



International Business Ethics and Anti-Corruption

The Long Arm of the United States Foreign Corrupt Practices Act

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Penalties of \$579 Million

In February of this year, Kellogg Brown & Root LLC (KBR) entered into a plea agreement with the United States Department of Justice (DOJ) and KBR and Haliburton Company entered into settlements with the United States Securities and Exchange Commission (SEC) whereby these companies agreed to pay a total of \$579 million in combined civil and criminal penalties. The plea agreement and settlements result from allegations that these companies violated the *Foreign Corrupt Practices Act* (FCPA) by paying bribes to Nigerian government officials to secure large scale construction contracts relating to the building of a natural gas liquefaction plant on Bonny Island, Nigeria.

In relation to the same allegations, on February 19, 2009, a federal grand jury in the United States indicted two United Kingdom residents, Jeffrey Tesler and Wojciech Chodan, and charged each with violations under the FCPA. Tesler is a U.K. lawyer and Chodan is a former employee and consultant of KBR's U.K. subsidiary.

On March 5, 2009 Tesler was arrested in the U.K. and an arrest warrant has been issued for Chodan. The DOJ is seeking to extradite Tesler and Chodan from the U.K. to stand trial in the United States.

If convicted on all charges, Tesler and Chodan could each face up to 55 years in prison. The DOJ is also seeking forfeiture of more than US\$130 million.

Jurisdiction of the United States

United States enforcement agencies have exhibited impatience with the lack of commitment of foreign jurisdictions to enforcing their anti-corruption laws. U.S. authorities view the limited success of foreign countries in prosecuting the bribery of public officials as a means of unfair competition in international trade. As such, the efforts that the DOJ and SEC have been making to combat bribery, both within the United States and outside the United States has increased dramatically over the past couple of years.

“U.S. Jurisdiction Applies to any Payments Made by any U.S. issuer of Domestic Concern and their Agents”

Under the FCPA, U.S. jurisdiction over corrupt payments to foreign officials applies to any payments made by any U.S. issuer or U.S. domestic concern wherever the payment occurs, any

foreign nationals or businesses operating within the territory of the U.S., and any officer, director, employee, shareholder or agent acting on behalf of the above entities.

This case will test the reach of the jurisdiction of the FCPA, as both Tesler and Chodan are foreign citizens who were not in the United States at the time of any of the allegations charged and the bribes were not paid to a U.S. government official. In the indictment, the DOJ asserts jurisdiction over the individuals because Tesler and Chodan were hired to act as agents of KBR, a U.S. domestic concern. The indictment also claims a U.S. connection over the bribery scheme because Tesler and Chodan caused two e-mails relating to the payments to be sent to the United States and the bribe payments were made using a U.S. bank account. The actual bank accounts which the payments were sent from and received were not located in the U.S. or held at U.S. banks, however the payments were denominated in U.S. dollars, thus the payments were transferred via a correspondent U.S. bank account which was used to clear the U.S. dollar transactions.

Commentary

This case highlights the broad interpretation of the jurisdictional reach under the FCPA which U.S. enforcement agencies will use. As the impact of the FCPA continues to grow worldwide, we have seen an increase in U.S. authorities pushing their Canadian counterparts to enforce the *Corruption of Foreign Public Officials Act* (Canada) (CFPOA), the Canadian equivalent of the FCPA. Non-U.S. entities now need to consider implementing compliance programs similar to those of their U.S. counterparts.

Companies or citizens outside of the United States need to be cautious when conducting business with U.S. entities or in making payments in U.S. funds. When dealing with entities from the United States, counsel should assume that the provisions of the FCPA will apply to any transactions. Furthermore, when dealing in U.S. dollars, payments will generally flow through the United States, satisfying the prerequisite for the DOJ to assume jurisdiction under the FCPA.

In addition, as we learn specifically from Tesler's situation, counsel should use caution when acting as an agent for a client to arrange payments to government officials, particularly payments made in U.S. dollars.

This case leaves open the question as to how far U.S. authorities are willing to expand their jurisdiction and in what other areas will may attempt to exercise the same broad jurisdiction.

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