

Reach of Foreign Corrupt Practices Act Exceeds Grasp

Due Process Limits

By Rebecca Roberts

ACCORDING TO FORBES, the government has initiated more proceedings under the Foreign Corrupt Practices Act in the last five years than it did in the previous twenty. Given the huge expense and political and economic implications of an enforcement action,

many companies choose to settle rather than litigate. As a result, there is not much case law on the constitutional implications of the FCPA's long reach, which may, in some cases, exceed due process requirements.

The FCPA prohibits offering or giving bribes or other payments to foreign officials for the purpose of obtaining or retaining business. In addition, the FCPA requires "issuers" to keep records that accurately reflect transactions and to maintain an adequate system of internal controls.

The FCPA may be enforced by the SEC, which has primary jurisdiction over issuers as well as their officers, directors, employees, and agents, or by the DOJ, which is responsible for civil enforcement against all other entities, foreign or domestic. The DOJ also has sole authority to bring criminal charges against any company or individual under the FCPA.

The FCPA casts a very wide net. In general it covers three different types of entities: (1) Issuers or any company, whether foreign or domestic, subject to the registration or reporting requirements of the Securities and Exchange Acts (as well as their officers, directors, employees and/or agents), (2) domestic concerns or any U.S. person or entity other than an issuer, including U.S. citizens working for or retained by foreign entities and/or working abroad, and (3) foreign persons or any foreign corporation or foreign national acting within the United States.

The 1998 amendments to the FCPA, which implemented an international anti-corruption treaty, further expanded the scope of the

law's provisions. The amendments did away with any U.S. nexus requirements. Issuers and domestic concerns may now be liable under the FCPA even if the events did not take place in the United States. For example, a U.S. corporation or person may be liable for the conduct of its overseas agents even if no money touched the United States or no U.S. person participated in the illegal act.

The Foreign Persons' provision, which also was part of the 1998 amendments, requires a U.S. territorial basis. However, it does not require extensive physical presence or a direct connection between the U.S. action and the violation. For example, the mailing of a letter, interbank approval of a check, wire transfer of funds, travel by air, train, or the interstate highway system by a foreign national in

furtherance of a violation may give rise to a FCPA action.

Additionally, foreign businesses may be liable for "acts taken on their behalf" by their agents. Thus, foreign subsidiaries and foreign national employees of foreign subsidiaries have clear exposure.

The government has taken full advantage of these provisions. For example, the DOJ criminally charged British and American subsidiaries of ABB Vecto, a Swiss company, for bribing government officials to obtain contract work on oil exploration projects in Nigeria. The British subsidiary, based in Aberdeen, Scotland, was charged under the Foreign Persons provision. The allegations concerned wired transfers to the United States, that were reimbursing an agent for payments made to a foreign official.

The SEC also filed civil claims against the Swiss parent company, which had only recently become a reporting company in the United States. The two subsidiaries and the parent company settled with the SEC and the DOJ for approximately \$26 million.

In another case, the DOJ criminally charged Christian Sapsizian, a French citizen and a former deputy vice president of a Paris-based subsidiary of Alcatel, a French telecommunications company, for bribing officials in Costa Rica to obtain a mobile telephone contract.

Alcatel's depository shares were traded on the New York Exchange and it later merged with U.S. company Lucent Technologies, Inc. Thus it qualified as an issuer. Sapsizian was a foreign citizen. Sapsizian's alleged contact with the United States



concerned an authorized payment from Alcatel's bank in New York, through a bank in Miami, to an overseas account of the foreign official. Sapsizian pleaded guilty to two counts of violating the FCPA and conspiracy, and it faces a maximum sentence of 10 years in prison, a \$250,000 fine, and \$330,000 in forfeiture.

DUE PROCESS LIMITATIONS

The terms of the FCPA alone do not suffice to haul parties into court. The due process clause of the Constitution requires an adequate basis for jurisdiction over the party charged. Generally, if a party is served or is domiciled in the state in which the court sits or consents, a court has jurisdiction.

However, absent one of these traditional bases, due process requires a party to have certain minimum contacts with the forum such that maintenance of the suit "does not offend traditional notions of fair play and substantial justice."

For criminal cases, due process requires courts to consider whether the defendant's extraterritorial conduct has sufficient link with the United States. The Ninth Circuit has observed that this requirement serves the same purpose as the minimal contacts test. Thus, in both criminal and civil cases, a due process inquiry "ensures that a United States court will assert jurisdiction only over a defendant who should reasonably anticipate being hauled into court."

In most cases, a court will consider whether a party has sufficient contacts with the state in which it presides when conducting a due process inquiry. However, some federal statutes authorize nationwide service of process and, if a party is served under such a provision, courts will consider whether its contacts with the United States as a whole are sufficient to establish Jurisdiction.

In addition, if a foreign party does not have sufficient contacts with a particular state, courts may look to whether the party has contacts with the United States as whole. If so, a foreign party can be sued anywhere in the United States. A due process inquiry for claims brought under the FCPA will likely look at the parties' contacts with the nation as whole, but it will be a case-specific inquiry.

MINIMAL CONTACTS

When conducting a due process analysis, a court will consider the nature and quality of the party's contact with the appropriate forum. If a party's activities within the forum are "substantial, continuous, and systematic," a court may have "general jurisdiction," which means the party may be subject to suit on matters unrelated to its contacts to the forum. However, this is a high standard and usually limited to big companies doing a large amount of business within the United States.

It is far from clear that the government can haul any person within reach of the FCPA into court, particularly when the action concerns a foreign person and circumstances that do not impact any U.S. investor or company.

If a party is not subject to general jurisdiction, courts will consider whether the party is subject to jurisdiction limited to the

claims related to its activities or contacts. Under this inquiry, courts will consider whether the party purposefully directed its activities toward residents of the forum or otherwise established contacts, and whether the cause of action arises out of or results from the party's forum-related contacts.

Under the latter, a court may have jurisdiction if the FCPA violation would not have occurred "but for" the defendant's forum-related activities.

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Lastly, the court's Jurisdiction must be reasonable or "comport with traditional notions of fair play and substantial justice." Courts will balance a number of factors, including the inconvenience to the party, the forum's interest in adjudicating the case and the existence of an alternative forum. This inquiry is also linked to the "purposeful availment" requirement: The weaker the evidence of the party's forum related acts, the less unreasonableness a party will need to show to defeat jurisdiction, and vice versa.

Courts have declined to exercise jurisdiction over companies, some of which would fall under FCPA provisions, for lack of minimal contacts. For example, in *Doe v. Unocal Corp.*, the Ninth Circuit declined to exercise jurisdiction in a RICO action over a French corporation whose stock was listed on U.S. exchanges and had U.S. and California-based subsidiaries. There was little evidence that the French corporation had purposefully availed itself of the benefits and/or protections of U.S. law. The oil pipeline contracts at issue had been entered into outside the United States, and the pipeline and sale of oil would not directly touch the United States.

The court concluded that the company's stock listings alone were insufficient contacts, and without evidence that the subsidiaries served as alter egos or agents of the parent, jurisdiction was inappropriate.

In light of this standard, it is far from clear that the government can haul any person within reach of the FCPA into court, particularly when the action concerns a foreign person and circumstances that do not impact any U.S. investor or company. Rather, the case may depend on the significance of the effects of the conduct at issue. Parties who face potential FCPA enforcement actions should not overlook this basic requirement, guaranteed by the Constitution.



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