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De Minimis Contacts, Maximum Penalties? Government Asserts Aggressive Interpretation of FCPA Jurisdiction

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The U.S. Department of Justice (DOJ) has long been proclaiming that anti-corruption efforts are a "priority" of the agency, and Acting Assistant Attorney General Mythili Raman's recent declaration that Foreign Corrupt Practices Act (FCPA) enforcement is a "core priority of the Department of Justice" [1] is no exception. Actions speak louder than words, however, and for years, enforcement of the FCPA and similar statutes has languished in the face of other, seemingly more urgent priorities. This quarter, however, it has become clear that the DOJ and other government agencies have truly been stepping up their efforts to combat corruption—and employing even more novel and potentially powerful tools in the anti-corruption toolbox in doing so.

In recent months, we have seen an increased number of enforcement actions generally,[2] as well as increased scrutiny of certain sectors, such as financial services, which had previously been relatively free from FCPA actions.[3] Perhaps most importantly, however, we have seen increased enforcement efforts against entities and individuals *previously thought to be beyond the reach of the FCPA*, with the government employing novel and extremely broad interpretations of its jurisdiction under the act.

At the end of 2012, the DOJ and the U.S. Securities and Exchange Commission (SEC) together published a 120-page "Resource Guide to the U.S. Foreign Corrupt Practices Act," described as "the most comprehensive effort ever undertaken by either the DOJ or the SEC to explain our approach to enforcing a particular statute."[4] Although much of the guide merely confirmed longstanding practice in the area, it did contain a few surprises—particularly with respect to the breadth of the agencies' interpretation of their own jurisdiction.[5]

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1 *See* Mythili Raman, Keynote Address to the Global Anti-Corruption Congress (June 17, 2013), available at http://www.justice.gov/criminal/pr/speeches/2013/crm-speech-130617.html

2 *See* http://www.law360.com/articles/453320/a-midyear-review-of-fcpa-enforcement.

3 *See, e.g.*, Amy Riella, "Have Financial Institutions Beaten the FCPA Rap? Don't Bank On It," Apr. 11, 2013, *available at* www.mondaq.com/unitedstates/x/232408/White+Collar+Crime+Fraud/Have+Financial+Institutions+Beaten+the+FCPA+Rap

4 Raman, Keynote Address, *supra.*

5 On its face, the anti-bribery provisions of the FCPA apply to three

For example, the guide takes the aggressive position that foreign "issuers," and their officers, directors, employees, agents, and stockholders, may subject themselves to FCPA jurisdiction based on nothing more than *de minimus* contacts with the United States, such as "*placing a telephone call or sending an email, text message, or fax from, to, or through the United States*" or "sending a wire transfer from or to a U.S. bank or otherwise *using the U.S. banking system*."[6] And the government has not shied away from applying this extraordinarily broad jurisdictional interpretation in real cases: Indeed, in recent high-profile cases such as *United States v. JGC Group*[7] and the related *Technip*[8] and *Snamprogetti*[9] prosecutions, the government asserted that a foreign company was subject to U.S. jurisdiction merely because its overseas financial transactions had involved U.S. dollars, and thus likely cleared through banking accounts in the United States.[10] Although these cases settled out of court, leaving the jurisdictional arguments ultimately untested, they settled for substantial sums—highlighting the extremely high cost of an FCPA investigation and the threat of substantial liability.[11]

In the Magyar Telekom case, moreover, the government urged that a foreign defendant was subject to FCPA jurisdiction based solely on the transmission and storage of two emails on U.S. servers. The U.S. District Court (SDNY) *agreed* with the government's position that such emails were sufficient to establish the FCPA requirement of "corruptly" making "use of the mails or any means or instrumentality of interstate commerce"—even though the defendants

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types of individuals/entities: (1) "issuers" on U.S. stock exchanges; (2) "domestic concerns," or U.S. persons and companies incorporated in the United States; and (3) any person or entity, regardless of nationality, that violates the Act while in the "territory" of the United States.

6 U.S. Dep't of Justice & U.S. Sec. Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act, 11 (Nov. 14, 2012) (emphasis added).

7 *See* Criminal Information, *United States v. JGC Corp*., No. 11-CR-260 (S.D. Tex. April, 6, 2011) (settled out of court, with foreign entity JGC agreeing to pay $218.8 million).

8 *United States v. Technip S.A*., No. 10-CR-439 (S.D.Tex., filed June 28, 2010) (settled out of court, with foreign entity Technip agreeing to pay $240 million).

9 *United States v. Snamprogetti Netherlands B.V*., No. 10-CR-460 (S.D.Tex., filed July 7, 2010) (settled out of court, with foreign entity Snamprogetti agreeing to pay $240 million).

10 *See* Shearman & Sterling, "The New FCPA Guide: the DOJ and the SEC Do Not Break New Ground But Offer Useful Guidance & Some Ominous Warnings," Nov. 15, 2012, *available at* http://www.shearman.com/files/Publication/52c42676-c821-41c6-b992-8313454cb2b0/Presentation/PublicationAttachment/4c17d9ea-0f1f-4af9-b95f-d4e1e317da4e/The%20New%20FCPA-Guide-The-DOJ-and-SEC-Do-Not-Break-New-Ground-But-Offer-Useful-Guidance-and-W.pdf.

11 *But see United States v. Patel*, No. 1:09-CR-00335 (D.D.C. Feb. 24, 2012) (rejecting the Government's attempt to assert jurisdiction over a UK citizen and director of a non-issuer UK company, based on allegations that he mailed a corrupt purchase agreement from the UK to Washington, DC, reasoning that territorial jurisdiction attaches against a foreign person only when the corrupt act takes place within the territorial United States).

had not been aware of where their emails would be routed or stored.[12] Such actions (and affirming decisions) suggest that foreign entities or individuals with only tenuous connections to the United States may nevertheless be subject to FCPA enforcement.

In addition, in the agencies' view, a foreign company or individual may subject itself to FCPA liability if it aids, abets, conspires with, or acts as an agent of a liable issuer or domestic concern—"*regardless of whether the foreign national or company itself takes any action in the United States*."[13] For example, in conspiracy cases, the guide asserts that "the United States generally has jurisdiction over all the conspirators where at least one conspirator is an issuer, domestic concern, or commits a reasonably foreseeable overt act within the United States."[14] Although the agencies attempt to suggest that such an interpretation is merely the "traditional application of conspiracy law" or Pinkerton liability, employing such doctrines to establish jurisdiction—not merely liability—seems to be a relatively novel and expansive approach to establishing jurisdiction over non-U.S. entities.

Finally, and perhaps most importantly for U.S.-based companies, the guide suggests that a parent company may be held liable for the acts of its subsidiary "under traditional agency principles," even if the parent was not directly involved in and had no direct control over the corrupt acts at issue. Such a reliance on indefinite notions of agency, rather than on the direct knowledge requirements of the statute, suggests an intent to exercise expanded prosecutorial discretion to impose criminal liability on parent companies for the acts of their subsidiaries.[15] Because the FCPA itself subjects parent companies to only civil sanctions for the criminal acts of their subsidiaries, absent knowledge or direct involvement in the corrupt scheme, "the agency theory of liability potentially offers a back-door avenue—couched in elusive notions of 'control'—for imposing criminal liability on parent companies for conduct that traditionally has been enforced through civil remedies."[16]

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12 *See* Order, *SEC v. Elek Straub*, No. 11-CV-9645 (S.D.N.Y., Feb. 8, 2013) (Straub has requested leave to file an interlocutory appeal; the motion is currently pending).

13 U.S. Dep't of Justice & U.S. Sec. Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act, 12 (Nov. 14, 2012) (emphasis added).

14 *Id.*

15 *See* http://www.sidley.com/The-Top-Ten-Take-Aways-from-the-DOJ-and-SEC-Resource-Guide-to-the-US-Foreign-Corrupt-Practices-Act-11-30-2012 ("In essence, the *Guide* advances an interpretation of the agency relationship that could allow the government to impute a subsidiary's conduct to its parent based on nothing more than the typical parent-subsidiary relationship.").

16 *See* Covington and Burling, AN ANALYSIS OF THE FCPA RESOURCE GUIDE, Nov. 2012, *available at* http://www.cov.com/files/Publication/891bb2c8-569f-4d0d-a0e3-0749c0b26ac3/Presentation/PublicationAttachment/44eef69f-f84e-4d0c-9abe-327c5738b579/Advisory%20on%20FCPA%20Resource%20Guide.pdf; but *see* Opinion and Order, *SEC v. Sharef et al*., 11-CV-9073 (Feb. 19, 2013) ((dismissing FCPA claim against a non-U.S. executive of a U.S. issuer for lack of personal jurisdiction because he neither authorized the bribes nor directed, ordered, or knew about the alleged cover-up, and did not himself have sufficient minimum

As some commentators have noted, such an interpretation could also be extended to franchisors, exposing them to significant liability for the acts of their overseas franchisees, as "[i]t is always in the financial interest of a US franchisor for its franchisees to be successful businesses," and thus "[e]ven if it is not the US franchisor's own employees which engage in the FCPA violations, the US franchisor will still face the risk of an enforcement action if the franchisee's employees engage in such conduct." [17]

Unfortunately, the agencies' aggressive interpretation of these aspects of the FCPA has not been adequately tested because, given the high stakes of an FCPA investigation, such actions typically settle well before judicial intervention. Although at least one court recently attempted to place some limits on the government's assertion of jurisdiction over entities or individuals with no physical presence in the United States,[18] given the limited and contradictory judicial guidance on the issue,[19] the government's expansive jurisdictional interpretations—correct or not—will likely still have far-reaching (pardon the pun) practical effects. Numerous companies and individuals that had previously considered themselves immune from the FCPA may be exposed to liability—and, perhaps even more importantly, to the extreme costs of fending off an investigation. Moreover, the government has gone so far as to assert that a foreign company's initial refusal to cooperate with the DOJ "based on jurisdictional arguments" justifies seeking an *increased penalty* against the company.[20]

Such aggressive government positions—whether or not ultimately judicially accepted—make it extremely difficult to insulate oneself from FCPA actions. They also make it more important than ever to ensure that adequate internal compliance programs are in place, and to conduct appropriate due diligence regarding any potential partners, franchisees, or other "agents" before entering into such relationships.

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contacts with the United States).

17 Thomas R. Fox, "Oh Thank Heaven – The Saga of 7-Eleven and Franchising Under the FCPA" (June 21, 2013), available at http://tfoxlaw.wordpress.com/2013/06/21/oh-thank-heaven-the-saga-of-7-eleven-and-franchising-under-the-fcpa/; *see also* Shearman & Sterling, "The New FCPA Guide: the DOJ and the SEC Do Not Break New Ground But Offer Useful Guidance & Some Ominous Warnings," *supra* (noting that the Guide's application of agency principles in this manner would, "in our view, be a significant departure from existing practice and indeed from generally applicable corporate principles").

18 *See U.S. v. Patel,* No. 1:09-cr-00335, Trial Tr. 5:11–14, 7:17–8:2 (D.D.C. June 6, 2011) (the so-called "SHOT Show" case) (holding that, for territorial jurisdiction to attach, the corrupt act must—as the plain language of the statute suggests—take place "while in the territory of the United States").

19 *See, e.g.,* Sean Hecker, Margot Laporte, http://www.americanbar.org/publications/international_law_news/2013/winter/should_fcpa_territorial_jurisdiction_reach_extraterritorial_proportions.html.

20 *See* J. Scott Maberry et al., FCPA Overreach? Courts Address Personal Jurisdiction in Cases Against Foreign Defendants, Apr. 22, 2013, *available at* www.metrocorpcounsel.com/articles/23561/fcpa-overreach-courts-address-personal-jurisdiction-cases-against-foreign-defendants (citing United States v. JGC Corp.)

If you have any questions about FCPA jurisdiction, or any other compliance matters, feel free to contact Andre' Caldwell, Melanie Rughani or any other member of Crowe & Dunlevy's White Collar, Compliance and Investigations practice group.

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