THE LONG ARM OF THE LAW:
FCPA INDIVIDUAL LIABILITY

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Enforcement of Foreign Corrupt Practices Act ("FCPA") violations for individuals reaches CEOs, CFOs and employees, not just the companies that employ them.

The FCPA has two sections. The FCPA's anti-bribery section makes it a crime to offer, authorize, promise or make payments of anything of value to an officer, candidate, or member of the government of another country for the purpose of obtaining related business. The books and records section requires that transactions are accurately recorded, which requires companies that issue securities with United States stock exchanges to keep detailed transactional records and procedures to prevent FCPA violations.

The FCPA is applicable to U.S. citizens; those operating within the jurisdiction of the U.S.; foreign companies with American Depositary Receipt Programs; vendors, employees, agents, country representatives of U.S. companies; and companies with sufficient involvement with the U.S. The Department of Justice (DOJ) and the Securities Exchange Commission (SEC) share joint enforcement responsibilities under the FCPA, and they have been aggressive in using all of their tools in pursuing the broadest reach.

Intent to Commit FCPA Violations Creates Liability

It is not necessary for the value to actually have been transferred to the foreign official for criminal liability under the anti-bribery section of the FCPA to attach. The DOJ has shown a willingness to seek prosecutions of persons who intend to send value to influence foreign governments.

Recent high profile FCPA cases illustrate the expanding scope of intent based liability. Former Congressman William Jefferson of Louisiana was acquitted of conspiracy to commit FCPA violations on August 5, 2009.[3] The FBI found $90,000 in the freezer of Jefferson's Washington office, which was allegedly being held to bribe the vice president of Nigeria to obtain a telecommunications contract.[4]

Another high profile prosecution was that of Fredric A. Bourke, Jr., co founder of luxury handbag maker "Dooney & Bourke". Bourke was convicted of conspiracy to commit violations of the FCPA involving a scheme to take control of the Azerbaijan oil industry.[5] Bourke was part of a group of investors who pooled over $100 million to bribe Azerbaijan officials to privatize and hand over control of the state oil company.[6] The scheme was exposed when investors from Wall Street investment firms and AIG took civil action against Bourke's partner to try and recover the millions that they invested when they suspected that Bourke and his partner were looting the pool.[7]

Liability by Control

The SEC has expanded the liability of individuals by charging corporate officers as control persons for FCPA violations. *Control persons* are those that have the practical ability to manage, direct, and oversee those who have direct liability.[8] Control persons liability does not require knowledge of the fraudulent activities or the expertise to recognize or discover the fraud, instead relying on the concept of authority.[9] Control person liability was created to make corporate officers and directors accountable as the persons with the power and authority over the actors who personally violated securities laws.[10]

Control does not require that the persons with authority actually direct the day-to-day activities of the persons whose violations are imputed upon them; indirect power to influence or discipline is all that is necessary.[11] This vicarious liability for corporate officers has been used in connection with insider trading under Section 20A of the Securities Exchange Act of 1934.[12] Section 20A provides:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.[13]

This theory of liability is now being employed by the SEC to find corporate officers personally liable for FCPA violations for the first time.

The SEC used the *control persons* doctrine to find personal liability of former COO Douglas Faggioli and former CFO Craig Huff for FCPA books and records violations of a foreign subsidiary of Nature's Sunshine Products (NSP).[14] The SEC did not allege that Faggioli and Huff had participated or had any knowledge of the violations.[15] The liability was imputed upon Faggioli and Huff on the basis of their authority to supervise NSP management who were directly responsible for the books and records violations.[16]

The liability imposed upon Huff and Faggioli can be applied to the corporate officers and directors of any company to which the FCPA applies. NSP control persons were individually liable for the FCPA books and records requirement for subsidiaries in more than 30 countries where NSP has continuous operations. NSP self-reported the FCPA violations to the SEC after an internal investigation, and bad faith was not alledged.[17] In the end, NSP settled with the SEC for $600,000; Huff and Faggioli settled for $25,000 each.[18]

More than Just Corporations, More than Just Money

Settlements of FCPA violations by companies that have self-reported and cooperated with investigators have resulted in massive fines. In 2007, Baker Hughes Inc. reached an $11,000,000 settlement for more than $4,000,000 in bribes paid to a consulting firm under guise of fees, commissions, and legal services. The payments were actually bribes to Kazakhoil to secure contracts on a Karachaganak oilfield project worth almost $20,000,000 in profits. Now, in addition to millions in fines for corporations, individuals are facing personal and financial liability of SEC fines, and prosecution.

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[3] Paul Courson, *Ex-Rep. Jefferson convicted of corruption*, CNN, Aug. 6, 2009, http://www.cnn.com/2009/politics/08/05/us.rep.trial/.

[4] Jeery Markon and Brigid Schulte, *Jefferson Convicted in Bribery Scheme*, THE WASHINGTON POST, Aug. 6, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/08/05/AR2009080503195.html.

[5] *Connecticut Investor Found Guilty in Massive Scheme to Bribe Senior Government Officials in the Republic of Azerbijan*, FOX BUSINESS, Jul. 10, 2009, http://www.foxbusiness.com/story/markets/industries/finance/connecticut-investor-guilty-massive-scheme-bribe-senior-government-officials/.

[6] *Id.*

[7] Greg Farrell, *AIG executive suspending after bribery charges*, USA TODAY, Oct. 7, 2005, at B6.

[8] *Donohoe v. Consolidated Operating & Production Corp.*, 982 F.2d 1130, 1138 (7th Cir. 1992).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] 15 U.S.C. §78t(a) (2000).

[14] Business Wire, *Nature's Sunshine Products Issues Statement Relating to SEC Action*, Trading Markets.com, July 31, 2009, http://www.tradingmarkets.com/.site/news/Stock%20News/2454586/.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*