

# ALLEN & OVERY

## *The FCPA's broad reach and its impact on non-U.S. companies and individuals*

A question raised by many companies is whether their non-U.S. operations and non-U.S. employees fall within the jurisdiction of the U.S. Foreign Corrupt Practices Act 1977 (**FCPA**). This question is particularly pressing for companies reviewing their operations for possible infringements, as the reach of the FCPA will be a key consideration in deciding how to proceed with an internal investigation, strengthen compliance programs, or, in some cases, voluntarily disclose any possible misconduct identified.

Answering the question of whether the FCPA applies to your company's non-U.S. operations is often not straightforward. As a number of recent indictments have made clear, many cases require a close assessment of the facts, and individuals with scant connection to the U.S. may still fall foul of the statute – making the jurisdictional question a vexing yet important one for companies with non-U.S. operations.

### **FCPA Jurisdiction: Nationality Jurisdiction vs Territorial Jurisdiction**

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The U.S. Department of Justice (**DOJ**) is increasingly focused on FCPA enforcement actions against individuals, and its recent targets have included non-U.S. persons working for non-U.S. operations. Bringing an enforcement action requires the DOJ to show that the target falls into one of the FCPA's two basic jurisdictional provisions – “nationality” jurisdiction or “territorial” jurisdiction.

#### *Nationality Jurisdiction*

First, the nationality jurisdiction provisions generally cover those who are subject to the FCPA's anti-bribery requirements even when acting outside of the U.S. Those covered by nationality jurisdiction include the following, among others:

- U.S. “domestic concerns,” such as entities organized under the laws of a U.S. state, entities having their principal place of business in the U.S., and individual U.S. citizens, nationals, or residents;
- U.S. “issuers,” which include, for example, companies with a class of securities listed on a national U.S. securities exchange; and
- Any agents, officers, directors, or employees of U.S. domestic concerns or issuers.

Notably, even non-U.S. companies acting outside of the U.S. may be subject to nationality jurisdiction so long as they are acting as agents for U.S. domestic concerns. The same is true for non-U.S. employees, officers, or directors who may have some connection with U.S. operations, such as reporting lines into or oversight of the U.S. operations. The result is that non-U.S. agents or employees may be liable for FCPA violations occurring anywhere in the world, not just in the U.S.

#### *Territorial Jurisdiction*

By contrast to nationality jurisdiction, territorial jurisdiction covers:

- any conduct, whether or not involving a U.S. domestic concern or issuer, taken in furtherance of a bribe “*while in the territory of the United States.*”

A point of difficulty for non-U.S. operations is that U.S. authorities interpret what constitutes actions within the territory of the U.S. very broadly. Such actions could include, but are not limited to:

- sending an email or fax in furtherance of a bribe that transits through a server located in the U.S., even if the sender and recipient are located outside of the U.S.;
- wire transfers of U.S. dollars in furtherance of a bribe, even if the sender and recipient are located outside of the U.S.;
- payments in non-U.S. currencies in furtherance of a bribe that pass through the U.S. banking system;
- one-off business meetings occurring within U.S. territory in furtherance of a bribery scheme; or
- oversight of the non-U.S. entities by, or reporting lines into, entities in the U.S.

The upshot is that territorial jurisdiction is highly fact-specific, presenting a thorny issue particularly for those companies with U.S. operations or U.S. related entities. In determining whether potential misconduct outside the U.S. falls within the statute's scope, companies should look at all potential U.S. connections – including whether any U.S. email servers, U.S. dollars, or U.S. bank accounts were used. Companies should also consider what level of control or interrelation exists between their U.S. and non-U.S. operations.

A number of recent enforcement actions provide examples of these factors at work, including the actions filed against individuals connected with Rolls-Royce Energy Systems Inc. (**RRESI**) and SBM Offshore N.V. (**SBM Offshore**).

## Rolls Royce

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In November 2017, court documents were unsealed in an Ohio federal court revealing charges by the DOJ against a number of individuals allegedly involved in a scheme to pay bribes to a high-ranking Kazakh official on behalf of U.S.-based RRESI. The official had authority to award business in connection with the Asia Gas Pipeline LLC (AGP), a state-owned joint venture between Kazakh and Chinese entities to build a gas pipeline between Kazakhstan and China.

A number of non-U.S. persons were among the individuals charged, including:

- A Greek national and resident of Turkey, who was also the CEO of a Turkey-based advisory firm to the oil and gas industry. This individual was covered by the FCPA's nationality jurisdiction, because his firm was allegedly retained directly by RRESI to pay bribes and therefore qualified as an "agent" of a domestic concern. The FCPA's territorial jurisdiction provisions also applied because, for instance, he was involved in certain wire transfers from AGP's bank accounts in Kazakhstan to RRESI's bank accounts in Ohio, meaning an action took place "while in the territory of the United States."
- A UK citizen who worked as a senior executive of UK-based Rolls-Royce plc, but had responsibility for the sale of certain equipment made by U.S.-based RRESI. The charges alleged that this individual was an "agent" of a domestic concern on account of his oversight responsibility, thereby triggering nationality

jurisdiction. Among other things, the individual also allegedly caused RRESI to make corrupt commission payments from its accounts in Ohio to an account in the UK, thereby triggering territorial jurisdiction.

- An employee of a Dutch subsidiary of Rolls-Royce plc, who "assisted in" the sale of equipment made by RRESI. This individual was *not* alleged to be an "agent" of a domestic concern. However, he was alleged to have taken actions giving rise to territorial jurisdiction, including travelling to Ohio (where he sent emails in furtherance of the bribery scheme) and causing payments to be made from RRESI's bank accounts in Ohio to an intermediary in the UK.
- An Austrian National working in the Munich, Germany office of an engineering advisor to AGP. This individual allegedly was caught by territorial jurisdiction. Nationality jurisdiction did not apply, as the advisory firm apparently was retained by AGP, and therefore was not an "agent" of a domestic concern. However, territorial jurisdiction attached based on the individual's alleged actions in Ohio, including allegedly causing corrupt commission payments to be made from RRESI's bank accounts in Ohio to an intermediary's account in the UK. Few details are given in the documents as to how this individual caused payments to be made. Nonetheless, charges were filed and the individual entered a guilty plea.

## SBM Offshore

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Also in November 2017, the DOJ announced resolution of criminal charges against two individuals connected with SBM Offshore for their roles in a scheme to bribe foreign government officials in Brazil, Angola and Equatorial Guinea. The two individuals were:

- A British citizen based in Monaco or Amsterdam who was the former chief executive officer of SBM. He was also an executive or board member of one of SBM's subsidiaries located in Houston, Texas, making him the subject of the FCPA's nationality jurisdiction as an agent of a U.S. domestic concern. Territorial jurisdiction also applied based on, among other things, the authorization of transfers of money through a U.S. bank account in furtherance of the bribery scheme.

- A U.S. citizen based in California who was a former sales and marketing executive for one of SBM's U.S. subsidiaries. As a U.S. citizen, this individual was himself a domestic concern and, therefore, covered by the FCPA's nationality jurisdiction regardless of whether his actions took place in the U.S. or abroad. His role as an executive of one of SBM's U.S. subsidiaries also characterized him as an "employee" and "agent" of a domestic concern. Further, the FCPA's territorial jurisdiction provisions also applied because certain payments were wired through a bank account in the United States.

## Key takeaways

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With increasing levels of enforcement activity against both U.S. and non-U.S. individuals, companies are reminded that their operations in Europe, Asia, and elsewhere are not beyond U.S. regulators' reach. Given the relatively low threshold for meeting the FCPA's nationality or territorial jurisdiction provisions, companies reviewing their operations should begin by asking the following questions:

- How strong is my company's compliance program for employees in Europe, Asia, and elsewhere outside the U.S.?
- Are my company's non-U.S. directors, officers, and employees sufficiently trained in their FCPA compliance responsibilities?
- Are my company's directors, officers, or employees outside of the U.S. keeping sufficient books and records to meet requirements of U.S. enforcers and regulators? Does my company monitor and audit documents kept?

- Does my company have directors, officers, or employees outside of the U.S. involved in the sale of U.S. products or other U.S. operations?
- Is my company acting as an agent for any U.S. domestic concerns or issuers – and, if so, are internal controls in place to mitigate the increased FCPA risk?
- How well-equipped are non-U.S. operations to address non-compliance with the FCPA's anti-bribery requirements?