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White-Collar Crime

Expert Analysis

How the FCPA Applies To Private Companies

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In recent years, investigations and prosecutions under the Foreign Corrupt Practices Act (FCPA) have been one of the most active areas of white-collar criminal enforcement, as we discussed in a recent column.[1] The FCPA is applicable to a wide range of individuals and public and private entities, but the law has mostly been applied to public issuers of securities in the United States rather than private companies.

In this article, after discussing the reach of the FCPA generally, we will focus on civil and criminal enforcement authority applicable to private U.S. companies, which are referred to as "domestic concerns" in the FCPA. We will discuss recent enforcement activity involving private companies and their employees—notably, agreements between the Department of Justice (DOJ) and two private companies in the fall of 2016 in which prosecution was declined but disgorgement of ill-gotten profits required.[2] We will conclude with some thoughts about why private companies may receive increasing attention in the future from FCPA enforcement authorities.

The FCPA and Private Companies. The FCPA contains anti-bribery and accounting provisions. The anti-bribery provisions, broadly speaking, prohibit giving things of value to foreign government officials in order to obtain or retain business.[3] The accounting provisions, broadly speaking, require publicly traded U.S. companies ("issuers") to maintain reasonably effective internal controls and accurate books and records.[4]

The FCPA covers three categories of individuals and entities. First, it applies to what the law terms "issuers," which are companies that have a class of securities registered under §12 or are required to file periodic reports with the SEC under §15(d) of the Securities Exchange Act of 1934, and officers, directors, employees, agents, and shareholders acting on behalf of such companies. Second, the law applies to "domestic concerns," which are defined as U.S. citizens, nationals or residents and companies (organized under U.S. law or that have their principal place of business in the United States) that are not issuers, including private businesses with a principal place of business in the United States or that are organized in the United States. Third, the law applies to "persons other than an issuer or domestic concern" which refers to foreign nationals or entities that directly, or through an agent, use the mail or any means of interstate commerce to engage in an act in furtherance of a corrupt payment while in the United States.

The FCPA gives enforcement authority to two law enforcement agencies—the DOJ and Securities and Exchange Commission (SEC). The SEC enforces the anti-bribery and accounting provisions of the law as to issuers. The DOJ has criminal enforcement authority of the anti-bribery and accounting provisions generally, and more narrowly has civil enforcement authority of the anti-bribery provisions for "domestic concerns" and "other persons" under the law, but not as to "issuers." In short, the DOJ and SEC have parallel criminal and civil enforcement authority as to issuers, while the DOJ alone has civil and criminal authority as to non-issuers.[5]

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The upshot of the FCPA's substantive and enforcement provisions for private companies is that they are subject to enforcement of the anti-bribery

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provisions only—not the law's accounting requirements—and they are subject to civil as well as criminal enforcement by the DOJ.

DOJ's Use of Its Civil Enforcement Authority Against Domestic Concerns. In "A Resource Guide to the U.S. Foreign Corrupt Practices Act" (the Resource Guide), published by the DOJ and SEC in 2012, the authors acknowledge that the DOJ had used its civil authority only "in limited circumstances in the last thirty years."[6] The Resource Guide cites five DOJ civil enforcement actions. The most recent case cited was a 2001 action against the professional services firm KPMG Siddharta Siddharta & Harson, an Indonesian affiliate of KPMG International, based on the company's alleged payment of bribes to an Indonesian tax official. According to a leading FCPA commentator, between 1991 and 2001 the DOJ resolved just four civil FCPA enforcement actions, and has not brought a civil enforcement action since.[7]

Although the DOJ has not pursued a civil enforcement action since 2001, it recently exercised its civil authority by requiring disgorgement in connection with settlements with two private companies, HMT LLC and NCH Corporation, in September 2016. These two were among the five publicly disclosed FCPA declinations in 2016 pursuant to a DOJ program to encourage voluntary disclosure of FCPA violations, commonly referred to as the "Pilot Program," which was begun in April 2016.[8]

HMT, a Texas-based manufacturer of storage tanks for the energy industry, paid bribes through sales agents and distributors of approximately $500,000 to foreign officials in Venezuela and China in exchange for purchases of HMT products that resulted in net profits to HMT of over $2.7 million. HMT reportedly launched a comprehensive investigation when it discovered the misconduct, voluntarily reported to the DOJ, and cooperated fully with the DOJ's investigation.[9] NCH, a Texas-based supply and maintenance company, paid bribes of approximately $44,000 in the form of gifts, meals, entertainment and travel expenses, including paying expenses for employees of a Chinese government customer for a 10-day sightseeing trip of the United States and Canada. NCH voluntarily disclosed its misconduct to the DOJ.

These two private company declinations differed from the declinations given in 2016 to issuers in two ways: HMT and NCH were required to sign declination letters that included agreed upon statements of facts, and their declinations required disgorgement of illegally gained profits. In issuing three prior declination letters to issuers, the DOJ did not include statements of facts and disgorgement by the issuers was resolved by the SEC.

The DOJ's requirement that HMT and NCH disgorge illegal profits is consistent with the Pilot Program, which states that "to qualify for any mitigation credit under this pilot … the company should be required to disgorge all profits from the FCPA misconduct at issue." Commentators have noted, however, that in prohibiting HMT and NCH from seeking tax deductions in connection with their payment of disgorgement, the DOJ is treating them more harshly than the SEC treats issuers. The SEC ordinarily does not prohibit tax deductions for disgorgement.[10] Except for noting that disgorgement is required to obtain leniency, the Pilot Program includes no further explanation as to how it should be calculated or treated for tax purposes. Similarly, nothing in the Pilot Program indicates why the DOJ required agreed upon statements of fact from private companies but did not require similar disclosures from issuers.

To the extent the DOJ continues to seek disgorgement under the Pilot Program, the scope of this power may be affected by the Supreme Court's decision in *Kokesh v. U.S. Securities and Exchange Commission*, in which the court is expected to decide whether the SEC may bring disgorgement actions for conduct going back in time indefinitely or is subject to a five-year statute of limitations.[11]

Prosecution of Domestic Concerns and Responsible Individuals. Although most corporate criminal FCPA enforcement actions have involved issuers rather than private companies, most of the individual employees who have been prosecuted for FCPA offenses have worked for private companies. The FCPA Professor Blog, which tracks FCPA enforcement activity, recently reported that "[o]f the 129 individuals charged by the DOJ with FCPA criminal offenses since 2006, 101 of the individuals (78 percent) were employees or otherwise affiliated with *private business organizations*." This contrasted with enforcement actions against companies: "72 of the 94 corporate DOJ FCPA enforcement actions since 2006 (77 percent) were against *publicly traded corporations*." Similarly, "[i]n the 22 private business organization DOJ FCPA enforcement actions since 2006, individuals were charged in connection with 10 of those actions (45 percent)," while individuals were charges in only 15 percent of FCPA cases involving publicly traded corporations.[12]

DOJ policy statements in recent years have increased the focus on charging individuals. In September 2015, Deputy Attorney Sally Yates issued guidelines for "Individual Accountability for Corporate Wrongdoing," that reinforced DOJ's efforts to prosecute individuals responsible for corporate misconduct and use cooperation from companies to help secure "all relevant facts about individual misconduct."[13] The DOJ's FCPA Pilot Program, announced in April 2016, is designed "to promote greater accountability for individuals

and companies that engage in corporate crime by motivating companies to voluntarily disclose FCPA-related misconduct, fully cooperate with the [DOJ], and, where appropriate, remediate flaws in their controls and compliance programs."[14] The Yates Memo and Pilot Program reinforce one another: Consistent with the Yates Memo, one of the goals of the Pilot Program is to enhance the DOJ's "ability to prosecute individual wrongdoers."

While some commentators have questioned whether the incoming administration would aggressively enforce the FCPA, in a series of speeches and comments administration officials have made clear their intention to maintain vigorous FCPA enforcement. In April 20, 2017 remarks, Trevor N. McFadden, the new Acting Principal Deputy Assistant Attorney General, said that he wanted to "dispel" the "myth" that the DOJ "no longer is interested in prosecuting white collar crime" emphasizing that "the Criminal Division is fully engaged in combatting crime in all its forms, and no matter what color collar its perpetrators wear."[15] A few days later, Attorney General Jeff Sessions unequivocally advised the Ethics and Compliance Initiative Annual Conference that "[w]e will continue to strongly enforce the FCPA and other anti-corruption laws.[16] In other recent remarks at the Anti-Corruption, Export Controls & Sanctions Compliance Summit, McFadden said that DOJ "continues to prioritize prosecutions of individuals who have willfully and corruptly violated the FCPA," and added that Attorney General Sessions similarly "noted the importance of individual accountability for corporate misconduct."[17]

In the remarks noted above, McFadden added that when the DOJ lacks "evidence of the requisite criminal intent … we will defer to our regulatory colleagues to handle the matter." It is clear that the DOJ will defer to the SEC in FCPA cases involving issuers. McFadden did not address whether DOJ intends to pursue civil remedies against private companies and other non-issuers who violate the FCPA, but recent comments suggest that businesses and individuals should expect continued vigorous enforcement of the law.

Conclusion. Recent high-profile FCPA investigations and settlements have generally involved large public companies that operate on a global scale. This is understandable. Such companies are likely to have extensive dealings with government officials in many countries, and such companies, with public reporting requirements under the securities laws, are very likely to conduct comprehensive internal investigations and report the findings to the SEC and DOJ. In contrast, private companies are highly variable in terms of their global reach and often have fewer incentives to conduct extensive investigations and report findings to the government.

Private companies may find themselves increasingly subject to law enforcement interest, and the wide disparity in FCPA actions between private and public concerns may narrow.

These enforcement trends and company incentives may very well continue as they are, and future enforcement may resemble past enforcement activity. However, to the extent private companies increasingly operate on a global scale, and substantial capital is available to finance the growth of private businesses, private companies may find themselves increasingly subject to law enforcement interest, and the wide disparity in FCPA actions between private and public concerns may narrow. In this law enforcement environment, private companies should certainly not see themselves as beyond the reach or interest of law enforcement when they operate abroad.

1. See Abramowitz and Sack, "FCPA Enforcement Trends: Will They Continue," NYLJ (March 7, 2017).
2. See HMT LLC Declination Letter (Sept. 29, 2016); NCH Corporation Declination Letter (Sept. 29, 2016).
3. 15 U.S.C. §§78dd-1, 78dd-2, 78dd-3.
4. 15 U.S.C. §78m.
5. "A Resource Guide to the U.S. Foreign Corrupt Practices Act," at 4-5, 69 (2012).
6. Id. at n. 357.
7. "Why Has the DOJ Stopped Civilly Enforcing the FCPA," FCPA Professor Blog (March 23, 2017); "A Unique FCPA Enforcement Action Then and Still Unique Now," FCPA Professor Blog (March 29, 2017).
8. Memorandum from Andrew Weissmann (April 5, 2016).
9. Kang, "DOJ Clears 2 Texas Cos. for Self-Reported FCPA Violations," Law360 (Sept. 29, 2016).
10. Daniel Patrick Wendt, "Are those DOJ disgorgements really disgorgement?" FCPA Blog (Nov. 28, 2016).
11. *Kokesh v. U.S. Securities and Exchange Commission*, No. 16-529.
12. "DOJ Individual Actions: The Strange Public—Private Divide," FCPA Professor Blog (Jan. 27, 2017) (emphasis in original).
13. Memorandum from Deputy Attorney General Sally Quillian Yates to Assistant Attorneys General (Sept. 9, 2015).
14. Memorandum from Andrew Weissmann (April 5, 2016).
15. Prepared remarks by McFadden, ACI's 19th Annual Conference on Foreign Corrupt Practices Act (April 20, 2017).
16. Prepared remarks by Attorney General Sessions, Ethics and Compliance Initiative Annual Conf. (April 24, 2017).
17. Prepared remarks by Acting Principal Assist. Attorney General McFadden, Anti-Corruption, Export Controls & Sanctions 10th Compliance Summit (April 18, 2017).