Japanese company pleaded guilty to, among other things, conspiracy to violate the FCPA and was sentenced to two years in prison. The government alleged an FCPA conspiracy that involved payments to officials at various Latin American state-owned oil companies in an effort to secure business for the Japanese company and its U.S. subsidiary. The defendant, a Japanese citizen who reportedly lived and worked in Japan, was arrested in the United States following a business meeting in which the conspiracy was allegedly discussed.

On September 23, 2008, Christian Sapsizian, a French citizen, was sentenced to 30 months in prison for his role in paying over \$2.5 million in bribes to Costa Rican officials on behalf of Alcatel — at the time a French telecommunications company whose shares were traded in the U.S. through ADRs. The criminal indictment stated that Sapsizian arranged for

payments to foreign officials through wire transfers that, at some point, passed through U.S. financial institutions. Because the indictment also alleged that Sapsizian was the “employee” or “agent” of an Issuer, it is unclear whether the U.S. Government would have based jurisdiction solely on the wire transfers passing through the U.S.

Finally, in 2002, a Taiwanese company pleaded guilty and agreed to pay a \$2 million criminal fine because its chairman, while in the United States, authorized cash payments to be made in Taiwan to Taiwanese officials via hand-delivered envelopes.¹⁷

CONCLUSION

There can be no question that enforcement of the FCPA is at an all-time high. It is therefore unsurprising the U.S. Government has spread its enforcement wings to individuals and entities outside the United States. Indeed, at a January 28, 2009 conference on anti-corruption officers, Mark Mendelsohn, the senior U.S. prosecutor overseeing all FCPA investigations commenced by the DOJ, predicted that in 2009, the U.S. will continue to investigate U.S. and foreign Issuers equally. If a company falls within any of the categories discussed in this article, it would be prudent to consult with competent FCPA counsel to assess the risk of non-compliance and be ready to act if learning of suspicious activity at the company.

NOTES

¹ 15 USC § 78dd-1 *et seq.*

² 15 USC § 78dd-2.

³ 15 U.S.C. § 78(c)(a)(8).

⁴ See generally 14A Guy Lander, U.S. Securities Law for International Financial Transactions and Capital Markets Chapter 8 (“ADRs”) (Rev. Second Ed. 2008) (describing generally the registrations and the filing requirements for companies listed on U.S. Exchange through ADRs). Specific examples include: *United States of America v. Siemens Aktiengesellschaft*, Case 08-cr-00367 (December 12, 2008) (asserting jurisdiction because, among other reasons, Siemens sponsored ADRs on the NYSE); *In the Matter of Statoil, ASA*, Exchange Act Release No 54,599 (Oct. 13, 2006) (Order Instituting Cease-and-Desist Proceedings) (asserting jurisdiction based on sponsorship of ADRs on

the NYSE); *S.E.C. v. ABB, Ltd.*, No 05-1141 (D.D.C. July 6, 2004) (asserting jurisdiction because company traded ADRs on the NYSE and company, as a “foreign private issuer,” filed annual reports with the SEC on Form 20-F); *S.E.C. v. Montedison, S.p.A.*, (D.D.C. Nov. 21, 1996) No. 96-2631 and SEC Litigation Release No. 15164 (Nov. 21, 1996) (finding jurisdiction based on ADRs traded on the NYSE).

Non-U.S. companies trading on over-the-counter markets through “Level 1 ADRs” may be exempt from these requirements. See 17 C.F.R. § 240.12g3-2, exempting some foreign issuers from U.S. Securities laws.

⁵ Information compiled by the authors using The Bank of New York Mellon’s Depository Receipts Directory, available at http://www.adrbnymellon.com/dr_directory.jsp.

⁶ 15 U.S.C. §§ 78dd-1(a), 78dd-2, 78 dd-3.

⁷ 15 USC § 78dd-2.

⁸ 15 USC § 78m(b)(2) and (b)(3).

⁹ For example, in 1996, the SEC brought a civil injunction action for violation of the Company Records and Internal Control Provisions against an Italian company that sold its home country’s stock through an ADR program under the ‘34 Act. See Complaint filed by the SEC in *Securities and Exchange Commission v. Montedison, S.p.A.*, (D.D.C. Nov. 21, 1996) No. 96-2631 and SEC Litigation Release No. 15164 (Nov. 21, 1996).

¹⁰ 15 USC § 78m(b)(6).

¹¹ See DOJ Press Release entitled “Siemens and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations,” available at http://www.usdoj.gov/usao/dc/Press_Releases/2008%20Archives/December/08-1105.pdf.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ October 12, 2006 DOJ Press release entitled “U.S. Resolves Probe Against Oil Company That Bribed Iranian Official,” available at <http://www.usdoj.gov/usao/nys/pressreleases/October06/statoildeferredprosecutionagreementpr.pdf>.

¹⁶ See Complaint filed by SEC in *SEC vs. Willbros Group, Inc., et al.* (S.D. Texas May 15, 2008), available at <http://www.sec.gov/litigation/complaints/2008/comp20571.pdf>.

¹⁷ See Department of Justice, “Syncor Taiwan, Inc. Pleads Guilty to Violating the Foreign Corrupt Practices Act” (December 10, 2002) available at http://www.usdoj.gov/opa/pr/2002/December/02_crm_707.htm.