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Foreign Corrupt Practices Act

UPDATES

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Fifth Circuit Upholds Broad Reading of “Obtain and Retain Business” Under the FCPA

One open issue under the Foreign Corrupt Practices Act (“FCPA”) has been whether its “obtain or retain business” element narrowly confines the statute’s application to situations in which an improper payment is made to secure a contract or business opportunity or whether, as the government has contended, the statute broadly criminalizes improper payments made to obtain any government action, for example, a payment to obtain tax relief. Substantially but not totally adopting the government’s position, the United States Court of Appeals for the Fifth Circuit ruled on February 4, 2004, that the FCPA prohibits any illicit payment to a foreign government official as long as the government proves some nexus, even an indirect one, to obtaining or retaining business.¹ The Fifth Circuit reversed a decision by the United States District Court for the Southern District of Texas² that had held that the FCPA’s business nexus prong limits the statute to payments made to obtain or retain contracts or other business from the foreign government and does not criminalize bribes paid to reduce taxes or customs duties.

The Fifth Circuit decision provides significant support for expansive readings of the FCPA that have been advanced by the Department of Justice (“DOJ”) and Securities and Exchange Commission (“SEC”) in recent years, although it was not a complete victory for the government. The Court rejected the government’s argument that paying reduced taxes is the type of improper advantage that will always assist in obtaining or retaining business in a foreign country and held that the government must show that such payments are made to assist in obtaining or retaining specific business opportunities. The case also raises, but does not resolve, important questions about the kind of criminal intent that the government must prove where a payment is not directly made to obtain or retain business, but only indirectly “assists” in obtaining or retaining business.

The FCPA’s Antibribery Provisions

The FCPA antibribery provisions make it unlawful for any issuer, domestic concern, or person acting within the United States to make or offer

¹ *United States v. Kay*, No. 02-20588 (5th Cir. Feb. 4, 2004).

² *United States v. Kay*, 200 F. Supp. 2d 681 (S.D. Tex. 2002).

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to make a payment of anything of value directly or indirectly to a foreign official, international organization official, political party, or party official, or any candidate for public office, for the purpose of influencing that official to assist in obtaining or retaining business.³

In a number of cases, the government has interpreted the “obtain or retain business” component of the statute expansively to include payments intended to influence a wide range of government decisions, including payments to obtain more favorable tax treatment,⁴ payments to obtain tax refunds,⁵ or payments to obtain favorable pipeline tariff rates.⁶

The Indictment and Lower Court Decision

According to the indictment, between 1995 and August 1999, Douglas Murphy, president of American Rice, and David Kay, a vice-president for marketing, paid bribes or authorized bribes to induce Haitian customs officials to accept bills of lading and other documents that intentionally understated the true amount of the rice that the company exported to Haiti. These inaccurate documents allowed the company to obtain a reduction in the customs duties it owed to the Haitian government. The indictment also alleged that the company paid bribes to other Haitian government officials to reduce the sales taxes owed by the company to the Haitian government.

In determining the scope of the “obtain or retain business” prong of the FCPA, the District Court looked to the statute’s legislative history to resolve ambiguities in the language. After noting Congress’s consideration and rejection of

statutory language that would have broadened the scope of the FCPA, the court found that the “legislative history weighs against the Government’s argument that the FCPA should be construed so broadly so as to encompass payments made to reduce customs duties or tax obligations.”⁷

Fifth Circuit Decision

The Fifth Circuit reversed, rejecting the argument that, as a matter of law, illicit payments to foreign officials for the purpose of avoiding customs and taxes are not the kinds of bribes the FCPA criminalizes. The Court agreed with the lower court that the statute was ambiguous in failing to provide a clear indication of the precise scope of the business nexus element. The Court went on to analyze the statute’s legislative history, concluding that “Congress meant to prohibit a range of payments wider than only those that directly influence the acquisition or retention of government contracts or similar commercial or industrial arrangements.”⁸ Thus, the Court held, payments to reduce taxes or customs duties could be among the illicit payments that the FCPA prohibits so long as such payments were made to assist the payor in obtaining or retaining business.

The Court rejected the government’s argument that paying reduced customs duties and sales taxes is the type of improper advantage that always will assist in obtaining or retaining business in a foreign country and thus are automatically covered by the FCPA. Rather, the Court held that the government must make a particularized showing that such payments are made to “assist” a defendant in obtaining or retaining specific

³ 15 U.S.C. § 78m(b).

⁴ *United States v. Vitusa Corp.*, Cr. No. 93-253 (D.N.J. 1994).

⁵ *SEC v. Triton Energy Corp.*, Civ. Act. No. 1:97CV00401 (D.D.C. Feb 27, 1997).

⁶ *Id.*

⁷ *Kay*, 200 F. Supp. 2d at 684.

⁸ *Kay*, No. 02-20588, at 22.

business and that, to pass muster, the indictment must explain “the nexus between reduced taxes and obtaining identified business or retaining identified business opportunities.”⁹ The Court remanded for the District Court to consider what additional facts, if any, would have to be included in the indictment.

Significance of the Decision

This decision is of great import because it is the first time that a court has ratified the expansive interpretation of the business nexus prong that both DOJ and the SEC have been advancing in FCPA cases in recent years. The decision allows FCPA cases to be brought for payments intended to influence nearly any governmental decision that would favorably affect a covered company’s business.

Although the Court rejected the government’s view that illicit payments to reduce taxes and customs duties are *per se* FCPA violations, it is not clear whether the Court’s requirement that the government prove the nexus between the benefit obtained from the government and identified business opportunities will act as any meaningful limitation. As the Court explained, “[e]ven a modest imagination can hypothesize myriad ways that an unwarranted reduction in duties and taxes in a large volume rice import operation could assist in obtaining or retaining business. For example, it could . . . so reduce the beneficiary’s cost of doing business as to allow the beneficiary to underbid competitors for private commercial contracts, government allocations, and the like; or it could provide the margin of profit needed to fend off potential competition seeking to take business away from the beneficiary; or it could make the difference between an operating loss and an operating profit, without which the beneficiary could not even stay in business; or it could free up funds to expend on legitimate lobbying

or other influence-carrying activities to favor the beneficiary’s efforts to get, keep, or expand, its share of the foreign business.”¹⁰ This analysis suggests that the government’s burden is not particularly high in demonstrating the requisite link between the benefit obtained through the bribe and its assistance in obtaining or retaining business.

As noted, another important question that the decision raises, but does not resolve, is what evidence will suffice to prove criminal intent in a case in which a payment is not directly made to obtain or retain business, but only indirectly “assists” in obtaining or retaining business. It is unclear whether the government can prosecute a defendant whose provable criminal intent was solely directed to the short-term benefit (here, reducing taxes and customs duties) and not to the long-term goal of obtaining or retaining business. The answer to that question will likely depend on whether courts require a separate showing of intent for the business nexus prong in such cases.

Practical Application

The Fifth Circuit’s decision, unless reversed by the Supreme Court, is binding only in that Circuit (which consists of Texas, Louisiana, and Mississippi). Nevertheless, it will likely have considerable precedential effect nationwide, even though in our view it is somewhat dubiously reasoned. The government will likely see this ruling as an endorsement of its broad interpretation of the reach of the FCPA. Given the Fifth Circuit’s analysis, companies would be wise to avoid payments to influence any decision by a foreign government official that could assist the company’s business, which for all practical purposes means any payment (other than those permitted by the exceptions or affirmative defenses provided in FCPA). Companies and individuals subject to the FCPA

⁹ *Id.* at 5.

¹⁰ *Id.* at 44.

should not conduct their activities going forward in manner that depends on the government's failure in some future enforcement action to prove the business nexus or intent elements of the statute under the liberal standard articulated by the Fifth Circuit. Of course, in any case relating to past conduct, defendants will be able, outside the Fifth Circuit, to litigate the issue of the proper scope of the FCPA; and, both in and outside the Fifth Circuit, defendants will be able to litigate whether the government has properly alleged and proven the requisite degree of business nexus and intent.

For a fuller discussion of these and other FCPA issues, see Roger M. Witten, *Complying with the*

Foreign Corrupt Practices Act (Matthew Bender, 4th ed. 2003). If you have any questions or need additional information, please contact:

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