The FCPA REPORT

www.fcpareport.com Volume 3, Number 11 May 28, 2014

Individual FCPA Defendants

Should an Individual Defendant Go to Trial on FCPA Charges? Five Important Considerations

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Creative. Aggressive. Those are the two words a senior official at the SEC recently used to describe the government's increasing pursuit of FCPA cases against individuals. During a keynote address at the International Conference on the FCPA last November, Andrew Ceresney, Director of the SEC's Enforcement Division, emphasized that "companies can only act through their people" and a core principle of a strong enforcement strategy "is to pursue culpable individuals wherever possible."

Indeed, as The FCPA Report has indicated, an increasing number of individuals are being pursued under the FCPA. Historically, individuals – facing the potential loss of their liberty – have been more willing than companies to fight FCPA charges at trial. And this trend is continuing. On May 9, 2014, a federal grand jury in New Jersey indicted Joseph Sigelman, CEO of oil and gas company PetroTiger Ltd., with FCPA and money laundering charges for allegedly bribing Columbian officials. According to the *Wall Street Journal*, Sigelman, through his attorney, insists that he will go to trial unless the charges are dropped or dismissed. See also "A Guilty Plea and Two Flight Risks in PetroTiger Columbian Bribery Case," The FCPA Report, Vol. 3, No. 2 (Jan. 22, 2014).

As the number of FCPA cases against individuals increases, it is likely that so too will the number of individuals who, like Sigelman, must consider whether the government is able to meet its burden of proof. In light of these trends, this article discusses five factors that an individual who is facing an FCPA action should consider when determining whether to go to trial or not.

1) The Government Faces Unique Challenges to Meet Its Burden of Proof

FCPA cases against individuals pose unique challenges for the government with respect to its ability to gather evidence and ultimately meet its burden of proof at trial. These difficulties have translated into some significant victories for individuals.

Challenges to Pursuing a Case

During his speech, Ceresney acknowledged the significant challenges the government encounters in pursuing an FCPA case against an individual. For example, the government is sometimes unable to reach defendants who are in foreign jurisdictions. The remedies available to the United States against such individuals are often limited, especially when the United States cannot enforce U.S. orders in those jurisdictions. Compounding these problems, Ceresney noted that the government often has difficulties obtaining foreign evidence and gaining access to overseas witnesses.

Even the Federal Rules of Criminal Procedure do not provide a clear path toward obtaining and admitting foreign evidence. For example, under Rule 15, the government can depose a witness who is located in a foreign country. But to use that testimony at trial, the government must show that

it is material and that the witness is unavailable. Further, the testimony may be subject to challenge on due process and evidentiary grounds. These complications can often lead to lengthier investigations, and may present a statute of limitations issue.

For example, in March, the SEC announced that it would drop allegations that executives at Deutsche Telekom bribed officials in Montenegro in return for regulatory changes that would adversely affect competitors. Media reports suggest that among the main reasons the SEC decided to drop the case was its complexity – the case involved hundreds of witnesses in six countries speaking at least 12 languages, as well as 26 million documents to review.

Difficulty Meeting Burden of Proof

In turn, several of the FCPA cases against individuals that have gone to trial illustrate the difficulties the government has encountered in meeting its burden and have resulted in key victories for the individual defendants.

In 2012, the DOJ asked U.S. District Court Judge Richard Leon to dismiss indictments in the most significant case against individuals in FCPA history, the "Africa Sting." In 2009, 22 individuals were arrested as part of an undercover sting operation. The individuals allegedly agreed to pay bribes to undercover agents who said the money would be given to the defense minister of Gabon in return for public contracts. Three of the individuals pleaded guilty. However, other defendants were not convicted, following several acquittals, two mistrials, and hung juries. As the *New York Times* reported, questions were raised throughout the trials with respect to the government's trial tactics, including reliance on a key informant with significant credibility issues.

In dismissing the charges, Judge Leon stated: "*I for one hope this very long, and I'm sure very expensive, ordeal will be a true learning experience for both the Department and the FBI as they regroup to investigate and prosecute FCPA cases against individuals in the future.*"

During that same year, a Houston federal court acquitted another individual FCPA defendant, John O'Shea, who was a former manager with Texas-based ABB Inc. O'Shea was accused of violating the FCPA by allegedly authorizing payments to officials of a Mexican state-owned electric utility in return for contracts. The judge granted an acquittal at the close of the government's case, finding O'Shea not guilty of all substantive FCPA charges, stating that the testimony of the government's chief witness was rife with "abstract and vague" answers and did not connect O'Shea to the alleged crimes.

In another setback for the government, following a trial in 2011, a U.S. District Court Judge in Los Angeles threw out the conviction of Lindsey Manufacturing, a California-based manufacturer of electricity towers, and two of its executives, who were accused of paying bribes to Mexican officials. The judge ordered that the indictment be dismissed with prejudice, noting "flagrant" misconduct by the prosecutors, such as withholding evidence and violating court orders. According to the judge, this FCPA case, "add[ed] up to an unusual and extreme picture of a prosecution gone awry."

Recognizing the government's challenges in these cases is not meant to suggest that the government has not successfully tried FCPA cases against individuals. More importantly, the government has acknowledged its challenges and is refining its tactics and strategy. As Ceresney revealed, these refinements include reaching agreements with international financial

regulators to obtain bank records, other documents, and testimony; using border-watches and other tactics to obtain information from foreign nationals; issuing subpoenas to the U.S.-based affiliates of foreign companies; and seeking videotaped depositions that can be used at trial in the event the government cannot secure live testimony.

However, these tactics consume government resources and take time, which can reduce the viability of an FCPA prosecution. Indeed, the fact that the government has needed to resort to these enhanced investigatory techniques underlines the challenges presented by FCPA charges, dynamics that should be taken into account when considering whether to take such charges to trial.

Takeaway: Pursuing an FCPA case to trial is by no means a sure bet for the government. Individuals facing FCPA actions should particularly consider the challenges the government faces, and its recent defeats, when determining whether to hold the government to its burden.

2) FCPA Case Law Remains Underdeveloped

FCPA case law is not well developed. Individuals who are considering whether to go to trial do not have extensive judicial guidance they can evaluate or rely upon. Answers to threshold questions, such as the extent to which the U.S. government has personal jurisdiction over foreign defendants, remain contested and unclear.

Personal Jurisdiction over Foreign Defendants

The scope of personal jurisdiction over foreign individuals under the FCPA is still an unanswered question, with two judges in the Southern District of New York issuing ostensibly opposite rulings. See "One U.S. District Court in New York Affirms Broad Jurisdictional and Temporal Reach of the FCPA While Another Dismisses FCPA Case for Lack of Contacts," The FCPA Report, Vol. 2, No. 4 (Feb. 20, 2013).

In *SEC v. Straub*, Judge Richard Sullivan concluded that personal jurisdiction was appropriate under the FCPA over executives of Hungarian company Magyar Telekom, despite the fact that they did not engage in any activity in the United States. However, the executives allegedly authorized bribes, transmitted inculpatory e-mails through U.S. servers, and approved falsified SEC filings.

In *SEC v. Sharef*, Judge Shira Scheindlin dismissed a case against the former CEO of Siemens Argentina on the grounds that the SEC did not establish personal jurisdiction. While it was alleged that the Argentinian CEO encouraged another executive to bribe Argentinian officials, Judge Scheindlin held that the facts were not sufficient to show that the defendant participated in or was aware of the subsequent scheme, or that he approved or executed any of the related, falsified filings to the SEC.

Together, *Straub and Sharef* may suggest that with respect to questions of personal jurisdiction over foreign defendants, such individuals should consider the extent to which the government is able to demonstrate that the individual was directly involved in conduct aimed at the United States.

Takeaway: Individuals determining whether or not to contest FCPA charges at trial should consider that there is a lack of judicial guidance regarding personal jurisdiction.

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3) U.S. Sentencing Guideline Levels

Individuals facing FCPA charges should consider potential offense levels and enhancements with respect to the U.S. Sentencing Guidelines. FCPA violations are categorized under §2C1.1 (Offenses Involving Public Officials), which provides a base prison term of ten months per violation. However, that does not take into account any specific offense characteristics or certain enhancements, which if included, may add years to a potential prison sentence. Moreover, individuals should also consider potential mitigating factors, as well the sentencing levels for other offenses that are often coupled with FCPA counts (e.g., money laundering).

Sentencing Enhancements

Individuals facing FCPA charges should particularly consider any potential enhancements under §3B1.1, which increases the sentencing guideline based on the defendant's role. If the defendant organized or led criminal activity that involved five or more participants, or was otherwise extensive, a four-level increase is applicable. Where a defendant was a supervisor or manager (but not an organizer or leader), the offense is increased by three levels.

The case against former telecommunications executive Joel Esquenazi is illustrative. The Eleventh Circuit recently affirmed his 15-year prison sentence – the longest in FCPA history. The sentence resulted in part from his role as the president of a company through which he orchestrated and led a bribery scheme involving Haiti's state-owned telecommunications company, as well as the sophistication of a related money laundering charge. Notably, FCPA charges are often coupled with related charges, such as money laundering or mail/wire fraud, each carrying its own sentencing levels and potential enhancements.

Mitigating Considerations

As the DOJ has recognized in its FCPA Resource Guide, the U.S. Sentencing Guidelines also take into consideration an individual's cooperation and voluntary disclosure. For example, under §5K1.1, a defendant's cooperation may justify the government filing a motion for a reduced sentence. Moreover, under §5K2.16, a defendant's voluntary disclosure of an offense prior to its discovery may warrant a downward departure. See "For Individual FCPA Defendants, Providing Assistance Can Lead to Downward Departures in Sentencing," The FCPA Report, Vol. 2, No. 8 (Apr. 17, 2013).

Takeaway: As individuals facing FCPA violations consider whether to go to trial or not, they should be mindful of the potential calculations with respect to offense levels under the U.S. Sentencing Guidelines. In particular, they should consider potential enhancements, mitigating factors associated with cooperation, and additional sentencing terms resulting from other potential charges.

4) Multi-Jurisdiction Prosecutions

Individuals who are alleged to have been involved in a bribery scheme that has international implications should consider that they can be prosecuted in multiple countries. Notably, there is no cross-border protection against double jeopardy. Moreover, individuals should evaluate their ability (or lack thereof) – considering factors such as cost, resources, and time – to address cases that may arise in multiple countries, and thereby determine whether trial is a viable option.

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No Double-Jeopardy Protection

The Fifth Circuit's 2010 holding in *United States v. Jeong* is particularly illustrative of the legal challenges individuals encounter when faced with multi-jurisdictional prosecutions. In *Jeong*, the defendant, a South Korean national, was convicted and sentenced in a South Korean court for bribing a U.S. public official. Subsequently, the defendant was indicted in the United States for the same underlying conduct. The Fifth Circuit held that the United States and South Korea's membership in the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions did not prohibit the defendant from being prosecuted in multiple nation-states for the same underlying acts. In essence, the defendant received no cross-border protection against double jeopardy.

Financial Implications

Moreover, the multi-jurisdictional cases against Siemens' executives help demonstrate, in part, some financial/cost implications. Along with substantial civil monetary penalties in the United States against some of these individuals, they have also faced the demands of responding to criminal charges in Argentina. In 2011, the United States indicted eight former executives and agents of Siemens under the FCPA for their alleged role in a scheme to bribe Argentinian officials. Media reports suggest that at least three of these individuals collectively face nearly $2 million in fines and penalties in the United States. Despite these debts, those three individuals, along with others who were charged in the United States, were also charged in 2013 by the Argentinian government. See Former Siemens Executives Receive Record-Breaking Individual FCPA Fines in Default Judgment," The FCPA Report, Vol. 3, No. 4 (Feb. 19, 2014).

Takeaway: Individuals facing FCPA actions in the United States should recognize that they may be subject to additional enforcement actions in other jurisdictions based on the same alleged conduct. They should carefully evaluate potential legal and financial implications when planning their response strategy, and consult with foreign counsel.

5) Related Cases Against the Company or Other Individuals

In his speech to the International Conference on the FCPA, SEC Enforcement Division Director Andrew Ceresney stated that "in every [FCPA] case against a company, we ask ourselves whether an action against an individual is appropriate." In fact, an FCPA case against an individual often follows an enforcement action against a company. Further, the government may pursue actions against not just one individual, but multiple persons who were involved in the alleged violation.

For example, following Siemens' $800 million FCPA settlement, which included a guilty plea, former Siemens executives subsequently faced criminal and civil charges with respect to the same underlying conduct. Moreover, prior to the recent indictment of PetroTiger CEO Joseph Sigelman for FCPA and money laundering violations, three other executives had already pleaded guilty. The PetroTiger case originated from a voluntary disclosure by the company to the DOJ.

These dynamics raise a few considerations that individuals facing FCPA actions should evaluate. First, where the company has pleaded guilty and/or has voluntarily cooperated with the government, an individual who is

subsequently charged should consider the extent to which, if at all, the underlying conduct is even admissible against him (whether at trial or any other point). Second, as co-defendants/conspirators opt to cooperate, reach agreements, or enter guilty pleas, an individual should evaluate what, if any, implications (i.e., evidentiary, tactical, etc.) these may have on his case, and whether it makes sense to pursue similar strategies.

Takeaway: Individuals should be mindful of related cases involving the company or other individuals as they consider their options when faced with an FCPA prosecution.

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