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Is Anyone *Not* a Foreign Official Under the FCPA?

By Jacqueline C. Wolff and Nirav Shah

Recent years have seen a rise in the number of enforcement actions taken by the Department of Justice (DOJ) and the Securities Exchange Commission (SEC) under the Foreign Corrupt Practices Act (FCPA), as well as a notable expansion of the types of conduct covered by these prosecutions. Increasingly, the government has focused on prosecuting individuals and companies for allegedly corrupt payments to officials of state-owned enterprises (SOEs), rather than more traditional government entities.

The FCPA prohibits corrupt payments to "foreign officials," defining a foreign official as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof ... or any person acting in an official capacity for or on behalf of any such government or department ... " 15 U.S.C. § 78dd-2(h)(2)(A).

The DOJ has brought cases against companies and individuals in relation to their dealings with SOEs based on a broad reading of the term "instrumentality," a term not otherwise defined in the statute. According to one survey of FCPA prosecutions in 2009, two-thirds of the prosecutions against companies that year related to SOEs, with DOJ and the SEC pursuing a disproportionate number of cases in a handful of industries like energy,

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Foreign Bribery: Feds Aggressively Use FCPA And the Money Laundering Statute

By Steven F. Reich

Every time you turn around, the Justice Department or SEC announces a new round of charges and settlements against individuals and entities under the Foreign Corrupt Practices Act (FCPA). Historically, the government has focused FCPA enforcement efforts on persons or entities within the U.S., or on foreign persons or entities that commit unlawful acts within our borders. But, more recently, the government has employed conspiracy or aiding and abetting theories to reach acts of foreign bribery not previously thought to be within U.S. law enforcement's reach. This article examines recent charges and settlements suggesting a new approach by federal authorities to foreign bribery.

Background

Before turning to the cases, a little history is required.

Investigations by the Watergate Special Prosecutor and SEC during the 1970s revealed that numerous U.S. companies had bribed foreign officials while doing business abroad. As a result, Congress in 1977 enacted the FCPA to curb foreign bribery in two ways. First, with some notable exceptions not pertinent here, the FCPA prohibited bribes (or offers of bribes) to foreign officials by U.S. persons or entities doing business overseas. Second, the FCPA required companies whose stock is registered with the SEC (issuers) to establish accounting and financial controls aimed at preventing corrupt payments to foreign officials.

As originally enacted, the FCPA's anti-bribery provisions had limited reach. As noted, the statute applied only to "issuers," *i.e.*, to companies whose stock was registered with the SEC or that were required to file reports with the SEC, and also to "domestic concerns." 15 U.S.C. §§ 78dd-1, 78dd-2. An individual was a "domestic concern" only if he or she was a U.S. citizen, national or resident. 15 U.S.C. § 78dd-2(h). An entity was a "domestic concern" only if its principal place of business was in the U.S. or if it was organized under the laws of a state of the U.S. *Id.* Thus, liability generally was limited to U.S. companies or individuals that made corrupt payments to foreign officials.

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That changed with enactment of the International Bribery and Fair Competition Act of 1998. Among other things, that Act expanded the FCPA's reach to foreign companies and persons that directly or indirectly caused to occur within the U.S. an act in furtherance of a corrupt payment abroad. However, even after the 1998 amendment, if a party did not directly or indirectly cause such an act to occur within the U.S., the party was immune from FCPA liability. As a result, foreign nationals or companies (except those registered as issuers) whose unlawful acts occur entirely outside our borders have been thought to be outside the FCPA's reach.

Moreover, government efforts to broaden the FCPA's scope by charging exempt persons or entities with conspiring to violate the statute have been rejected by courts. In *United States v. Castle*, 925 F.2d 831, 836 (5th Cir. 1991), for example, the government charged two Canadian officials with conspiring to violate the FCPA after they agreed to accept bribes from a U.S. company. The U.S. Court of Appeals for the Fifth Circuit held that because foreign officials who receive bribes cannot be charged with primary violations of the FCPA, they also cannot be charged with conspiring to violate the statute. In short, because Congress had specifically excluded a class of alleged wrongdoers from the FCPA's reach, the Fifth Circuit concluded that the government could not use a conspiracy theory to reach them.

Notwithstanding this seemingly well-settled principle, several recent cases suggest that the government is becoming more aggressive in using conspiracy and aiding and abetting theories to bring enforcement actions against non-U.S. companies and persons whose core violations involve foreign bribery schemes.

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U.S. v. Snamprogetti Netherlands B.V.

A notable recent example is *U.S. v. Snamprogetti Netherlands B.V.*, No. 10 Crim. 460 (S.D. Tex.). Snamprogetti, a Dutch corporation, was part of a joint venture that allegedly authorized bribes to Nigerian officials to obtain contracts to build liquefied natural gas facilities in that country. In July 2010, Snamprogetti and its current and former Italian parent companies entered into a deferred prosecution agreement with the Justice Department calling for a $240 million dollar fine. Snamprogetti separately agreed to pay $125 million in disgorgement to settle SEC charges.

Notably, the Justice Department did not allege that Snamprogetti committed a primary violation of the FCPA. Rather, Snamprogetti was alleged to have entered into a conspiracy with its joint venture partners and others to pay bribes through intermediaries and to have aided and abetted those same acts. The charging document in that case contained no allegations of direct conduct by Snamprogetti within the U.S. in furtherance of the alleged FCPA conspiracy. Instead, the government relied on allegations that Snamprogetti and its co-conspirators caused wire transfers to flow through bank accounts in New York, and that the company's alleged co-conspirators caused emails and faxes to be sent to other co-conspirators in Houston, all in furtherance of the alleged conspiracy.

Thus, to support its charges, the government appears to have attributed to Snamprogetti the conduct of its purported co-conspirators, notwithstanding the fact that the company's core bribery scheme appears to have had little or no connection to the U.S. While the government would likely argue that U.S. wire transfers made in support of the conspiracy provided a sufficient jurisdictional predicate to support FCPA liability, the case nevertheless can be seen as an incremental step toward the day when the acts of U.S.-based co-conspirators are attributed to foreign actors for FCPA purposes even when those acts were not "caused" by the foreign actor within the meaning of the FCPA.

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Judicial Immunity Resurfaces in the Third Circuit

By Ronald H. Levine, Barbara A. Zemlock, and Matthew T. Newcomer

Use immunity is traditionally viewed as a prerogative of the Executive Branch exercised by law enforcement to compel truthful testimony from witnesses who otherwise would refuse to testify based on their Fifth Amendment right against self-incrimination. However, a few federal courts also recognize the court's inherent authority to grant or compel immunity for defense witnesses over the objection of the prosecution. A recent decision out of the Middle District of Pennsylvania may revive the doctrine of "judicial immunity" for defense witnesses. *U.S. v. Nagle,* Crim. No. 1:09-CR-384-01 (M.D.Pa. filed Oct. 4, 2010) (Rambo, J.). To understand the potential implications of *Nagle*, some background is helpful.

Government-Initiated Use Immunity

Absent a cooperation guilty plea agreement, a witness with exposure in a federal prosecution usually will only provide trial or grand jury testimony after receiving some measure of assurance that what he or she says will not subject him or her to criminal prosecution. There are two kinds of protection usually available to such a witness, both of which require the prosecutor's acquiescence: 1) "informal" use immunity obtained via a contractual agreement with a U.S. Attorney's Office; and 2) "formal" use immunity obtained via a formal court order. 18 U.S.C. §§ 6002-03 (formal immunity); U.S.A.M. § 9-23.100; DOJ Crim. Resource Manual at 719 (letter immunity). Whether to push an Assistant U.S. Attorney (AUSA) for formal immunity, and how hard, are tactical decisions that witnesses and their attorneys must make based on the facts of each case, including the evidence against the witness, the witness' exposure and the value of her testimony to the government.

Informal or Letter Use Immunity

Informal immunity, otherwise known as "pocket" or "letter" immunity, is reached via a written letter agreement in which the U.S. Attorney's Office that is prosecuting the case promises not to bring charges against the witness in exchange for the witness's truthful testimony. Many federal prosecutors favor giving letter immunity because it can be accomplished quickly via the unilateral execution of a form letter, as opposed to the relatively more arduous process of obtaining court-ordered immunity.

However, because the Department of Justice (DOJ) takes the position that testimony given under informal immunity is not compelled, but rather is pursuant to agreement and voluntary (DOJ Criminal Resource Manual at 719), the protections of informal letter immunity are only as good as the actual language of the letter. For example, a witness cannot expect protection from derivative use of his testimony unless the non-prosecution letter expressly provides for it. Similarly, a letter agreement only protects the witness from being prosecuted by the specific government entity that signs it. DOJ Criminal Resource Manual at 719. Finally, an informal immunity letter may contain all kinds of additional cooperation-related conditions and government escape clauses. Depending on how the letter is drafted, violation of those conditions may void the immunity protection altogether.

Formal or Court-Ordered Use Immunity

Formal or "statutory" immunity offers protections that are both broader and more predictable than letter immunity. Formal immunity includes a prohibition on derivative use of the witness' testimony. 18 U.S.C. § 6002. If the witness were ever prosecuted, the government would have the extremely difficult burden of proving in a *Kastigar* hearing that the evidence it attempts to admit is derived from a legitimate source wholly independent of the immunized testimony. *Kastigar v. U.S.*, 406 U.S. 441 (1972); *see e.g., U.S. v. Hubbell*, 530 U.S. 27 (2000); *U.S. v. North*, 910 F.2d 843 (D.C. Cir. 1990). Moreover, a grant of statutory use immunity is binding on the states as well as the federal government. *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964).

Obtaining statutory use immunity takes several steps. The prosecuting AUSA must obtain internal approval from the U.S. Attorney's Office and the DOJ Office of Enforcement Operations (OEO). The AUSA must then get an order from the assigned grand jury or trial judge via a motion to compel testimony. The asserted basis of that motion will be that the witness' testimony is necessary to the public interest and that the witness would otherwise refuse to testify based on his or her privilege against self-incrimination. 18 U.S.C. § 6003. If the judge grants the motion, the judge will issue an order compelling the witness's testimony under the protection of statutory use immunity that is limited only by the witness' failure to tell the truth or comply with the order. 18 U.S.C. § 6002.

Judicial Immunity

Defense attorneys, unlike federal prosecutors, lack the statutory authority to seek immunity for witnesses who would otherwise refuse to testify based on their privilege against self-incrimination. Several Circuits have recognized that when a federal prosecutor's refusal to seek

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immunity for a defense witness is determined to be a deliberate attempt to distort the judicial fact finding process, courts may invoke due process and seek to force the prosecutor to request immunity under Sections 6002-6003 for the defense witness under threat of acquittal or prohibiting the testimony of the government's immunized witnesses. *See e.g., U.S. v. Castro*, 129 F.3d 226, 232 (1st Cir. 1997), cert. denied, 523 U.S. 1100 (1998); *U.S. v. Ebbers*, 458 F.3d 110 (2d Cir. 2006), cert. denied, 549 U.S. 1274 (2007). These courts have required a defendant to show that the government has implemented its immunity in a discriminatory way, has forced a potential witness to invoke the Fifth Amendment through "overreaching," or has deliberately denied immunity for the purpose of withholding exculpatory evidence and gaining a tactical advantage through such manipulation. *See e.g., Castro*, 129 F.3d at 232; *Ebbers*, 458 F.3d at 199.

A few other federal circuits have recognized a judge's independent and inherent authority to immunize the testimony of defense witnesses based on a defendant's constitutional right to present an effective defense. The Third Circuit has held that a judge may only implement this "effective defense" theory of judicial immunity where the withheld testimony is both clearly exculpatory and essential to the defense, and where there is no strong countervailing systematic interest against excluding the evidence. *Virgin Islands v. Smith*, 615 F.2d 964, 970 (3d Cir. 1980). The Second Circuit, while uniformly rejecting requests for judicial immunity, has nevertheless left open the possibility that the facts of a particular case may warrant immunization of a witness under principles of constitutional fairness. *See U.S. v. Turkish*, 623 F.2d 769, 774 - 777 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981). It has also limited this power by holding that a prosecution target cannot receive judicial immunity. *U.S. v. Todaro*, 744 F.2d 5, 9 (2d Cir. 1984), cert. denied, 469 U.S. 1213 (1985). Yet until the *Nagle* case, a federal court has not exercised "effective defense" judicial immunity in nearly 30 years.

U.S. v. Nagle

Nagle involves the indictment of principals and key employees of a family contracting business on charges of conspiracy to defraud the federal Department of Transportation in the implementation of its disadvantaged business enterprise (DBE) program, DBE-related mail and wire fraud and money laundering. All defendants had pleaded guilty by the time of trial except for Nagle, the CEO, who maintained that he acquired that position only after an internal struggle for power with his co-defendant uncle, who allegedly excluded him from the day-to day operations of the company.

Nagle further maintained that the one person who could exonerate him was the co-defendant uncle, who had pleaded guilty in a non-cooperation deal without a proffer but has yet to be sentenced. In response to a defense trial subpoena, the uncle advised the defense that he intended to assert his Fifth Amendment rights. Nagle asked the government to seek use immunity for the uncle, and the government declined. Nagle then moved the court to compel the uncle's testimony on several grounds, including compelling the government to seek use immunity or via the grant of judicial immunity.

The District Court refused to compel the government to seek use immunity, finding that Nagle had made no showing that the government's refusal to grant immunity was a deliberate attempt to distort the fact-finding process. However, the court granted judicial immunity to the uncle. Relying on the Third Circuit's decision in *Virgin Islands v. Smith*, the court held that the defendant had met his burden of showing that his co-defendant uncle's testimony was "clearly exculpatory," essential to the defense and likely to make a dispositive difference in the trial's outcome.

Importantly, the court based its ruling solely on a defense "proffer" of the uncle's expected testimony with references to limited entries in the uncle's handwritten journal, all of which was recited in the defense brief in support of its motion to compel. In other words, there was no direct or sworn evidence of the content of the uncle's expected testimony. The court also concluded that the prosecution had not articulated a strong countervailing interest for not granting immunity to the co-defendant uncle, noting that it was the prosecution's decision to allow the co-defendant to plead guilty without cooperation to only one count of a 32-count indictment (the *Klein* conspiracy charge) without first obtaining a proffer from him. The court rejected the government's fear of an "immunity bath" as a basis for denying the motion, noting that the government "cannot hide behind its decision to allow [the co-defendant uncle] to plead without a proffer, and yet insist that it has a strong interest in preventing the immunization of a witness for whom it does not have a proffer." In the "clash" between Nagle's due process rights and the uncle's Fifth Amendment rights, the court found that it could protect both and best balance competing interests by granting judicial immunity. The court's ruling is currently on interlocutory appeal to the Third Circuit.

Conclusion

Because judicial immunity is recognized in only a few jurisdictions and, even then, implemented sparingly, the doctrine is often overlooked or forgotten. If the Third Circuit reaches the merits in *Nagle*, an opportunity will exist for it to reaffirm this limited but powerful tool for securing exculpatory testimony and breathe new life into the doctrine.

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telecommunications and health care. Mike Koehler, The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence, 43 *Ind. L. Rev.* 389, 411-13 (2010). Some recent examples include:

- A deferred prosecution agreement and $2 million fine for payments made to physicians employed at Chinese state-owned hospitals in exchange for physicians directing their hospitals to purchase the defendant U.S. corporation's

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medical devices. *U.S. v. AGA Medical Corp.*, 0:08-cr-00172-1 (D. Minn. 2008).

- Charges leading to a $402 million criminal settlement for, *inter alia*, bribes allegedly made by KBR to officials of Nigeria LNG, a joint venture between private multinational energy companies owning 51% of the joint venture, and Nigeria's state-owned oil company owning 49%, for the purpose of securing engineering and procurement contracts. *U.S. v. Kellogg, Brown and Root LLC*, 09-cr-071 (S.D. Tex. 2009).
- Indictments of officers of a Florida company for payments made to officials of Honduras' national telecommunications company — including the senior in-house attorney of that company — in exchange for interconnection agreements and preferential rates. *U.S. v. Granados*, 1:10-cr-20881 (S.D.Fla. 2010).

The government's approach appears to subsume nearly every entity that has some government ownership, even if the amount of government ownership is less than 50% of an otherwise privately owned entity or the entity is engaged in purely commercial pursuits. From a domestic perspective, this approach has potentially absurd results: if the U.S. were a foreign country, American International Group officers would have to be deemed foreign officials by virtue of the government's takeover of that company as part of TARP.

Legislative History Suggests Otherwise

In two recent cases, defendants have sought to highlight this potential absurdity. In both *U.S. v. Nguyen*, 2:08-cr-00522 (E.D.Pa. 2009) and *U.S. v. Esquenazi*, 1:09-cr-21010 (S.D. Fla. 2009), the defendants filed motions to dismiss on the grounds that the recipients of their alleged payments were not "foreign officials" under the FCPA. In *Nguyen*, the president of Nexus Technologies Inc. was charged with violating the FCPA by making payments to secure contracts with various Vietnamese state-owned enterprises. *Esquenazi* involved payments to the directors of international relations at Haiti's government-owned telecommunications utility, allegedly in exchange for lower usage rates.

Nguyen and Esquenazi argued that Congress's intent in enacting the FCPA was to criminalize payments to individuals performing public functions, not the commercial functions typical of SOEs. They argued that the ordinary meaning of "instrumentality" — "a thing used to achieve an end or a purpose" — compels this interpretation. As an instrumentality of the government, such entities must necessarily advance the "end or purpose" normally associated with governance, not simple financial gain.

Nguyen and Esquenazi also analyzed the use of the term "instrumentality" in other statutes on the books in 1977, such as the Foreign Sovereign Immunities Act (FSIA) and Employee Retirement Income Security Act (ERISA), arguing that these definitions should be persuasive in interpreting FCPA.

Drawing on FSIA case law indicating that instrumentalities must be directly owned by the government, for example, Nguyen argued that one company named in the indictment, PVGC, was a subdivision of an entity that was owned by the Vietnamese government. Nguyen claimed that the "corporate layer separating PVGC from the Vietnamese government" was sufficient to preclude PVGC's status as an instrumentality. Additionally, courts interpreting "instrumentality" under ERISA have held that "a government instrumentality is one that performs an important government function," a point used by the defendants to attempt to highlight the distinction between public and commercial functions. *See Fed. Reserve Bank v. Metrocentre Improvement Dist. #1*, 657 F.2d 183, 185.

Nguyen and Esquenazi also addressed the legislative history surrounding the 1998 amendment to the FCPA. The amendment added international organizations to the list of entities whose officials could be deemed foreign officials. The amendment was undertaken to conform the Act with the Organisation for Economic Co-operation and Development (OECD) Convention, an agreement among over 30 nations to effectuate stronger and more consistent laws that criminalize corruption of foreign officials. The Commentaries to the OECD Convention state that the Convention's anti-bribery provisions should apply to SOEs unless "the enterprise operates on a normal commercial basis in the relevant market, *i.e.*, on a basis that is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges." Convention Commentary ¶¶ 14-15. This Commentary weighs in favor of the argument that traditionally commercial entities should be deliberately excluded from the FCPA.

The district courts in *Nguyen* and *Esquenazi* rejected the defendants' arguments but only because the issue (and evidence) would be better left as a question of fact for a jury.

In addition to the sources cited in the *Nguyen* and *Esquenazi* cases, there are numerous other sources of authority that may be helpful to a practitioner seeking to defend her client in an FCPA enforcement action where the "foreign official" appears to be more private than "official."

The 1976 SEC Report

In *U.S. v. Kay*, 359 F.3d 738, 749 (5th Cir. 2004), the U.S. Court of Appeals for the Fifth Circuit identified two primary sources of FCPA legislative history — congressional reports and the 1976 SEC Report that provided the impetus for enactment of the FCPA. This second document, titled the "Report on Questionable and Illegal Corporate Payments and Practices," bolsters the argument that the term "foreign officials" means individuals performing a traditionally public function.

The SEC Report addressed improper foreign expenditures, dividing these by recipient: "government officials, commission agents and

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consultants, and recipients of commercial bribery." SEC Report at 25. Thus, payments to officials are set forth as a category separate from ordinary commercial bribery.

The 1977 House Report for the FCPA made repeated reference to this SEC Report, and added only one example to those cited in the Report: Lockheed's bribery of various high-level politicians, such as the Japanese Prime Minister and Minister of Finance, a Dutch prince, and various Cabinet-level politicians in Italy. H.R. Rep. 95-640 at 5. While not dispositive of the issue, a deeper look at the 1977 legislative history shows that Congress was addressing traditional government officials, not SOE employees, when it passed the FCPA.

The OECD Convention

In the years prior to the ratification of the OECD Convention in 1998, the passage of the FCPA had created a comparative disadvantage for American companies, which were forced to compete with foreign companies that were unrestrained in their ability to pay bribes. The central purpose of the 1998 Amendment and the OECD Convention was to "level the playing field for business worldwide." House Report No. 105-802 at 12 (1998).

By creating a uniform anti-bribery policy among the 30-plus signatories, the OECD Convention intends to eliminate any comparative disadvantage to honest companies. An FCPA defendant could use this to argue that reciprocity is a key principle to be applied when interpreting the FCPA — that Congress intended American companies to be bound only as much as companies from other signatory nations would be. This principle militates against criminalizing conduct by American companies abroad if analogous conduct in the U.S. would not fall under other signatories' anti-corruption laws promulgated pursuant to the Convention. For example, under this approach, payments to telecommunications executives for preferential rates would fall outside the FCPA, since the equivalent American companies — Verizon, AT&T, etc. — are private. Instead, commercial bribery laws would cover such conduct.

The OECD Questionnaire

The DOJ's response to the OECD Phase I Questionnaire is also helpful. This questionnaire sought information regarding the DOJ's compliance with the OECD Convention. In response to a request to define the scope of the term "foreign official," the DOJ stated:

> State-owned business may, *in appropriate circumstances*, be considered instrumentalities of a foreign government and their officers and employees to be foreign officials … . Among the factors [the DOJ] considers are the foreign state's own characterization of the enterprise and its employees, *i.e.*, whether it prohibits and persecutes bribery of the enterprise's employees as public corruption, the purpose of the enterprise, and the degree of control exercised over the enterprise by the foreign government.

See U.S. Response to Phase I Questionnaire, available at www.oecd.org (emphasis added).

The DOJ's response, drafted essentially contemporaneous to the passage of the 1998 Amendment, implies that SOEs should not automatically be understood to be instrumentalities for purposes of the FCPA. Each of the factors listed — legal characterization, purpose of the enterprise, degree of control — offers a ground to oppose the application of FCPA to a specific SOE.

In this respect, an investigation of the foreign country's legal characterization of its SOEs may bring useful defenses to light. Certain French public corruption legislation, for example, appears to explicitly exclude companies that have less than 30% public ownership, potentially removing such companies from the FCPA's reach. *See* Modernization of Public Services Act of 2007.

Conclusion

The government's broad interpretation of the terms "foreign official" and "instrumentality" significantly expands the types of transactions implicated by the FCPA. Yet there are arguments to be made that this interpretation violates the intent of the statute. Despite the failure of two recent defendants to dismiss indictments on some of these grounds, the arguments can continue to be made and certainly remain viable for a defendant in the post-motion to dismiss stages of an FCPA enforcement action.

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SEC v. Panalpina

In November 2010, the SEC announced civil settlements with several companies in oil services industries, including Panalpina Inc., a global freight forwarding and logistics services company, for violating the FCPA. The SEC alleged that Panalpina, the U.S. subsidiary of a Swiss parent, bribed customs officials in more than 10 countries in exchange for various benefits, including preferential customs duties and import treatment for international freight shipments. Panalpina agreed to pay $11,329,369 in disgorgement to settle the charges. Panalpina and its Swiss parent also agreed to pay the Justice Department a criminal fine of $70.56 million.

While Panalpina, as a U.S.-based entity, clearly could have been (and was) charged with violations of the FCPA as a principal, the SEC's complaint is notable because it conceded that neither Panalpina nor its parent were issuers. Despite this, the complaint charged Panalpina with two counts of aiding and abetting FCPA violations by customers of the company that were issuers. According to a statement by an SEC official, this was the first time that the agency had charged a non-issuer with FCPA violations. Thus, Panalpina potentially represents an effort by the SEC to expand its focus beyond "issuers" through application of aiding and abetting or, potentially, conspiracy, theories of FCPA liability.

U.S. v. Siriwan

Another example of non-traditional anti-bribery enforcement is the Justice Department's indictment of a Thai public official, Juthamis Siriwan. *See U.S. v. Siriwan*, No. 09 Crim. 0081 (C.D. Cal.). In that case, the government alleged that the defendant, the former head of the Tourism Authority of Thailand, accepted bribes from two U.S. citizens

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IN THE COURTS

Ninth Circuit Reverses Conviction of Former CFO Of Network Associates Inc.

The U.S. Court of Appeals for the Ninth Circuit reversed the conviction of Prabhat Goyal, the former Chief Financial Officer of Network Associates Inc. ("NAI"), on the grounds that no jury could have found him guilty based on the evidence presented by the prosecution at trial. *United States v. Goyal*, No. 08-10436 (9th Cir. Dec. 10, 2010).

Goyal was the CFO of NAI from 1997 to 2001. In 1998, NAI added sales to distributors to its business model, which had historically focused on direct sales to end-users. The primary focus of the government's case was the manner in which NAI recognized the revenues generated from sales to distributor Ingram Micro. To help meet its quarterly projections, NAI made deals providing incentives to Ingram at the end of each quarter to boost sales. The government did not take issue with this practice; rather, the government contended that NAI improperly recognized the revenue from these transactions earlier than it should have. *Id*. at 19746-47. Specifically, the government claimed that NAI improperly used "sell-in" accounting, which recognizes revenue at the time a product is sold into the distribution chain (as opposed to when it is sold to the end user, known as "sell-through" accounting), to overstate revenues by recognizing these sales earlier than was appropriate. *Id*. at 19747.

A jury convicted Goyal on a number of counts: one count of securities fraud, seven counts of making false filings with the SEC, and seven counts of making false statements to NAI's auditors. Addressing the first eight counts, the Ninth Circuit found that the government failed to carry its burden to show materiality. The court noted that the government had to demonstrate that "the accounting produced artificially higher revenue figures in certain periods that 'would have been viewed by a reasonable investor as having significantly altered the total mix of information made available.'" *Id*. (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988).)

To establish this at trial, the government relied on the stipulation of the parties that using sell-through (as opposed to sell-in) accounting in all of NAI's operations would have resulted in a materially lower revenue figure. The court found this stipulation too broad to be useful. The government only contended that sell-through accounting would have been required for the Ingram transactions. It did not, however, offer any evidence regarding the effect on revenues of changing the accounting for just the Ingram transactions. Thus, the Ninth Circuit found that the jury had "no basis to conclude that the misstatement of reported revenue resulting from the Ingram transactions was material." *Id*. at 19750. The court dismissed the government's arguments that the jury could have inferred materiality based on the portion of total revenue (24%) that the Ingram sales represented because the jury never saw the proportions. Even if they had this figure, the jurors had no facts that would have allowed them to compare the difference between the use of sell-in accounting against the use of sell-through accounting for these transactions.

The remaining counts were based on Goyal's statements to auditors that: 1) the company's financial statements complied with GAAP; and 2) all sales terms had been disclosed. To meet its burden, the government had to establish that Goyal voluntarily made these statements and knew that they were false.

The court found that the government had failed to provide evidence to support all but one of its alleged GAAP violations and that, for that one violation, it had provided no evidence that Goyal's resulting false statement was willful and knowing. In order to use sell-in accounting, the relevant GAAP provisions required that the price to the buyer be "substantially fixed or determinable," that the seller not have "significant obligations for future performance" to effect the resale of the product by the buyer, and that the quantity of "future returns" could be estimated.

The court found that the government offered no evidence that NAI had inadequate reserves to cover the terms of the deals with Ingram, which would have been necessary to establish a violation of the "substantially fixed or determinable" GAAP provision. The government also failed to offer evidence that NAI was unable to determine the likely rate of returns from Ingram, a necessary predicate to showing that NAI had violated the "returns" prong of GAAP.

However, the court did find that there was evidence on which the jury could have found that the buybacks of software violated the GAAP prohibition on a "significant obligation[] for future performance." The Ninth Circuit, however, found that the government had failed to offer any evidence from which the jury could have found that Goyal's misstatement was willful and knowing. The circuit court rejected the government's arguments that the jury could have inferred such intent. Specifically, the court noted that "Goyal's presumed knowledge of GAAP as a qualified CFO does not make him criminally responsible for his every conceivable mistake." In addition, the court noted that his "general financial incentive" to see the company perform well "cannot be inherently probative of fraud."

The Ninth Circuit also found that the government failed to provide any evidence that any non-disclosure of sales terms were willful and knowing. The sales terms of the end-of-quarter Ingram deals were disclosed in the after-the-fact debit memos that Ingram submitted and that were provided to auditors, although the initial buy-in letters had not been provided. The court found that a reasonable juror could have found that this was insufficient to constitute disclosure of "all sales terms." It dismissed the government's arguments that Goyal's required intent element could have been inferred.

Notably, Chief Judge Alex Kozinski filed a concurring opinion identifying this as an example of "a string of recent cases in which courts have found that federal prosecutors overreached by trying to stretch criminal law beyond its proper bounds." *Id*. at 19762.

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BUSINESS CRIMES HOTLINE

CALIFORNIA

Former Chairman of McKeeson Corporation Sentenced to 10 Years in Prison

U.S. District Court Judge William H. Alsup sentenced Charles McCall to 10 years in prison and ordered him to pay a $1 million fine for his alleged role in a fraud designed to inflate sales revenue.

McCall was indicted in 2003 and, after a 2006 jury trial, was acquitted on conspiracy charges, but the jury failed to resolve other charges. Thereafter, federal prosecutors re-indicted McCall, leading to his 2009 re-trial. McCall was convicted in November 2010 of five counts of securities fraud and circumventing accounting rules. The government alleged that McCall had backdated sales contracts to meet projections by recognizing revenue early.

The prison term was the minimum sentence, five years less than what the government requested. McCall's attorney said that he would appeal the conviction and that his client maintains his innocence.

Five other former McKeeson executives had pleaded guilty as a part of the government's investigation. In 2005, the company settled investor suits by agreeing to pay $960 million.

DISTRICT OF COLUMBIA

Online Sales of Counterfeit Goods Targeted in Nationwide 'Cyber Monday' Seizure of Web Site Domains

On Nov. 29, 2010, Attorney General Eric Holder and Director John Morton of the Department of Homeland Security's Immigration and Customs Enforcement (ICE) announced that Operation in Our Sites v. 2.0, a joint operation targeting online retailers of counterfeit goods, had led to the execution of 82 seizure orders against commercial Web site domain names for their sale and/or distribution of copyrighted works and counterfeit goods. The National Intellectual Property Rights Coordination Center (IPR Center), led by ICE's Office of Homeland Security Investigations (HIS), headed up the investigation, with assistance from the Computer Crime and Intellectual Property, and Asset Forfeiture and Money Laundering sections of the DOJ's Criminal Division and U.S. Attorney's Offices in nine districts.

Operation in Our Sites v. 2.0 built upon Operation in Our Sites I, which was announced in June 2010. While the latter targeted nine Web site domain names engaged in sales of pirated first-run movie copies, the scope of the former expanded to include domain names selling counterfeit sporting goods and athletic clothing, handbags and sunglasses, in addition to copies of copyrighted software, music, and DVDs. As part of their efforts to secure the seizure orders needed to shut down the Web sites, federal law enforcement agents worked undercover to purchase suspected counterfeit items online. Once purchased, the goods, which were often shipped via international express mail into the U.S. from suppliers abroad, were determined to be counterfeit or illegal in some other manner. Magistrate judges issued the requested seizure orders for the respective Web site domain names. According to the government, those Web sites now contain a banner notifying those seeking to access each Web site that the domain name has been seized by federal authorities.

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In the Courts and Business Crimes Hotline were written by Associate Editor **Kenneth S. Clark** and **Matthew J. Alexander,** respectively. Both are associates at Kirkland & Ellis LLP, Washington, DC.

Foreign Bribery

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who owned and operated several businesses in Southern California. In exchange, Siriwan allegedly secured several lucrative Thai contracts for her U.S. benefactors.

Siriwan was not charged with any FCPA violations because, as discussed already, foreign officials who do no more than receive bribes from a covered person or entity are beyond the reach of the statute. Instead, the Justice Department charged Siriwan under the federal money laundering statute, 18 U.S.C. § 1956, on the theory that she had laundered money for the purpose of furthering the primary FCPA violations allegedly committed by her U.S. bribe-givers. In essence, rather than charging Siriwan with accepting a bribe, the government charged her with conspiring to transport the money used for the bribe.

To be sure, the government's theory was not entirely novel. In *U.S. v. Bodmer*, 342 F. Supp. 2d 176 (S.D.N.Y. 2004), Manhattan federal district Judge Shira Scheindlin rejected a defendant's motion to dismiss in similar circumstances, noting that "i[f] immunity from the FCPA's criminal penalties automatically conferred non-resident foreign nationals with immunity from the money laundering statute, these non-resident foreign nationals could openly serve as professional money launderers of proceeds derived from violations of the FCPA, without repercussion." *Id.* at 191. Combined, however, with the kind of aggressive use of the FCPA reflected in the *Snamprogetti* and *Panalpina* cases, the charging theory in Siriwan reflects the government's clear intention to reach foreign bribery previously considered outside the reach of U.S. law enforcement.

Conclusion

The cases discussed above make clear that federal authorities have undertaken a concerted effort to curb foreign bribery schemes. The government appears to be signaling that foreign bribery with even a marginal connection to the U.S. is now fair game for pursuit under the FCPA or other arguably applicable statute.

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