. . . as appeared in . . .

Published by *WorldTrade Executive, a part of Thomson Reuters*

LATIN AMERICAN
Law & Business Report

THOMSON REUTERS

Volume 19, Number 2 February 2011

The Foreign Corrupt Practices Act Requires Vigilance When Conducting Business in Latin America

By Hector Gonzalez and Mauricio A. España (Mayer Brown LLP)

A recent survey of corporate executives, investment bankers, private equity executives, and hedge fund managers at companies in the United States, Mexico, and Canada revealed that sixty-three percent of participants, nearly a third, identified the Foreign Corrupt Practices Act ("FCPA") and anti-corruption issues as the cause for an aborted deal or a re-negotiation of a deal over the past three years.[1] This figure jumped to almost eighty percent when focused solely on strategic buyers.[2] These same participants also ranked Mexico, and Central and South America, as the second highest region for concerns relating to the potential for compliance and integrity-related issues.[3] It is not surprising that corporate executives and deal makers have halted deals and re-opened negotiations after learning of possible FCPA violations. As the recent enforcement actions by the United States Department of Justice ("DoJ") and the United States Securities and Exchange Commission ("SEC") make clear, as a result of the FCPA's extremely broad extra-territorial jurisdiction, the DoJ and SEC have been able to successfully prosecute companies and individuals, foreign and domestic, who violate the FCPA's anti-bribery provisions while doing business in Latin America. And as last year's prosecution of General Electric demonstrates, it makes no difference to the DoJ and SEC that the entity that currently owns the company was not the owner of the assets or subsidiary at issue when the alleged violations occurred.[4]

A recent survey of corporate executives, investment bankers, private equity executives, and hedge fund managers at companies in the United States, Mexico, and Canada revealed that sixty-three percent of participants, nearly a third, identified the Foreign Corrupt Practices Act ("FCPA") and anti-corruption issues as the cause for an aborted deal or a re-negotiation of a deal over the past three years.

Aside from the United Kingdom's Bribery Act, which threatens to have the most extensive extra-territorial reach of any anti-bribery legislation, the FCPA's jurisdiction is the most expansive to date. The FCPA provides United States regulators with three independent ways to obtain jurisdiction over individuals and entities. First, the FCPA provides jurisdiction over issuers who have registered their securities with a United States securities exchange and who are required to file reports, pursuant to the Securities Exchange Act of 1934, or any employee or agent acting on the issuer's behalf.[5] Second, the "nationality" jurisdiction provisions of the FCPA provide regulators with jurisdiction over "domestic concerns" and employees or agents acting on their behalf.[6] Finally, the FCPA's

Hector Gonzalez (hgonzalez@mayerbrown.com) is Partner with Mayer Brown LLP in the New York office. Focusing on litigation, Hector represents corporations and corporate executives in all aspects of criminal and related civil and administrative matters, SEC and CFTC enforcement proceedings, internal investigations, state and federal grand jury investigations, and state attorneys general investigations. Mauricio A. España (mespana@mayerbrown.com) is an Associate with Mayer Brown LLP in the New York office. Mauricio is a litigator who counsels clients in cases dealing with complex commercial disputes, securities fraud actions, internal corporate investigations, federal and state agency general investigations, broker dealer—customer disputes, white collar criminal defense, and obtaining discovery in the U.S. for use in foreign litigations.

"territoriality" jurisdiction provisions are catch-all provisions that apply to "persons" other than issuers or domestic concerns who engage in conduct that violates the FCPA "while in the territory of the United States."[7] Pursuant to these provisions, the DoJ and SEC have jurisdiction over all issuers, foreign or domestic; all United States individuals and entities; any foreign individual or entity not listed on a United States securities exchange who violates the FCPA and has some contact with the United States; and any employee or agent of any of the aforementioned individuals and entities acting on their behalf. In today's world of global commerce, it is hard to envision an individual or entity that would not fit into at least one of these categories.

A review of the DOJ's and SEC's recent enforcement matters provides a better understanding of the breadth and scope of the FCPA's jurisdiction over conduct that occurs in, among other places, Latin America. The DoJ's and SEC's recent prosecution of Alcatel-Lucent, S.A. ("Alcatel") and three of its foreign subsidiaries is particularly instructive. Alcatel, a French corporation headquartered in France, is registered with the SEC and trades its shares on the New York Stock Exchange ("NYSE"), and also had an office in Miami, Florida during the relevant period.[8] Alcatel's three subsidiaries were also foreign entities, but did not have offices in the United States. Alcatel-Lucent France, S.A. ("Alcatel-Lucent") is a French corporation headquartered in France; Alcatel-Lucent Trade International, A.G. ("Alcatel-Lucent Trade") is a Swiss corporation headquartered in Switzerland; and Alcatel CentroAmerica, S.A. ("Alcatel CentroAmerica") is a Costa Rican corporation headquartered in Costa Rica.[9] The Alcatel entities are providers of a wide variety of technology products, including telecommunications equipment and services. The DoJ alleged that the Alcatel entities' business dealings in, among other countries, Costa Rica and Honduras violated the FCPA.

In Costa Rica, Alcatel-Lucent allegedly "won three contracts . . . worth a combined total of more than $300 million as a result of corrupt payments to government officials and from which Alcatel[-Lucent] reaped a profit of more than $23 million. . . ."[10] The corrupt payments were allegedly coordinated by two former Alcatel-Lucent, Alcatel CentroAmerica employees who engaged two Costa Rican consultants to act as intermediaries between the Alcatel entities and the Costa Rican government officials.[11] Alcatel-Lucent Trade, on behalf of Alcatel-Lucent, executed the various consulting agreements.[12] In furtherance of their alleged bribery scheme, Alcatel-Lucent allegedly wired more than $18 million to the Costa Rican consultants.[13] The consultants in turn provided more than half of this money to various Costa Rican government officials for assisting Alcatel-Lucent and Alcatel CentroAmerica in obtaining and retaining business.[14] In Honduras, Alcatel Trade, on behalf of Alcatel-Lucent, also allegedly hired a consultant to provide corrupt payments to a senior Honduran government official.[15] The DoJ claimed that as a result of these payments, Alcatel-Lucent was able to retain contracts worth approximately $47 million, from which it earned $870,000.[16] The Alcatel-Lucent consultant was allegedly a perfume distributor who did not have any experience in the telecommunications industry. The DoJ further alleged that Alcatel-Lucent executives paid the consultant the agreed-upon fees while fully aware that the consultant was providing a significant portion of those fees to the family of the senior Honduran government official in exchange for favorable treatment of Alcatel-Lucent.[17]

Although none of the Alcatel entities are incorporated in the United States and only one, Alcatel, has an office in the United States, the DoJ asserted jurisdiction over all four entities. Because Alcatel was registered with the SEC and traded its securities on the NYSE, the DOJ, as well as the SEC, asserted jurisdiction over it as an "issuer."[18] Asserting jurisdiction over Alcatel's subsidiaries, however, was not as simple. The DoJ asserted "territoriality" jurisdiction over the Alcatel subsidiaries as a result of conduct that it claimed occurred within the territory of the United States.[19] Specifically, the Alcatel subsidiaries' financial results were included in the consolidated financial statements that Alcatel filed with the SEC;[20] their employees "had regular communications with, including telephone calls, facsimiles, and email, with Alcatel personnel located in the office of Miami, Florida;"[21] Alcatel-Lucent employees "traveled to and met with . . . Alcatel personnel located in the office in Miami, Florida;"[22] Alcatel-Lucent "maintained at least one bank account in the United States through which it paid money to third-party consultants that it knew were going to pass on some or all of that money to foreign officials in exchange for obtaining or retaining business;"[23] and Alcatel Trade "also made some payments to third-party consultants via a correspondent account in the United States."[24] Although the Alcatel entities' contacts with the United States over a six-year period were not significant, they were sufficient enough for the DoJ and SEC to assert jurisdiction over these foreign entities. On December 27, 2010, Alcatel and its foreign subsidiaries settled their FCPA claims with the DoJ and the SEC and agreed to pay $137 million in penalties.[25]

Another example that illustrates how very little is required for jurisdiction under the FCPA is the DoJ's prosecution of Siemens AG ("Siemens"), and its Latin American subsidiaries. Siemens is a German corporation with its principal offices in Berlin and Munich, Germany and its securities were listed on the NYSE during the relevant time period.[26] According to the DoJ, two of its subsidiaries—Siemens S.A.-Argentina ("Siemens Argentina") and Siemens S.A.-Venezuela ("Siemens Venezuela")—allegedly violated the FCPA as a result of their business dealings in Argentina and Venezuela. Siemens Argentina is an Argentine corporation headquartered in Buenos Aires, Argentina and Siemens Venezuela is a Venezuelan corporation headquartered in Caracas, Venezuela.[27] The DoJ alleged

that between March 2001 and January 2007, Siemens Argentina, through intermediaries, paid approximately $31.2 million in bribes to Argentine government officials to procure a multi-billion dollar contract to implement Argentina's national identity card program.[28] Similarly, the DoJ alleged that between November 2001 and May 2007, Siemens Venezuela, also through intermediaries, paid approximately $18.7 million in bribes to Venezuelan government officials in connection with the construction of metro transit systems in the cities of Valencia and Maracaibo, Venezuela.[29] Although neither entity is a United States entity or has offices in the United States, the DoJ asserted "territoriality" jurisdiction over both of them.[30] The DoJ's jurisdiction over Siemens Argentina was premised on two meetings that officers of Siemens Argentina had with its consultants in New York and the use of a correspondent bank in New York to facilitate its payments to its consultants.[31] Aside from its affiliation with Siemens, which is subject to issuer jurisdiction, the DoJ's sole basis for "territoriality" jurisdiction over Siemens Venezuela was that "some of the payments [to its intermediaries] were made using United States bank accounts . . . ."[32] In December 15, 2008, Siemens and its subsidiaries agreed to settle their FCPA claims with the DoJ and SEC for $800 million, the largest FCPA penalty to date.[33]

The lesson to be learned from these two examples, which are representative of many other prosecutions related to activities in Latin America, is that individuals and entities doing business abroad, especially in Latin America, should be cautious and vigilant in their business dealings. The ugly truth is that corruption is prevalent throughout the globe and that the slightest participation in a scheme to bribe government officials to seek or retain business will expose an individual and/or entity to severe civil and criminal penalties.

1 Deloitte, Look before you leap: Managing risk in global investments at 7 (Feb. 2011).
2 Id.
3 Id. at 1.
4 See, e.g., Press Release, SEC Charges General Electric and Two Subsidiaries with FCPA violations (July 27, 2010), available at http://www.sec.gov/news/press/2010/2010-133.htm (last visited February 17, 2011).
5 15 U.S.C. § 78dd-1(a) (2010).
6 Id. § 78dd-2(a). The nationality jurisdiction provisions are intended to provide the DoJ with jurisdiction over all United States individuals and all entities organized under the laws of the United States. Specifically, the FCPA defines a "domestic concern" as either (i) an "individual who is a citizen, national, or resident of the United States" or (ii) an entity that "has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States." Id.
7 Id. § 78dd-3(a). The last type of jurisdiction—"territoriality" jurisdiction—was specifically drafted to expand the FCPA's jurisdiction to foreigners who violate the FCPA by engaging in conduct within the United States. H.R. Rep. 105-802 (1998).
8 Information, United States v. Alcatel-Lucent France, S.A. et al, Case No. 10-CR-20906, at 3 (S.D. Fl. Dec. 27, 2010) (hereinafter "Alcatel Information").
9 Id. at 3-5.
10 Press Release, Department of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation: Coordinated Enforcement Actions by Department of Justice and SEC Result in Penalties of more than $137 Million (Dec. 27, 2010).
11 Alcatel Information, supra at 17.
12 Id.
13 Id. at 18-19.
14 Id. at 19-20.
15 Id. at 22.
16 Id. at 23.
17 Id. at 22.
18 Id. at 3; see also Complaint, Securities and Exchange Commission v. Alcatel-Lucent, S.A. 10-cv-24620, at 3 (S.D. Fl. Dec. 27, 2010).
19 Alcatel Information, supra at 3-5.
20 Id.
21 Id.
22 Id. at 4.
23 Id.
24 Id. at 5.
25 Press Release, Department of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines: Coordinated Enforcement Actions by DOJ, SEC and German Authorities Result in Penalties of $1.6 Billion (Dec. 15, 2008) (Hereinafter "Siemens Press Release").
26 Statement of Offense, United States v. Siemens S.A. (Venezuela) 08-Cr-370, at 1 (D.D.C. Dec. 15, 2008) (Hereinafter "Siemens Venezuela Statement of Offense").
27 Siemens Press Release, supra.
28 Statement of Offense, United States v. Siemens S.A. (Argentina) 08-Cr-368, at 9 (D.D.C. Dec. 15, 2008) (Hereinafter "Siemens Argentina Statement of Offense").
29 Siemens Venezuela Statement of Offense, supra at 5.
30 Id. at 2; Siemens Argentina Statement of Offense, supra at 2.
31 Siemens Argentina Statement of Offense, supra at 11, 13-14.
32 Siemens Venezuela Statement of Offense, supra at 5.
33 Siemens Press Release, supra.
