EXPERT GUIDE

CorporateLiveWire

July 2014

Fraud and White Collar Crime 2014

Mara Senn
mara.senn@aporter.com
+1 202 942 6448

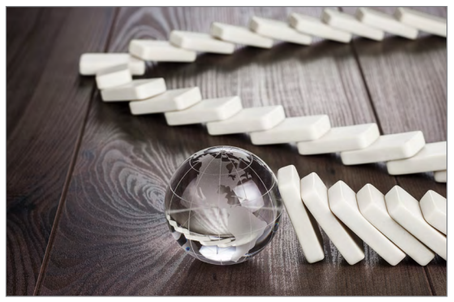
Brandie Weddle
Brandie.Weddle@aporter.com
+1 202 942 5865

Never Been To The U.S.? You May Still Be Charged Under The FCPA

By Mara Senn & Brandie Weddle

ARNOLD & PORTER LLP

Foreign entities and individuals be on notice: The U.S. Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") are actively bringing Foreign Corrupt Practices Act ("FCPA") cases based on activities that occur wholly outside the United States. In its latest foray into this area, the DOJ charged a South Korean national with an FCPA violation, not for any connection with the U.S. but for conspiring to violate the FCPA and aiding and abetting a U.S. company to pay a bribe to a foreign official. On 18 June 2014, the Ninth Circuit rejected his attempt to challenge the court's jurisdiction from his home country of South Korea.



DOJ's charge is consistent with DOJ and the SEC's November 2012 Resource Guide to the U.S. Foreign Corrupt Practices Act ("FCPA Guidance"), which states that the U.S. government believes it can assert jurisdiction over foreign entities and individuals that conspire with U.S.-based companies to violate the FCPA:

> "A foreign national or company may…be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States."[1]

In the South Korea case, the DOJ indicted Han Yong Kim, the former President of Control Components Inc.'s ("CCI") Korean office and a national of South Korea. Even though Kim apparently traveled to the U.S. on at least one occasion and caused wire transfers through a United States bank during the course of the alleged conspiracy, the DOJ based jurisdiction on Kim's conspiracy with a U.S. company, rather than his contacts with the U.S., Kim allegedly conspired to violate the FCPA and aided and abetted a U.S. company based in Delaware to violate the FCPA by causing approximately $550,000 in corrupt payments to be paid to employees and officers of state-owned and private companies.[2] In addition, the DOJ commenced extradition proceedings in South Korea and Interpol issued a "Red Notice" against Kim, which calls on member nations to provisionally arrest a defendant while the member nation commences extradition proceedings.

Although Kim is not directly challenging the basis of DOJ's asserted jurisdiction, Kim is attempting to challenge the case without submitting to the court's jurisdiction by asking for permission for his counsel to make a special appearance in his case. The California court denied Kim's motion under the "fugitive disentitlement doctrine," which prevents a fugitive from challenging the jurisdiction of the court without "submitting himself personally to the court's jurisdiction."[3] Specifically, the court, relying on Second Circuit precedent, found that Kim "is a fugitive when with knowledge of the prosecution he remains outside the jurisdiction."[4]

Kim petitioned the Ninth Circuit for a writ of mandamus to order the California court to allow him to challenge the bribery allegations from his home in South Korea. Kim argued that the California court's order was clearly erroneous because as a matter of fact he had at all times lived in South Korea and had never fled from the California court's jurisdiction.[5] The Ninth Circuit Panel acknowledged that there was a circuit split as to whether a "fugitive disentitlement can be determined on the basis of 'constructive flight;'" but held, in the absence of Supreme Court or Ninth Circuit precedent, the California court's order was not clearly erroneous.[6] On 18 June 2014, the Ninth Circuit denied Kim's request for en banc review of his motion. Kim may still challenge the California court's order in a direct appeal, but absent permission from the court, he must wait until after the entry of a final judgment.

The theory of FCPA jurisdiction based on conspiring with a U.S.

company has also been applied to foreign companies. For example, the DOJ successfully entered into deferred prosecution agreements with two foreign companies — JGC Corporation, headquartered in Yokohama, Japan, and Marubeni Corporation, headquartered in Tokyo, Japan. In both of these cases, the DOJ alleged jurisdiction based on the fact that these companies conspired with a U.S. company to violate the FCPA by bribing Nigerian government officials to secure engineering, procurement, and construction contracts to "design and build a liquefied natural gas plant" on Bonny Island, Nigeria. Although, the DOJ's filings allege, as a matter of fact, that the companies conspired to cause wire transfers to be sent through U.S. banks, this allegation was not the basis for jurisdiction. Instead, the DOJ relied on its so-called authority to prosecute foreign companies for conspiring with U.S. companies "even though they took no action in the United States."[7] Rather than challenging the basis of the DOJ's jurisdiction, both entities pleaded guilty to conspiring with Houston-based Kellogg, Brown, and Root, Inc. ("KBR") to violate the FCPA and aiding and abetting KBR to violate the FCPA.

Fearing reputational harm, foreign companies like JGC Corporation and Marubeni Corporation are loathe to litigate against the U.S. government in FCPA cases. As a result of the lack of legal challenge to DOJ's asserted scope of jurisdiction under the FCPA, DOJ has continued to push the jurisdictional envelope. Recent legal challenge to the scope of the FCPA's jurisdiction have come from individuals facing civil FCPA charges, and those facing jail time have even more of an incentive to bring such challenges. However, the Ninth Circuit's recent ruling increases the risk to foreign nationals because it requires them to submit to a U.S. court's jurisdiction to challenge a DOJ indictment, or face extradition proceedings and severe international travel restrictions. To the extent foreign nationals do submit to a U.S. court's jurisdiction they face possible arrest and detention in the U.S. during any settlement negotiations or trial. But absent a challenge by a foreign entity or individual, the DOJ has every incentive to continue pushing the outer limits of its jurisdictional reach over foreign entities and individuals.

Despite DOJ's success thus far, jurisdictional challenges in the FCPA context can be brought on a number of different grounds. Foreign companies and individuals whose only possible connection to the U.S. is aiding and abetting or conspiracy with a U.S. company could assert that aiding and abetting and conspiracy cannot confer jurisdiction when there is no jurisdiction to bring any substantive claim under the statute. See Gebardi v. U.S., 287 U.S. 112 (1932); U.S. v. Castle, 925 F.2d 831 (5th Cir. 1991). They could also assert that U.S. courts lack personal and subject matter jurisdiction over entities and individuals with no connection to the U.S. that engaged in activities that occur only outside of the U.S. See SEC v. Sharef, 2013 WL 603135 (S.D.N.Y., Feb. 19, 2013) (dismissing civil bribery case against Canadian national, who was an employee of Siemens, for lack of personal jurisdiction); but see SEC v. Straub, 2013 WL 466600 (S.D.N.Y., Feb. 8, 2013) (finding jurisdiction over foreign national in the Magyar Telecom case because he "knew or had reason to know that any false or misleading financial reports would be given to prospective American purchasers of those securities").

Of course, there is no guarantee that such jurisdictional challenges will succeed. As a result, in light of the U.S. enforcers' aggressive jurisdictional stance, even foreign companies that do not have direct dealings with the U.S. should comply with anti-corruption standards under the FCPA. This should include a robust anti-corruption compliance program, including, among other things, due diligence on third parties, anti-corruption clauses in third-party agreements, and anti-corruption training for third parties. Finally, foreign entities should consider the U.S. government's pronouncements on its jurisdiction when evaluating whether to self-disclose suspected FCPA violations.

ARNOLD & PORTER LLP

Mara Senn is a partner at Arnold & Porter LLP and represents clients on global anti-corruption issues. She leads multijurisdictional corruption internal investigations and responds to government inquiries and investigations in many industry sectors and countries. Ms. Senn advises clients on high-level strategy, including the investigation, whether and how to discipline current employees and agents, how global corruption issues affect the business, and ways to ameliorate corporate structures to avoid future problems. She also counsels clients on all aspects of global anti-corruption compliance, third-party due diligence and due diligences in the context of joint ventures and corporate acquisitions and mergers. She regularly speaks and publishes on anti-corruption issues.

Brandie Weddle is an associate at Arnold & Porter LLP. Her practice is focused on securities, compliance, enforcement litigation, and complex commercial litigation. Her clients have included publicly traded companies, private companies, and corporate officers and directors. Ms. Weddle has represented clients in all aspects of Foreign Corrupt Practices Act compliance, investigations, and enforcement matters before United States civil and criminal authorities.

1 - FCPA Guidance at 12 (emphasis added).

2 - U.S. v. Carson, No. 8:09-cr-77, Indictment (C.D. Ca. Apr. 8, 2009).

3 - Min. Order re Def. Kim's Mot. for Leave to File a Special Appearance, April 4, 2011, Dkt. No. 330 at 2 (citing Molinaro v. New Jersey, 396 U.S. 365, 366 (1970)).

4 - Id. at 2 (citing United States v. Catino, 735 F.2d 718, 722 (2d Cir. 1984)).

5 - Pet. For Writ of Mandamus, at 9-10.

6 - In re Han Yong Kim, No. 13-72727 at 3.

7 - FCPA Guidance at 34. See also JGC Corp. at ¶¶ 17, 19(e), 22 and U.S. v. Marubeni Corp., No. 12-22, Information (S.D. Tex. Jan. 17, 2012).