

Targeting business and freedom

By Robert Bennett, Ty Cobb, Michael Kelly, and Carl Rauh

It is a law that has travelled around the world and imposed billions of dollars in costs on international companies.

It has caused many companies to conduct endless investigations of their own operations, fundamentally change the way they do business, and fire countless executives and other employees. It has even forced some individuals to spend years in prison cells several thousand miles away from home.

On every continent, every general counsel must be familiar with the US foreign bribery law, even if their company has no significant presence in the country. It is now commonplace for US law enforcement authorities to target non-US companies, officers, directors, employees, and lawyers for criminal prosecution and imprisonment in the jurisdiction. In the last four years, the US has brought criminal charges against companies worldwide, both large and small, including such well known European names as BAE Systems, Siemens AG, Statoil ASA, and Renault Trucks SAS.

Bribery indictments

More pointedly, the Justice Department has sought to imprison non-US citizens with only slight connections to the country. Its lawyers have brought foreign bribery indictments against citizens from the UK, France, Italy, Switzerland, the Netherlands, the Czech Republic, Japan, South Korea, Canada, Mexico, Costa Rica, Israel and Lebanon.

This prosecutorial trend will only intensify. The Justice Department has advanced aggressive theories of US criminal law that would allow

for prosecution of anyone involved in any business transaction that has any connection to the jurisdiction. For example, if a payment in furtherance of a bribery scheme passes through a US bank, the Justice Department will not hesitate to bring charges against those responsible, wherever they may be. The same is true if someone involved in a bribery scheme sends an email or a fax transmission or makes a telephone call to or through the US.

And if one person in the scheme becomes subject to criminal jurisdiction in the US, this may allow the Government to assert criminal jurisdiction over everyone else in the scheme under the theory that they are all co-conspirators. With the advances of modern-day technology, it has never been easier to become the target of criminal prosecutors in the US.

Power to pursue

Through diplomacy, the US has removed many obstacles that once made the question of long-arm prosecutions a theoretical exercise. The US now has an unprecedented ability to obtain the evidence necessary to prosecute and, just as importantly, to force foreign companies and citizens to appear in an American court.

As the US has gained the power to pursue foreign companies and citizens, it must be selective in the cases it prosecutes. Although a significant risk of prosecution exists for any non-US company or individual involved in a bribery scheme touching the country, an examination of existing cases shows how the Justice Department has exercised its prosecutorial discretion. If what's past is prologue, those at a greater risk of prosecution may include: companies whose securities are traded in the US,

companies in industries with widespread corruption, middlemen who facilitate bribes, companies whose prosecution might be used to send a message, and non-US citizens affiliated with any company with any US connection.

To avoid the trauma of a potential prosecution, company lawyers need to protect their businesses and themselves. For any company, a well-conceived and well-executed compliance programme is the best protection against a foreign bribery investigation.

Such schemes demonstrate to the Justice Department that the company is a responsible citizen and that the company's culture is not conducive to misconduct.

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If bribery is discovered within the company, its board needs to consult counsel and take corrective action immediately.

Although there are any number of ways in which the Justice Department might fail in its efforts to prosecute non-US companies and citizens, it is dangerous for anyone to bet against it. General counsel should take steps today to avoid next year's investigation or, worse, the indictment that may arrive in two or three years.

The environment with respect to foreign bribery and other criminal investigations has changed in the US and abroad. A new era of law enforcement has begun. The time to respond is now.

Robert Bennett, Ty Cobb, Michael Kelly, and Carl Rauh are litigation partners at the Washington office of US global law firm Hogan & Hartson