



# WHITE COLLAR CRIME REPORT



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## BRIBERY

### FCPA's Road Less Traveled? The Travel Act Extends Justice Department's Anti-Corruption Reach

BY BRIAN M. PRIVOR

The Justice Department has opened up a new front in the war against overseas corruption involving U.S. companies. The explosion of enforcement actions brought under the Foreign Corrupt Practices Act in the past few years has been well documented. But a little-noticed aspect of one recent FCPA case suggests DOJ is poised to further extend its reach beyond the already capacious contours of the FCPA. Companies should take heed, as they may need to rethink their compliance programs.

On July 31, DOJ announced that California-based valve maker Control Components Inc. pleaded guilty to conspiracy to violate the FCPA's anti-bribery provisions and the Travel Act, 18 U.S.C. § 1952, in connection with a decade-long scheme to secure contracts around the world by bribing officials and employees of foreign state-owned and foreign and domestic private companies. Having admitted to bribing foreign officials for the purpose of obtaining or retaining business, CCI's guilty

plea is not particularly remarkable in the annals of FCPA enforcement. But the fact that prosecutors also charged CCI under the lesser-known Travel Act with commercial bribery involving *private* companies may signal a more aggressive approach to extraterritorial anti-corruption enforcement. Although the CCI case is not the first in which the Travel Act has been invoked alongside the FCPA, the focus on purely private commercial transactions that do not involve foreign officials reflects a broadening of the typical FCPA case.

#### Travel Act Applications To FCPA Prosecutions

Prosecutors have relied principally on the FCPA to root out overseas corruption, but they have other statutory tools at their disposal. Among other things, prosecutors have charged companies with mail and wire fraud,<sup>1</sup> money laundering,<sup>2</sup> and Travel Act violations in connection with FCPA prosecutions. Indeed, DOJ's "Lay-Person's Guide to the FCPA"<sup>3</sup> has long cautioned U.S. companies that prosecutors may rely on alterna-

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<sup>1</sup> 18 U.S.C. §§ 1341, 1343.

<sup>2</sup> 18 U.S.C. § 1956.

<sup>3</sup> Available at <http://www.justice.gov/criminal/fraud/docs/dojdocb.html>.

tive statutes, including the Travel Act, to reach the same underlying misconduct covered by the FCPA.

At first blush, the Travel Act may seem an odd fit for prosecuting overseas corruption. After all, it was enacted as part of a program directed against organized crime.<sup>4</sup> As a companion to the Racketeer Influenced and Corrupt Organizations Act<sup>5</sup> and other racketeering statutes, the Travel Act makes it a federal offense to travel in interstate or foreign commerce or to use interstate “facilities” (i.e., the mail or wires) to promote, facilitate, or carry on “unlawful activity,” which includes certain racketeering activity such as gambling, prostitution, narcotics and liquor offenses, bribery, extortion, arson, and illegal monetary transactions.<sup>6</sup>

**Federal, State Law Violations.** Whatever its original aim, the Travel Act plainly applies to “bribery” in violation of federal or state law.<sup>7</sup> That includes bribery of foreign officials made illegal under the FCPA. For example, in the recent prosecution (and conviction) of Frederic Bourke, the government charged Bourke with conspiracy to violate the FCPA and the Travel Act in connection with corrupt payments made to Kazakh officials. The indictment made clear, however, that the “unlawful activity” at issue under the Travel Act was the violation of the FCPA’s anti-bribery provisions.<sup>8</sup> Thus, the Travel Act charge was essentially redundant of the FCPA charge.<sup>9</sup>

Travel Act violations also have been charged in FCPA cases on the basis of violations of state-law commercial bribery statutes. For example, the former chief executive officer of Saybolt Inc. was convicted of violating both the FCPA and the Travel Act for bribing a Panamanian government official to help secure valuable concessions from the government in connection with a land deal.<sup>10</sup> In that case, the Travel Act charge was premised on a violation of New Jersey’s commercial bribery statute. In 2001, the government indicted two employees of Owl Securities & Investments Ltd. for violating the FCPA and the Travel Act (for violating Missouri’s anti-bribery statute) in connection with a scheme to bribe government officials and political parties in Costa Rica to obtain a land concession.<sup>11</sup> In each case, however, the Travel Act merely provided an alternative theory to prosecuting the same underlying misconduct involving corrupt payments made to foreign officials.

**Foreign Official Requirement.** Significantly, the offense of commercial bribery—even when federalized under the Travel Act—does not depend on there being any (foreign) government official involved in the transac-

tion.<sup>12</sup> Prosecutors relying on the Travel Act in overseas corruption cases therefore can remove from the charging calculus one of the most vexing questions that arises under the FCPA: Who is a foreign official? Even under the FCPA’s accommodating definition of “foreign official”—which includes any employee of a foreign government “instrumentality”<sup>13</sup>—the answer is not always clear. This is particularly true in places such as China or the Middle East, where ostensibly private companies may be intertwined with interests owned or controlled by the state. In such cases, the Travel Act serves as an important complement to the FCPA by ensuring that the government has a viable prosecution theory whether or not a foreign official is involved.

That may explain the prosecutors’ decision to invoke the Travel Act in the 2007 case against two executives of ITXC Corp. accused of paying (or offering to pay) bribes to employees of state-owned or -controlled telecommunications companies in five African countries.<sup>14</sup> The government alleged that employees of four of the companies were “foreign officials” under the FCPA, but conspicuously it did not make that allegation with respect to an employee of the fifth company (Sonatel), which was 25 percent owned by the Senegalese government and 42 percent owned by France Telecom (which is partially owned by the French government).<sup>15</sup> Tacitly conceding that it could not satisfy the “foreign official” element for an FCPA charge, the government apparently used the Travel Act to weave in a violation of New Jersey’s commercial bribery statute to cover the Sonatel transaction.

**Charges Carefully Distinguished.** The CCI case follows this same formula but perhaps also suggests an even broader purpose for invoking the Travel Act. The criminal information carefully distinguished between CCI’s alleged \$4.9 million in payments made to officers and employees of state-owned customers and the \$1.95 million in payments to “officers and employees of privately-owned companies.”<sup>16</sup> The indictment against several former CCI employees further elaborates on that distinction, referring to specific payments to five unidentified private companies in violation of California’s commercial bribery law.<sup>17</sup> Thus, the government evidently sought to reach conduct—commercial bribery involving private companies—that otherwise exceeded the grasp of the FCPA alone.<sup>18</sup>

<sup>12</sup> *Perrin*, 444 U.S. at 50.

<sup>13</sup> 18 U.S.C. § 78dd-1(1)(A).

<sup>14</sup> *United States v. Ott*, No. 3:07-cr-608 (D.N.J.); *United States v. Young*, No. 3:07-cr-609 (D.N.J.).

<sup>15</sup> See, e.g., *Young*, criminal information at paragraphs 19-21 (July 25, 2007).

<sup>16</sup> See *United States v. Control Components Inc.*, No. 8:09-cr-00162, criminal information at paragraph 6 (C.D. Cal. July 22, 2009).

<sup>17</sup> See *United States v. Carson*, No. 8:09-cr-00077, indictment at paragraph 13-14, 18, 35 (C.D. Cal. April 8, 2009).

<sup>18</sup> The Travel Act requires only that the defendant intended to “promote” or “facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.” 18 U.S.C. § 1952(a)(3). Thus, the government need not prove the predicate violation of state law. *United States v. Welch*, 327 F.3d 1081, 1092 (10th Cir. 2003). Furthermore, the intent to promote or facilitate bribery outside the state that harms a business within the state is sufficient to trigger the Travel Act’s application. *United States v. Lee*, 359 F.3d 194, 206 (3d Cir. 2004).

<sup>4</sup> *Perrin v. United States*, 444 U.S. 37, 41 (1979).

<sup>5</sup> 18 U.S.C. § 1961-1968.

<sup>6</sup> 18 U.S.C. § 1952(a), (b).

<sup>7</sup> 18 U.S.C. § 1952(b)(2); *Perrin*, 444 U.S. at 50.

<sup>8</sup> See *United States v. Kozeny*, No. 1:05-cr-00518, indictment at paragraph 65 (S.D.N.Y. May 12, 2005).

<sup>9</sup> The reason for this is unclear. The government may have included the Travel Act charge to demonstrate “dual criminality” to facilitate extradition or to ensure legal assistance from foreign authorities under a Mutual Legal Assistance Treaty.

<sup>10</sup> *United States v. Mead*, No. 3:98-cr-00240 (D.N.J. Oct. 16, 1998).

<sup>11</sup> *United States v. King*, No. 4:01-cr-00190 (W.D. Mo.). Robert Richard King was convicted of several FCPA charges, but the court dismissed the Travel Act charges at trial. His co-defendant, Pablo Barquero Hernandez, remains a fugitive.

It is the Travel Act's application in this context that suggests an outcrop from the FCPA's already outside reach. Whereas FCPA cases ordinarily have focused on bribery of foreign public officials, the government evidently has staked its claim to extraterritorial jurisdiction over commercial bribery without any pretense of involvement by a foreign official. As the government's field of vision expands beyond the FCPA's limits, companies must reorient their compliance programs to address all suspect business practices, not just those implicating relationships with foreign officials.

### Nonprosecution Agreements, Deferred Prosecution Agreements

Even where there has been no substantive charge under the Travel Act, DOJ has required, as part of deferred or nonprosecution agreements in FCPA cases, that the company implement a compliance program designed to detect and prevent violations of both the FCPA and commercial bribery statutes. For example, in the Schnitzer Steel case, the government charged the company's wholly owned subsidiary with violating the FCPA by making illegal payments to both government-owned and private steel production companies in South Korea. Although the criminal information did not include an explicit charge for violating the Travel Act, the government unmistakably sought to sanction the company for both official and commercial bribery. To that end, under a deferred prosecution agreement, the parent company agreed to implement a compliance program "designed to detect and prevent violations of the FCPA, U.S. commercial bribery laws and all applicable foreign bribery laws throughout its operations."<sup>19</sup>

Similarly, a Baker Hughes subsidiary pleaded guilty to a criminal information that did not mention the Travel Act or even any commercial bribery. Nevertheless, in addition to paying an \$11 million fine, as part of its deferred prosecution agreement the parent company agreed to maintain a compliance program aimed at bribery of all stripes, including "violations of the FCPA, U.S. commercial bribery laws and foreign bribery laws."<sup>20</sup>

These agreements should send a clear signal to the business community that their compliance programs should be designed to thwart bribery of all varieties, not just bribery involving foreign officials.

### Implications for SEC Enforcement

The Securities and Exchange Commission does not have power to enforce the Travel Act, but that does not mean commercial bribery has gone unnoticed. In fact, the SEC has referred to commercial bribery in several recent FCPA-related cases, and the associated illegal payments have been a factor in bringing charges for books and records or controls violations.<sup>21</sup>

For example, in the infamous Siemens case, the SEC identified \$1.4 billion in illegal payments to foreign of-

ficials, as well as an additional \$391 million in improper payments that were used, at least in part, for commercial bribery.<sup>22</sup> Siemens ultimately settled by disgorging \$350 million of ill-gotten profits (and paid a \$450 million criminal fine to DOJ), but it is unclear how the commercial bribery factored into that calculation.

Similarly, the SEC charged Schnitzer Steel and a subsidiary with making illegal payments to employees of both government-owned and private steel production companies.<sup>23</sup> The parent company settled by agreeing to pay approximately \$7.7 million in disgorgement and prejudgment interest. That figure, however, reflected only the \$6,279,095 in profits (plus interest) from alleged illegal payments made to foreign officials in violation of the FCPA; it did not include any profits from payments to private parties.<sup>24</sup>

It remains to be seen how the SEC will factor commercial bribery into calculating civil penalties in the future. It is clear, however, that the SEC will scrutinize commercial bribery, like any other financial transaction, through the lens of the FCPA's books and records and controls provisions.

### The Travel Act in Civil Litigation

There is no private right of action under the FCPA.<sup>25</sup> Creative plaintiffs, however, have crafted alternative theories for imposing liability for FCPA-related transgressions. Some have relied on the RICO statute.<sup>26</sup> Courts are divided, however, on whether FCPA offenses can serve as predicate acts under RICO.<sup>27</sup>

In any case, bribery that would violate the FCPA can be the basis for a charge under the Travel Act, which is one of several specifically enumerated predicate acts under RICO.<sup>28</sup> Thus, civil plaintiffs can use the Travel Act as a proxy for asserting a foreign bribery offense as the predicate act for RICO liability. For example, Jack Grynberg, president of Grynberg Production Corp., sued BP PLC and others for allegedly offering, without Grynberg's knowledge, illegal payments to Kazakh officials to secure oil and gas contracts for their joint venture. Grynberg alleged that BP violated RICO by, among other things, committing predicate acts sound-

<sup>22</sup> See *SEC v. Siemens AG*, No. 1:08-cv-02167, complaint at paragraph 36 (D.D.C. Dec. 12, 2008).

<sup>23</sup> See *In re Schnitzer Steel Industries Inc.*, Exchange Act Release No. 54606, order instituting cease-and-desist proceedings at paragraph 11-12 (Oct. 16, 2006); *United States v. SSI International Far East Ltd.*, No. 3:06-cr-00398, information at paragraph 10 (D. Ore. Oct. 10, 2006).

<sup>24</sup> Schnitzer Steel's subsidiary, SSI International Far East Ltd., pleaded guilty to FCPA and wire fraud charges in connection with the illegal payments. Although the government did not bring any charges under the Travel Act, the wire fraud charge may have accomplished the same purpose in reaching conduct not otherwise covered by the FCPA.

<sup>25</sup> See *Lamb v. Phillip Morris Inc.*, 915 F.2d 1024 (6th Cir. 1990) (there is no private right of action under the FCPA's anti-bribery provisions); *Eisenberger v. Spectex Industries Inc.*, 644 F. Supp. 48 (E.D.N.Y. 1986) (there is no private right of action under the FCPA's accounting provisions).

<sup>26</sup> 18 U.S.C. § § 1962-1968.

<sup>27</sup> Compare *United States v. Young & Rubicam Inc.*, 741 F. Supp. 334 (D. Conn. 1990) (rejecting RICO claim premised on FCPA violations), with *Environmental Tectonics v. W.S. Kirkpatrick Inc.*, 847 F.2d 1052 (3d Cir. 1988) (approving FCPA violations as predicate act under RICO).

<sup>28</sup> See 18 U.S.C. § 1961(1)(B).

<sup>19</sup> Schnitzer Steel Industries Inc. deferred prosecution agreement at paragraph 7 (Oct. 19, 2006).

<sup>20</sup> *United States v. Baker Hughes Inc.*, No. 4:07-cr-00130, deferred prosecution agreement at paragraph 6 (S.D. Tex. April 26, 2007).

<sup>21</sup> See 15 U.S.C. § 78m(b).

ing in bribery and Travel Act violations.<sup>29</sup> In another case, Aluminum Bahrain BSC (Alba) recently sued Alcoa for allegedly overcharging Alba in connection with supply contracts and using the excess funds to bribe officials in Bahrain in exchange for granting the contracts. Alba asserted a cause of action under RICO citing predicate acts based on violations of both the FCPA's anti-bribery provisions and the Travel Act.<sup>30</sup>

### **Conclusion**

Increased FCPA enforcement in recent years has been animated, at least in part, by efforts to help level

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<sup>29</sup> See *Grynberg v. BP PLC*, No. 1:08-cv-00301, complaint at paragraph 56 (D.D.C. Feb. 21, 2008).

<sup>30</sup> See *Aluminum Bahrain BSC v. Alcoa Inc.*, No. 2:08-cv-00299, complaint at paragraph 10-120 (W.D. Pa. Feb. 27, 2008).

the playing field for U.S. companies seeking to do business overseas. Although the FCPA has garnered the most public attention in recent years, the government has numerous statutory tools at its disposal for combating overseas corruption. The government's newfound reliance on the Travel Act to criminalize overseas commercial bribery involving wholly private parties is a natural outgrowth of FCPA enforcement.

Companies and compliance officers should take heed. Those that focus exclusively on official bribery may be losing sight of the forest for the trees. Compliance officers should use the heightened focus on FCPA prosecutions as an opportunity to educate their workforce about all types of illegal business practices, including questionable transactions that do not involve foreign officials.