DEBEVOISE & PLIMPTON LLP

FCPA Update

October 2011 ■ Vol. 3, No. 3

The Use of the Travel Act to Prosecute Foreign Commercial Bribery: A Review of the Denial of the Defense Motion in *United States v. Carson*

On September 20, 2011, the United States District Court for the Central District of California denied another round of defense motions in *United States v. Carson* – a case arising out of alleged bribes paid or authorized by employees of Control Components Inc. ("CCI"), a California manufacturer of control valves that pleaded guilty to FCPA violations in 2009.[1] The latest motions had challenged the government's indictments under the Travel Act. The court also denied motions that had contended that California's commercial bribery statute does not reach defendants' conduct, that the relevant statutes invoked in the indictment are unconstitutionally vague, and that several of the government's counts are defective because they omitted allegations pertaining to essential elements of the Travel Act.

The *Carson* case, which is not scheduled to go to trial until mid-2012, has already featured several challenges to the U.S. government's prosecution of foreign bribery. The Travel Act motion comes on the heels of the defendants' objection to the government's interpretation of the term "foreign official" in the FCPA. As we reported in the May 2011 edition of *FCPA Update*, the district court rejected the "foreign official" challenge that had asserted that payments to employees of state instrumentalities that do not perform traditional government functions are not encompassed by the FCPA and that specific individuals employed by Mexico state-owned public utility Comisión Federal de Electricidad did not fall within the parameters of this definition.[2]

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1 *See* DOJ Press Rel. No. 09-754, Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $18.2 Million Criminal Fine (July 31, 2009), http://www.justice.gov/opa/pr/2009/July/09-crm-754.html.

2 *See* Sean Hecker, Philip Rohlik & Michael A. Janson, *Carson Ruling on Defendants' Challenge to the DOJ's Definition of "Foreign Official": A Fact-Based Approach*, FCPA UPDATE, Vol. 2., No. 10 (May 2011). For further coverage on *Carson*, *see* Sean Hecker, Bruce E. Yannett & Michael A. Janson, *Defendants Contest DOJ's Definition of "Foreign Official"*, FCPA UPDATE, Vol. 2, No. 9 (Apr. 2011).

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Subsequent to that ruling, in preparing to formulate jury instructions for the upcoming trials, Judge James V. Selna posed the question whether a conviction under the FCPA requires the defendant to have known that the bribe recipient was a foreign official. Both parties answered that question affirmatively, although the government contended that it should not have to prove that the defendant was aware of the definition of foreign official under the FCPA or the factors that constitute a government instrumentality.[3] Both the definition of foreign official and the defendant's knowledge of the bribe recipient's official function are critical issues that will certainly receive continued attention as the FCPA's provisions are further scrutinized and interpreted in ongoing and future prosecutions.

The relevant portions of the indictments in *Carson* for violations of the Travel Act – which accompany the FCPA counts – are noteworthy because they signal the government's resolve to use the Travel Act to pursue foreign commercial bribery. Because the FCPA's anti-bribery provisions criminalize solely payments or offers of same to foreign government officials, the government must employ a different statute if it seeks to prosecute payments to private individuals.[4] The district court's denial of the defense motion provides a useful analysis of the issues that are triggered by the government's application of the Travel Act in the context of foreign commercial bribery. If appellate courts were ultimately to prescribe a more restrictive definition of foreign official, the Travel Act might become an even more prominent ground for charges in foreign bribery proceedings.

Application of the Travel Act in Carson

The Travel Act is a federal criminal statute passed in 1961 that proscribes travel in interstate or foreign commerce or use of the mail or any facility in interstate or foreign commerce with intent to promote, manage, establish, carry on, or facilitate any unlawful activity with subsequent performance or attempted performance of the unlawful activity.[5] The Travel Act defines "unlawful activity" as including "extortion, bribery or arson in violation of the laws of the State in which committed or of the United States."[6] The underlying state law pursuant to which the *Carson* defendants allegedly committed the "unlawful activity" is California's Penal Code § 641.3, which prohibits commercial bribery.

In *Carson*, the government is alleging that the defendants bribed foreign officials, as well as business persons, by making corrupt payments and providing for lavish travel

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3 *See United States v. Carson*, No. 8:09-cr-00077-JVS, Government's Supplemental Brief Regarding Jury Instructions (C.D. Cal. Sept. 26, 2011).

4 The government has used the mail and wire fraud statutes to prosecute foreign commercial bribery. *See, e.g.*, DOJ Press Rel. No. 06-707, *Schnitzer Steel Industries Inc.'s Subsidiary Pleads Guilty to Foreign Bribes and Agrees to Pay a $7.5 Million Criminal Fine* (Oct. 16, 2006), on file with author (foreign bribery guilty plea based on violations of FCPA, conspiracy law and wire fraud statute); *see also* DOJ Press Rel. No. 10-278, *Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba* (Mar. 18, 2010), http://www.justice.gov/opa/pr/2010/March/10-crm-278.html (guilty plea for violations of FCPA and wire fraud statute in connection with kickbacks to the former Iraqi government under the Oil-for-Food program).

5 18 U.S.C. § 1952(a). *See also Erlenbaugh v. United States*, 409 U.S. 239, 246 (1972) (describing the Travel Act as "an effort to deny individuals who act [with the requisite] criminal purpose access to the channels of commerce."). *See also* H.R. Rep. No. 87-966, at 4 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2664, 2666 (letter from Attorney General Robert F. Kennedy to the Speaker of the House of Representatives) (stating that the Travel Act "impose[s] criminal sanctions upon the person whose work takes him across State or National boundaries in aid of certain 'unlawful activities'.").

6 18 U.S.C. § 1952(b).

FCPA Update

FCPA Update is a publication of Debevoise & Plimpton LLP

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accommodations, trips and entertainment in an effort to obtain or retain business for their employer. The defendants, all of whom are U.S. citizens, served as executives at the California headquarters of CCI. In addition to the FCPA counts, the government has also charged the defendants with conspiracy to violate the Travel Act and three substantive violations of the Travel Act stemming from alleged corrupt wire transfers to persons in foreign countries.[7] The government contends that the defendants, from their offices in California, knowingly facilitated the commission of the wire transfers.

The Impact of *Morrison*

The motion to dismiss the Travel Act counts principally contended that the government is seeking to apply the statute and the accompanying California bribery law improperly in an extraterritorial manner. Defendants placed great weight on the United States Supreme Court's recent holding in *Morrison*, which declared that § 10(b) of the Securities Exchange Act of 1934 provides no "cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges."[8] The larger principle animating *Morrison* suggests that a federal statute does not extend extraterritorially in the absence of evidence of an affirmatively expressed intent by Congress.[9]

The *Carson* defendants argued that under *Morrison* their Travel Act indictments are deficient because they depend on the statute's extraterritorial application contrary to Congress's intent. They pointed to the Travel Act's language and legislative history as evincing no intent by Congress of extraterritorial application, in contrast to the explicitly authorized extraterritorial reach of the subsequently passed FCPA.[10] Because the FCPA was "intended to occupy the field of foreign bribery" and an expansion of the Travel Act into foreign bribery prosecutions could result in a conflict with provisions of the FCPA, the defendants advocated for the Travel Act's limitation to domestic affairs.[11]

In denying the motion, the district court determined that defendants' alleged conduct – directing bribe payments from their offices in California – constituted a domestic activity, even if the targets of their bribery scheme were located abroad. The district court ruled that the indictment described the use of facilities in the interstate or foreign commerce of the United States with intent to facilitate commercial bribery, followed by an act in furtherance of commercial bribery, and thus met all required elements of a Travel Act violation without implicating extraterritorial application.[12] The district court accordingly deemed *Morrison* inapposite and instead analogized the alleged conduct to *Pasquantino v. United States*.[13] In *Pasquantino*, the Supreme Court held that the indictment of U.S.-based defendants who had smuggled liquor from the United States into Canada did not implicate an extraterritorial application of the federal wire fraud statute, because the "offense was complete the moment [defendants] executed the scheme inside the United States."[14]

The Lingering Effect of *Bowman*

The district court did not limit its analysis to ruling that defendants' alleged conduct did not require an extraterritorial application of the Travel Act. The court also found that the Travel Act could be applied extraterritorially despite the presumption espoused by *Morrison*. Noting that *Morrison* examined a civil enforcement provision of the Securities Exchange Act of 1934, the district court ruled that the presumption against extraterritoriality – according to Supreme Court precedent that was not discussed let alone overruled in *Morrison* – does not apply with the same force to criminal statutes.[15] The district court relied for that proposition on a 1922 decision, *United States v. Bowman*, which involved

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7 The first wire transfer in question in the amount of $10,000 was allegedly sent from California to China, the second transfer in the amount of $69,420 was allegedly sent from Sweden to China, and the third transfer in the amount of approximately $136,584.98 was allegedly sent from Sweden to Latvia.

8 *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2875 (2010).

9 *See Morrison*, 130 S. Ct. at 2877-78 (stating that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none.").

10 *See Carson*, Defendants' Notice of Motion and Motion to Dismiss Counts 1, 11, 12 and 14 of the Indictment; Memorandum of Points and Authorities in Support Thereof at 7-12 (C.D. Cal. June 13, 2011) [hereinafter "Defense Motion"].

11 *Id.* at 12. The defendants suggested in their motion that the FCPA's exceptions (i.e. "routine government actions" and "legality under local written law") would create a conflict between the Travel Act, as applied through California's penal code, and the FCPA. *See id.* at 9-12.

12 *See Carson*, Order Denying Defendants' Motion to Dismiss Counts 1, 11, 12 and 14 of the Indictment at 6 (C.D. Cal. Sept. 20, 2011) [hereinafter "Order Denying Defendants' Motion"]. Even with respect to the counts that did not explicitly cite actions in the United States, *i.e.* the alleged a wired payment from Sweden to China or Sweden to Latvia, the district court assumed that defendants took action in California to facilitate the payments.

13 544 U.S. 349 (2005).

14 *Id.* at 371. Specifically, the defendants, while in New York, had ordered liquor from Maryland and then drove it or instructed others to drive it to Canada without paying excise taxes. *Id.* at 373.

15 *United States v. Bowman*, 260 U.S. 94, 98 (1922).

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a criminal conspiracy to defraud a U.S. corporation that was planned and executed entirely outside the United States. In upholding the indictment in *Bowman*, the Supreme Court recognized that limiting the jurisdiction of U.S. courts in criminal cases to acts committed solely within the territory of the United States would "leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home."[16] For that reason, extraterritorial application may be inferred for certain criminal laws from the nature of the offense notwithstanding the general rule that failure by Congress to express its intent to apply the law extraterritorially will limit its reach to conduct wholly within U.S. territory.[17]

Under its interpretation of *Bowman*, the district court found that Congress desired the Travel Act to punish conduct taking place in foreign territory.[18] The court pointed out that the Travel Act's title – "Interstate and foreign travel or transportation in aid of racketeering enterprises" – suggested a clear intent that bribes paid in foreign commerce were encompassed by the statute, even in the face of the Supreme Court's caution that laws that contain the words "foreign commerce" are not necessarily intended to apply abroad.[19] The district court judge acknowledged that *Morrison*'s rather sweeping language to the effect that the presumption against extraterritorial application applies "in all cases" invites a debate whether *Bowman* remains good law. Moreover, the strict distinction between criminal statutes and civil statutes – as implicitly set forth by *Bowman* – was not articulated in *Morrison*. Yet, absent the Supreme Court explicitly overruling *Bowman*, the district court reasoned that it was obligated to presume Congress's intent that U.S. federal criminal statutes apply extraterritorially when restricting them would severely diminish their effectiveness, a path that has also been taken by other federal courts.[20]

California's Commercial Bribery Law Permits Extraterritorial Application

Prosecution under the Travel Act requires the government to prove violation of the underlying state (or federal) statute that reaches the alleged conduct. This is because the Travel Act "proscribes not the unlawful activity per se, but the use of interstate facilities with the requisite intent to promote such unlawful activity."[21] In *Carson*, the government invoked a provision of California's penal code, which prohibits, *inter alia*, offering or giving "corruptly" money or anything of value to a company employee, who in return agrees to use his position to benefit the bribe payer.[22]

The defendants raised two principal arguments against the application of California's commercial bribery statute as a vehicle for the Travel Act count. They pointed out that the California law has never before been used to prosecute foreign commercial bribery and argued that the California legislature did not intend extraterritorial reach. Defendants acknowledged that states have jurisdiction to enforce their laws to pursue conduct taking place elsewhere if the conduct produces harm inside the state, but they denied that harm could have arisen in California through defendants' alleged offer of bribes to employees of foreign companies. The district court disposed of defendants' extraterritorial argument, noting that a different provision of California's penal code, § 778a, expressly authorizes the prosecution of statutorily-defined criminal activity executed in part in California and culminated either within or without the state.[23] Accordingly, the court deemed California state law to reach defendants' alleged conduct.

The defendants' motion seeking dismissal of their indictment under the Travel Act raises intriguing issues about the government's intended use of the Travel Act to prosecute foreign commercial bribery.

Carson exemplifies an effort by the government to pursue foreign commercial

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16 *Id.* (holding that criminal statutes, "as a class, [are] not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated…").

17 *Id.*

18 *See Carson*, Order Denying Defendants' Motion, at 8-9.

19 *See Morrison*, 130 S.Ct. at 2882 (quoting *E.E.O.C. v. Aramco*, 499 U.S. 244, 251 (1991)).

20 *See Carson*, Order Denying Defendants' Motion, at 8-9; *see also*, *e.g.*, *United States v. Weingarten*, 632 F.3d 60, 66 (2d Cir. 2011); *United States v. Leija-Sanchez*, 602 F.3d 797, 799 (7th Cir. 2010).

21 *United States v. Welch*, 327 F.3d 1081, 1092 (10th Cir. 2003).

22 Cal. Penal Code § 641.3(a) ("Any employee who solicits, accepts, or agrees to accept money or any thing of value…, in return for using or agreeing to use his or her position for the benefit of that other person, and any person who offers or gives an employee money or any thing of value under those circumstances, is guilty of commercial bribery.").

23 Cal. Penal Code § 778a ("[T]he person is punishable for that crime in this state in the same manner as if the crime had been committed entirely within this state."). The district court also cited to a number of decisions in which courts have applied the law to offenses committed in part in California and in part in foreign jurisdictions, including in the bribery context. *See People v. Brown*, 91 Cal. App. 4th 256, 266-67 (2001); *Bryant v. Mattel, Inc.*, No. CV 04-9049 DOC (RNBx), 2010 WL 3705668, at *8-9 (C.D. Cal. Aug. 2, 2010).

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bribery through the Travel Act and underlying state law due to the inherent limitation of the FCPA which, unlike the UK Bribery Act, reaches bribery of only foreign officials. In many foreign bribery schemes, payments are made not only to public officials, but also to private business executives. Should the U.S. government continue to press ahead with Travel Act indictments, companies and individuals will face serious risks in addition to those posed by the anti-bribery provisions of the FCPA.

It is also likely that the arguments of the *Carson* defendants concerning the extraterritorial application of the Travel Act will receive further attention by district and appellate courts in the future. Although the district court in *Carson* categorized the Travel Act indictments as not implicating the presumption against extraterritorial application, a different factual scenario – with defendants located (or at the relevant times acting) outside the state whose bribery law is being applied – may generate different conclusions even under *Carson*'s reasoning. It is in any case apparent that the impact of *Morrison* on criminal law enforcement, if any, has not yet been fully resolved. Given the sweeping language in *Morrison*, it remains entirely possible that direct appellate review or Supreme Court action, including an express overruling or limitation of *Bowman* and its progeny, could severely crimp the government's ability to utilize the Travel Act or other statutes to plug perceived gaps in the FCPA. ■

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Debevoise Expands Disputes, Compliance and Investigations Capabilities in Asia

On September 19, 2011, Debevoise & Plimpton LLP announced that it will expand the firm's disputes, compliance and investigations capabilities in Asia. Litigation partner Christopher K. Tahbaz will lead the initiative as Co-Chair of Asian Litigation from the firm's Hong Kong and New York offices. Lord Goldsmith QC, PC, former UK Attorney General, will regularly attend the Hong Kong office as Chair of European and Asian Litigation, so as to devote substantial time to matters in the region. Several Debevoise litigators have permanently relocated to the firm's Hong Kong office to provide a greater on-the-ground presence, including Philip Rohlik, a counsel in the firm's Litigation Department with substantial experience leading compliance and other matters throughout Asia. Anti-corruption compliance guidance will be a significant focus of the effort.

Lord Goldsmith QC said: "The legal market in Asia is expanding each day, frequently focusing on regulatory compliance and contentious disputes. England, of course, shares a common legal heritage not only with Hong Kong, but also with India, Singapore, Malaysia and other countries in the region, and over the course of my career, I have had the good fortune to work on matters in these countries – in courts and in arbitrations – and continue to do so. I look forward to being a part of our firm's enhanced commitment to clients in this vitally important part of the world."

Bruce E. Yannett, Debevoise's Deputy Presiding Partner and Co-Chair of the White Collar Practice, said: "At a time when clients are looking for ever more efficient solutions, it is essential to be able quickly to deploy resources to where a client's matters and issues are materializing. Our investment in Asia recognizes the region's increasing significance to the world economy, and reflects our commitment to assist clients on the ground throughout the world on a 24-7 basis."

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Biographical and full contact information for Mr. Tahbaz, Lord Goldsmith QC, Mr. Yannett, and Mr. Rohlik may be obtained at www.debevoise.com.

Deloitte Anti-Corruption Practices Survey Highlights Challenges Facing Companies

Another of the Big Four accounting firms – Deloitte – has released a survey of anti-corruption, anti-bribery, and anti-fraud practices and trends at companies around the world. Deloitte's "Anti-Corruption Practices Survey 2011: Cloudy With a Chance of Prosecution?"[1] surveyed 276 executives regarding their companies' anti-corruption compliance practices and policies, their attitudes about those measures, and their concerns about anti-corruption trends and issues facing their companies. Deloitte's findings both build on findings in similar surveys conducted earlier this year by Ernst & Young and KPMG – and covered in the June 2011 issue of *FCPA Update*[2] – and highlight additional trends and issues of concern to global companies.

Like the earlier surveys, the Deloitte Survey shows that increased enforcement is heightening company executives' attention to anti-corruption measures. Whereas in 2004 the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ") prosecuted only five FCPA enforcement actions, in 2009 and 2010 the SEC and DOJ prosecuted 40 and 74 actions, respectively.[3] Additionally, eight of the ten largest FCPA settlements occurred in 2010.[4]

Despite this rapid increase in the number of enforcement actions, relatively few executives – only 29% – were "very confident" of the effectiveness of their company's anti-corruption policies and procedures; in contrast, 13% of executives admitted being "not confident" about their company's anti-corruption program.[5] The Deloitte Survey suggests that this lack of confidence may be a result of executives' concern over the many sources of potential corruption. Seven separate sources of corruption were rated by at least 20% of executives as posing "significant risk" to their companies.[6] Executives' top-three concerns were use of third parties (52%), customs clearance and importation of goods (36%), and entertainment related to government business/relations (30%).[7]

Also, and not surprisingly, the July 1, 2011 effective date of the U.K. Bribery Act[8] appears to be driving concerns among company executives. Of particular concern to companies was designing an effective policy to prevent facilitating payments, also called "grease" or "expediting" payments. Although the FCPA permits facilitation payments for routine government actions to which the payer is entitled, the U.K. Bribery Act prohibits them entirely; given the extraterritorial reach of the U.K. Bribery Act, many companies are revising their anti-corruption policies to forbid these payments.[9] Still, only 47% of companies prohibited facilitating payments altogether, while 36% of companies allowed such payments with pre-approval, and 5% of companies allowed such payments with no restrictions.[10] Moreover, of the companies at which facilitating payments are permitted, 53% placed no restrictions on the amount of such payments.[11]

Respondents in the Deloitte Survey identified many of the same key issues facing their anti-corruption efforts as were identified by respondents in the Ernst & Young and KPMG surveys. For example, the Deloitte Survey found that more than any other issue surveyed, executives considered identifying and managing third-party relationships to be a significant challenge for their companies' anti-corruption compliance programs.[12] Moreover, 52% of all executives surveyed

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1 Deloitte, *Anti-Corruption Practices Survey 2011: Cloudy With a Chance of Prosecution?* (2011), www.deloitte.com/us/pr/anticorruptionsurvey2011 (hereinafter "Deloitte Survey").

2 Paul R. Berger, Sean Hecker & Jane Shvets, *E&Y and KPMG Surveys Shed Light on Anti-Corruption Trends*, FCPA Update at 4 (June 2011), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=027aee9f-9006-4037-8195-6da0c6a55c00. *See* Ernst & Young, *European Fraud Survey 2011: Recovery, Regulation and Integrity* (2011), http://www.ey.com/GL/en/Services/Assurance/Fraud-Investigation---Dispute-Services/European-fraud-survey-2011--recovery--regulation-and-integrity (hereinafter "E&Y Survey"); KPMG, *Global Anti-Bribery and Corruption Survey 2011* (2011), http://www.kpmg.com/UK/en/IssuesAndInsights/ArticlesPublications/Pages/global-abc-survey-2011.aspx (hereinafter "KPMG Survey").

3 Deloitte Survey at 3 (*citing* Gibson, Dunn & Crutcher LLP, *2010 Year-End FCPA Update*).

4 *Id.*

5 *Id.* at 7.

6 *Id.*

7 *Id.* at 7. Rounding out the top seven were bribes (27%), gifts to foreign officials (24%), expenses for travel and lodging of foreign government officials (21%), and facilitating payments (20%). *Id.*

8 Bribery Act, 2010, c. 23 (Eng.).

9 Deloitte Survey at 6.

10 *Id.*

11 *Id.*

12 *Id.* at 8.

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considered the activities of third-party vendors to pose a significant risk to their company's anti-corruption efforts.[13] Unsurprisingly given the myriad third-party vendors used by large companies (defined by Deloitte as those with $1 billion or more in reported annual revenue), many more executives at large companies perceived third-party activities to be a risk than did executives at small companies (those with less than $1 billion in reported annual revenue) – 63% of large-company executives responded that use of third parties posed a "significant risk," whereas only 33% percent of small-company executives did.[14]

At the same time, only 41% of companies regularly conducted due diligence on third parties in foreign countries,[15] and, despite the fact that companies generally included provisions in third-party contracts requiring vendors to comply with the company's anti-corruption policies,[16] just 9% of companies conducted "very detailed" monitoring of third parties to ensure such compliance, and 44% did not monitor third-party compliance at all.[17] Given the significant cost potentially associated with in-depth monitoring of third-party vendors, Deloitte recommends that companies take a risk-based approach, monitoring in detail third parties engaged in situations or countries that pose a high risk of corruption, and monitoring all other third parties on a regular basis in a less intensive manner, and sampling a few third parties for more intensive monitoring each year.[18]

The Deloitte Survey found companies facing difficulties surrounding training of, and awareness of anti-corruption policies among, employees. Seventy-three percent of companies reported providing anti-corruption training, with varying levels and approaches reported:

- 64% of companies reported training select employees, based on their potential exposure to activities susceptible to corruption;
- 50% of companies reported training all international employees;
- 44% of companies reported training all domestic employees;
- 34% of companies reported training their board of directors; 80% of large-company boards of directors received training, and only 32% of small-company boards of directors received training; and
- 26% of companies reported training third parties.[19]

The earlier Ernst & Young and KPMG surveys found that, despite positive trends in the development of formal anti-corruption policies, improving awareness of compliance programs among executives and rank-and-file employees remained a challenge at many companies. For example, the Ernst & Young survey found that, between 2009 and 2011, awareness of compliance policies decreased significantly, suggesting that policies are not adequately publicized within companies and training programs might be slipping.[20] The Ernst & Young survey also found that 43% of those surveyed could not identify to whom they could report concerns of impropriety.[21]

The finding in the Deloitte Survey that only 29% of executives felt very confident that their company's anti-corruption program would prevent and detect corruption activities,[22] and the findings in the Ernst & Young and KPMG surveys of low rates of employee awareness of compliance policies, suggest that companies may be deficient in the manner in which information about anti-corruption policies is delivered to employees. Specifically, while 90% of executives reported having a company anti-corruption policy, only 45% of those were stand-alone policies.[23] The Deloitte Survey recommends that the most effective way of improving attention to and awareness of a company's anti-corruption program is to devise and promulgate that program as a stand-alone anti-corruption policy, rather than a program subsumed within a larger company code of conduct.[24]

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13 *Id.* at 7.

14 *Id.* at 8.

15 *Id.* at 10.

16 *Id.* at 11.

17 *Id.* at 12.

18 *Id.*

19 *Id.* at 5, 13.

20 Berger *et al.*, note 2, *supra* at 5; KPMG Survey; E&Y Survey.

21 *Id.*

22 Deloitte Survey at 7.

23 *Id.* at 1.

24 *Id.* at 2.

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Finally, the Deloitte Survey noted company executives' particular concern over the potential for corruption in emerging markets. Forty percent of executives reported that managing cultural norms in different countries was a significant challenge to their anti-corruption programs, though only 57% of companies reported having tailored their programs to countries deemed to pose a high corruption risk.[25] The statistics regarding concerns for business operations in the BRIC countries (Brazil, Russia, India and China) are noteworthy: 55% of executives were concerned about the potential impact on their business of corruption in China, 43% were concerned about the potential business impact of corruption in Russia, 39% were concerned about the potential business impact of corruption in India, and 26% were concerned about the potential business impact of corruption in Brazil.[26] Moreover, executives were more concerned about the impact of corruption in BRIC countries now than they were three years ago.[27]

All three surveys found that many employees, even those responsible for anti-corruption compliance, believed that unethical behavior is tolerated in many countries, and, in some, unavoidable for companies trying to do business there.[28] The Ernst & Young survey found that 81% of those responsible for business in emerging markets believed that bribery and corruption are inherent in business in their country; the KPMG survey found that 70% of executives stated that there are places in the world in which it is impossible to conduct business without engaging in corruption.[29]

As noted in the June 2011 edition of *FCPA Update*, these anti-corruption surveys provide valuable insight into the attitudes toward anti-corruption programs from those on the "front lines." The Deloitte Survey's findings – especially when taken together with the similar Ernst & Young and KPMG surveys from earlier this year – provide a high-level, but helpful, view into the issues and challenges facing companies as they try to adapt to new anti-corruption laws and to more vigorous enforcement by governments around the world. Moreover, the surveys provide insight into the challenges companies face as they try to apply those new regulatory and enforcement realities to the increasingly important business environment presented by emerging markets. ■

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25 *Id.* at 18.

26 *Id.*

27 *Id.* at 19.

28 Berger, *et al.*, note 2, *supra* at 4; KPMG Survey; E&Y Survey; Deloitte Survey at 10, 18–19.

29 Berger, *et al.*, note 2, *supra* at 4; KPMG Survey at 18; E&Y Survey at 10.

Recent Publication

"The U.K Bribery Act: How It Matters for the Securities Industry"
By Lord Goldsmith QC, Paul R. Berger, Sean Hecker, Karolos Seeger, Steven S. Michaels, and Matthew Getz

Practical Compliance & Risk Management for the Securities Industry

And So, the Official Says: "What Are You Gonna Do": The Third Circuit Weighs in on the Extortion Defense to Bribery

Given that the legislative history of the FCPA makes clear Congress's intent that the statute not apply to cases of "true extortion,"[1] it is perhaps surprising that so few FCPA defendants invoke an extortion defense. After all, it is often common in cases of foreign public corruption that the officials involved have demanded the corrupt payment to "get things done," and have excluded those unprepared to pay a bribe from receiving a fair hearing on an application for a contract or some other required approval.

In other words, if, as we suspect, the minority of bribes are initiated by bribe-payers, why would an extortion defense not be the cornerstone of more FCPA defenses than it is presently? In a recent decision in a domestic bribery case, the United States Court of Appeals for the Third Circuit, after canvassing the law relating to extortion as a defense to federal bribery charges, identified the principal reasons why extortion is so rarely raised, and even more rarely effective, as a defense.

The Third Circuit's decision, in *United States v. Friedman*,[2] following the Second Circuit, held that extortion is not an absolute defense but "can bear on the intent required for the commission of bribery only where: (1) the defendant is paying the official to perform an act to which he is legally entitled and (2) the official threatens the defendant with 'serious economic loss' unless the bribe is paid."[3] The court made clear that a defendant's subjective belief in the validity of his entitlement to the requested action is insufficient, and that even substantial costs associated with red tape and the like are not the kind of "serious economic loss" to which the extortion defense is intended to apply.[4]

In *Friedman*, the court of appeals was asked to reverse the conviction of a New Jersey businessman who was accused of having made a payment to a building inspector to avoid having to seek a variance to obtain a required Certificate of Occupancy that was needed for Friedman to lease an illegal apartment unit in a building Friedman owned.[5] Friedman claimed he reasonably believed that he was entitled to rent the building as is, that all the building's apartments were operated without government interference when he bought the building in 2006, that the city tax department was well aware of the additional unit's existence, "and there was no indication the unit was a recent addition" that would require a building code variance to be granted by the city of West New York.[6]

The evidence showed that the building inspector had a practice of soliciting bribes (and indeed, without Friedman knowing it, had pleaded guilty to doing so in an unrelated case), and that the building inspector, after telling Friedman that a variance would be needed, said to Friedman: "what are you gonna do."[7] Against this backdrop, Friedman agreed to pay $5,000 to the building inspector, and the inspector, based on the agreement, dismissed an administrative complaint against Friedman, leaving Friedman free to lease the property.[8] When Friedman balked at making the payment, however, the building inspector (who throughout his interactions with Friedman was cooperating with the FBI), re-filed the administrative complaint, and Friedman then paid the $5,000, after which he was indicted on one count of federal program bribery under 18 U.S.C. § 666(a)(2),[9] which, like the FCPA, criminalizes the making of payments to government officials with a willful and corrupt intent to influence the officials in order to gain or retain business.[10]

At his trial, Friedman sought a jury instruction stating: "[T]he fact that the defendant was extorted or coerced, while it is not alone a defense to the charge, may bear upon whether the defendant ever

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1 S. Rep. No. 95-114, at 10–11 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108.

2 *United States v. Friedman*, No. 10-2235 (3rd Cir. Sept. 28, 2011) (citing *United States v. Barash*, 365 F.2d 395, 401–02 (2d Cir. 1966)).

3 *Id.*, slip op. at 21.

4 *Id.* at 21–23.

5 *Id.* at 3–4.

6 *Id.* at 4–5.

7 *Id.* at 5.

8 *Id.*

9 *Id.* at 6.

10 *Compare* 18 U.S.C. § 666(a)(2) (2006) (prohibiting payments "to influence or reward . . . any business, transaction, or series of transactions"), *with* 15 U.S.C. §§ 78dd-2(a)(1) (2006) (prohibiting payments "in order to assist . . . in obtaining or retaining business for or with, or directing business to, any person").

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formed the intent required to commit the crime of bribery, specifically upon whether he committed the act, 'willfully,' that is, with a purpose to disobey or disregard the law."[11]

> The requested instruction went on: "'Extortion' means obtaining property from another, with his consent, in either one of two ways: [] inducing or bringing about this consent through the use of actual or threatened force, violence or fear, which can include fear of economic harm or hardship, which exists if a victim experiences anxiety, concern, or worry over expected personal economic harm, and which fear must be reasonable under the circumstances existing at the time of the defendant's actions.
>
> As I also explained to you earlier, a person may be guilty of bribery whether or not the official action sought to be influenced was right or wrong. That is, a bribery defendant may be guilty even if he paid the official to perform an act to which the defendant was legally entitled. However, you may consider whether the defendant believed that he was paying the official to perform an act to which he believed he was legally entitled in evaluating whether the government has proven that the defendant had the intent required to commit the bribery at issue, that is, whether the government has proven that he had the purpose to disobey or disregard the law."[12]

In rejecting Friedman's appeal of the trial court's refusal to give the requested instruction, the court of appeals held that the proposed instruction was flawed because it "did not limit the consideration of coercion to situations in which the defendant was legally entitled to the act" that was the object of the agreed payment.[13]

Similarly, the mere fact that Friedman had lined up a buyer who was prepared to pay more than a million dollars for the apartment building "but only if the sixteenth apartment was properly approved by the municipality" was not the kind of situation in which Friedman faced a sufficiently severe "economic loss." As the Third Circuit reasoned, "Friedman could [have] proceed[ed] through the normal route of applying for a variance," and, "[a]lthough obtaining a variance requires time and money, it is the correct legal process that should have been followed and informing someone of the correct, legal steps they should take, in itself, is not threatening serious economic loss" – even if that meant Friedman would lose the offer made on the building.[14]

Indeed, the Third Circuit's decision in *Friedman* potentially understates the obstacles facing defendants seeking to make use of a government official's acts of extortion or coercion. In a number of circuits, the very strong presumption, if not a flat rule, is that "[t]he proper response to coercion by corrupt public officials should be to go to the authorities, not to make the payoff."[15] A determination that the requested action is in any manner "discretionary" is often fatal to extortion and coercion defenses, even in those circuits in which the law is more open to debate.[16] Although courts in domestic bribery cases do not take issue with the idea that at least in some cases "one can be a victim of extortion but not a briber, and that would surely be right in a case where the victim had paid the extortionist at the point of a gun,"[17] the lack of certainty in the law concerning the type of economic harm that must be threatened for the defense of extortion to have bite leaves the defense as yet another of the vagaries of FCPA enforcement. Such vagaries have led many compliance policies to acknowledge, in the context of extortionate threats by government officials, the ability of company personnel to make payments to officials to protect only against illegal harm to life and limb, but little more.

In her pre-trial decisions in *United States v. Kozeny (Bourke)*,[18] United States District Judge Shira A. Scheindlin sought to honor the FCPA's legislative history, noting that "while the FCPA would apply to a situation in which a 'payment [is] demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract,' it would not apply to one in which payment is made to an official 'to keep an

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11 *Friedman,* slip op. at 11.

12 *Id.* at 11–12.

13 *Id.* at 21.

14 *Id.* at 23.

15 *United States v. Kahn*, 472 F.2d 272, 278 (2d Cir. 1973), *quoted in United States. v. Alfisi*, 308 F.3d 144, 150 n.1 (2d Cir. 2002).

16 *See, e.g.*, *United States v. West*, 746 F. Supp. 2d 932, 940 (N.D. Ill. 2010) (citing *United States v. Lee*, 846 F.2d 531, 534 n.1 (9th Cir. 1988); *United States v. Colacurcio*, 659 F.2d 684, 690 (5th Cir. 1981); *United States v. Labovitz*, 251 F.2d 393, 394 (3d Cir. 1958)). The District Court in *West* noted that the Seventh Circuit has neither precluded nor permitted an economic duress defense to a bribery charge. *West*, 746 F. Supp. 2d at 939 (citing *United States v. Toney*, 27 F.3d 1245 (7th Cir. 1994)). The *West* court concluded that the Supreme Court's decision in *Dixon v. United States*, 548 U.S. 1 (2006), which held that "the defense of duress does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully," *id.* at 7, had not been interpreted to prohibit "a duress defense for a crime whose *mens rea is* 'corruptly' acting to 'influence an official act.'" *West*, 746 F. Supp. 2d at 939.

17 *West*, 746 F. Supp. 2d at 935 (quoting *United States v. Holzer*, 840 F.2d 1343, 1351–52 (7th Cir. 1988)).

18 *United States v. Kozeny*, 582 F. Supp. 2d 535 (S.D.N.Y. 2008).

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oil rig from being dynamited.'"[19] Judge Scheindlin also observed that the distinct defense of duress, which comes into play if there is "'(1) a threat of force directed at the time of the defendant's conduct; (2) a threat sufficient to induce a well-founded fear of impending death or serious bodily injury; and (3) a lack of a reasonable opportunity to escape harm other than by engaging in the illegal activity,'"[20] is viable in any FCPA prosecution. But further guidance likely will not emanate from the *Bourke* case, which remains on appeal, as the defendant did not press for an extortion or duress defense at the jury instruction stage at trial, and chose to focus on other issues on appeal.[21]

Although bribe payers who succumb to threats by foreign officials that they will never have a fair chance at competing unless they make payments under the table can take the position that their conduct is economically rational, that is not the lesson that the FCPA teaches, at least absent special circumstances.[22] Nevertheless, it undoubtedly would ameliorate the uncertainty that pervades the law for Congress or the Department of Justice to clarify with further examples or criteria the circumstances in which submitting to extortion or coercion by foreign officials is either not a crime or will lead to a declination. Between the "market entry" bribe and a payment to protect a valuable investment from immediate and permanent physical destruction is a vast landscape of circumstances that legitimate businesses face in high-risk jurisdictions, in which significant investments, made in good faith and in reliance on expectations of lawful conduct by the government, are threatened by unscrupulous officials. If the United States is not prepared to enact a compliance defense to primary anti-bribery violations, greater certainty in the law over when extortion will and will not amount to a defense would be a welcome development.

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19 *Id.* at 540.

20 *Id.* at 540 n.31 (quoting *United States v. Gonzalez*, 407 F.3d 118, 122 (2d Cir.2005)).

21 *See United States v. Kozeny*, No. 09-4704, Brief of Appellant (2d Cir. Apr. 1, 2010) (focusing on trial court's coercion instruction and allowance of expert testimony on corruption risk).

22 To be sure, in many bribery cases it is difficult for the defendant to raise a reasonable doubt that a "fair hearing" was all that a payment to a government official was intended to secure. As the Second Circuit observed in reflection on "the most lamentable episode in this court's history," in which the Chief Circuit Judge was convicted of obstruction of justice for accepting bribes and unsuccessfully defended himself on the ground that the decisions he rendered after accepting money from litigants "were legally correct," "the key element of the offense is the intent of the payor to purchase a particular decision 'without regard to the merits,' . . . as opposed to an impartial judgment." *United States v. Alfisi*, 308 F.3d 144, 151–52 (2d Cir. 2002) (quoting *United States v. Manton*, 107 F.2d 834, 845–46 (2d Cir. 1939)).

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