Increased Risk of FCPA Prosecution of Foreign National Executives of U.S. Issuers

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Recent Court Decision Allows Open-Ended Statute of Limitations and Bases FCPA Jurisdiction on Email Routed Through US Servers

A recent federal court decision highlights the increasing risk of prosecution for foreign national executives under the Foreign Corrupt Practices Act ("FCPA"). The decision from the federal district court in New York denied a motion to dismiss filed by three defendants, all former foreign national executives of Magyar Telekom Plc. ("Magyar"), a Hungarian telecommunications company, finding that:

- The five-year statute of limitations under the FCPA does not run while a defendant is outside of the United States; and
- Emails sent and received outside of the United States, but routed through or stored on servers in the United States, were enough to assert jurisdiction over the defendants under the FCPA, regardless of whether the defendants intended or even knew that the emails were routed through the United States.

In December 2011, the Securities and Exchange Commission ("SEC") initiated a civil enforcement action against the executives alleging that, as officers, directors, employees or agents of an Issuer, they violated the FCPA by orchestrating bribes of government officials in Macedonia and Montenegro to obtain various competitive advantages, including inducing the officials to block competitors from entering certain markets and to enable Magyar to acquire majority ownership of a formerly state-owned telecommunications provider. At the time the alleged bribes took place, Magyar was publicly traded through American Depository Receipts listed on the New York Stock Exchange and was registered with the SEC, qualifying it as an "Issuer" under the FCPA. The bribes were allegedly paid under the guise of sham contracts, which were not accurately recorded in Magyar's books. The defendants also allegedly made false representations to Magyar's auditors.

The Company and its majority owner, Deutsche Telekom AG of Germany, settled with the Department of Justice ("DOJ") and the SEC, agreeing to pay $95 million to resolve both civil and criminal charges stemming from this same conduct, and the case proceeded against the executives alone.

The three foreign national executives moved to dismiss the SEC action on several grounds, including two often-asserted FCPA defenses - that the statute of limitations had expired and that the court lacked jurisdiction over the defendants. The court rejected both arguments and denied the motion to dismiss in its entirety.

Open-Ended Statute of Limitations

The defendants argued that the SEC's claims were barred by the FCPA's five-year statute of limitations. Although it was undisputed that more than five years had passed since the underlying alleged misconduct, the court ruled that the FCPA statute of limitations does not run while a defendant is physically outside of the United States. If this aspect of the decision stands, it would mean that the SEC could bring an FCPA enforcement action against a foreign national for an indefinite period of time so long as the foreign national does not step foot into the United States.

FCPA Jurisdiction based on email routed through the United States

The defendants argued that the SEC did not allege sufficient facts to satisfy the FCPA jurisdictional requirement that the defendants made use of United States mail or other instrumentality of interstate commerce corruptly in furtherance of the alleged bribery scheme.

The SEC based its substantive jurisdictional argument on a series of emails to and from the executives, all of which were sent and received abroad, but were routed through or stored on servers in the United States. The court found that the defendants' emails satisfied the FCPA jurisdictional requirement, regardless of whether the defendants actually knew of the location of the servers or actually intended their email to go through the United States. If this aspect of the decision stands, a single email sent and received abroad with the aid of servers in the United States could lead to jurisdiction under the FCPA over foreign national executives working abroad.

Background on FCPA

First enacted in 1977, the FCPA was designed to prevent and criminalize bribery of foreign officials, including employees at state-owned enterprises. Specifically, the FCPA prohibits U.S. individuals, private and public companies, other companies operating in the U.S., including non-U.S. companies that are traded on U.S. stock exchanges, certain foreign subsidiaries and joint ventures, as well as agents and intermediaries, from making payments to foreign officials in order to secure any favorable business treatment. The FCPA also requires U.S. public companies to keep accurate books and records.

For more background on the FCPA, click here.

Conclusion

The majority of the DOJ's and the SEC's criminal prosecutions and civil enforcement actions against individuals under the FCPA are brought against foreign national executives. The decision in this case highlights the very broad reach sought by US authorities for the FCPA, and the risk that foreign national executives may find themselves facing FCPA enforcement actions in the United States based on minimal contacts with the United States, including their use of electronic communications services based in or routed through the United States. Companies and their executives can reduce these risks by developing and implementing effective anti-corruption compliance programs.

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