

Sentencing of Individuals in FCPA Cases

By Gary Stein

As part of their stepped-up enforcement of the Foreign Corrupt Practices Act (FCPA) in recent years, Justice Department officials have emphasized the importance of prosecuting — and sending to prison — individual executives who violate the statute. Calling “aggressive prosecution of individuals” a “cornerstone of our FCPA enforcement policy” in a speech last year, Assistant Attorney General Lanny Breuer warned that “the prospect of significant prison sentences for individuals” should “make clear to every corporate executive” that they will be held “personally accountable for FCPA violations.”

The DOJ exercises virtually unlimited discretion in deciding who gets charged in FCPA cases and, for all practical purposes, in deciding the amount of the financial penalty imposed against corporate violators. But sentencing of individual defendants, particularly after *United States v. Booker*, 543 U.S. 220 (2005), is ultimately a matter of judicial, not prosecutorial, discretion. And it has become apparent that there is a wide and growing rift between the views of the DOJ and the courts as to the appropriate sentences for individual violators in FCPA cases.

CASES IN POINT

Over the past year or so, the courts have delivered a series of stunning rebukes to federal prosecutors’ efforts to obtain lengthy prison sentences for FCPA violators:

- Prosecutors in the Southern District of New York sought a ten-year sentence for Frederic Bourke, who was convicted after a hard-fought trial involving a privatization ven-

ture in Azerbaijan. The court sentenced Bourke to one year and one day in prison.

- Prosecutors in the Central District of Los Angeles were equally disappointed in the six-month sentences meted out to Gerald and Patricia Green after another high-profile FCPA trial. Prosecutors had asked that each receive 10 years for bribing Thai officials in order to secure rights to produce the annual Bangkok Film Festival.
- A district judge in the Eastern District of Pennsylvania rejected the 168–210 month Guidelines sentence prosecutors recommended for Nam Nguyen, the lead defendant in a Vietnam bribery case. Nguyen was instead sentenced to 16 months. His co-defendant, Am Nguyen, received a nine-month sentence, likewise well below the 87–108 months recommended by prosecutors.

At each of these five sentencings, the government argued emphatically that a lengthy sentence was necessary to punish the defendant’s conduct and deter others in the business community from violating the FCPA. And in each case, the court imposed a sentence dramatically below the applicable Guidelines range amounting to roughly 10%, or less, of the government’s recommended sentence.

A similar pattern can be seen in recent sentencings of cooperators in FCPA cases. While moving for a downward departure under Section 5K1.1, prosecutors have nonetheless urged courts to sentence cooperators to substantial jail terms. Still, in five separate sentencings over the past year, the courts have refused to do so:

- The two cooperators in the Vietnamese bribery case, Kim Nguyen and Joseph Lukas, were both sentenced to probation, even though the government sought jail time for both.
- Two former executives of the Wilbros Group who cooperated with

the government, Jason Edward Steph and Jim Bob Brown, were sentenced in the Southern District of Texas to 15 months and one year and one day in prison, respectively, despite government recommendations that they be sentenced to 45 months and 30 months, respectively.

- Bobby Jay Elkin, a cooperator in a case involving the Alliance One tobacco company, was sentenced to probation in the Western District of West Virginia, notwithstanding the prosecution’s request for a 38-month sentence.

THE STATISTICS

The evidence of judicial reluctance to impose harsh sentences in FCPA cases is more than anecdotal; it is statistical as well. Over the past four years, approximately 58% of all federal sentences were within the Guidelines range and 40% were below the range, according to U.S. Sentencing Commission data. See U.S. Sentencing Comm’n, Sourcebook of Federal Sentencing Statistics, FY 2007–2010. In FCPA cases, however, the opposite is true: a Guidelines sentence is the exception rather than the norm. Since 1998, a total of 36 individuals have been sentenced in FCPA cases. Only nine of the 36 defendants, or 25%, received sentences within the Guidelines range. The remaining 27 defendants — a remarkable 75% of the total — were sentenced below the range. Post-*Booker*, the percentage of below-Guidelines sentences is even higher: 81%. (Moreover, two of the seven defendants sentenced within the Guidelines, Juan Diaz and Charles Jumet, may yet receive a lower sentence, as they have been cooperating with the government in hopes of obtaining a Rule 35 post-sentencing motion.)

The unusually high percentage of below-Guidelines sentences in FCPA cases reflects, to some extent, the disproportionate number of FCPA cooperators. Half of the FCPA defendants received the benefit of a 5K1.1 departure motion from

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the government. This compares with 13% of federal criminal defendants overall. Yet even non-cooperating defendants are sentenced more leniently in FCPA cases. Nine of the 18 non-cooperators, (eight of 13 post-*Booker*) received a below-Guidelines sentence.

The prevalence of below-Guidelines sentences in FCPA cases also reflects the nature of the crime: bribery. In federal bribery offenses of all types (not just FCPA prosecutions), courts have imposed below-Guidelines sentences 61% of the time. Bribery, it seems, is viewed by the courts as less deserving of Guidelines-level punishment than other federal crimes. The only offense categories that consistently see similar or greater levels of below-Guidelines sentences are tax (58%), money laundering (58%), national defense (61%) and antitrust (88%). These white-collar crimes frequently led to non-incarceratory sentences prior to the enactment of the Sentencing Guidelines in 1987, and it may be that we are seeing a return to pre-Guidelines sentencing practices in white-collar cases across-the-board, including in bribery cases.

The median and mean (average) sentences imposed in FCPA cases are also revealing. Notwithstanding the DOJ's demands for severity, the median sentence in the 36 FCPA cases is only 12 months; the average is 17.8 months. In all bribery cases over the past four years, the median sentence has been the same — 12 months — and the average has been slightly higher, ranging from 19.4 to 22.9 months. Yet FCPA prosecutions typically involve much greater dollar amounts — a key determinant of the Guidelines offense level — than run-of-the-mill bribery cases. *See* U.S.S.G. § 2C1.1(b)(2). Only a small fraction (about 15%-30% per year) of bribery sentences under § 2C1.1 involve amounts in excess of \$200,000. *See* U.S. Sentencing Comm'n, Use of Guidelines and Specific Offense Characteristics, FY 2006-2009. By contrast, the vast majority of FCPA cases (more than 70%) have involved bribe payments in excess of that amount, often in the millions of dollars. Nevertheless, the average FCPA sentence is below the average sentence in a bribery case.

WHY THE GAP?

What accounts for the predominance of relatively low, below-Guidelines sentences in FCPA cases? While each sentence may be significantly influenced by the defendant's unique characteristics (*e.g.*, age, health, family situation), there are some common mitigating circumstances found

FCPA SENTENCES: COOPERATORS (WITH YEAR OF SENTENCE)

Darold Crites, 6 months' home confinement (1999); Albert Reitz, 6 months' home confinement (2002); Richard Halford, probation (2002); Richard Pitchford, 12 months (2002); Faheem Mousa Salam, 36 months (2007); Yaw Osei Amoako, 18 months (2007); Steve Head, 6 months (2007); Gautam Sengupta, 2 months (2008); Steven Ott, 6 months' home confinement, 6 months' community center (2008); Roger Michael Young, 3 months' home confinement, 3 months' community center (2008); Christian Sapsizian, 30 months (2008); Richard Novak, probation (2008); Misao Hioki, 24 months (2008); Jim Bob Brown, 12 months (2010); Jason Steph, 15 months (2010); Kim Nguyen, probation (2010); Joseph Lukas, probation (2010); Bobby Jay Elkin, probation (2010)

FCPA SENTENCES: NON-COOPERATORS (WITH YEAR OF SENTENCE)

David Mead, 4 months plus 4 months' home confinement (1999); Herbert Tannenbaum, 12 months (1999); Thomas Qualey, 4 months' home confinement (1999); Daniel Rothrock, probation (2001); Robert Richard King, 30 months (2003); David Kay, 37 months (2005); Douglas Murphy, 63 months (2005); Ramendra Basu, 15 months (2008); Martin Self, probation (2008); Shu Quan-Sheng, 51 months (2009); Frederic Bourke, 12 months (2009); Charles Jumet, 87 months (2010); John Warwick, 37 months (2010); Juan Diaz, 57 months (2010); Gerald Green, 6 months (2010); Patricia Green, 6 months (2010); Nam Nguyen, 16 months (2010); Am Nguyen, 9 months (2010)

in FCPA cases that appear to be playing a role in the courts' reluctance to dance to the DOJ's tune in sentencing individual defendants.

First, FCPA violators often, if not typically, do not set out to break the law. Rather, operating in countries in which corruption is a way of life, they may accede to an official's solicitation of a bribe, or turn a blind eye to an intermediary's misconduct, in the belief that there is no other way to obtain the sought-after government contract. None of this may be a defense to an FCPA charge, but sentencing courts understandably view these circumstances as mitigating. At the Bourke sentencing, for instance, the court expressly noted that "this defendant was in no way the originator of this scheme," but rather "went along with" it. The judge who sentenced Elkin similarly noted that the defendant was confronted with a choice of "either you do this or you lose your job," and compared Elkin's actions with the CIA's payments to warlords in Afghanistan, saying that "it sort of goes to the morality of the situation."

Second, FCPA defendants often do not directly benefit from their crimes. Rather, most are sales representatives or business executives attempting to secure contracts for their companies. This fact has not been lost on sentencing courts, such as the judge who, in sentencing Brown, expressly noted that "he did not personally profit from the scheme." The loss in FCPA cases is also often abstract at best; the judge in the Green case reportedly

did not view Thailand as a victim of the Greens' offenses since the Bangkok Film Festival generated substantial revenues for the Thai economy.

Third, FCPA defendants typically are first-time offenders who have led otherwise honest, law-abiding and often exemplary lives. Incarceration will not be necessary to achieve specific deterrence. For example, the judge who sentenced Bourke, a prominent businessman active in charitable causes, described him as "an asset to the public" whose incarceration "will only impede his efforts to improve the environment and the society in which he lives."

Many judges have failed to see the wisdom of imprisoning such individuals for many years in order to "send a message" to the business community that violations of the FCPA will not be tolerated. Instead, courts seem to be sending a message of their own to the DOJ.

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