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Testing the waters: DOJ continues pursuing expansive view of the FCPA with prosecutions of domestic and foreign nationals

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Hot on the heels of 2019's record number of prosecutions under the U.S. Foreign Corrupt Practices Act (FCPA), 2020 is already shaping up to be another busy year for the U.S. Department of Justice (DOJ). The department is off to a fast start this year, again testing the FCPA's outer limits with charges against individual defendants. Two recent developments in federal cases set the stage for more, and more aggressive, FCPA prosecutions. Here is what you should know.

Same bribe, multiple charges

In a New Jersey federal court, two former senior Cognizant executives stand charged with violating the FCPA. Three counts in the indictment allege substantive violations of the FCPA's anti-bribery provision. The three counts correspond to three separate emails that DOJ says were sent by the executives in furtherance of a single \$2 million bribe paid to obtain a construction permit in India.

The executives recently moved to dismiss two of these three anti-bribery counts as impermissibly multiplicitous. They contended that, because the "gist" of the FCPA is to prohibit bribery, a one-time bribe should only be charged once, rather than in three separate counts. In other words, the executives argued that the FCPA's "unit of prosecution"—that is, the precise act prohibited by the statute—is the payment of a bribe. Since the government only alleges payment of a single bribe, they asserted, only one of the three anti-bribery counts should reach the jury. (As the court aptly observed, the argument goes: "the man who steals \$100 from a billfold can be prosecuted once for the \$100 theft and not ten times for ten \$10 thefts.")

But the court disagreed. In a groundbreaking [order](#) that is the first to address the FCPA's unit of prosecution, the court analyzed the plain language of the FCPA and analogized its structure to similarly styled federal criminal laws (the federal mail and wire fraud statutes, the Travel Act, and the federal murder-for-hire statute). From that vantage point, the court agreed with DOJ that the unit of prosecution under the FCPA is not the payment of a bribe *per se*, but rather the use of "interstate commerce facilities," like email, to facilitate bribery. Put differently, while it is clear that the FCPA's purpose is to prohibit bribery, each email sent in furtherance of a single bribe is a separate chargeable offense under the statute. The court thus concluded that DOJ could bring three

substantive anti-bribery provision charges against the executives based on the three emails they sent in furtherance of the single alleged bribe.

Same bribe, new defendants

DOJ closed out 2019 by securing the conviction of former Alstom exec Lawrence Hoskins for his role in an Indonesian bribery scheme that violated the FCPA, relying on the theory that Hoskins, though employed by a foreign company, acted as the agent of a domestic principal. The [Hoskins trial](#) was the first to showcase how DOJ may pursue an FCPA charge against a foreign national, working for a non-U.S. company, under the principal-agent precedent Hoskins' case set in the Second Circuit.

On the eve of Hoskins' post-trial motions hearing, DOJ unsealed a five-year-old [indictment](#) that charges three more foreign nationals employed by foreign companies with conduct related to the Alstom bribery scheme. These Indonesian and Japanese nationals are not yet in custody. But if they voluntarily surrender or are extradited, then the case against them will fit squarely in the prosecutorial framework used to convict Hoskins. And if those prosecutions are successful, it appears that DOJ will have perfected its approach to charging and convicting foreign nationals under the Second Circuit's FCPA principal-agent framework.

Takeaway

These case developments are telling. They demonstrate DOJ's intentional efforts to shape FCPA precedent in a way that enables prosecutors to bring more charges against more foreign nationals. By doing so, DOJ is continuing to push an agenda that focuses on multinational companies, their global compliance programs, and the resources those companies dedicate to both training employees located across the globe on their obligations under the FCPA and policing those employees' conduct.

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