The Global Reach of American Criminal Law

A country's criminal laws typically apply to entities and individuals within that country. This is true of the United States, as it is with most countries. "It is a longstanding principle of American law," the United States Supreme Court has written, "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[1] Nonetheless, several major U.S. criminal laws reach beyond the United States' borders. What can be surprising is how aggressively U.S. authorities enforce these laws against non-U.S. companies and citizens for conduct outside the United States. This paper identifies some of the key U.S. criminal laws for businesses internationally, with examples illustrating the significant consequences that can result from violating these statutes.

The Foreign Corrupt Practices Act of 1977 ("FCPA")

Following reports of numerous U.S. businesses making millions of dollars of questionable payments to foreign government officials to secure business, the FCPA was signed into law in 1977. With limited exceptions, the FCPA makes it unlawful for certain entities and individuals to corruptly confer benefits to non-U.S. government officials to secure business. Specifically, the FCPA's anti-bribery provisions prohibit corruptly offering, paying, promising, or authorizing the provision of anything of value, directly or indirectly, to a non-U.S. government official to influence the official in his or her official capacity, induce the official to misuse his or her position, or to secure any improper advantage in order to assist in obtaining or retaining business.[2]

Violations bring severe penalties. Corporations can be fined up to $2 million for each violation or twice the pecuniary gain or loss, which can be significantly greater, and frequently carry related civil penalties and costly collateral consequences. Individuals who violate the anti-bribery provision can be imprisoned for up to five years and fined $250,000, or twice the pecuniary gain or loss, for each violation. Of the thirty-four persons sentenced in FCPA cases in the last two years, eight were non-U.S. citizens.

The anti-bribery provisions apply to U.S. entities and persons ("domestic concerns") as well as "issuers," companies that have securities listed on U.S. exchanges or are required to file periodic reports with the U.S. Securities and Exchange Commission ("SEC"), and their stockholders, officers, directors, and agents acting on their behalf. Under these provisions, a non-U.S. company that is listed on a U.S. exchange can face prosecution for the misconduct of its employees or agents operating outside of the United States. In one striking example, in

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[1] *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (internal quotation marks omitted).

[2] The FCPA also requires companies with securities listed on U.S. exchanges or that are required to file periodic reports with the U.S. Securities and Exchange Commission to (a) make and keep books, records, and accounts that accurately and fairly reflect the transactions of the company and (b) devise and maintain a system of reasonable internal accounting controls.

2008, German multinational Siemens AG, which is listed on the New York Stock Exchange, paid $800 million in fines and penalties to resolve allegations with the SEC and U.S. Department of Justice ("DOJ") that its employees and foreign subsidiaries paid bribes in connection with transactions around the world, ranging from metro transit lines in Venezuela, power plants in Israel, refineries in Mexico, mobile telephone networks in Bangladesh, power stations in Iraq, and national identity cards in Argentina, to medical devices in China, Russia, and Vietnam.[3] In addition, the SEC is pursuing charges against several former executives, some of whom never worked in the United States or even travelled there during the time of the misconduct (in this instance, alleged bribery in Argentina).

The FCPA's anti-bribery provisions also reach non-U.S. companies and persons who take acts in furtherance of a corrupt payment while within the territory of the United States. For example, U.S. authorities used this theory to prosecute Taiwan-based Syncor Taiwan, Inc., which pleaded guilty and paid a $2 million fine. Syncor Taiwan admitted to paying more than $400,000 to physicians at hospitals owned by the Taiwanese government. The company's chairman lived in the United States and authorized the practice of making payments to the hospital employees.

U.S. law enforcement authorities also frequently employ legal theories of aiding and abetting[4] and conspiracy[5] in FCPA cases to reach companies and persons outside of the United States. The significant enforcement action against JGC Corporation, a Japanese company, highlights the statute's expansive jurisdiction. JGC was a member of a joint venture that allegedly paid millions of dollars of bribes to secure contracts to build liquefied gas facilities in Nigeria. DOJ charged JGC with conspiring with and aiding and abetting other joint venture partners, which were themselves issuers or U.S. domestic concerns. JGC allegedly caused bribe payments to be wire transferred from bank accounts in Amsterdam to banks in Switzerland passing through correspondent bank accounts in the United States. This resulted in a $218.8 million criminal penalty for JGC.

The Travel Act

A lesser-known, but similarly potent, statute, the U.S. Travel Act, leverages both local and federal U.S. criminal laws to capture conduct occurring in interstate or foreign commerce with the intent to promote, manage, establish, or carry on "unlawful activity."[6] This broad-reaching statute covers anyone who "travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to: (1) distribute the

[3] Siemens also paid hundreds of millions of dollars in fines and penalties in other countries, including Germany, Greece, and Nigeria.

[4] 18 U.S.C. § 2 defines the crime of aiding and abetting as follows: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal," and "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

[5] 18 U.S.C. § 371 prohibits "two or more persons [from] conspir[ing] either to [1] commit any offense against the United States, or [2] to defraud the United States . . . and one or more of such persons do[ing] any act to effect the object of the conspiracy."

[6] 18 U.S.C. § 1952.

proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity," and thereafter performs or attempts to perform an act in furtherance thereof.[7] Despite its name, the Travel Act does not require actual travel; even cross-border communications may give rise to a violation.

The Travel's Act extraterritorial reach differs from the FCPA in two important respects. First, the Travel Act covers a broader range of activity because it is not limited to bribery of foreign officials. Indeed, the underlying "unlawful activity" can range from extortion to money laundering, drug smuggling to arson. In the 1980s, for example, U.S. prosecutors used the Travel Act to convict the former Commerce and Development Minister from the Turks and Caicos Islands for his role in a scheme to smuggle drugs into the United States.

U.S. prosecutors have, however, employed the Travel Act in several high-profile cases involving international bribery. A well-known Travel Act prosecution involved individual officers of the Salt Lake Bid Committee, an American nonprofit, who were charged with bribing International Olympic Committee ("IOC") officials in an effort to secure the 2002 Winter Games for Salt Lake City, Utah. A nonprofit headquartered in Switzerland, the IOC is not a government entity, and its officials are not foreign government officials for purposes of the FCPA. The Travel Act provided a basis for U.S. prosecution of extraterritorial bribery.[8]

Second, violation of a U.S. State bribery law can serve a predicate offense for purposes of the Travel Act. In the Salt Lake prosecution, the state law at issue was Utah's commercial bribery statute.[9] The Travel Act prosecutions of Control Components, Inc. ("CCI") and its officers involved an overseas scheme where part of the conduct occurred in a U.S. State in violation of that State's bribery laws. The U.S. government alleged that CCI violated the Travel Act based on its bribery of private-sector Chinese and Russian companies to secure sales.

A federal U.S. district court in California found that, "even if the target of Defendants' commercial bribery scheme was overseas," the Travel Act was satisfied because of a nexus to conduct in Florida. The court observed, "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." This shows that prosecutors will use the Travel Act to prosecute commercial bribery overseas in cases where state law prohibits the conduct.

The recent U.S. prosecution of Viktor Kozeny, a Czech Republic citizen, illustrates that the Travel Act can provide a basis for prosecuting foreign citizens for bribery entirely outside of the United States. Kozeny allegedly cost U.S. investors millions of dollars in a failed scheme to bribe Azeri officials to gain control of a state-run Azerbaijan oil company.[10] He

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[7] 18 U.S.C. § 1952(a).

[8] *See* United States v. Welch, Crim. Indictment, No. 2:00-cr-00324 (D. Utah July 20, 2000).

[9] *See* United State v. Welch, 327 F.3d 1081 (10th Cir. 2003).

[10] *See* United States v. Kozeny, 667 F.3d 122 (2d Cir. 2011).

allegedly teamed with U.S. businessman Frederic Bourke to use funds from New York investors in furtherance of the bribery scheme. Kozeny remains a fugitive in the Bahamas, but Bourke's own FCPA and Travel Act convictions were affirmed by a U.S. appellate court.[11]

U.S. Antitrust Laws

U.S. antitrust law has a similarly broad reach—for corporations and individuals. U.S. courts and enforcement agencies have long held that the Sherman Antitrust Act[12]—the main federal statute prohibiting anti-competitive conduct—applies to foreign conduct that is intended to produce and did produce substantial effect in the United States. DOJ and the United States' Federal Trade Commission ("FTC") enforce the federal antitrust laws, including the Sherman Antitrust Act.[13] DOJ prosecutes antitrust violations both as criminal and civil offenses; the FTC prosecutes them only as civil offenses. Criminal prosecution may lead to severe penalties. Corporations convicted of a criminal violation of the Sherman Antitrust Act can be fined up to $100,000,000; and individuals can be fined up to $1,000,000 and receive a prison sentence of up to ten years.

Several key U.S. court decisions recognize the extraterritorial reach of the U.S. antitrust laws. In a 1945 civil antitrust action, a U.S. appellate court held in *United States v. Aluminum Co. of America*[14] that conduct perpetrated abroad could violate the Sherman Act if it was "intended to affect imports and did affect them."[15] In 1982, U.S. Congress adopted the Foreign Trade Antitrust Improvement Act ("FTAIA")[16] to limit the application of the Sherman Act in cases in which there was no effect on U.S. commerce. The FTAIA provided that the Sherman Act applied to foreign conduct (other than import commerce) that "has a direct, substantial, and reasonably foreseeable effect" on U.S. commerce.

Eleven years later, the U.S. Supreme Court stated in with respect to import commerce that it was "well established . . . that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[17] In 1997, an appellate court extended this extraterritoriality test to a criminal matter involving a price-fixing conspiracy that occurred entirely in Japan.[18]

DOJ and the FTC reflected these principles in their 1995 guidance regarding their "international enforcement policy."[19] The 1995 Antitrust Enforcement Guidelines for International Operations firmly state that "[a]nticompetitive conduct that affects U.S.

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[11] *See id.*
[12] 15 U.S.C. § 1.
[13] U.S. Department of Justice, Antitrust Enforcement Guidelines for International Operations (1995).
[14] 148 F.2d 416 (2d Cir. 1945).
[15] 148 F.2d 416, 444 (2d Cir. 1945).
[16] 15 U.S.C. § 6a.
[17] Hartford Fire Insurance Co. v. California, 509 U.S. 764, 796 (1993).
[18] United States v. Nippon Paper Indus. Co, 109 F.3d 1 (1st Cir. 1997).
[19] U.S. Department of Justice, Antitrust Enforcement Guidelines for International Operations (1995).

domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved."[20]

DOJ has been successful in bringing criminal enforcement actions against foreign corporations and individuals. For example, Mitsubishi Corporation was found guilty of aiding and abetting a criminal violation of Section 1 of the Sherman Antitrust Act involving a price-fixing conspiracy among graphite electrode producers.[21] Mitsubishi encouraged its 50%-owned U.S. producer of graphite electrodes to fix prices, participate in cartel meetings, sell products at fixed prices, and conceal the cartel activity. Mitsubishi was sentenced to a $134 million fine, one of the largest in the history of U.S. criminal antitrust enforcement.

In another example, DOJ obtained convictions last year against Taiwanese company AU Optronics Corporation, its U.S. subsidiary, and two executives for fixing the prices of LCD panels sold into the United States, as agreed during meetings with their competitors occurring in Taiwan.[22] AU Optronics was fined $500 million—"matching the largest fine imposed against a company for violating U.S. antitrust laws"—the gain that the jury found the company derived from the conspiracy, as well as was required to adopt an antitrust compliance program and retain an independent compliance monitor.[23] The two Taiwanese executives were each sentenced to three years in prison and fined $200,000.[24]

Earlier that year, two Japanese suppliers of auto parts—Yazaki Corporation and DENSO Corporation—agreed to plead guilty and to pay criminal fines of $470 million and $78 million, respectively, for their roles in multiple auto parts price-fixing and bid-rigging conspiracies.[25] Yazaki's fine was the second largest criminal fine secured by DOJ's Antitrust Division for a Sherman Act violation.[26] This was also one of the many cartel investigations in which the Antitrust Division cooperated closely with foreign cartel

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[20] U.S. Department of Justice, Antitrust Enforcement Guidelines for International Operations (1995).

[21] United States v. Mitsubishi Corporation, Crim. No. 00-033 (2001).

[22] Antitrust Division, Taiwan-Based AU Optronics Corporation, Its Houston-Based Subsidiary and Former Top Executives Convicted for Role in LCD Price-Fixing Conspiracy (Mar. 2012), *at* http://www.justice.gov/opa/pr/2012/March/12-at-313.html.

[23] Antitrust Division, Taiwan-Based AU Optronics Corporation, Its Houston-Based Subsidiary and Former Top Executives Convicted for Role in LCD Price-Fixing Conspiracy (March 2012), *at* http://www.justice.gov/opa/pr/2012/March/12-at-313.html.

[24] Antitrust Division, AU Optronics Corporation Executive Convicted for Role in LCD Price-Fixing Conspiracy (Dec. 2012), *at* www.justice.gov/atr/public/press-releases/2012/290399.htm.

[25] Yazaki Corp, DENSO Corp. and Four Yazaki Executives Agree to Plead Guilty to Automobile Parts Price-Fixing and Bid-Rigging Conspiracies (Jan. 30, 2012), *at* http://www.justice.gov/atr/public/press_releases/2012/279734.htm.

[26] Yazaki Corp, DENSO Corp. and Four Yazaki Executives Agree to Plead Guilty to Automobile Parts Price-Fixing and Bid-Rigging Conspiracies (Jan. 30, 2012), *at* http://www.justice.gov/atr/public/press_releases/2012/279734.htm.

authorities, including the European Commission, the Canadian Competition Bureau, and the Japanese Fair Trade Commission.[27]

With respect to individuals, DOJ continues to state that it is "committed to ensuring the culpable foreign nationals, just like U.S. co-conspirators, serve jail sentences in order to resolve their criminal liability."[28] In FY 2011, foreign executives faced average prison sentences of 10 months for antitrust violations.[29] In FY 2012, DOJ continued to obtain long prison sentences for foreign nationals, including a 24-month sentence for two executives of Japan-based Yazaki Corporation, who voluntarily submitted to U.S. jurisdiction, imposed in connection with their involvement in international conspiracies to fix prices for auto parts sold to automobile manufacturers in the United States.[30] Overall, approximately 97% of the $6.4 billion in criminal antitrust fines imposed in the United States from FY1997 to the end of FY2011 were "in connection with the prosecution of international cartel activity" and "51 foreign defendants from France, Germany, Japan, South Korea, Taiwan, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom" received prison sentences during the same period.[31]

U.S. Trade Sanctions

The U.S. Office of Foreign Assets Control ("OFAC") administers the diverse collection of U.S. trade sanctions. These sanctions restrict a variety of activities, from exporting certain goods to facilitating wire transfers either directly with a sanctioned nation or through a third party for the purposes of transacting with a sanctioned nation. Sanctioned countries include Cuba, Iran, Libya, North Korea, Sudan, and Syria. Most of these programs prohibit U.S. persons from engaging in transactions with sanctioned entities, which include U.S. persons working abroad for non-U.S. companies. In the case of certain programs, such as those regarding Cuba, Iran, and North Korea, the prohibitions apply even to foreign subsidiaries owned or controlled by U.S. companies.

OFAC enforcement can result in steep financial penalties. In a recent action that settled in 2012, OFAC alleged that ING Bank violated the Cuban Assets Control Regulations, the Burmese Sanctions Regulations, the Sudanese Sanctions Regulations, the Libya Sanctions

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[27] Rachel Brandenburger, Special Advisor, International, Antitrust Division, Intensification of International Cooperation: The Antitrust Division's Recent Efforts (Feb. 17, 2012), at 13, *at* http://www.justice.gov/atr/public/division-update/2012/criminal-program.html.

[28] Antitrust Division Update Spring 2012, Criminal Program, *at* www.justice.gov/atr/public/division-update/2012/crimina-program.html.

[29] Antitrust Division Update Spring 2012, Criminal Program, at www.justice.gov/atr/public/division-update/2012/crimina-program.html.

[30] Yazaki Corp, DENSO Corp. and Four Yazaki Executives Agree to Plead Guilty to Automobile Parts Price-Fixing and Bid-Rigging Conspiracies (Jan. 30, 2012), *at* http://www.justice.gov/atr/public/press_releases/2012/279734.htm.

[31] U.S. Dep't of Justice, Antitrust Div., Congressional Submission, FY 2013 Performance Budget 4, *available at* http://www.justice.gov/jmd/2013justification/pdf/fy13-atr-justification.pdf.

Regulations, and the Iranian Transactions Regulations.[32] In large part, ING's violations included processing thousands of electronic fund transfers, trade finance transactions, and traveler's checks in which Burma, Cuba, Iran, Libya, and Sudan had an interest. ING and OFAC agreed to a multi-part settlement under which ING agreed to pay $619 million. ING further agreed to institute policies and procedures designed to minimize the risk of recurrence and to review its compliance policies and report to OFAC. The penalties could have been more severe had ING not taken substantial mitigating steps including voluntarily disclosure and remedial action.

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U.S. criminal laws can have expansive jurisdictional claims and provide numerous hooks for prosecuting foreign violators. Successful compliance programs of non-U.S. entities should take into account the myriad criminal laws of the U.S.—and their long reach.

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[32] Information on the ING prosecution and settlement is provided in a U.S. Treasury press release dated June 12, 2012, available at http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/06122012_ing.pdf.