CNBC Moneycontrol
Apr 03, 2012

GIBSON DUNN

# FCPA + Travel Act: Double trouble?

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**Introduction**

It is no secret that in recent years, U.S. law enforcement authorities, specifically the U.S. Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"), have aggressively pursued public sector corruption around the world by companies and individuals subject to the U.S. Foreign Corrupt Practices Act ("FCPA"). Last year DOJ and the SEC combined initiated nearly 50 FCPA enforcement actions. Monetary recoveries from companies for FCPA violations topped $500 million in 2011. These results evidence a continuation in the recent surge in FCPA enforcement, coming on the heels of 2010's record figures, in which DOJ alone brought almost 50 enforcement actions.

U.S. President Barack Obama's administration has staked out its position as an aggressive enforcer of the anti-corruption statute, continuing increased enforcement activity that began during the George W. Bush administration. U.S. Secretary of State Hillary Clinton recently reaffirmed the Obama administration's commitment to the FCPA, despite several recent setbacks in U.S. prosecutions. The Obama administration, Clinton said in a recent speech, "like those before us, has taken a strong stand when it comes to American companies bribing foreign officials. We are unequivocally opposed to weakening the Foreign Corrupt Practices Act. We don't need to lower our standards. We need to work with other countries to raise theirs." Yet, the law is clearly under attack, as U.S. business interests, led by the U.S. Chamber of Commerce, have questioned whether it imposes undue burdens on corporations.

Regardless of the FCPA's future in the U.S. political arena, however, companies potentially subject to U.S. law should know that U.S. law enforcement has other statutes at its disposal to prosecute corruption abroad. One such law is the Travel Act, a statute that is sometimes overlooked but that can both complement and broaden the FCPA's scope, and which companies in the United States and abroad should understand and consider when developing anti-corruption compliance programs.

**What is the Travel Act?**

The Travel Act, 18 U.S.C. 1952, is a U.S. federal statute prohibiting the use of "any facility in interstate or foreign commerce" with the intent to "distribute the proceeds of any unlawful activity" or "otherwise [to] promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity."

Under the broad reach of the Travel Act, a "facility in interstate or foreign commerce" can include not only actual travel between U.S. states or between the United States and a foreign country, but it could also encompass cross-border communications. In the case of Frederic Bourke, discussed below, the judge instructed the jury about the broad meaning of "facility in interstate or foreign commerce" under the Travel Act, in the context of a charge of conspiracy to violate the Travel Act. Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York instructed the jury that "[a] facility in interstate commerce is any vehicle or instrument that crosses state lines, or boundaries between a state and foreign country, in the course of commerce," including phone calls, faxes, e-mail, or wire transfers.

Under the Travel Act, "unlawful activity" includes bribery in violation of U.S. law, including the FCPA, or the laws of any U.S. state where the alleged conduct occurs. Many U.S. states, including states like New York and California that are home

to industry and financial centers, criminalize commercial bribery, in addition to public corruption. In the Bourke case, the underlying "unlawful activity" was an alleged violation of the FCPA itself. "Unlawful activity" also includes money laundering and extortion in violation of U.S. law or the laws of the state where the activity occurs, among other conduct. The penalties for Travel Act violations can be severe, including fines or imprisonment for up to five years for most offenses (20 years for others), or both.

Courts interpret the Travel Act broadly. In the Bourke case, for example, Judge Scheindlin instructed the jury that the Travel Act requires proof that the defendant used a facility of commerce "for the purpose of facilitating the unlawful activity"-specifically, to advance the bribery scheme in violation of the FCPA-but proof of a "completed bribery scheme" was not necessary. "All that is required is proof that the person agreed to use interstate channels in order to facilitate the crime of violating the FCPA."

DOJ has used the Travel Act in international corruption cases as a complement to the FCPA. Notably, it has pursued Travel Act charges, depending on the case, both for conduct subject to the FCPA and for conduct beyond the FCPA's reach, such as commercial bribery.

**Recent Enforcement Actions Using the Travel Act**

In recent years, there have been a number of high-profile U.S. prosecutions relying on the Travel Act in conjunction with the FCPA. For example, U.S. authorities indicted Nexus Technologies, Inc., along with several of its employees, for conspiring to pay Vietnamese officials $250,000 in bribes in exchange for major equipment and technology contracts. The indictment alleged FCPA violations, money laundering, conspiracy, and Travel Act violations, among other charges.

The government relied on wire transfers from Nexus's bank account in Philadelphia to accounts in Hong Kong as the predicate conduct, thereby linking U.S. activities to the wider scheme. The individual defendants pleaded guilty and received sentences ranging from 16 months imprisonment to two years of probation-light sentences, in relative terms, compared to the decades-long imprisonment they could have faced. But the company itself faced a much harsher penalty: the so-called corporate death penalty. Nexus pleaded guilty to the charges against it and agreed to shut its doors as a condition of the plea.

Another individual who faced prosecution for an alleged Travel Act violation is investor and businessman Frederic Bourke, whose case was noted above. Mr. Bourke invested in a company run by Viktor Kozeny, who allegedly bribed government officials in Azerbaijan in relation to the privatization of its national oil company, and was convicted of conspiracy to violate the FCPA and the Travel Act, based on his alleged knowledge of Mr. Kozeny's allegedly corrupt conduct. Mr. Bourke received a prison sentence of one year and a day, a $1 million fine, and three years of supervised release after his sentence. He remains free on bail pending appeal, but Mr. Kozeny, the alleged mastermind in the scheme, is at large in the Bahamas, where he fled years ago. The U.K. Privy Council on March 28 affirmed previous court rulings that Mr. Kozeny cannot be extradited to the United States. The Privy Council's decision did not discuss the Travel Act but found that Mr. Kozeny could not be extradited to face FCPA charges because his alleged conduct would not have violated any laws in the Bahamas had it occurred there.

In another prominent case, U.S. authorities alleged that Control Components, Inc., a California company, paid millions of dollars in bribes to officials at state-owned businesses abroad and to private sector employees. Prosecutors charged the company with violations of the FCPA and the Travel Act. The company pleaded guilty to Travel Act and FCPA charges in 2009, agreeing to pay a criminal fine of $18.2 million and to serve three years of probation. The company's plea agreement also required it to engage an independent compliance monitor for three years and to implement a wide-ranging anti-bribery program. Former executives who were allegedly involved in approving, negotiating, or making the purported payments are awaiting trial.

**Extraterritorial Application of the Travel Act**

The Travel Act effectively federalizes state anti-bribery laws, requiring a jurisdictional connection to the state whose law was allegedly violated. In the context of domestic conduct,

that connection is usually simple. Conduct involving foreign, commercial bribery, however, sometimes presents a more complicated scenario for prosecutors to find the required nexus.

In the Control Components case, individual defendants unsuccessfully challenged the Travel Act charges pending against them in 2011, claiming that the law does not apply extraterritorially. The government alleged Travel Act violations based on the purported bribery of employees and private sector Chinese and Russian companies to secure sales of construction materials. The U.S. District Court for the Central District of California rejected the defendants' claim, finding that where any part of the alleged conduct occurred in a U.S. state in violation of that state's anti-bribery law (or was other "unlawful activity" under the statute), the specific conduct was sufficient to violate the Travel Act, even though other parts of the scheme occurred outside the state.

"All elements under the Travel Act were allegedly satisfied in California," U.S. District Judge James V. Selna wrote in his September 20, 2011 decision, "even if the target of Defendants' commercial bribery scheme was overseas." The chain of money transfers involving countries outside the United States did not affect the Travel Act charges. Therefore, Judge Selna wrote, the Travel Act "offense was complete the moment Defendants used a channel of foreign commerce allegedly to offer a 'corrupt payment' to an employee and thereafter effectuated a payment to that employee."

The court also found that the Travel Act could apply to schemes involving conduct outside the United States. It found the statute could not be used effectively if the mere occurrence of some conduct outside the United States barred the statute's application. The court further found Congress intended for the Travel Act "to reach conduct overseas." And it noted that the statute itself proscribes conduct related to foreign commerce, in addition to domestic conduct. Finally, Judge Selna explained, "Congress's other legislative efforts to eliminate similar crimes, including eliminating bribery of foreign officials by passing the FCPA, supports an extraterritorial application of the Travel Act."

**The Travel Act Can Affect Business**

As pressure mounts for the U.S. Congress to revisit the FCPA-and it is mounting, with several powerful U.S. senators voicing concerns-the Travel Act may present to DOJ an attractive alternative to the FCPA for prosecuting overseas bribery. And if the Control Components case is any indication of prosecutorial intentions, U.S. companies doing business in India, and their Indian partners, through joint ventures or as subsidiaries, may face growing risk of Travel Act exposure for conduct in India.

U.S. courts may increasingly permit such extraterritorial applications of the Travel Act. Even where commercial bribery is carried out exclusively in India, by an Indian company or agent, if done in connection with or on behalf of a U.S. partner, it is likely there could be some predicate for Travel Act charges. Some connection would exist, for instance, if money were wired to India from a U.S. partner in a U.S. state that prohibits commercial bribery. Prosecutors may go to great lengths to trace such funds from a U.S. account, through interstate and foreign commerce, to India, to support a Travel Act charge based on a chain of conduct.

Given the greater attention currently being paid to the issue of corruption in India, this country is as likely as any to be linked to acts predicating a Travel Act prosecution. With its fast-growing economy and homegrown anti-corruption movement, India is a potential hotbed for enforcement. U.S. authorities have already, in recent years, turned the FCPA spotlight on Asia, including India. Between 2000 and 2006, U.S. authorities pursued only one FCPA enforcement action involving India. But between 2007 and 2011, they pursued 12 such actions. Moreover, if the Indian Parliament enacts the Lokpal Bill, local efforts to root out and prosecute corruption will no doubt grow. Such local attention could prompt further U.S. scrutiny and may facilitate cooperation among Indian and U.S. authorities to pursue conduct that touches both countries. U.S. authorities may then turn increasingly to the Travel Act, which is well-positioned to fill the gaps left by the FCPA.

**Conclusion**

The continued push by U.S. authorities for robust anti-corruption enforcement suggests that they may turn increasingly toward the Travel Act, both as a complement to the FCPA and to reach beyond its scope. And as India's economy continues to grow, activities in India will continue to be the subject of U.S. anti-bribery enforcement. Further, if the Lokpal Bill becomes law, Indian and U.S. authorities may engage in additional cooperation in transnational anti-corruption prosecutions. It is likely that the Travel Act may well play a significant role in that effort.