

## ARTICLES

### A BRIBE NEW WORLD: THE FEDERAL GOVERNMENT GETS CREATIVE IN CHASING FOREIGN OFFICIALS FOR TAKING BRIBES

*Jorge Mestre\**

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An itchy palm is nothing new. People have been slipping money from one hand to another in exchange for unfair advantage since the beginning

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\* J.D. with honors, 1996, Florida State University. Mr. Mestre is a member of the Florida Bar, the District of Columbia Bar, and the New York State Bar. He is also on the Board of Directors of the Hispanic National Bar Foundation. Mr. Mestre is a member of Rivero Mestre in Miami.

of recorded history. Exodus 23:8 enjoins us from bribery: “And you shall take no bribe, for a bribe blinds the clear-sighted and subverts the cause of those who are in the right.” Even a cursory look at history reveals that the problem of public corruption is as old as Methuselah—but the fact that there is a problem does not mean that prosecutors ought to ignore the intent of Congress and legislate their own solution. Yet that is precisely what they are doing.

The Foreign Corrupt Practices Act (FCPA)<sup>1</sup> is a supply-side statute—that is, it criminalizes bribe giving but not bribe taking by foreign officials. Accordingly, and until recently, prosecutors followed a supply-side strategy by prosecuting bribe givers and not government bribe takers. But more and more, prosecutors are taking the fight to the bribe takers—in other words, including a demand-side approach to the offensive. They are doing so by charging corrupt foreign officials under statutes such as the Travel Act<sup>2</sup> and the Money Laundering Control Act (MLCA).<sup>3</sup> This newly minted strategy was not contemplated by Congress, which left foreign officials out of the FCPA.

There may be several motives for this new stratagem. It may be that the United States is starting to feel that the FCPA has given way to the U.K. Bribery Act as the most feared anti-bribery law on the globe. For instance, the U.K. Bribery Act prohibits both supply-side and demand-side bribery—in other words, it is aimed at bribe givers as well as bribe takers.<sup>4</sup> It may simply be that the United States is trying to keep up.

Another reason may be the notion that if bribe takers share some prosecution risk with bribe givers, the market for bribes might shrink. If foreign officials do not feel any risk of being prosecuted, they will persist in coercing companies into making payments to procure business. This new stratagem might deter them from doing so.

Finally, it might be a belief that American corporations are for the most part committed to the rule of law, free competition and good citizenship, and no matter how much they do to comply, they cannot stop the barrage of extortionate demands for bribes in foreign markets. The United States might simply be trying to reduce bribe solicitation to ease the burden on American companies doing business abroad.

Whatever the reason, there is no doubt that the United States is taking a new approach to charging foreign officials who would not otherwise be accountable for taking bribes under the FCPA. No matter how good their reasons, prosecutors should not be permitted to go around the policy decisions made by Congress in the FCPA and essentially become legislators themselves.

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1. 15 U.S.C. § 78dd-1 (2014).
  2. 18 U.S.C. § 1952 (2014).
  3. 18 U.S.C. §§ 1956–1957 (2012).
  4. Bribery Act, 2010, c. 23, § 2 (U.K.).

## I. FCPA

### A. History

After the Watergate scandal, the U.S. Securities and Exchange Commission (SEC) investigated certain corporations that had donated to political-election campaigns, including the re-election campaign of then-President Nixon.<sup>5</sup> Because of its work and that of the special prosecutor, several corporations were charged with making illegal political contributions with corporate funds.<sup>6</sup> The investigation revealed the existence of “slush funds” that many corporations kept off the books, sometimes in offshore bank accounts or shell companies created only to fund bribes.<sup>7</sup> The discovery sounded an alarm because these illegal payments could be significant to potential investors.<sup>8</sup> It justifiably caused concern about the disclosure system on which our financial system and U.S. securities laws rest.<sup>9</sup>

One of the infamous examples was that of Lockheed Corporation.<sup>10</sup> It had paid about \$1.8 million in bribes to the Prime Minister of Japan (among others) to obtain a contract for the sale of passenger aircraft.<sup>11</sup> This embarrassed the United States, given that Lockheed was seen almost as an arm of the U.S. government.<sup>12</sup> It was also the Cold-War era, during which the United States thought of itself as the shining city on the hill.<sup>13</sup> It was important to show that capitalism did not equal corruption as it related to the fight against communism.<sup>14</sup>

Congress also was concerned about more practical foreign policy issues. It was troubled that many multinational enterprises and U.S. government agencies had been accused of attempting to subvert friendly

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5. U.S. Sec. & Exch. Comm’n, Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payment and Practices (1976), *reprinted in* Special Supplement, Sec. Reg. & L. Rep. (BNA) No. 353, at 2, 39–40 (May 19, 1976) [hereinafter SEC Report on Corporate Payments]; see Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT’L L.J. 89, 92 (2010).

6. SEC Report on Corporate Payments, *supra* note 5, at 2.

7. *Id.* at 3.

8. *Id.* at 2.

9. *Id.* at 3.

10. See A. Carl Kotchian, *The Payoff: Lockheed’s 70-Day Mission to Tokyo*, SATURDAY REV. (July 9, 1977); H.R. REP. NO. 95-640, at 2 (1977), available at <http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf>.

11. See *id.* at 8–12; Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 941 (2012); SEC Report on Corporate Payments, *supra* note 5, at 40.

12. See Joseph W. Yockey, *Choosing Governance in the FCPA Reform Debate*, 38 J. CORP. L. 325, 338–39 (2013).

13. See Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 939–41 (2012); S. REP. NO. 95-114, at 2 (1977).

14. See Koehler, *supra* note 13, at 941.

foreign governments.<sup>15</sup> Congress was concerned that such conduct could weaken friendly governments in the eyes of their own people, which was counter to U.S. foreign-policy goals.<sup>16</sup>

Finally, broad economic arguments were made in support of a new anti-bribery law. Besides undermining democracy and subverting legitimate governments, bribery short-circuits free markets.<sup>17</sup> Markets are supposed to reward efficiency and quality. When bribes are paid, resources go to the corrupt, not the efficient:

[Bribery] is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. . . . [I]t rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.<sup>18</sup>

The question was how to fix the problem. After scores of hearings, Congress was worried that existing laws that possibly could have addressed this type of corruption were deficient.<sup>19</sup> For instance, the securities laws had some gaping holes—they generally only required disclosure of “material” facts.<sup>20</sup> Thus, under the securities laws, unless a bribe was material, it did not need to be disclosed.<sup>21</sup> It was not hard to imagine a scenario where a company might decide that a small bribe would not matter to an investor and therefore would deem it immaterial and not report it. The tax laws also were found wanting, because under those laws, making the payment is not the illegal act—the illegal act was taking a tax deduction for the bribe as if it were a legitimate business expense.<sup>22</sup> No deduction, no crime—that was unacceptable.<sup>23</sup> Finally, the antitrust laws generally would not apply unless the bribe would have an anticompetitive effect on U.S. foreign commerce.<sup>24</sup> Congress wanted to close these gaps and find a way to prosecute overseas corruption.<sup>25</sup>

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15. *The Activities of Multinational Corporations Abroad: Hearings Before the Subcomm. on Int'l Econ. Policy of the H. Comm. on Int'l Relations*, 94th Cong. 22 (1975) (statement of Mark B. Feldman, Deputy Legal Advisor, U.S. Dep't of State).

16. See S. REP. NO. 95-114, at 3-4 (1977); *Statement of Comm'n Policy Concerning Section 30a of the Sec. Exch. Act of 1934*, Release No. 17099, at 2 (Aug. 28, 1980).

17. S. REP. NO. 94-1031, at 3 (1976).

18. H.R. REP. NO. 95-640, at 4-5 (1977).

19. See Koehler, *supra* note 13, at 950-60.

20. *Id.* at 951-55.

21. *Id.*

22. See *id.* at 954-56; I.R.C. § 162(c) (2011).

23. See Koehler, *supra* note 13, at 954-56.

24. See *id.* at 955-56.

25. See *id.* at 956-61.

So Congress acted and passed the FCPA as an amendment to the Securities Exchange Act of 1934.<sup>26</sup> It was described as an effort to “restore public confidence in the integrity of the American business system.”<sup>27</sup> But the FCPA only penalizes those who give the bribe and not those who take it.<sup>28</sup> It was therefore an inside-out approach to tackling corruption based on our own commitment to the rule of law.

This inside-out approach was very much intentional. Congress was well aware that under international law the United States had the power to reach conduct of noncitizens, including foreign bribe takers.<sup>29</sup> What’s more, constitutionally, Article I, Section 8, gives Congress the power to “regulate Commerce with foreign Nations and among the several States” and “to define and punish Offenses against the Law of Nations.”<sup>30</sup> Thus, Congress arguably could have regulated the bribe takers based on territoriality and the effects principles of jurisdiction.<sup>31</sup> But it chose not to, doubtless constrained by notions of comity and the concern that subjecting bribe takers in friendly foreign governments to criminal liability would exacerbate foreign-policy problems.

Three decades later, it appears that the U.S. Department of Justice (DOJ) and the SEC have decided to work around the FCPA’s limitations and go after foreign-bribe takers. To understand their strategy, it is first important to understand the basic structure of the FCPA and why these agencies decided that they needed to go around the law in the first place.

### B. Structure

The FCPA is essentially a two-part statute.<sup>32</sup> It contains both anti-bribery<sup>33</sup> and accounting provisions.<sup>34</sup> Most would agree that the anti-bribery provisions are the guts of the law. They define what is and is not acceptable.<sup>35</sup> The accounting provisions are nevertheless also important in that they require companies to disclose and monitor.<sup>36</sup> It is this

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26. 15 U.S.C. § 78dd-1 (2012).

27. S. REP. NO. 95-114, at 4 (1977).

28. *United States v. Castle*, 925 F. 2d 831, 835 (5th Cir. 1991).

29. *Id.* at 835 (citing H.R. REP. NO. 95-640, at 12 n.3 (1977)).

30. U.S. CONST. art. I, § 8.

31. *United States v. Noriega*, 746 F. Supp. 1506, 1515 (S.D. Fla. 1990) (upholding jurisdiction in case against Noriega for Racketeer Influenced and Corrupt Organization Act (RICO) and Travel Act violations based on the effects doctrine).

32. U.S. Dep’t of Justice & U.S. Sec. Exch. Comm’n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 11 (Nov. 14, 2012), <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf> [hereinafter SEC & DOJ Guide], at 10.

33. *See id.*; 15 U.S.C. § 78dd-1.

34. *See* SEC & DOJ Guide, *supra* note 32, at 38; Section 13(b)(2)(A) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(A)–(B).

35. *See* SEC & DOJ Guide, *supra* note 32, at 10–35.

36. *See id.* at 40–41.

transparency that sets apart American financial markets from some others.<sup>37</sup> As a matter of procedure, the DOJ prosecutes all criminal actions as well as civil proceedings against non-issuers of securities.<sup>38</sup> The SEC handles civil actions against issuers.<sup>39</sup> Oftentimes, the two bring parallel proceedings.<sup>40</sup>

### 1. Anti-Bribery

The anti-bribery provisions forbid “issuers” and “domestic concerns” from making or promising to make corrupt payments, either directly or indirectly, of money, or anything of value, to foreign officials,<sup>41</sup> with corrupt intent to retain or get business.<sup>42</sup> It is best to break down the dictates of the statute into its constituent parts.

An “issuer” is a company that has registered securities or is required to file reports with the SEC.<sup>43</sup> A “domestic concern” is broader and includes a “citizen, national, or resident of the United States” plus “any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principle place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.”<sup>44</sup> The term “anything of value” necessarily is not limited to money.<sup>45</sup> It can include gifts like cars, trips, promise of future employment, and even gifts to charities.<sup>46</sup>

Next, the payment must be made to a “foreign official,”<sup>47</sup> which includes any officer or employee of a foreign government, a department, agency or instrumentality of the government, and any foreign political party, party official, or candidate for foreign office.<sup>48</sup> The FCPA also

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37. No express private right of action exists in the Act for violation of either the anti-bribery or the accounting provisions. *See, e.g.*, *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1028–29 (6th Cir. 1990); *McLean v. Int’l Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987).

38. *See* SEC & DOJ Guide, *supra* note 32, at 4–5.

39. *See id.*

40. *See id.*

41. It can be argued that the United States has taken an expansive role of defining who is a foreign official.

42. 15 U.S.C. § 78dd-1(a) (2012).

43. 15 U.S.C. § 78(c)(a)(8) (2012). Foreign issuers whose American Depositary Receipts are listed on a U.S. exchange are “issuers” for purposes of the FCPA. *See* Cort Malmberg & Alison B. Miller, *Foreign Corrupt Practices Act*, 50 AM. CRIM. L. REV. 1077, 1082 (2013).

44. 15 U.S.C. §§ 78dd-2(h)(1)(A)–(B) (2012).

45. SEC & DOJ Guide, *supra* note 32, at 14–19.

46. *Id.*

47. *Id.* § 78dd-1(a).

48. The term has not been fully developed and there is not much case law explaining it. *See* 15 U.S.C. §§ 78dd-1(a)(2), 78dd-1(f)(1)(A), 78dd-2(a)(2), 78dd-2(h)(2)(A), 78dd-3(a)(2); 78dd-3(f)(2)(A).

reaches a payment to any third party that is made with the knowledge that part of it will be offered to bribe a foreign official.<sup>49</sup> Finally, what it means to “obtain or retain business” is extremely fact-specific.<sup>50</sup> This gives prosecutors some leeway, but also gives a defendant some room to maneuver. Any covered person who “willfully” violates the anti-bribery provisions can be both imprisoned and fined.<sup>51</sup>

The anti-bribery provisions do not prohibit the acceptance of bribes by foreign officials—they address only the supply side and not the demand side of international corporate bribery.<sup>52</sup>

## 2. Accounting

The “books-and-records” provisions of the FCPA are in some ways more limited than the anti-bribery provisions, in that they apply only to “issuers” of U.S. registered securities.<sup>53</sup> These accounting provisions require those issuers to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuers.”<sup>54</sup> However, the FCPA’s accounting provisions take into account that required controls should be in proportion to the size of the corporation:

The definition of accounting controls does comprehend reasonable, but not absolute, assurances that the objectives expressed in it will be accomplished by the system. The concept of “reasonable assurances” . . . recognizes that the costs of internal controls should not exceed the benefits expected to be derived. It does not appear that either the SEC or Congress, which adopted the SEC’s recommendations, intended that the statute should require that each affected issuer install a fail-safe accounting control system at all costs. It appears that Congress was fully cognizant of the cost-effective considerations which confront companies as they consider the institution of accounting controls and of the subjective elements which may lead reasonable individuals to arrive at different conclusions. Congress has demanded only that judgment be exercised in applying the standard of reasonableness. . . . It is also true that the internal accounting controls provisions contemplate the financial principle

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49. 15 U.S.C. § 78dd-1(a)(3); *see* *United States v. Kozeny*, 667 F.3d 122, 135 (2d Cir. 2011).

50. *United States v. Kay*, 359 F. 3d 738, 757 (5th Cir. 2004).

51. *See* *United States v. Kozeny*, 667 F.3d 122, 136 (2d Cir. 2011).

52. *United States v. Castle*, 925 F.2d 831, 835 (5th Cir. 1991).

53. Malmberg & Miller, *supra* note 43, at 1083.

54. 15 U.S.C. § 78m(b)(2) (2012).

or proportionality—what is material to a small company is not necessarily material to a large company.<sup>55</sup>

Albeit proportionally, the accounting provisions require a system of internal controls that provide reasonable assurance that transactions are properly authorized and recorded:

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

- (i) transactions are executed in accordance with management’s general or specific authorization;
- (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
- (iii) access to assets is permitted only in accordance with management’s general or specific authorization; and
- (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences . . . .<sup>56</sup>

Thus, even a payment that is not tied to a bribe can lead to an enforcement action under the accounting provisions if it is inaccurately recorded or attributed to a deficiency in an internal-control program. This does not mean that these provisions do not apply in an actual FCPA violation case (for instance, if a bribe is booked under “cost of goods sold” or something similar, it would violate the FCPA), only that it enables prosecutors who find no actual bribe to go after a corporation.

The SEC also could use the accounting provisions to go after commercial bribery—as opposed to bribing a foreign official—where payments were inaccurately recorded.<sup>57</sup> But beware, because a properly recorded payment may later turn out to have been a bribe, in which case the company just became the government’s cartographers for its own prosecution.

Just like the anti-bribery provisions, the accounting provisions also failed to attack the demand-side of bribery.

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55. SEC v. World-Wide Coin Invs., 567 F. Supp. 724, 751 (N.D. Ga. 1983).

56. 15 U.S.C. § 78m(b)(2) (2012).

57. See *In re* York Int’l Corp., Secs. & Exch. Comm’n Litig. Release No. 20319 (Oct. 1, 2007), available at <http://www.sec.gov/litigation/litreleases/2007/lr20319.htm>.

## C. Amendments

### 1. 1988 Amendments

The early 1980s were a period of economic recession in the United States. As a result, companies were concerned that the FCPA was hurting their competitiveness. Eventually, in 1988 Congress amended the FCPA for the first time in Title V of the Omnibus Trade and Competitiveness Act.<sup>58</sup> There were a few key amendments. First, the statute's application was extended to anyone that violated the FCPA in the United States.<sup>59</sup> Second, Congress tried to distinguish between payments. It passed an exception for “grease” payments made merely to facilitate “routine governmental action” as opposed to those made in order to get an improper benefit.<sup>60</sup> This exception allows payments to speed-up routine matters like processing visas and work orders.<sup>61</sup> It also reinforces its respect for foreign sovereigns by adding an affirmative defense for payments that are legal under the laws of the foreign country.<sup>62</sup>

Thus, rather than promulgating an inflexible rule, the amendment essentially placed the authority to define an acceptable payment in the hands of the foreign sovereign.<sup>63</sup> It provides some guidance, while at the same time giving foreign governments flexibility to establish their own rules.<sup>64</sup> In essence, a foreign government can now help define what constitutes a crime under the FCPA—certainly a generous application of international comity. This should silence those that might say the FCPA is just another example of U.S. imperialism abroad.

Finally, the amendments allowed for payments that are bona-fide expenses related to product promotion or contract performance.<sup>65</sup> Notably, the amendments did nothing to focus on the demand side of the problem.

### 2. Organization for Economic Cooperation and Development Anti-Bribery Convention

After the FCPA's enactment, many American companies felt that they were at a competitive disadvantage. After many years of trying to level the playing field, in 1997 the Organization for Economic Co-operation

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58. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5001–5003, 102 Stat. 1107, 1115 (1988) (codified at 15 U.S.C. §§ 78dd-1–78dd-3, 78ff (2012)).

59. 15 U.S.C. § 78dd-3 (2012).

60. *Id.* § 78dd-1(b).

61. *Id.* § § 78dd-1(f)(3)(A) (2012).

62. *Id.* § §§ 78dd-1(c)(1), 78dd-2(c)(1) (2012).

63. *Id.*

64. *Id.*

65. *Id.* § 78dd-1(c)(2) (2012).

and Development (OECD) adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “OECD Convention”). The OECD Convention was an important event in anti-bribery history for American companies. It required that signatories ban the paying of bribes to government officials as a means of doing business abroad.<sup>66</sup> Forty-one countries have now ratified the Convention.<sup>67</sup> The OECD Convention helped readily expand FCPA enforcement by the United States.<sup>68</sup> Although it generally may be said that policy makers around the world have concluded that it is not only the corporations that are responsible—it is also the local politicians or functionaries that are looking out for themselves and not their compatriots—nevertheless, the OECD Convention is a supply-side agreement. Prosecutors cannot look here to justify their recent stratagem of self-legislating.

### 3. 1998 Amendments

The 1998 amendments were passed in *pari passu* with the OECD Convention.<sup>69</sup> To make the FCPA conform to the OECD Convention, Congress passed the International Bribery and Fair Competition Act of 1998 (the “1998 Amendment”).<sup>70</sup> The 1998 Amendment expanded nationality jurisdiction by stating that any U.S. person or company that violates the FCPA can be held liable regardless of whether they used any means of interstate commerce.<sup>71</sup> Further, anyone who violates the FCPA “while in the territory of the United States” also can be held liable.<sup>72</sup> In other words, the 1998 Amendment also added territorial jurisdiction over foreign persons. Finally, it expanded the definition of “foreign official.”<sup>73</sup> In line with the OECD Convention, the 1998 Amendments expanded the definition of “foreign officials” to include officers and employees of “public international organizations.”<sup>74</sup> Nothing in the 1998 Amendments

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66. See Organization for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43 (1998) [hereinafter International Business Transactions].

67. See Organization for Economic Co-operation and Development, *Ratification Status as of December 2012*, <http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf> (last viewed on Jan. 19, 2014).

68. Many countries criticize the United States for the way it chooses to enforce the FCPA. They claim the United States uses its enforcement efforts as a pretext to punish foreign multinationals. This is not permitted by the OECD Convention’s Article 5 mandate.

69. The Convention came into effect in 1999.

70. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified as amended at 15 U.S.C. §§ 78dd(1)–(3), 78ff).

71. 15 U.S.C. §§ 78dd-1(g), 78dd(2)(i) (2012).

72. *Id.*

73. International Anti-Bribery and Fair Competition Act of 1998, *supra* note 70.

74. 15 U.S.C. § 78dd-1(f)(1) (2012).

addressed the prosecution of bribe takers.

#### D. Extraterritoriality of FCPA

If a U.S. national or company bribes a foreign official anywhere in the world, the FCPA applies. Because it also applies to issuers, and many foreign issuers deem it necessary to participate in U.S. securities markets, the FCPA applies to many foreign corporations. This is still a “nationality” approach to jurisdiction because it requires that the foreign defendants have a significant connection to the United States because of their participation in its securities markets. Moreover, although not technically extraterritorial, the FCPA applies if a foreigner bribes a foreign official anywhere and any act in furtherance of the bribe takes place within the territory of the United States. Some might say that this amounts to extraterritorial jurisdiction because, in practice, the nexus to the United States does not have to be very strong.

For example, in its recently published resource guide, the DOJ and SEC affirmed their position that even “placing a telephone call or sending an email, text message, or fax from, to, or through the United States” is sufficient.<sup>75</sup> So, if you sent an email from one foreign country to another without having any idea that the server through which your email travelled was in the United States, you still would be subject to FCPA liability. Sending a wire transfer of a purely foreign bribe to or from a bank in the United States (or otherwise using the U.S. banking system) also exposes a foreign bribe giver to FCPA liability.<sup>76</sup> The DOJ and SEC also have clarified that there is liability for aiding and abetting and conspiring to violate the FCPA if any act in furtherance of the crime took place within the United States.<sup>77</sup> Therefore, the government can prosecute a violation even if most of the activity took place outside the United States. In fact, some of the largest FCPA settlements have been with foreign corporations (Siemens paid approximately \$800 million to settle its FCPA issues).<sup>78</sup>

But despite the extraterritorial reach of the statute, nothing in it criminalizes the conduct of bribe takers.

## II. THE NEW APPROACHES: RECENT DEMAND-SIDE PROSECUTIONS

Since the FCPA’s birth, companies generally have felt that it was

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75. SEC & DOJ Guide, *supra* note 32.

76. *Id.*

77. *Id.* at 34.

78. See Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Siemens AG for Engaging in Worldwide Bribery No. 2008-294 (Dec. 15, 2008).

unfair to make the FCPA strictly a supply-side statute. Many felt foreign officials were extorting them, yet extortion applied only to threats of violence.<sup>79</sup> In other words, a duress defense was unavailable if there was a reasonable, legal alternative to violating the law—which was usually the case in an economic-threat scenario.<sup>80</sup> The OECD Convention similarly excludes threats to economic advantage.<sup>81</sup> Although companies are justified in their complaints, the DOJ and SEC (and the President) should not be able to ignore congressional intent. In the long run, the companies being extorted will be harmed if prosecutors are allowed to expand criminal statutes however they like.

But first, we examine some of the clever ways prosecutors are trying to circumvent the FCPA's limitations and prosecute bribe takers. These include Presidential Proclamations and federal prosecutions under the Money Laundering Control Act (MLCA) and the Travel Act. Before getting to specific cases, we will take a general look at these proclamations and laws.

#### A. *Money Laundering Control Act*

The U.S. money-laundering laws are perhaps the toughest in existence.<sup>82</sup> In general, liability under the money laundering laws attaches if (a) a predicate act is committed, (b) the money is then used in some transaction, and (c) the accused participated in the transaction knowing, or ignoring, that the money came from the unlawful act:<sup>83</sup>

(a) (1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A) (i) with the intent to promote the carrying on of specified unlawful activity;

\* \* \*

(B) knowing that the transaction is designed in whole or in part—  
(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

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79. *United States v. Kozeny*, 582 F. Supp. 2d 535, 538–40 (S.D.N.Y. 2008).

80. S. Comm. on Foreign Corrupt Practices and Domestic and Foreign Investment Improved Disclosure Acts of 1977, S. REP. NO. 95-114, at 10–11 (1977).

81. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 66, cmt. 7.

82. 18 U.S.C. § 1956 (2012).

83. *Id.*

(ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced . . . .<sup>84</sup>

A defendant also is subject to liability for conspiring to engage in, or aiding and abetting money laundering.

The penalties are significant. For example, each count of a § 1956 money laundering violation carries a maximum criminal penalty of 20 years imprisonment—exceeding the maximum imprisonment for an FCPA violation—and a \$500,000 fine, or twice the defendant’s gross gain or the victim’s gross loss.<sup>85</sup> A civil penalty of \$10,000 (or the value of the funds) also may be applied for each violation.<sup>86</sup> The DOJ also can file a forfeiture proceeding against a foreigner if the proceeds are in the United States.<sup>87</sup>

The money-laundering laws also generally apply extraterritorially to the acts of U.S. persons abroad and to actions taken by non-U.S. persons inside or partially inside the United States:

There is extraterritorial jurisdiction over the conduct prohibited by this section if

- (1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and
- (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding \$10,000.<sup>88</sup>

This language makes the statute’s extraterritorial reach expansive and a valuable arrow in the prosecutor’s anti-bribe-taker quiver.

In 1992, that arrow was sharpened as the MLCA made violating the FCPA one of the possible predicate offenses for money laundering.<sup>89</sup> Although FCPA violations thus became a “specified unlawful activity”<sup>90</sup> under the statute, there was no change in the rule that a defendant who is a “foreign official” and takes a bribe does not violate the FCPA.<sup>91</sup> Consequently, there cannot be a conspiracy charge against that foreign official for an MLCA violation, either.<sup>92</sup> Thus, if the government uses the

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84. *Id.* (emphasis added).

85. *Id.* §§ 1956(a)(1)(B)(ii), (2)(B)(ii).

86. *Id.* § 1956(b)(1).

87. 18 U.S.C. § 981(a)(1)(A) (2012).

88. 18 U.S.C. § 1956(f).

89. 18 U.S.C. § 1956(c)(7)(D) (foreign bribery became a predicate offense with the addition of “a felony violation of the Foreign Corrupt Practices Act” to the list of predicate money laundering offenses).

90. *Id.*

91. *United States v. Castle*, 925 F.2d 831, 835 (5th Cir. 1991).

92. *Id.* at 836.

violation of the FCPA as the predicate act against a bribe taker, the charges must necessarily rest on an expansive reading of “to promote the carrying on of” language in the statute.<sup>93</sup>

The Patriot Act further expanded the money-laundering laws to include any foreign corruption, including bribery, even if it did not violate the FCPA.<sup>94</sup> It did so by including offenses against a foreign nation involving bribery of a public official in its definition of the term “specified unlawful activity”:

- (7) the term “specified unlawful activity” means— . . .
- (B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving—
- (iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official.<sup>95</sup>

The MLCA is also attractive for prosecutors because its provisions do not require that defendants actually be convicted of the predicate offense. Instead the prosecutor will arguably only need to establish that the transaction involved proceeds that derive from the unlawful activity. The MLCA does not, however, dispense with the required elements of intentionality and knowledge, to wit, that “the person knew that the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal or foreign law . . . .”<sup>96</sup> Courts have held that the requirement of knowledge may be satisfied by proof of willful blindness.<sup>97</sup> The defendant must also have knowledge of intent to conceal—that is, the defendant must know that the “transaction is designed in whole or in part -- to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity. . . .”<sup>98</sup>

To summarize, prosecutors now, at least according to their interpretation of the statute, may charge a foreign official with violations of the MLCA if that official acted with the intent to promote the carrying on of specified unlawful activity, which includes bribery; ergo—demand-

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93. 18 U.S.C. § 1956(a).

94. *Id.* § 1956(c)(7)(B)(iv) (“an offense against a foreign nation involving . . . bribery of a foreign official, or the misappropriation, theft or embezzlement of public funds by or for the benefit of the public official.”).

95. *Id.* § 1956(c)(7) (emphasis added).

96. 18 U.S.C. § 1956(c)(1).

97. *United States v. Smith*, 46 F.3d 1223, 1237 (1st Cir. 1999).

98. 18 U.S.C. § 1956(a)(1)(B)(i).

side prosecution.

### B. *Presidential Proclamation*

Another handy tool is the Presidential Proclamation—in this case, Presidential Proclamation number 7750. In it, President George W. Bush in January 2004 allowed the U.S. Department of State to deny visas to corrupt foreign officials, their families, and their friends.<sup>99</sup> By itself, the proclamation does not have much teeth; however, the movement to allow “no safe haven” now includes scores of countries. It is difficult to gauge how effective this has been because visas are confidential under U.S. law.

### C. *Travel Act*

The Travel Act was enacted in 1961, during Attorney General Robert F. Kennedy’s attempts to crackdown against organized crime and racketeering.<sup>100</sup> It targeted defendants who resided in one state while conducting illegal activities in another.<sup>101</sup> Kennedy wanted the federal government to assist when local authorities were unable to prosecute these types of crimes.<sup>102</sup> The Travel Act prohibits travel in interstate or foreign commerce in furtherance of, among other things, unlawful bribery:

- (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—
  - (1) distribute the proceeds of any unlawful activity; or . . .
  - (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity . . .
 Shall be fined . . . imprisoned . . . or both . . . .
- (b) As used in this section ‘unlawful activity’ means . . .
  - (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States. . . .<sup>103</sup>

The DOJ recently added the Travel Act to the weapons it uses to go after foreign officials it cannot reach under the FCPA. In fact, both the DOJ and SEC explicitly stated in their recently published Guide that they will

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99. Proclamation No. 7750, 69 Fed. Reg. 2287, 2287 (Jan. 14, 2004).

100. See H.R. REP. NO. 87-966, at 2664–65 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2664, 2666.

101. *Id.*

102. S. REP. NO. 87-644, at 3–4 (1961).

103. 18 U.S.C. § 1952 (2012) (emphasis added).

use the Travel Act as a means to prosecute bribery.<sup>104</sup>

The Travel Act also allows the government to bring charges against defendants that violate state commercial bribery laws: “if a company pays kickbacks to an employee of a private company who is not a foreign official, such private-to-private bribery could possibly be charged under the Travel Act.”<sup>105</sup> Under the Travel Act, the bribe taker need not even be a public official. It also allows prosecution when the defendant is not an issuer under the FCPA or subject to its accounting provisions.<sup>106</sup>

It should be noted that courts have struggled with defining the requisite relationship between the unlawful activity and the interstate act. Some circuits have required more contact than others, but most hold that the nature of the activity must be more than “incidental.”<sup>107</sup> On balance, however, this application of the Travel Act provides another way to broaden the attack on public corruption.

#### *D. Specific Cases: From Siriwan to Gonzalez*

We now examine the cases, in which prosecutors are trying all kinds of work-arounds to criminally charge “foreign officials” for taking bribes.

##### 1. The Thai Film Festival: Juthamas Siriwan and Jittsopa Siriwan

###### a. Factual Background<sup>108</sup>

The Tourism Authority of Thailand (TAT), administered and funded contracts to promote Thai tourism.<sup>109</sup> As part of its work, TAT administered the annual Bangkok International Film Festival (Thai Film Festival).<sup>110</sup> Juthamas Siriwan, known as the “Governor,” was a TAT senior officer from 2002 until 2006.<sup>111</sup> During that time she was responsible for picking the businesses that would provide goods and services to TAT.<sup>112</sup> It is alleged that she is a “foreign official” as that term is used in the FCPA.<sup>113</sup>

The Governor’s daughter, Jittsopa Siriwan, known as Jib, was an employee of the Thailand Privilege Card Co., an instrumentality of the

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104. See SEC & DOJ Guide, *supra* note 32, at 34.

105. *Id.* at 48.

106. *Id.* at 12, 34, 45.

107. United States v. Archer, 486 F.2d 670, 682 (2d Cir. 1973).

108. *Id.* at 670.

109. Indictment at 2, United States v. Siriwan, No. 09-00081 (C.D. Cal. Jan. 28, 2009).

110. *Id.*

111. *Id.* at 3; it is also alleged that from 2006 until 2007 she acted as an advisor to the TAT.

112. *Id.*

113. *Id.*

Thai government.<sup>114</sup> From 2002 through 2007, husband and wife Hollywood movie executives, Gerald and Patricia Green, received about \$14 million in funds in connection with work performed for TAT.<sup>115</sup> During that same period, the Siriwans allegedly opened foreign accounts (for example, in the United Kingdom, the Isle of Jersey, and Singapore) for the receipt of crooked payments from the Greens.<sup>116</sup> The Greens allegedly sent at least \$1.8 million of the funds they received from the work they did for TAT to the Siriwans.<sup>117</sup> The alleged agreement was that the Greens would secure lucrative TAT contracts by kicking back 10% to 20% of the value of the agreements to the Governor.<sup>118</sup> Most of the transfers were by wire.<sup>119</sup>

The Governor only had authority to approve TAT payments to foreign entities up to a certain amount.<sup>120</sup> Accordingly, in an effort to conceal the scheme, at the Governor's direction, the Greens split up the performance of large contracts among different businesses.<sup>121</sup> To further the coverup, the Greens created the appearance of different businesses by using different bank accounts, mailing addresses, and telephone numbers in their dealings with TAT.<sup>122</sup> But all of the Thai film festival work was allegedly managed by the same personnel in the same place at the Greens' direction.<sup>123</sup> This allowed the Siriwans and the Greens to evade detection by other Thai government officials.<sup>124</sup> In return for the payments, the Governor would help the Greens secure the lucrative Thai Film Festival contracts.<sup>125</sup>

### b. Charges

The Greens were charged with violating the FCPA.<sup>126</sup> They were convicted in 2010 and sentenced to six months in prison.<sup>127</sup> Of course, the Greens were on the supply side of the equation—that is, they were bribe payers explicitly targeted by the FCPA. Because the Siriwans were

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114. *Id.*

115. *Id.* at 5 (references to TAT include other related Thai government agencies).

116. *Id.*

117. *Id.*

118. *See id.* at 5, 8.

119. *See id.* at 5.

120. *Id.* at 9.

121. *See id.*

122. *See id.*

123. *Id.* at 9–10.

124. *Id.*

125. *See id.* at 11.

126. 18 U.S.C. § 1956(a).

127. Defendant's Appeal at 4, *United States v. Gerald Green* (9th Cir. 2011), No. 10-50519; Defendant's Appeal at 4, *United States v. Patricia Green*, No. 10-50524 (9th Cir. 2011).

bribe takers, they did not violate the FCPA.

But that did not stop the United States from bringing charges against the Siritwans and targeting “foreign officials.” In 2007, the Siritwans were charged with violating and conspiring to violate the MLCA.<sup>128</sup> The Siritwans are the first to challenge an effort to prosecute foreign officials not subject to FCPA liability.<sup>129</sup> The overt acts cited in the indictment included opening bank accounts, wiring money, and giving instructions about dividing “commission” payments.<sup>130</sup> Specifically, the Siritwans were charged with an agreement to transfer money in and out of the United States to promote the carrying on of prohibited acts:

to transport, transmit, and transfer monetary instruments and funds from a place in the United States to a place outside the United States, with the intent to promote the carrying on of specified unlawful activity, namely, bribery of a foreign official, a felony violation of the FCPA, Title 15, United States Code, Section 78dd-2(a)(1); bribery of a public official of Thailand, in violation of Section 149 of Thailand’s Penal Code; and the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official, in violation of Section 152 of Thailand’s Penal Code, all in violation of Title 18, United States Code, Section 1956(a)(2)(A).<sup>131</sup>

The government advanced essentially two theories of “specified unlawful activity”—(1) violations of the FCPA by the Greens, and (2) violations of Thai law.

Regardless of the final outcome, at least from a timing perspective, including Thailand’s penal code in the charges appears to have been a tactical mistake by the prosecution, as the case has been stayed in the United States as a result.<sup>132</sup>

### c. The Siritwans’ Arguments Regarding the Lack of a Separate and Distinct Crime

The Siritwans argue that no money laundering could have occurred, because the transaction “must be separate and distinct from the

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128. 18 U.S.C. § 1956(h).

129. Defendants’ Motion to Dismiss the Indictment at 9, *United States v. Siritwan*, No. 09-00081 (C.D. Cal. Aug. 19, 2011), ECF No. 64.

130. Indictment at 10-11, *United States v. Siritwan*, No. 09-00081 (C.D. Cal. Jan. 28, 2009).

131. Indictment, *United States v. Siritwan*, No. 09-00081 (C.D. Cal. Jan. 28, 2009).

132. Criminal Minutes at 1, *United States v. Siritwan*, No. 09-00081 (C.D. Cal. Feb. 1, 2012), ECF No. 90.

underlying offense that generated the money to be laundered.”<sup>133</sup> They question whether the bribes can serve both as an FCPA violation and the “separate and distinct crime” necessary to the MLCA charge against them, arguing that “[c]ongress appears to have intended the money laundering statute to be a separate crime distinct from the underlying offense that generated the money to be laundered.”<sup>134</sup> The Siriwan argue that because both the MLCA and the FCPA require a money transfer as an essential element, the alleged crimes are not separate and distinct.<sup>135</sup> They argue that only when the predicate crime becomes a completed offense can money laundering have occurred.<sup>136</sup>

The government has responded by arguing that the FCPA does not require a monetary transfer but instead only a promise of something of value and, thus, no money needs to be transferred.<sup>137</sup> Further, the government argues that the concept of generating “ill-gotten gains” before one is subjected to money laundering charges does not apply to the offense the defendants are charged with—that is 18 U.S.C. § 1956(a)(2)(A):

- (2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States  
(A) with the intent to promote the carrying on of specified unlawful activity . . . shall be sentenced . . . .

Based on the language in the statute, the government argues that there is no requirement to show any proceeds of criminal activity.<sup>138</sup> The government argues that it only needs to show that the defendants transmitted or attempted to transmit, funds “with the intent to promote the carrying on of specified unlawful activity.”<sup>139</sup> In other words, the government’s position is that for purposes of “promoting” specified unlawful activity under the statute, the source of the funds that serve as the basis of the promotion is irrelevant.<sup>140</sup> The government goes even

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133. *United States v. Hall*, 613 F.3d 249, 254 (D.C. Cir. 2010).

134. *United States v. Savage*, 67 F.3d 1435, 1441 (9th Cir. 1995).

135. *Id.*

136. *United States v. Christo*, 129 F.3d 578, 579–80 (11th Cir. 1997). A recent case on this issue is *Hall*. In that case, the Court rejected the government’s theory and held that the transactions were separate and distinct. *Hall*, 613 F.3d at 254.

137. *See* Government’s Response in Opposition to Defendants’ Motion to Dismiss the Indictment at 16, *United States v. Siriwan*, No. 09-00081 (C.D. Cal. Sept. 9, 2011), ECF No. 67.

138. *See id.* at 7.

139. *See id.* at 7, 9.

140. *See id.* at 9.

further and argues that because of the “no proceeds” requirement, there is no need for a separate and distinct, specified unlawful act to occur for it to charge a § 1956(a)(2)(A) violation.<sup>141</sup>

The government relies on *Krasinski*, in which a defendant was convicted of conspiracy to promote international money laundering and to distribute the drug, ecstasy.<sup>142</sup> The court held that even though the activities were “part and parcel of the underlying offense,” they could be considered when deciding the promotion issue.<sup>143</sup> The decision also cites several circuit courts that have interpreted the “intent to promote” language very broadly.<sup>144</sup>

It is unclear, however, how the government intends to show that the Siriwans in particular acted “with the intent to promote.”<sup>145</sup>

#### d. Siriwans’ Rule of Lenity Defense

The defendants also have raised the rule of lenity and due process as a defense.<sup>146</sup> The rule of lenity requires that an ambiguous criminal law be interpreted in favor of the defendants subjected to them.<sup>147</sup> The rule “ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.”<sup>148</sup> It “vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.”<sup>149</sup> In other words, a defendant might not have proper notice if the statute leaves unclear the possibility that the facts supporting the predicate crime and the money laundering may be merged into one crime.<sup>150</sup>

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141. *See id.* at 10; *see* *United States v. Piervinanzi*, 23 F.3d 670, 681 (2d Cir. 1994).

142. *United States v. Krasinski*, 545 F.3d 546, 546 (7th Cir. 2008).

143. *Id.* at 550–51; *see* Government’s Supplemental Brief in Opposition to Defendants’ Motion to Dismiss the Indictment Re: Intent to Promote and Organic Jurisdiction at 5, *United States v. Siriwan*, No. 09-00081 (C.D. Cal. Dec. 2, 2011), ECF No. 84.

144. *See* *United States v. Moreland*, 622 F.3d 1147, 1167 (9th Cir. 2010); *United States v. Bush*, 626 F.3d 527, 538 (9th Cir. 2010).

145. *See* Government’s Supplemental Brief in Opposition to Defendants’ Motion to Dismiss Re: Intent to Promote and Organic Jurisdiction at 5, *United States v. Siriwan*, No. 09-00081 (C.D. Cal. Dec. 2, 2011), ECF No. 84. The government relies on the concept that at the pleading stage it “need not allege its theory of the case or supporting evidence, but only essential facts necessary to apprise a defendant of the crime charged.” *United States v. Buckley*, 689 F.2d 893, 897 (9th Cir. 1982).

146. *See* Defendants’ Notice of Motion and Motion to Dismiss the Indictment at 2, *United States v. Siriwan*, No. 09-00081 (C.D. Cal. Aug. 19, 2011), ECF No. 64.

147. *United States v. Santos*, 553 U.S. 507, 514 (2008).

148. *United States v. Lanier*, 520 U.S. 259, 266 (1997).

149. *Santos*, 553 U.S. at 514.

150. *See id.* However, *Santos* has been limited to “proceeds” cases. *See, e.g.*, *United States v. Moreland*, 622 F.3d 1147, 1167 (9th Cir. 2010).

### e. Specified Unlawful Activity

#### 2. FCPA

The defendants argue that they did not violate the FCPA because they were bribe takers and not bribe givers.<sup>151</sup> They argue that the MLCA charge is merely an artifice to get around the FCPA's prohibition against charging foreign officials for taking bribes.<sup>152</sup> The government, of course, argues that that is not what it is doing, arguing that: "defendants are charged with the separate, and entirely analytically distinct, crime of international money laundering to promote the Greens' violation of the FCPA. That defendant Juthamas Siriwan was a foreign official at the time of these offenses, and therefore, not charged under the FCPA does not change the analysis."<sup>153</sup> The government argues that just because foreign officials cannot be charged with violating the FCPA, this does not mean they have "a free pass to commit other, entirely separate, crimes."<sup>154</sup> In what might be a preview of how courts will grapple with this problem, Judge George Wu of the Central District of California was concerned that Congress had expressed its intent to not go after foreign officials by leaving bribe takers out of the FCPA:

[I]f . . . the whole point of Congress in excepting foreign officials is to avoid certain problems when you prosecute foreign officials for these type of criminal acts involving bribery . . . those are the same concerns when you attempt to go after these people for money laundering because they accepted bribes.<sup>155</sup>

#### 3. Thai law

Thai law also might provide the promoted "specified unlawful activity" through an "offense against a foreign nation involving . . . bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official."<sup>156</sup> Judge Wu stayed the case against the Siriwans because Thai law was

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151. See Defendants' Notice of Motion and Motion to Dismiss the Indictment at 1–2, United States v. Siriwan, No. 09-00081 (C.D. Cal. Aug. 19, 2011), ECF No. 64.

152. *Id.*

153. See Government Response in Opposition to Defendants' Motion to Dismiss the Indictment, at 22–23, United States v. Siriwan, No. 09-00081 (C.D. Cal. Oct. 20, 2011), ECF No. 67.

154. See *id.* at 23–24.

155. Reporter's Transcript of Proceedings at 10, United States v. Siriwan, No. 09-00081 (C.D. Cal. Feb. 07, 2012), ECF No. 91.

156. 18 U.S.C. § 1956(c)(7)(B)(iv) (2012).

asserted as a basis for the money laundering charge.<sup>157</sup> The court was concerned about how it could determine if the Siriwan had violated Thai law:

Therefore, you know, especially when there are very serious issues, it behooves the court to be somewhat cautious in this regard. And, again, it seems to me that what will happen in Thailand will inform this court as to what this court's proper response should be to the motion to dismiss. And I do not feel that it is my obligation to do that which can be done through a prosecution in Thailand as to Thai law. You know, it behooves me to wait and see even for no other reason that I can say, at least, they are experts in Thailand as to what Thai law is.<sup>158</sup>

The Court stated that an acquittal in Thailand would weaken this part of the government's case.<sup>159</sup> We will have to wait and see what the Thai courts do and what Judge Wu decides to do once the Thai case is resolved.

At least in terms of charging strategy, however, the government seems to have learned its lesson. In a subsequent case against a foreign bribe taker, it did not include an offense against the foreign country as part of the money-laundering charge. Instead it relied only on the FCPA and Travel Act violations as the predicate acts required under the MLCA.

#### 4. Maria de Los Angeles Gonzalez de Hernandez

##### a. Background

According to the sealed complaint, Banco de Desarrollo Economico y Social de Venezuela (BANDES) is the state-owned and state-controlled economic development bank of the Government of Venezuela (GOV).<sup>160</sup> BANDES was operated by the Venezuelan People's Ministry of Planning and Finance and acted as the financial agent of the GOV.<sup>161</sup> Gonzalez was allegedly BANDES's Vice-President of Finance or Executive Manager of Finance and Funds Administration, which would make her a

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157. Mike Dearington, *From Siriwan to Gonzalez: Why the DOJ Altered the Way It Charges Alleged Corrupt Foreign Officials*, FCPA Professor (Aug. 26, 2013), [www.fcprofessor.com/category/siriwan](http://www.fcprofessor.com/category/siriwan).

158. *Id.*; Reporter's Transcript of Proceedings at 24, *United States v. Siriwan*, No. 09-00081 (C.D. Cal. Apr. 2, 2013), ECF No. 115.

159. Defendants' Motion to Dismiss the Indictment at 10, *United States v. Siriwan*, No. 09-00081 (C.D. Cal. Aug. 19, 2011), ECF No. 64.

160. *See Sealed Complaint* at 10, *United States v. Bethancourt*, No. 13-MAG-0683 (S.D.N.Y. Mar. 2, 2013).

161. *See id.*

foreign official under the FCPA.<sup>162</sup>

Tomas Clarke and Jose Hurtado worked for a broker-dealer domiciled in the United States (the “Broker-Dealer”).<sup>163</sup> The Broker-Dealer was a brokerage firm that had its principle offices in New York, also had offices in Miami, and was registered with the SEC.<sup>164</sup> Gonzalez allegedly oversaw BANDES’s trading abroad, including the trading by the Broker-Dealer on behalf of BANDES.<sup>165</sup> Clarke and Hurtado were accused of paying kickback to Gonzalez in exchange for steering BANDES business to the Broker-Dealer and authorizing it to execute bond trades for BANDES.<sup>166</sup> The money for the kickbacks allegedly came from the revenues the Broker-Dealer generated through BANDES trading.<sup>167</sup>

One alleged example is that Clarke caused the Broker-Dealer to execute at least two trades between the Broker-Dealer and BANDES for the same bonds on the same day.<sup>168</sup> If true, this would mean that BANDES was left with the same bonds it started with, but only after paying millions of dollars in mark-ups and mark-downs to the Broker-Dealer.<sup>169</sup>

#### b. Charges

Gonzalez was charged with conspiracy to violate the Travel Act, violation of the Travel Act, conspiracy to commit money laundering, and money laundering.

##### (1) Conspiracy to violate and violation of the Travel Act

Gonzalez allegedly both conspired to and did:

[T]ravel in interstate and foreign commerce, with intent to otherwise promote, manage establish, carry on, and facilitate the promotion, management, establishment, and carrying on of unlawful activities, namely, (a) violations of the anti-bribery provisions of the FCPA . . . (b) commercial bribery, in violation of New York State Penal Law Section 180.00 and (c) commercial bribe receiving, in violation of New York State Penal Law 180.05;

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162. *See id.*

163. *See id.*

164. *See id.*

165. *See id.*

166. *See id.* at 11 (alleging that Gonzalez received at least \$3.6 million in payments from the Broker-Dealer and that the Broker-Dealer generated over \$60 million in revenue from BANDES).

167. *See id.* at 15.

168. *Id.* at 14; United States v. Bethancourt, No. 13-MAG-0683 (S.D.N.Y. Mar. 2, 2013).

169. *See id.* at 5.

and therefore would and did perform and attempt to perform acts to otherwise promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on, of such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(3)(A).<sup>170</sup>

The alleged overt act supporting the charges includes emailing wire instructions, emailing spreadsheets of the bond transactions and the commissions, and wiring money.<sup>171</sup>

## (2) Conspiracy to Commit and Committing Money Laundering

Gonzalez also was charged with an agreement

[T]o transport, transmit, and transfer funds from a place in the United States to and through a place outside the United States and to a place in the United States from a place outside the United States, with the intent to promote the carrying on of specified unlawful activity, that is, (1) violations of the FCPA, Title 15, United States Code, Section 78dd-2, and (2) violations of the Travel Act, Title 18, United States Code, Section 1952(a)(2)(A).<sup>172</sup>

Here we see prosecutors learning the lesson of the case against the Siriwans. Instead of charging a violation of the laws of a foreign country, the government alleged only that the specified unlawful activity consisted of violations of U.S. laws—the FCPA and the Travel Act. Thus, this district court judge, unlike Judge Wu, will not be able to wait and see what courts of a foreign country do about the claim that its laws were violated. This should avoid stays of the proceedings and make the cases simpler to prosecute.

There is also an interesting subplot here. Attorney General Eric Holder co-chaired the Money Laundering Steering Committee during the Clinton administration.<sup>173</sup> He was supportive of proposals to include “bribery of a foreign official” as part of an “offense against a foreign nation,” which is part of the MLCA’s list of specified unlawful activities. It is thus not surprising that this charge was included in the cases against the Siriwans. It is also interesting that it was abandoned in *Gonzalez*.

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170. *See id.* at 8.

171. *See* Sealed Complaint at 5–6, *United States v. Bethancourt*, No. 13-MAG-0683 (S.D.N.Y. Mar. 2, 2013).

172. *Id.*

173. U.S. Dep’t of Treasury & U.S. Dep’t of Justice, *The National Money Laundering Strategy for 2000*, FINCEN.GOV (Mar. 2000), available at <http://www.treasury.gov/press-center/press-releases/Documents/ml2000.pdf>.

### III. CONCLUSION

So here is what we know. The DOJ and SEC have decided to go after foreign bribe takers. In doing so, they have demonstrated a willingness to think creatively and stretch other criminal statutes to cover conduct that the FCPA expressly excludes, despite the fact that Congress repeatedly, over three decades, has expressed a legislative intent to limit foreign corruption prosecutions to those who give bribes, not those who take them. In so doing Congressional intent is being ignored. Let us see if someone calls them on it. Stay tuned.

