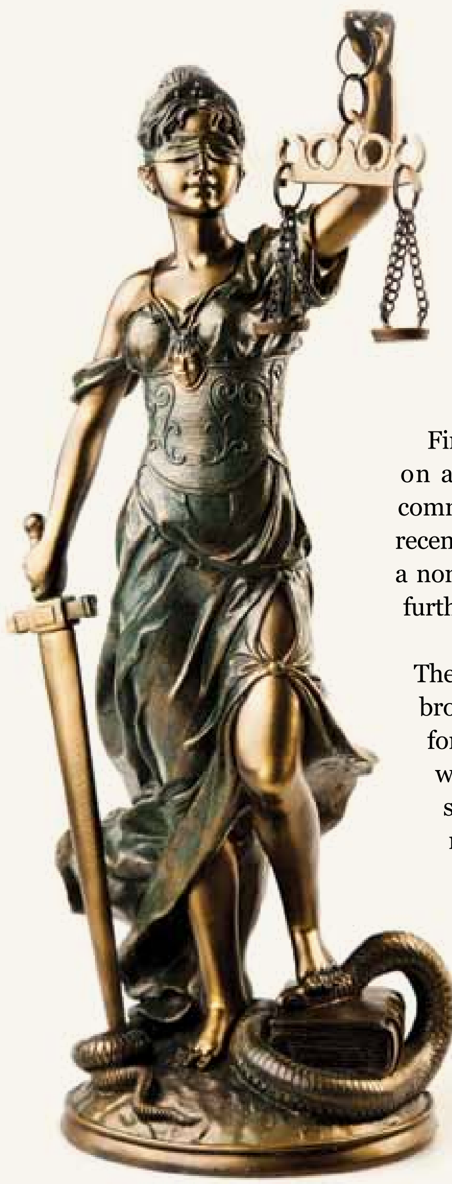
You Are a Non-U.S. Company.

Why Should You Care about the U.S. Foreign Corrupt Practices Act?

By Jonathan S. Abernethy and Colin C. Bridge



The oftentimes long arm of U.S. law can be seen clearly in recent enforcement of the Foreign Corrupt Practices Act or FCPA, a criminal law prohibiting bribery of non-U.S. government officials. Nine of the ten largest FCPA fines to date have been assessed against companies based outside of the U.S., with seven of those nine in amounts well in excess of $100 million. U.S. regulators have sent a clear message: not just American companies — but any company whose operations touch the U.S. — should pay attention to the FCPA.

The FCPA prohibits corrupt payments and offers to pay money or anything of value to "foreign officials" or third party intermediaries, when such payments or offers to pay are made to obtain new business or retain existing business. "Foreign official" is defined broadly to include employees of non-U.S. government departments and agencies and employees of state-owned or controlled entities.

How has this U.S. law ensnared companies all over the world? There are two principal ways that non-U.S. companies can be subject to the FCPA's long arm. First, a non-U.S. company that has American Depository Receipts (ADRs) listed on a U.S. exchange can be liable, assuming the company uses a form of communication or commerce that touches the U.S. to commit a violation. Many recent enforcement actions have targeted these so-called "foreign issuers." Second, a non-U.S. company that is not an issuer can be liable if it engages in any act in furtherance of a corrupt payment while in the territory of the United States.

The U.S. Department of Justice (DOJ), which prosecutes FCPA violations, takes a broad view of both types of jurisdiction. The DOJ has asserted jurisdiction against foreign issuers even when no employee ever set foot in the U.S. in connection with the bribery scheme. For foreign non-issuers, the DOJ has alleged that it is sufficient for the company merely to cause an act to be done within the U.S. – a reading of the Act that has been widely criticized and has yet to be approved by any court. According to the DOJ, any "telephone calls, faxes, e-mails and bank transfers to, from, or through the United States" that are part of a scheme are enough for jurisdiction.[1] The DOJ also contends that foreign non-issuers who take no action in the U.S. may be liable if they conspire with, aid or abet, or act as an agent of a U.S. company that violates the FCPA.

1. U.S. Department of Justice, Response of the United States, Supplementary Questions Concerning Phase 3, OECD Working Group on Bribery, May 21, 2010, available at http://www.justice.gov/criminal/fraud/fcpa/docs/response3-supp.pdf.

The DOJ's expansive view of FCPA jurisdiction is illustrated in a number of enforcement actions over the past several years, including the following fact scenarios:

Bank Transfers

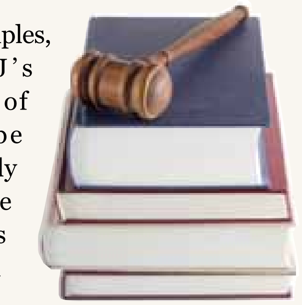
In charging the Korean subsidiary of a U.S. issuer with bribing employees of government-owned Korean and Chinese steel companies, the DOJ asserted jurisdiction based on the subsidiary having caused unlawful payments to be made from the parent company's U.S. bank account. In another case involving a Japanese non-issuer that was part of a joint venture that bribed Nigerian government officials, the company's only connection to the U.S. was that it assisted in causing corrupt payments to be wired from a Netherlands bank account to Swiss bank accounts by way of a correspondent account in New York.

E-mail

In settling a matter with a Hungarian telecommunications provider that was an issuer, the DOJ alleged as the only contact with the U.S. e-mail messages sent by an executive of the Hungarian company to foreign officials that passed through e-mail servers in the U.S.

Telephone, Facsimile and E-mail

In charging the Chinese subsidiary of a U.S. issuer with paying doctors and laboratory personnel at government-owned hospitals to obtain sales of the subsidiary's medical equipment, the DOJ alleged as the only jurisdictional hook the subsidiary's causing approvals of budgets with improper payment amounts to be sent by telephone, fax, and e-mail from Los Angeles to China.



Despite these and other examples, it is possible the DOJ's expansive interpretation of FCPA jurisdiction will be narrowed. One court recently dismissed an FCPA charge against a U.K. citizen that was based solely on his mailing a DHL package to the U.S. allegedly as part of the scheme, with the judge calling the DOJ's position on jurisdiction "novel." In FCPA guidance published in November 2012, the DOJ and U.S. Securities and Exchange Commission emphasized that a foreign non-issuer must commit an act while in U.S. territory, a narrower reading of the statute, although a footnote cites the DOJ's longstanding and broader position that causing an act in the U.S. is sufficient.

Greater clarity is likely to come on these issues with more court challenges. In the meantime, companies whose operations even remotely touch the U.S. and who therefore could come within the FCPA's jurisdiction should consider implementing anti-corruption compliance programs to prevent, detect, and remediate violations. Such programs can be a key mitigating factor in U.S. regulators' decisions whether to bring an enforcement action or in the penalties sought if an action is brought. Given the potentially huge fines from a violation, the cost of implementing a compliance program will be money well spent.

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