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Expert Analysis

Liability Under the Travel Act For Commercial Bribery

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Much attention has been given to the Department of Justice's investigation and prosecution of overseas corruption under the Foreign Corrupt Practices Act, and deservedly so. In 2011 the DOJ collected over a half billion dollars in FCPA penalties and disgorgement, marking four consecutive years in which collections exceeded that amount, including the record amount of $1.8 billion in 2010.

As the DOJ has made clear, however, the FCPA is not the only statute at its disposal for prosecuting overseas corruption. U.S. companies should be familiar not only with the FCPA, but also with the mail and wire fraud statutes (18 U.S.C. §§ 1341 and 1343), and with the Travel Act (18 U.S.C. § 1952).

The DOJ has used the Travel Act, combined with the FCPA, to reach both public and commercial bribery abroad.

TRAVEL ACT VIOLATION

The Travel Act does not prohibit commercial bribery itself but rather the use of the facilities of interstate or foreign commerce — such as mail, email, Internet, fax or telephone — in the commission of an "unlawful activity." The Travel Act recognizes bribery as one of the covered "unlawful activities." 18 U.S.C. § 1952(b). The government may charge a violation of the Travel Act even if the bribe was unsuccessful, so long as the facilities of commerce were used for the attempted bribe.

A bribery offense may be sufficient to support the elements of a Travel Act violation if the following occur:

- Travel in interstate or foreign commerce, or use of the mail or any facility of interstate or foreign commerce.
- Intent to promote, manage, establish, carry on, facilitate or distribute the proceeds of any bribery.

States with commercial bribery statutes

The majority of U.S. states have commercial bribery statutes, including:

- California, Cal. Penal Code § 641.30
- Delaware, Del. Code Ann. tit. 11, § 881
- Florida, Fla. Stat. § 838.16
- Illinois, 38 Ill. Comp. Stat. 5/29A-1
- Massachusetts, Mass. Gen. Laws ch. 271 § 39
- New Jersey, N.J. Stat. Ann. § 2C:21-10
- New York, N.Y. Penal Code § 180.00
- Texas, Tex. Penal Code Ann. § 32.43

- Performance of or attempt to perform an act promoting, managing, establishing, carrying, facilitating or distributing the proceeds of bribery.

See United States v. Welch, 327 F.3d 1081, 1090 (10th Cir. 2003). The U.S. Supreme Court has held that Congress intended "bribery" to encompass state commercial bribery statutes. *Perrin v. United States,* 444 U.S. 37 50 (1979). Thus, the Travel Act makes it a federal offense to violate state commercial bribery laws while traveling in or using the facilities of interstate or foreign commerce.

U.S. companies should be familiar not only with the FCPA, but also with the mail and wire fraud statutes (18 U.S.C. §§ 1341 and 1343) and the Travel Act (18 U.S.C. § 952).

The Travel Act carries a maximum sentence of five years in prison for commercial bribery and fines, 18 U.S.C. § 1952(a)(3)(A). Since the Travel Act is a criminal statute; the Securities and Exchange Commission does not have authority to enforce it. When the DOJ prosecutes Travel Act violations against corporations and their employees, in deciding under what state law to charge the unlawful activity, the DOJ typically looks to the corporation's principal place of business.

SCOPE OF THE TRAVEL ACT

Under the government's expansive interpretation, the Travel Act applies when the target of the bribe is located abroad. That means if you are in the U.S. (within a state with a commercial bribery statute), and you send an email or make a call with the intent to facilitate an overseas bribe, the government will argue that the Travel Act applies.

Nor, according to the DOJ, can you escape the Travel Act by simply making the call or sending the email while traveling abroad if the purpose of the trip was to facilitate the bribery. It is only in those rare circumstances in which there is no territorial nexus to the United States that the government would concede the Travel Act would not apply. To illustrate, consider these examples:

- Illustration 1: A California company sends its employee to Japan to obtain business. While in Japan, the employee offers a bribe to the Japanese company. Employee subsequently returns to California. Although the bribe occurred in Japan, the Travel Act applies because the employee travelled in foreign commerce with the intent to bribe.

- Illustration 2: Same facts as Illustration 1, except that the employee stops at a conference in China first, visits the company's subsidiary in Taiwan and then goes to Japan. The Travel Act still applies because interposing intermediate stops on a multi-legged journey taken for an unlawful purpose does not immunize the company or the employee from prosecution. *See United States v. Weingarten*, 632 F.3d 60, 71 (2d Cir. 2011); *United States v. Carson*, No. 8:09-cr-00077-JVS, *order denying defendants' motion to dismiss counts 1, 11, 12, and 14 of the indictment*, No. 440, (C.D. Cal. Sept. 20, 2011) at 14-15.
- Illustration 3: A California company sends its employee to its Taiwanese subsidiary to act as an intermediary. The employee stays in Taiwan for several years. At some point, the employee visits Japan and offers a bribe. The employee returns to Taiwan and resumes his or her role as an intermediary. Subsequently, the employee returns to the U.S. Here, the Travel Act does not apply because the travel was between two foreign nations without any territorial nexus to the U.S., and thus "foreign commerce" is not implicated. *See Weingarten*, 632 F.3d at 70; *Carson*, No. 440, at 14-15.

EXTRATERRITORIALITY AND THE TRAVEL ACT

The Travel Act's jurisdictional reach over foreign bribery is an unsettled area of the law. In deciding a private securities case unrelated to the Travel Act, the Supreme Court held that a statute does not have extraterritorial reach unless Congress clearly expressed its affirmative intention to give the statute extraterritorial effect. *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869, 2877-78 (2010).

When combined with the FCPA, the DOJ has used the Travel Act to reach both public and commercial bribery abroad.

Arguably, since under *Morrison* general references to "foreign commerce" do not defeat the presumption against extraterritoriality, the Travel Act's express and repeated references to "foreign commerce" may not be sufficient to confer extraterritorial jurisdiction. *Id.* at 2882.

But, thus far only one court has considered *Morrison* in connection with the Travel Act, and that court found that *Morrison* did not apply to Travel Act violations. *See Carson*, No. 440, at 6-7.

Relying on *United States v. Bowman*, 260 U.S. 94, 98 (1922), the *Carson* court held that criminal statutes may apply extraterritorially even without an explicit congressional statement. Because *Morrison* did not address a criminal statute or expressly overrule *Bowman*, the *Carson* court held that the Travel Act could be applied to conduct outside the U.S.

Moreover, also relying on the fact that the alleged bribe was completed in California, the *Carson* court determined that there was no need to consider extraterritoriality issues.

ILLUSTRATIONS OF TRAVEL ACT PROSECUTIONS

The Travel Act and the FCPA are not mutually exclusive. In fact, the government regularly includes counts under both statutes in prosecutions. Here are several examples of recent Travel Act/FCPA prosecutions:

- *United States v. Control Components Inc.* (C.D. Cal. July 31, 2009). California-based valve maker Control Components Inc. pleaded guilty to violating the FCPA and the Travel Act. CCI's guilty plea under the Travel Act involved bribing employees of private companies in contravention of California's anti-commercial-bribery law.

CCI agreed to pay $18.2 million as part of its plea agreement for the FCPA and Travel Act violations.

- *United States v. Bourke* (S.D.N.Y. July 10, 2009). Frederic Bourke was found guilty of a conspiracy to violate the FCPA and the Travel Act for bribing senior government officials in Azerbaijan to ensure privatization of the state oil company. The indictment made clear that the "unlawful activity" at issue under the Travel Act was the violation of the FCPA's anti-bribery provisions. He was sentenced to a year and a day in prison and fined $1 million.
- *United States v. Carson* (C.D. Cal. Apr. 8, 2009). Six former executives of CCI were indicted for violating the FCPA and the Travel Act. The executives were charged with paying bribes to employees of private companies under California's commercial bribery law.
- *United States v. Ott et al.* (D.N.J. July 27, 2007). Two former ITXC executives pleaded guilty to conspiring to violate the FCPA and the Travel Act in connection with illegal payments made to employees of foreign state-owned and foreign-owned telecommunications carriers in Nigeria, Rwanda and Senegal. The purpose of the payments was to obtain and retain contracts for ITXC. The executives received five years' probation and three to six months of home confinement.
- *United States v. Thomson et al.* (N.D. Ala. July 1, 2004). Two former officers of HealthSouth Corp. were indicted for violating the Travel Act and the FCPA in connection with the alleged bribery of the director general of a Saudi Arabian foundation. The officers were acquitted of all chargers after a jury trial.

CONCLUSION

The Travel Act reaches commercial bribery that the FCPA does not. When coupled with the FCPA, the Travel Act allows the government to reach both public and commercial foreign bribery. In addition to the justified concern about FCPA issues, corporate compliance programs also must be designed to prevent and detect commercial bribery.

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