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The FCPA and AML Statutes

The Prosecutor's Combined Weapon of Choice

Part One of a Two-Part Article

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Although criminal prosecutions 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 have developed differently over the years, a review of recent enforcement actions reveals that prosecutions under these criminal schemes have started to converge. It is no secret that the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have placed increased emphasis on prosecutions for FCPA and AML violations. What *is* new, however, is that the DOJ has started to use the statutes in tandem to ensure the success of its criminal prosecutions. Some of the more recent cases over the past 12 to 18 months demonstrate that the dual use of these statutes has been successful in meeting this goal.

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In proclaiming the DOJ's firm commitment to investigating and prosecuting foreign bribery, Assistant Attorney General Lanny A. Breuer declared, at the 24th National FCPA Conference, that "FCPA enforcement is stronger than it's ever been … [and] we are in a new era of FCPA enforcement." Consistent with that approach, 2010 witnessed an 85% increase in FCPA enforcement actions over 2009, which was itself a record year. The DOJ brought 48 enforcement actions in 2010, compared with 26 actions in 2009. *See* FINRA Annual Conference, FCPA Compliance, May 24, 2011. The same is true for AML enforcement. In 2010, the number of federal banking fines for AML violations in the United States, according to MoneyLaundering.com, rose by nearly fourfold, while the total dollar amount of the monetary penalties rose to over $660 million. Moreover, the DOJ's combined focus on FCPA and AML is exemplified by its 2010 Kleptocracy Asset Recovery Initiative, which targets the proceeds of foreign official corruption that have been laundered into or through the United States.

While the government has clearly stepped up enforcement of both the FCPA and AML regulations independently, notably, prosecutors appear to be using these provisions concurrently in an increasing number of enforcement actions. An understanding of how these two sets of criminal statutes work together can help a defense lawyer in approaching the handling of these cases. In analyzing the "why" behind this emerging trend, it is best to begin with some background of the FCPA and AML provisions.

Legislative Background

The FCPA was enacted in 1977 as a result of SEC investigations into over 400 U.S. companies admittedly making questionable payments to foreign officials, as well as Congress' concern with foreign bribery and its desire to restore public confidence in the integrity of the American business system. It was amended by the International Anti-Bribery and Fair Competition Act of 1998, which was designed to implement the anti-bribery conventions of the Organization for Economic Cooperation and Development. In general, the FCPA prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business. The anti-bribery provisions of the FCPA make it unlawful for U.S. persons or companies, and foreign issuers of U.S.-registered securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business.

The Bank Secrecy Act, 31 U.S.C. §§ 5311 *et seq.*, which was enacted in 1970 as a result of the need to prevent illegally obtained funds from being deposited into the U.S. financial system, established a number of transaction reporting requirements to assist government agencies in detecting and preventing money laundering. More relevantly, Title 18 U.S.C. sections 1956 and 1967 (the criminal money laundering statutes) were enacted in 1986, making money laundering a crime in and of itself for the first time. Section 1956 prohibits conducting or attempting to conduct a financial transaction involving the proceeds of specified unlawful activity (SUA) for the purpose of promoting or concealing an SUA. Section 1957 prohibits engaging or attempting to engage in a monetary transaction of more than $10,000 in proceeds of specified unlawful activity. The Bank Secrecy Act and the criminal money laundering statutes have been amended several times over the years, but most significantly by the USA PATRIOT Act in 2001, after the events of 9/11. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 296 (2001).

In 1992, the FCPA was added as an SUA under the criminal money laundering statutes and, in 2011, the PATRIOT Act specifically added to the list of SUAs, among others, offenses against a foreign nation, with respect to a financial transaction occurring in whole or in part in the United States, involving the bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official.

Moreover, conspiracy charges pursuant to 18 U.S.C section 371 have also historically been used in FCPA and AML enforcement actions. The DOJ uses this law, among other things, to prosecute individuals for conspiring to commit FCPA or AML violations in cases where two or more persons conspire to commit the underlying offense, and one or more such persons commit an act in furtherance of the conspiracy. As discussed below, prosecutors also frequently combine the FCPA and AML laws as objects of the conspiracy.

AML and FCPA Legislation: The Convergence

The first significant instance of the government's concurrent use of FCPA and AML laws occurred in 2003 when prosecutors charged Hans Bodmer, a Swiss lawyer, with conspiracy to launder money and to violate the FCPA's anti-bribery provisions for participating in a scheme to bribe Azerbaijan government officials to secure a controlling interest in the State Oil Company of Azerbaijan (SOCAR). *See United States v. Bodmer*, 342 F. Supp. 2d 176 (S.D.N.Y. 2004). U.S. District Court Judge Shira Scheindlin dismissed the FCPA charges against Bodmer because the pre-1998 version of the FCPA had not given him fair notice that its criminal penalties applied to the conduct of a non-resident foreign national who acted as an agent for a U.S. concern. But the district court refused to dismiss the money laundering charge, finding that the alleged conduct was sufficient to substantiate the necessary criminal intent and noting that "if immunity from the FCPA's criminal penalties automatically conferred non-resident foreign nationals with immunity from the money laundering statute, these non-resident foreign nationals could openly serve as professional money launderers of proceeds derived from violations of the FCPA, without repercussion." The outcome of this case involved nuances such as the effect of FCPA amendments on foreign nationals and his extradition from South Korea. Yet, the government's joint use of these two statutes proved successful. Bodmer subsequently pleaded guilty to conspiracy to launder money, and facing the potential of a 10-year prison sentence, he cooperated with the government. Two years later Frederic Bourke and Viktor Kozeny, two alleged co-conspirators, were charged with FCPA and AML violations relating to their participation in the same investment consortium allegedly designed to bribe Azerbaijan officials. Bourke was acquitted of conspiracy to commit money laundering, but found guilty of conspiracy to violate the FCPA following a six-week trial. Kozeny is fighting extradition proceedings. *See United States v. Viktor Kozeny, et al.*, 05-CR-518 (S.D.N.Y. 2005).

Since 2003, AML charges have rapidly become a mainstay of FCPA enforcement actions. Some of the reasons a prosecutor may choose to bring AML charges in an FCPA-type enforcement action include: 1) extending the jurisdictional reach so as to include foreign bribe recipients who are not covered under the FCPA; and 2) bolstering settlement leverage by increasing the potential for higher sentences and fines.

Next month, we will discuss jurisdictional and sentencing factors that arise in FCPA/AML cases, along with specific cases in which both FCPA and AML charges were brought.

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