

## FCPA: DOJ AND SEC GUIDANCE (PART I) JURISDICTION OVER FOREIGN INDIVIDUALS AND COMPANIES

### Introduction

Over a year after announcing that “guidance” on the Foreign Corrupt Practices Act’s (“FCPA”) criminal and civil enforcement provisions would be forthcoming, on November 14, 2012, the U.S. Department of Justice (“DOJ”) and U.S. Securities and Exchange Commission (“SEC”) finally released their much-anticipated guide, entitled “*A Resource Guide to the U.S. Foreign Corrupt Practices Act*” (the “Guide”). The Guide, which by its terms is “designed to provide practical advice about, and useful insights into, [DOJ and SEC] enforcement considerations,” clarifies the government’s current position on various FCPA-related issues, thus increasing one’s ability to determine whether FCPA enforcement action is likely in a given situation.<sup>1</sup>

Curtis will be issuing a series of client alerts addressing key issues discussed in the Guide. In this client alert, we address the FCPA’s jurisdictional reach, with a particular focus on whether that reach extends to foreign individuals and companies acting outside of the United States.

### Who is Subject to the FCPA’s Anti-Bribery Provisions?

The FCPA’s anti-bribery provisions apply to U.S. companies and individuals, irrespective of whether they act within, or wholly outside of, the United States (i.e., “domestic concerns”).<sup>2</sup> The FCPA’s anti-

bribery provisions also apply to any company which has securities listed on a U.S. exchange, or any company that has shares quoted in the over-the-counter market and is required to file periodic reports with the SEC (i.e., “issuers”).<sup>3</sup> Foreign companies also may be issuers. For example, foreign companies that have American Depository Receipts (“ADRs”) listed on a U.S. exchange are issuers. In addition, the officers, directors, employees, agents, and stockholders of domestic concerns and issuers are also subject to the FCPA.

The FCPA’s anti-bribery provisions also apply to a foreign person or entity that engages in any act in furtherance of a corrupt payment *while in the United States*.<sup>4</sup> Lastly, but importantly, as reflected in the Guide, FCPA liability exists if a foreign national or company conspires with, aids and abets, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company engages in any action in the United States.<sup>5</sup>

joint-stock company, business trust, unincorporated organization, or sole proprietorship” that has its principal place of business in the United States, or that is organized under the laws of the United States or its states, territories, possessions, or commonwealths); see also 15 U.S.C. §§ 78dd-1(g), 78dd-2(i) (providing an alternative basis for jurisdiction over U.S. nationals and U.S. companies acting in furtherance of a corrupt payment to a foreign official wholly *outside of the United States*, irrespective of whether the act involved the U.S. mail or any means or instrumentality of interstate commerce).

<sup>3</sup> See 15 U.S.C. § 78dd-1(a).

<sup>4</sup> 15 U.S.C. § 78dd-3(a) (the “territorial jurisdiction provision”). For such individuals and entities, there is no requirement that such act involve the use of the U.S. mails or a means or instrumentality of interstate commerce. Id.

<sup>5</sup> See GUIDE, supra note 1, at 12.

<sup>1</sup> CRIM. DIV., U.S. DOJ & ENFORCEMENT DIV., U.S. SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 90 (Nov. 14, 2012) [hereinafter, “GUIDE”].

<sup>2</sup> See 15 U.S.C. §§ 78dd-2(a), 78dd-2(h) (the FCPA applies to “any individual who is a citizen, national, or resident of the United States,” or “any corporation, partnership, association,

### Conspiring With, or Aiding and Abetting, An Issuer or Domestic Concern

The FCPA's expansive jurisdictional reach is demonstrated by the government's interpretation of FCPA conspiracy jurisdiction and aiding and abetting jurisdiction. According to the Guide, a "foreign company or individual may be held liable for . . . conspiring to violate the FCPA, even if the foreign company or individual did not take any act in furtherance of the corrupt payment while in the territory of the United States."<sup>6</sup> The basis is that, in accordance with traditional conspiracy law, 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."<sup>7</sup> Thus, for example, a foreign individual or company that conspires to violate the FCPA with someone who commits a reasonably foreseeable overt act within the United States can be prosecuted for conspiracy.

Applying these principles, the DOJ has charged foreign companies with conspiracy in connection with a domestic concern's FCPA violations, despite the fact that the foreign companies engaged in no action within the United States.<sup>8</sup> Moreover, in addition to FCPA conspiracy charges, the Guide points out that a foreign individual or company that

has not taken any action in the United States may also be subject to substantive FCPA charges under Pinkerton v. United States, 328 U.S. 640, 647-48 (1946), "which imposes liability on a defendant for reasonably foreseeable crimes committed by a co-conspirator in furtherance of a conspiracy that the defendant joined."<sup>9</sup>

The government applies an analogous jurisdictional analysis to aiding and abetting violations. Thus, a foreign company or individual may be held liable for aiding and abetting an FCPA violation even if the foreign company or individual did not engage in any act in the United States.<sup>10</sup>

### Acting as an Agent of an Issuer or Domestic Concern

Equally expansive is the government's use of the agency provisions of the FCPA to obtain jurisdiction over foreign individuals and companies. Under the FCPA, in addition to liability as a conspirator or as an aider and abettor, a foreign agent of an issuer or domestic concern is liable as a principal if the agent uses any means or instrumentality of interstate commerce in furtherance of a bribe to a foreign official.<sup>11</sup> Thus, for example, the simple act of a foreign agent placing a telephone call or sending an e-mail, text message, or fax from or to the United States, as well as sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking

<sup>6</sup> Id. at 34; see also 18 U.S.C. § 371.

<sup>7</sup> See GUIDE, supra note 1, at 34 (citing United States v. MacAllister, 160 F.3d 1304, 1307 (11th Cir. 1998), and United States v. Winter, 509 F.2d 975, 982 (5th Cir. 1975)).

<sup>8</sup> See GUIDE, supra note 1, at 34; see, e.g., Criminal Information, United States v. Marubeni Corp., No. 12-cr-22 (S.D. Tex. Jan. 17, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/marubeni/2012-01-17-marubeni-information.pdf>; Criminal Information, United States v. JGC Corp., No. 11-cr-260 (S.D. Tex. Apr. 6, 2011), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-info.pdf>.

<sup>9</sup> See GUIDE, supra note 1, at 34.

<sup>10</sup> Id.; see also Criminal Information, United States v. Marubeni Corp., supra note 8; Criminal Information, United States v. JGC Corp., supra note 8. Specifically, federal law provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission," or "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States" is punishable as a principal. 18 U.S.C. § 2.

<sup>11</sup> See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

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system, could expose the foreign agent to direct liability under the FCPA.<sup>12</sup>

**Hypotheticals**

The Guide makes the straightforward observation that where executives from a U.S. issuer ("Company A") meet in the United States with executives from a foreign company ("Company B"), as well as with a foreign third-party consultant ("Intermediary"), and agree to have the Intermediary bribe foreign officials, all three parties fall within FCPA jurisdiction. Company A is both a domestic concern and an issuer and, therefore, subject to FCPA jurisdiction. Additionally, both Company B and the Intermediary are subject to the FCPA's territorial jurisdiction provision based on their conduct while in the United States. The Intermediary is also subject to FCPA jurisdiction as both an agent of a domestic concern and an agent of an issuer.

Suppose, however, that in the above hypothetical, no meetings occurred in the United States, and the conspiratorial agreement is instead reached via email. After the bribery scheme is finalized, Company A wires funds from the United States through the Intermediary to the foreign officials.

Under this revised hypothetical, the Intermediary is still subject to jurisdiction, both as an agent of a domestic concern and as an agent of an issuer, but Intermediary and Company B are no longer subject to the FCPA's territorial jurisdiction provision. They are, however, still subject to jurisdiction under a traditional application of conspiracy law, and may face conspiracy and aiding and abetting charges. Additionally, the Intermediary and Company B also may be subject to FCPA charges under Pinkerton liability – that is, "being liable for the reasonably

foreseeable substantive FCPA crimes committed by a co-conspirator in furtherance of the conspiracy."<sup>13</sup>

Suppose, further still, that all of the meetings in the above hypothetical occur in-person, but outside the United States. Here too, the government's position is that Intermediary and Company B are still subject to jurisdiction under traditional conspiracy law, and also as agents of an issuer.

Lastly, suppose Company A enters into a subsequent joint venture with another foreign company ("Company C") and that Company C is aware of the bribery scheme discussed above. Subsequently, in furtherance of the joint venture, Company A wires funds through the Intermediary to foreign officials in continuance of the scheme. Company C is subject to jurisdiction under traditional conspiracy law because of the acts of its joint venture partner.

As the hypotheticals illustrate, there are a number of ways in which the government can establish jurisdiction over foreign individuals and companies, even when such individuals and companies engage in no action within the United States.

**Conclusion**

Foreign individuals and companies acting within the United States are subject to jurisdiction under the FCPA. Similarly, foreign companies that have ADRs listed on a U.S. exchange or that have shares traded over-the-counter and that are required to file periodic reports with the SEC are also subject to the FCPA. The FCPA's expansive jurisdictional reach, however, extends to foreign individuals and companies well beyond U.S. borders through the following three theories:

<sup>12</sup> See GUIDE, supra note 1, at 11.

<sup>13</sup> See GUIDE, supra note 1, at 12.

- **Conspiracy.** The government may charge foreign individuals or companies acting wholly outside of the United States with conspiracy to commit an FCPA violation even if an agreement to act in a manner prohibited by the FCPA is reached on foreign soil, as long as it involves an issuer or domestic concern, and a reasonably foreseeable overt act in furtherance of the conspiracy occurs within the United States.
- **Aiding and Abetting.** Along with conspiracy charges, the government also may charge such foreign individuals or companies with aiding and abetting FCPA violations.
- **Agency.** Foreign individuals or companies acting on behalf of an issuer or domestic concern outside the United States should understand that a mere telephone call, e-mail, text message, or fax, to or from the United States, could be sufficient for the government to establish jurisdiction for an FCPA violation.

The Guide is a useful resource, as it presents the government’s view of the circumstances under which the government may reach purported FCPA wrongdoing by foreign individuals and companies with minimal or non-existent direct U.S. contact. Given the various jurisdictional tools that the government has at its disposal, foreign individuals and companies should recognize that their interaction with U.S. individuals or companies can subject them to FCPA violations. To avoid FCPA exposure, foreign individuals and companies should carefully consider the potential impact of their U.S. interactions, whether through travel, correspondence, telecommunication, banking, or engaging with U.S. joint venture partners.

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