

## PROCEED WITH CAUTION

**FCPA update**

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Non-US nationals must take care when conducting international business in Latin America and avoid violating the FCPA's anti-bribery provisions if they are to steer clear of prosecution in the US, argue Mayer Brown LLP partner Hector Gonzalez and associate Mauricio España



*Hector Gonzalez and Mauricio España*

As anti-bribery enforcement continues to increase worldwide, the United States maintains its lead in undertaking foreign bribery enforcement actions. According to a 2010 global enforcement report by TRACE - an association that provides anti-bribery compliances solutions to multinationals - the US "has pursued three foreign bribery enforcement actions for every one enforcement action pursued by all other countries over the last 33 years" - accounting for 75 per cent of all enforcement actions commenced between 1977 and 2010.

Although the US is already aggressively prosecuting foreign bribery and corruption, the recently enacted Dodd-Frank Act's whistle-blower incentives and protections are expected to further increase the number of Foreign Corrupt Practices Act (FCPA) investigations and enforcement actions commenced by the US Department of Justice (DOJ) and the Securities and Exchange Commission (SEC).

Additionally, at the behest of the US Congress, the DOJ may increasingly target individuals for criminal prosecution. At a recent senate hearing to examine the enforcement of the FCPA, Senator Arlen Specter, chairman of the US senate judiciary committee, subcommittee on drugs and crime, adamantly called for increased prosecution against

executives of companies that are alleged to have violated the FCPA and stated: “the only effective deterrent is a jail sentence.”

Although the DOJ has traditionally targeted US-based entities and their affiliates, its recent enforcement actions make clear that foreign nationals with no personal ties to the US are also within its cross hairs. As a result of the FCPA’s extremely broad extra-territorial jurisdiction, coupled with the DOJ’s robust cache of extradition treaties with dozens of countries, the DOJ has been able to successfully prosecute foreigners who violate the FCPA’s anti-bribery provisions while doing business abroad.

### *Broad extra-territorial jurisdiction*

Aside from the recently enacted 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 the DOJ with three independent ways to obtain jurisdiction over individuals and entities. First, the FCPA provides the DOJ with jurisdiction over issuers who have registered their securities with a US 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.

For ease of reference, we will refer to these provisions as providing “issuer” jurisdiction. The second form of jurisdiction is commonly referred to as “nationality” jurisdiction. These provisions provide the DOJ with jurisdiction over “domestic concerns” and employees or agents acting on their behalf. The nationality jurisdiction provisions are intended to provide the DOJ with jurisdiction over all US individuals and all entities organised under the laws of the US. Specifically, the FCPA defines a domestic concern as either an “individual who is a citizen, national, or resident of the United States” or an entity that “has its principal place of business in the United States, or which is organised under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.” Finally, the FCPA provides the DOJ with “territoriality” jurisdiction. The 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.”

The harsh reality is that foreign nationals may be subject to the FCPA’s jurisdiction under either of these categories. Although a foreign national who has no ties to the US would not be considered either an issuer or domestic concern, the first two types of jurisdiction - issuer and “nationality” jurisdiction - are applicable if the foreign national is employed by, or engages in business on behalf of, an entity or individual that is either itself an issuer or a domestic concern. 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 US. The most obvious and uncontroversial application of “territoriality” jurisdiction is the assertion of jurisdiction over an individual who violates, or causes someone to violate the FCPA “while in the territory of the United States.” Similar to issuer and nationality jurisdiction, however, a foreign national would also be subject to the territoriality jurisdiction provisions if the individual is an agent of a person, as defined in those provisions. Although the literal application of those provisions already provides the DOJ with a broad jurisdictional reach, the DOJ has taken the position that a foreign national is also subject to its jurisdiction if the individual “causes an act to be done within the territory of the United States by any person acting as that[...] national’s agent.”

Markedly different from the literal application of the FCPA’s text, according to the DOJ, a foreign national does not need to engage in prohibitive conduct “while [being personally present] in the territory of the United States” to come within the grasps of the territoriality jurisdiction provisions. Rather, the only thing that the foreign national would need to do is cause his agent to engage in conduct “within the territory of the United States” that violates the FCPA. Although no court has had the opportunity to assess whether the DOJ’s interpretation withstands judicial scrutiny, the DOJ has been able to successfully commence numerous FCPA cases that were jurisdictionally

grounded, at least in part, on the use of US banks to facilitate the flow of funds used to effectuate bribes and the transmission of e-mails and facsimiles to individuals in the US. Whether or not the DOJ's assertion of jurisdiction based on these and other tenuous connections with the US would withstand the strictures of due process is yet to be determined.

### *The DOJ's assertion of jurisdiction in practice*

Although the DOJ's assertion of territoriality jurisdiction has gone uncontested, the DOJ does not exclusively rely on those provisions when commencing enforcement actions against foreign nationals. As is evident from several of the DOJ's recent enforcement matters, in most instances, the DOJ asserts jurisdiction over foreign nationals who do not have any personal connections to the US on the basis that they are an agent of either an issuer, domestic concern, or person:

#### **United States v Enrique and Angela Aguilar (2010)**

Enrique Aguilar, a lawful permanent resident of the US living in Mexico, and Angela Aguilar, a Mexican citizen, are directors of Grupo Internacional de Asesores (Grupo), a Mexican company that purports to provide sales representation services for companies doing business with the Comision Federal de Electricidad (CFE), Mexico's electrical utility company that provides electricity to most of Mexico. According to the DOJ, Lindsey Manufacturing, a US-based company that makes emergency restoration systems and other equipment used by electrical utility companies, hired Grupo to serve as its sales representative in Mexico and to help it obtain contracts from the CFE. From approximately February 2002 until March 2009, Lindsey Manufacturing and Enrique Aguilar allegedly orchestrated a scheme in which Enrique Aguilar facilitated the making of illicit payments and gifts to Mexican officials in exchange for the CFE awarding contracts to Lindsey Manufacturing. Angela Aguilar is alleged to also have participated in the bribery scheme. In order to make the alleged illicit payments, Lindsey Manufacturing would allegedly wire the necessary funds from its US bank account into Grupo's US brokerage account. Angela Aguilar was arrested on 10 August 2010 as she travelled to Houston from Mexico and currently remains in the DOJ's custody. Enrique Aguilar remains a fugitive. The DOJ contends that it has jurisdiction over Angela Aguilar because she is an agent of Lindsey Manufacturing, a domestic concern.

#### **United States v Christian Sapsizian (2006)**

Sapsizian, a French citizen and assistant to a senior executive of the Latin American affiliate of Alcatel - a French telecoms company whose ADRs were traded on the New York Stock Exchange - allegedly lobbied Costa Rica's telecoms officials so that the Alcatel affiliate would be awarded a contract to install a mobile-based telephone network throughout Costa Rica. The DOJ's indictment contends that in furtherance of Alcatel's pursuit of the telephone network contract, Sapsizian obtained Alcatel's approval to enter into a consulting arrangement with a Costa Rican consulting firm that would serve as the intermediary to make bribe payments to the telecommunications officials. The consulting firm would allegedly provide fake invoices to Alcatel in order to obtain the bribe money, which Sapsizian personally approved. According to the indictment, upon Sapsizian's approval of the invoices, Alcatel transferred the money from its US bank account to the consulting firm's Costa Rican bank accounts. The DOJ's indictment further contends that as a result of Alcatel's bribes, the Alcatel affiliate was awarded two contracts valued at US\$250 million. Sapsizian was arrested in Miami while in transit through the US and was indicted on two counts of violating the FCPA, to which he pleaded guilty. He was sentenced to 30 months in prison and three years of supervised release. The DOJ's jurisdiction over Sapsizian was premised on his role as an agent of Alcatel, an issuer.

## **United States v Fernando Maya Basurto (2009)**

Basurto, a Mexican citizen, was the principal of a Mexican company that was hired by the US affiliates of ABB, a Swiss electrical engineering company, to serve as their Mexican representative before Mexico's CFE. According to the DOJ's indictment, ABB was awarded two large contracts by the CFE worth US\$90 million and in order to retain the CFE's business, ABB, with Basurto's assistance, provided CFE officials with US\$900,000 in illicit payments. Basurto, as ABB's Mexican representative, allegedly calculated and made the illicit bribe payments to the CFE officials using various US bank accounts. Basurto was initially arrested in Dallas, Texas on an unrelated matter and was subsequently indicted for violations of the FCPA. The DOJ premised its jurisdiction over Basurto on the basis that he was the agent of a domestic concern, the ABB affiliates. Basurto pleaded guilty to one count of conspiracy to violate the FCPA and agreed to cooperate in the DOJ's investigation.

## **United States v Jeffrey Tesler and Wojciech J Chodan (2009)**

The DOJ alleges that between 1995 and 2004, a four-company joint venture was formed to obtain contracts to build liquefied natural gas facilities on Bonny Island, Nigeria. Chodan, a UK citizen, was a sales vice president for the MW Kellogg Company and its successor company, Kellogg, Brown & Root Inc (KBR), a US company that was a member of the joint venture. The other members of the joint venture included two companies that either directly, or through its parent company, traded their stocks on a US securities exchange and an Italian company whose stock was not listed on any US securities exchange. According to the DOJ's indictment, in furtherance of the joint venture's goal to obtain contracts to build liquefied natural gas facilities on Bonny Island, Chodan hired Tesler, a UK citizen and lawyer, to be the intermediary responsible for coordinating bribes to officials from the Nigerian National Petroleum Corporation. The indictment further contends that as a result of illicit payments made to the Nigerian National Petroleum Corporation, the joint venture won four Bonny Island contracts. In February 2009, the DOJ filed an eleven-count indictment against Chodan and Tesler alleging violations of the FCPA based on email communications to the US and payments transferred through US correspondent banks. The DOJ asserted that it had jurisdiction over both individuals because they were agents of all four companies that made up the joint venture - two issuers, a domestic concern, and a person. Pursuant to an extradition request by the DOJ, Tesler was arrested in the UK and is in the process of being extradited to the US. On 3 December 2010, Chodan was extradited from the UK to the US and plead guilty to one count of conspiracy to violate the FCPA. Chodan faces a maximum penalty of 60 months in prison and agreed to forfeit US\$726,885 as part of his plea agreement.

### *Extraditing foreign nationals*

As the examples above illustrate, not only can the DOJ, pursuant to the FCPA, assert broad extraterritorial jurisdiction over foreign nationals living abroad, it also has the ability to seek the extradition of foreign nationals from almost anywhere in the world. The US is currently a party to bilateral extradition treaties with 112 countries, including Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Peru, Uruguay and Venezuela. The Organization For Economic Co-operation and Development's convention on combating bribery of foreign public officials in international business transactions (OECD Convention), which has been ratified by 43 nations, including Argentina, Brazil, Chile and Mexico, also provides that "[i]f a party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official." The OECD Convention further states that "[b]ribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them." The practical effect of the US's status as a party to these treaties and the OECD Convention is, as we have seen in the enforcement actions described above, that once the DOJ believes it has jurisdiction over a foreign national either because the individual is an agent of an issuer, domestic concern, or "person" or because he caused an act that violates the FCPA to be committed within the US, the DOJ can, and in many instances does, request that the authorities in the

foreign national's country arrest the individual and extradite him to the US for prosecution of the alleged violations of the FCPA. The reality is that the extradition to the US may in fact be the first time the foreign national ever steps into the US.

In sum, foreign nationals conducting international business in Latin America should proceed with caution as the FCPA's extremely broad extra-territorial jurisdiction, along with the US's various extradition treaties and conventions, provides the DOJ with the power to indict and prosecute foreigners who have no personal ties to the US who violate the FCPA's anti-bribery provisions.

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