Commercial Bribery and the New International Norms

Don R Berthiaume

Available at: https://works.bepress.com/don_berthiaume/6/
Commercial Bribery and the New International Norms

Contributed by Jeffrey J. Ansley, Don R. Berthiaume and Josh Zive, Bracewell & Giuliani LLP

It has been said that “every man has a price,” and that, sometimes, “bribery is just part of doing business.” Unfortunately, these maxims remain, in many parts of the world, a requirement for doing business and pose continuing conundrums to those who operate in the international marketplace, as they are placed in the unenviable position of having to choose to comply with the law, or engage in activity that can easily come under the scrutiny of governmental authorities.

The United States, through its Foreign Corrupt Practices Act (FCPA), and the member nations of the Organization for Economic Co-Operation and Development (OCED) and Council of Europe (CoE) who have adopted similar legislation have made tremendous strides in hindering corrupt payments to foreign officials relating to business transactions. In response to these enforcement initiatives, many International businesses have taken steps to comply with anti-bribery laws by developing compliance programs and conducting internal investigations and cooperating with law enforcement officials when allegations of corrupt payments arise.

While the news media continues to focus on the large fines and penalties associated with violations of the FCPA, it has largely ignored allegations and prosecutions of corrupt payments in private business dealings. As a result, international businesses that have made tremendous efforts to comply with the FCPA and its foreign developed progeny may have overlooked the possibility that their employees are making corrupt payments in their private, non-governmental business development activities. From a logic standpoint, it is likely that investigative agencies will assume that businesses which are willing to bribe foreign officials will also be likely to bribe employees of privately held companies to gain advantages in business transactions. Consequently, it is likely that these companies will be
investigated by U.S. and/or foreign authorities not only for violating the FCPA or its counterpart, but also for engaging in commercial bribery.

*The Travel Act, 18 U.S.C. § 1952*

While the United States Criminal Code (Title 18) does not have a *per se* commercial bribery statute outlawing the bribing or receiving of bribes in private business settings, it does have the "Travel Act," which is codified at 18 U.S.C. § 1952. That particular statute "applies to any person or business who travels or uses the mail or any facility in interstate or foreign commerce with the intent to: (1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity."¹

Importantly, for those corporations engaging in overseas business transactions, the Travel Act defines “unlawful activities” as meaning “extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.”² State, of course, includes any “State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.”³ Thus, so long as the state in which the corporate actor is operating or, if there is an applicable long-arm statute, in a state where some act of the transgressor occurs has a commercial bribery statute, the federal government can rely upon the Travel Act to prosecute corporate actors for engaging in commercial bribery in foreign jurisdictions.

“To prove a violation of the Travel Act, the government [is] required to establish that the [defendant]: (1) used a facility of interstate or foreign commerce; (2) with intent to commit any unlawful activity…; and (3) thereafter [perform] an additional act to further the unlawful activity.”⁴ Because the Travel Act applies not only in interstate commerce, but also foreign commerce, Department of Justice prosecutors can – and have, in fact, done so – use it to prosecute individuals and businesses who engage in commercial bribery in foreign countries; in effect they are "prosecuting private overseas corruption."⁵

In order to utilize the Travel Act in commercial bribery cases the federal government must rely upon the States to supply it with a viable statute for it to use. For example, California Penal Code Section 641.3 provides that:

"any employee who solicits, accepts, or agrees to accept money or anything of value from a person other than his or her employer, other
than in trust for the employer, corruptly and without the knowledge or consent of the employer, in return for using or agreeing to use his or her position for the benefit of that other person, and any person who offers or gives an employee money or anything of value under those circumstances, is guilty of commercial bribery.

This statute makes it possible for the federal government to prosecute those individuals who provide money or anything of value to an employee, without the employer's consent, of a foreign privately-owned business, so long as there is some jurisdictional nexus with the state statute co-opted by the federal government. To date, at least 35 states have commercial bribery statutes that can be used by the Department of Justice as the basis for a Travel Act prosecution; including, to name just a few, Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Dakota, Texas, and Washington. Thus, the federal authorities have a broad array of statutes to choose from when seeking to prosecute private overseas corruption.

The Department of Justice recently used the Travel Act in its prosecution of Control Components, Inc. (CCI). The California statute, which is detailed above, acted as the basis for the violation of the Travel Act contained in a conspiracy count that also alleged violations of the FCPA, contained in the criminal information to which CCI pleaded guilty on July 22, 2009. In this particular case, it was alleged that CCI, through its executives, conspired to bribe employees responsible for making purchasing decisions of several privately-owned and foreign-domiciled businesses in order to induce them to purchase CCI's products. Thus, CCI pleaded guilty to conspiring to engage in commercial bribery occurring in foreign jurisdictions (including China).

CCI's plea of guilty to a conspiracy count alleging violations of the Travel Act came as a shock to many commentators who follow events relating to the FCPA. However, this was not the first time that the Department of Justice has brought these types of charges in a criminal action. In 1998, the Travel Act, based upon a violation of the New Jersey commercial bribery statute, was used in the prosecution of David H. Mead. He was convicted following a jury trial of conspiracy to violate the FCPA and the Travel Act and sentenced to four months imprisonment, four months home detention, three years of supervised release, and a $20,000 fine.
The Department of Justice has publicly stated that it intends to use every tool in its arsenal to prosecute overseas corruption. At a conference in 2007, an attorney with the United States Department of Justice's Fraud Section publicly stated that it planned on utilizing the Travel Act in future prosecutions and that they would also criminally prosecute the books and records provisions of the FCPA. In doing so, he identified the methods by which the Fraud Section would seek to prosecute corrupt payments in private business transactions, which, under most circumstances would not fall under the FCPA.

The Justice Department's utilization of the Travel Act to prosecute commercial bribery is significant for corporations because it allows the government to bring charges where the defendant is not an issuer on a stock exchange and where the government cannot use the FCPA's accounting provisions to bring charges against the defendant. While it is unlikely that the Justice Departments will bring cases based solely upon commercial bribery and the Travel Act, corporations must take steps to insure that its employees are not engaging in activities that could open up to investigation. Failing to do so could lead to catastrophic fines and penalties.

The U.S. is Not Alone In Enforcing Anti-Bribery Laws

It is also important to note that the United States is not the only government pursuing business related bribery cases. The United Kingdom and Germany, to name but a few, have in recent years become more aggressive in pursuing cases alleging corrupt payments in business transactions. In fact, the United Kingdom's proposed anti-bribery legislation, if it is adopted, will make it a criminal offense for commercial organizations to fail to prevent bribery. Clause 5 of the legislation provides that a commercial organization fails to prevent bribery when:

(a) A person performing services for the commercial organization bribes another, (b) the bribe is in connection with the commercial organization's business and (c) another person (or persons) connected with the organization who has the responsibility of preventing bribery, negligently fails to prevent the bribe. Where there is no person within the organization whose responsibilities include prevent bribery, the responsibility is deemed to be that of any senior officer of the organization.

It is clear that this legislation is limited not only to the bribing of foreign officials, but is also broad enough to encompass commercial bribery. And, the U.K. is not the only authority
focusing is sights on commercial bribery. The CoE in its Criminal Law Convention on Corruption specifically addresses commercial bribery. Article 8 of the convention provides:

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, in the course of business activity, the request or receipt, directly or indirectly, by any persons who direct or work for, in any capacity, private sector entities, of any undue advantage or the promise thereof for themselves or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in breach of their duties.\(^9\)

The CoE's Criminal Law Convention "entered into force on July 1, 2002. As of March 1, 2005, of the 46 signatories to the convention, 30 have ratified it. The United States has signed but not yet ratified the Criminal Law Convention."\(^{10}\) As the CoE and OECD member nations move forward in their fight against corrupt dealings in business transactions, corporations will most likely be defending themselves on multiple fronts. Consequently, the best approach is prevention by developing or strengthening compliance programs and ensuring that they focus not only the bribing of foreign officials, but also commercial bribery.

Conclusion

During recent years, companies doing business overseas have become increasingly concerned about the prospect of being targeted by the Department of Justice for FCPA violations as a result of perceived bribes of public officials. That concern is justifiable and well-advised, given both the Department's dramatic increase in FCPA prosecutions and consistent saber-rattling over its growing use of the statute to attack foreign corruption involving U.S. businesses. However, those same companies, whether public or private, now are cautioned to be on the look-out for acts of potential commercial bribery within their organizations as well. As one California company – and convicted felon – now knows, the Travel Act can be effectively joined by the Department with a seemingly irrelevant state commercial bribery statute to criminalize and punish payments between private parties that never touch the hands of any public officials. The Department has a little-known weapon, and it's not afraid to use it.

The authors practice with the international law firm of Bracewell & Giuliani LLP. Jeffrey Ansley is a partner in the Firm's Dallas office, where he focuses his practice on the defense of white collar crime, especially matters involving allegations of securities fraud, health care fraud, money laundering, bribery, tax offenses and other business crimes. Don Berthiaume is an associate in the Firm's Washington, D.C. office, where his practice focuses on
representing clients in a wide array of white collar criminal matters and congressional inquiries. Joshua Zive, also an associate in the Firm's Washington, D.C. office, is an advocate for clients at the intersection of policy, law and politics. For more information, visit Bracewell & Giuliani White Collar Criminal Defense.

4 Kozeny at 706, quoting United States v. Salameh, 152 F.3d 88, 152 (2d. Cir. 1998) (citing United States v. Jenkins, 943 F.2d 167, 172 (2d Cir. 1991)).
6 The federal government has also filed an indictment against several executives of CCI alleging that they conspired to violate the Travel Act and Foreign Corrupt Practices Act. To date, the case remains open and it is not our intent to pass judgment on these executives or the allegations against them.
7 Mead's sentence may seem to the reader to be very light. Based on recent trends, a violation of the FCPA and/or Travel Act is likely to see a much more severe sentence.