LJN LAW JOURNAL NEWSLETTERS

Business Crimes Bulletin ®

An ALM Publication

Volume 19, Number 5 • January 2012

The FCPA and AML Statutes

Prosecutors Increasingly Combining Charges, to Great Effect

Part Two of a Two-Part Article

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Last month, we began to discuss how federal prosecutors are increasingly combining charges under the Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, *et seq.* ("FCPA") and the U.S. anti-money laundering ("AML") laws to reach more defendants and achieve greater success in their criminal prosecutions. We continue herein.

Jurisdictional Reach

Amendments made to the FCPA in 1998 expanded its reach so that territorial jurisdiction could be asserted over foreign companies and nationals. *See* 15 U.S.C. § 78dd-3. Since 1998, a foreign company or person has been subject to the FCPA for taking any act in furtherance of the corrupt payment while within the territory of the United States. However, foreign officials who do no more than receive bribes from a covered person or entity are beyond the reach of the FCPA.

Notwithstanding this limitation, an example of the DOJ's aggressive effort to combat foreign corruption, even when FCPA charges are inapplicable, is the prosecution of Juthamas Siriwan in the Central District of California. *United States v. Siriwan*, No. 09-CR-0081 (C.D.Cal. 2009). Siriwan, a senior official of the Tourism Authority of Thailand ("TAT"), was charged with money laundering and conspiracy to launder money in violation of 18 U.S.C. §§ 1956(a)(2)(A) and (h). The charges stem from bribes paid to her in violation of the FCPA, as well as the anti-corruption laws of Thailand. Film producers Gerald and Patricia Green were convicted of substantive FCPA violations for paying Siriwan $1.8 million in bribes to influence the granting of $14 million of TAT funds relating to the Bangkok International Film Festival. Under the FCPA, Siriwan is not prohibited from receiving bribes, yet the Department of Justice ("DOJ") creatively decided to bring AML charges in order to extend its otherwise insufficient jurisdictional reach. It will not be known for some time whether the money-laundering theory will be sustained in court. Additionally, in the Haiti Teleco case (09-CR-201010 (S.D.Fl. 2009)), involving bribes to two Haitian public officials, Robert Antoine and Jean Rene Duperval, the foreign officials were charged with conspiring to commit money laundering, essentially enabling the prosecutor to avoid the fact that foreign officials who are recipients of bribes cannot be charged under the FCPA.

Likewise, in *United States v. Lazarenko*, CR 00-0284-MJJ (N.D.Cal. 2001) prosecutors in the Northern District of California used money-laundering charges to reach a foreign national to fight foreign bribery and corruption without charging an FCPA violation. In that case, the government charged Pavlo Lazarenko, a former Ukrainian prime minister who was extradited to the United States, with engaging in a series of corrupt business transactions that defrauded the Ukrainian people of millions of dollars. Although his corruption was the root of the criminal charges against him, Lazarenko was charged with money laundering as a result of transferring funds from one foreign bank account to another, including bank accounts in the United States. A federal jury in San Francisco found Lazarenko guilty, and he was sentenced to nine years in federal prison.

These cases demonstrate the government's creativity in using AML statutes when it cannot pursue FCPA charges.

Increased Sentences and Fines

The criminal penalties for money laundering are severe, often exceeding the penalties under the FCPA and foreign anti-bribery laws. A violation of the FCPA carries a five-year prison term, as well as a criminal fine of up to $100,000 for each FCPA violation. By contrast, an AML violation carries a maximum term of imprisonment of 20 years and a fine of up to $500,000, or twice the value of the property involved in the transaction, whichever is greater. In addition, the Alternative Fines Act, 18 U.S.C. § 3571(d), which authorizes a fine of up to twice the gain from an unlawful activity, applies to both FCPA and AML offenses. Moreover, although the Federal Sentencing Guidelines are no longer mandatory, recommended FCPA and AML sentences are determined pursuant to a sentencing table that uses offense level and criminal history. AML sentences are additionally governed by § 2S1.1 of the U.S. Sentencing Guidelines, which tends to lengthen a prescribed sentence. Accordingly, in charging FCPA

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violations, the government's inclusion of AML charges serves to increase the potential penalties applicable to the defendant.

Present and Future: The Cases and Predictions

From the *Bodmer* indictment in 2003 until a few years ago, prosecutors' concurrent use of the FCPA and AML provisions was limited and sporadic. There were only a few prosecutions that included charges for both AML and FCPA violations. Since 2007, there have been at least 17 such prosecutions, the majority coming within the last 18 to 24 months. In addition to those cases discussed above, recent notable enforcement actions charging violations of both AML and FCPA provisions include:

- James Tillery and Paul Novak, 08-CR-022 (S.D.Tx. 2008) — Wilbros International executive and consultant accused of making corrupt payments to Nigerian and Ecuadorian officials were charged with FCPA violations, conspiracy to violate the FCPA and conspiracy to commit money laundering. Novak pleaded guilty to one count of conspiracy to violate the FCPA and one substantive count of violating the FCPA, and was sentenced to three years' probation. Tillery is a fugitive.
- Gerald and Patricia Green, 08-CR-59 (C.D.Ca. 2009) — The Greens were involved in a bribery scheme that enabled them to obtain a series of Thai government contracts, including valuable contracts to manage and operate Thailand's annual film festival. Both were charged with FCPA violations, conspiracy to violate the FCPA, money laundering and conspiracy to commit money laundering. A jury found the Greens guilty on all four counts, and both were sentenced to six months' imprisonment and six months' home confinement.
- Nexus Technologies, Inc. (Nguyens), 08-CR-522 (E.D.P. 2009) — The Nguyens conspired to bribe officials of the Vietnamese government in exchange for lucrative contracts to supply equipment and technology to Vietnamese government agencies. Charges included FCPA violations, conspiracy to violate the FCPA, money laundering and conspiracy to commit money laundering. Three former employees and a partner of Nexus Technologies pleaded guilty to both FCPA and AML charges and were sentenced to imprisonment and/or probation.
- John O'Shea, 09-CR-629 (S.D.Tx. 2009) — The general manager of a Texas business, who approved payments to sales representatives in a scheme to bribe Mexican government officials to secure contracts with CFE (Mexico Electric), was charged with FCPA violations, conspiracy to violate the FCPA and conspiracy to commit money laundering. O'Shea's case is currently being litigated.
- Enrique and Angela Aguilar, 10-CR-1031 (C.D.Ca. 2010) — Directors of a Mexican company (Grupo), which allegedly secured contracts with CFE for U.S.-based companies in return for a commission of the proceeds, were charged with FCPA violations, conspiracy to violate the FCPA, money laundering and conspiracy to commit money laundering. Angela Aguilar was convicted of conspiracy to launder money and sentenced to time served (nine months in custody), while Enrique Aguilar remains a fugitive.
- Haiti Teleco Case, 09-CR- 201010 (S.D.Fl. 2009) — Several individuals involved with a Florida-based telecommunications company collectively paid more than $800,000 in bribes to officials of Haiti's state-owned national telecommunications company. Charges against the individuals included FCPA violations, conspiracy to violate the FCPA, money laundering and conspiracy to commit money laundering. A jury found two former top executives guilty of substantive FCPA and AML violations, as well as the corresponding conspiracy charges. These convictions followed guilty pleas by four other defendants; six additional defendants charged with a related scheme are awaiting trial.
- Jorge Granados and Manuel Caceres, 10-CR-20881 (S.D.Fl. 2010) — The CEO and the VP of Miami-based Latin Node, who paid more than $500,000 in bribes to government officials in Honduras to secure telecommunications contracts with Hondutel, were charged with FCPA violations, conspiracy to violate the FCPA, money laundering and conspiracy to commit money laundering. Granados pleaded guilty to one count of conspiracy to violate the FCPA and was sentenced to 46 months in prison. Caceres also pleaded guilty, testified as a cooperating witness in the Granados sentencing, and is to be sentenced on Jan 30, 2012.
- *U.S. v. Goncalves*, 09-CR-00335 (D.D.C. 2010) — This was an undercover operation involving the military and law enforcement products industry, where individuals were indicted for engaging in schemes to bribe African government officials. They were charged with FCPA violations, conspiracy to violate the FCPA and conspiracy to commit money laundering. This case is currently being litigated.

In all of these actions, prosecutors used a combination of the FCPA, the AML laws and charges of conspiracy to violate one or the other statute. Moreover, in seven of the eight enforcement actions described above, the indictment alleged the "specified unlawful activity" under 18 U.S.C. § 1956 as the bribery of a foreign public official.

Conclusion

Whether prosecutors are using FCPA and AML charges together for efficiency purposes, or as a negotiating tactic in furtherance of the government's heightened commitment to rooting out foreign bribery, their convergence is unmistakable.

The effect of this emerging trend on practitioners is important because all signs point to an ever-increasing number of enforcement actions involving both FCPA and AML charges. Most notably, understanding how and why the government is using these statutes may alter one's defense strategy and a defense counsel's approach in plea negotiations.

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