FOLEY HOAG LLP

Business Crimes **Perspectives**

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DOJ's Recent Trend of Prosecuting Individuals for FCPA Violations Continues with Longer Prison Sentences and Increased Fines.

The longest prison term ever imposed in a Foreign Corrupt Practices Act ("FCPA") case -- *fifteen* years -- was recently given to Joel Esquenazi, former president of Terra Telecommunications Corporation, after a jury convicted him under the FCPA for bribes paid to officials at Haiti Teleco, a state-owned telecommunications agency. The former executive vice president of Terra, Carlos Rodriguez, was convicted by the same jury and sentenced to seven years in prison. Esquenazi and Rodriguez were also ordered to forfeit $3.09 million.

The prosecution of Esquenazi and Rodriguez, and the lengthy sentences sought and obtained by the prosecutors, are only the latest and most severe part of an established trend of prosecuting individual executives separately from their companies under the FCPA. Starting in 2007, the Department of Justice ("DOJ") and Securities Exchange Commission ("SEC") intentionally increased their pursuit of individuals for FCPA violations. The DOJ has stated that this heightened focus on individuals was specifically intended to get the attention of the business community and deter violations.

This current trend in FCPA enforcement stands in stark contrast to the first two decades of enforcement when prosecutions of individuals were relatively rare. The FCPA was enacted in 1977 to prevent and criminalize bribery of foreign officials. Specifically, the FCPA prohibits U.S. public companies, U.S. persons, and other companies operating in the U.S., together with their foreign subsidiaries, agents, and intermediaries, from making payments to foreign officials in order to obtain or maintain business or to secure any favorable business treatment. The act also requires U.S. public companies to keep accurate books and records, with the view that such transparency will prevent and deter improper payments.

Prosecution of Individuals

Individual executives and other company employees find themselves embroiled in FCPA investigations and prosecutions in various ways. In the most obvious cases, the individual is a corporate officer directly involved in the improper conduct. In other cases, the individual was not directly involved and may not have even specifically known about the wrongdoing, but turned a blind eye toward the wrongful conduct of others. In other instances, the individual is a senior executive – a control person – in a position to detect or prevent it. In addition, owners (i.e., shareholders) who turn a blind eye to the likelihood of improper payments by the enterprises in which they invest in have been prosecuted. Finally, the government has successfully prosecuted some foreign officials for accepting bribes, and other individuals have been prosecuted for facilitating bribes by serving as an intermediary between a company and foreign official.

The timing of the prosecution of individuals in regards to the prosecution of the companies they work for also varies. In some instances, the government pursues prosecution of individuals and uses information gleaned from those cases to build a case against the company, collecting substantial fines from each new defendant along the way. In other cases, the government has pursued prosecution of individuals based on information provided by companies which have bought corporate peace with the government by way of a civil settlement agreement, criminal plea, or deferred prosecution agreement requiring ongoing investigation and cooperation.

Regardless of the circumstances that lead to an individual being prosecuted under the FCPA, it is clear that prosecutors, as a matter of national practice and policy, have been recommending severe sentences and fines for individuals. Notably, the magnitude of the prison terms and fines being sought is not based only on the bribe amounts involved in each case, but on the supposed value gained (or sought to be gained) by the improper conduct. Thus, the financial penalties often dwarf the bribe amounts at issue.

Several Recent Examples

- **Terra Telecommunications Corporation, Joel Esquenazi, Carlos Rodriguez, and Robert Antoine:** Terra, a Miami-based company, had several contracts with Haiti Teleco, the sole provider of landline telephone services in Haiti, which allowed Terra customers to place phone calls to Haiti. Between 2001 and 2005, Terra paid over $890,000 to shell companies to be used as bribes for Haiti Teleco officials in exchange for continued connection contracts and favorable rates. In August 2011, after a two-and-a-half-week trial, a jury convicted former executives Esquenazi and Rodriguez of charges including FCPA violations and money laundering, for their role in the bribery (authorizing the payments). In October 2011, the trial judge ordered Esquenazi and Rodriguez to forfeit $3.09 million and serve fifteen and seven year sentences respectively. The forfeiture amount is nearly a million dollars more than the amount ($2.2 million) that Terra did not have to pay in telecommunications costs as a result of the bribes (that is, the value gained from the bribe).

  Prior to the convictions of Esquenazi and Rodriguez, four other individuals involved in the case pled guilty and were sentenced. One of these individuals was Robert Antoine, former director of international affairs for Haiti Teleco, who pled guilty, admitted to accepting bribe payments from Terra, and is now serving a four-year sentence. Several other individuals who were indicted in the case await trial.

- **Kellogg Brown & Root LLC and Albert Jackson Stanley:** KB&R was part of a joint venture seeking to obtain contracts to build and expand natural gas facilities at Bonny Island in Nigeria. Over a ten-year period, the joint venture allegedly paid approximately $180 million in bribes to Nigerian government officials to secure four contracts representing over $6 billion of potential business. To conceal the bribes, the joint venture entered into sham agreements with consultants, who were hired simply to facilitate the bribes. Former CEO of KB&R, Albert Jackson Stanley, admitted to taking part in the bribery scheme and pled guilty to FCPA charges in September 2008, before KB&R itself settled in February 2009. Stanley's plea agreement provided a preliminary sentence of seven years in prison and a restitution payment of $10.8 million, subject to revision based on his cooperation. His sentencing has been deferred several times since the plea deal and he remains free on bond while awaiting sentencing.

  After Stanley's plea, at least two other individuals involved in the scheme also pled guilty and are currently awaiting sentencing. Wojciech Chodan, a former manager of a U.K. subsidiary of one of the joint venture companies pled guilty in December 2010. Jeffrey Tesler, a British lawyer and middleman in the scheme, pled guilty in March 2011 and agreed to forfeit $149 million. Neither Chodan nor Tesler were in the U.S. at any time relevant to the improper conduct, which illustrates the wide jurisdictional reach of the FCPA.

- **Willbros Group, Inc., Jim Bob Brown, and Jason Steph:** Before Willbros settled with the DOJ and SEC in May 2008 for FCPA violations stemming from payments to secure oil pipeline construction contracts in Nigeria and Ecuador (resulting in a $32.3 million penalty, including disgorgement and interest), two former executives of the company, Jim Bob Brown and Jason Steph, had already pled guilty and agreed to assist in the ongoing investigation. Both admitted to helping to arrange payments to foreign government officials, followed through with their agreements to assist in the investigation, and received deferred sentences in January 2010. Although they each faced up to five years in prison and fines twice the value they gained by their violations (which would have

been in the millions), both men benefitted greatly from their cooperation. Still, both men went to prison, as Brown was sentenced to one year and a day and fined $17,500, and Steph was sentenced to fifteen months and fined $2,000.

- **Control Components, Inc. and six executives:** Six former executives of Control Components, a California-based company that makes valves used in the energy industry, were charged in April 2009 with making corrupt payments to secure business in China, Malaysia, South Korea, and the United Arab Emirates. Prior to those indictments, two former directors pled guilty to related charges and agreed to cooperate. In July 2009, Control Components entered a corporate guilty plea and agreed to pay $18.2 million and cooperate going forward. In April 2011, one of the six indicted executives pled guilty and agreed to assist in the investigation and prosecution. His sentencing was also deferred. The remaining five defendants are currently scheduled to go to trial in June 2012. All of the defendants who have already pled guilty have a powerful incentive to provide cooperation and testimony against the others, and the sentences ultimately imposed will likely range across the spectrum.

Avoiding this Nightmare – Compliance Efforts

Many good companies, executives, and employees doing business abroad have been caught up in FCPA investigations and prosecutions. Individuals working for companies with substantial government contracts or government-granted licenses, or companies that rely on agents or consultants to conduct their overseas business, are most at risk of being caught up in an FCPA enforcement action. To reduce the risk of prosecution and the magnitude of potential penalties should a violation occur, companies and their senior management must create a corporate culture of rigorous FCPA compliance by emphasizing the following, tailored to the unique structure of the company and the unique risks posed by the nature of its business and the geographies in which it operates:

- Implementing and maintaining internal anti-corruption policies and procedures that set a code of conduct and standards for contract administration, marketing, promotion, and gift, travel, and expense reimbursement. To provide effective risk reduction, it is essential that any such policies go beyond mere words on a page to include reasonable implementation and enforcement mechanisms within the company, an effective internal system for preventing, detecting, and reacting to potential violations, accompanied by training of key personnel as well as ongoing supervision of corporate agents and third-party intermediaries.
- Conducting careful and thorough due diligence when engaging a consultant or third party intermediary, entering into a joint venture or other business combination, or acquiring some or all of a foreign business operation.
- Responding effectively to “red flags.” Some geographically- or industry-based red flags -- such as doing business in a country with a reputation for corruption or weak anti-corruption efforts, or operating in an industry known to have corruption issues -- cannot be avoided, and so can only be addressed by heightened diligence across the board. Other red flags are case-specific, such as a consultant who has personal or business ties to a government official, an intermediary who does not have business experience in the relevant type of business operations, or who has a history of violations, or who is recommended by a specific government official, or the receipt of vague or otherwise irregular billing or accounting records. An appropriate response to such situations, in a way that can be documented and verified, reduces the risk posed.
- Maintaining accurate and consistent billing and accounting records, with compliance monitoring and oversight.
- When questions arise, obtain advice from experienced legal professionals to navigate the treacherous waters of FCPA compliance.

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