Robert Kennedy, the Travel Act and the FCPA

What does Robert Kennedy have to do with the Foreign Corrupt Practices and how has a nearly 50 year old statute aimed at US based organized crime now impacted the FCPA? It turns out quite a bit and perhaps it will be quite a bit more in significantly widening the scope of the FCPA.

Robert Kennedy's contribution is that while Attorney General, he urged Congress to enact the Travel Act in 1961 which was passed as part of the same series of bills as the Wire Act and was a part of his program to combat organized crime and racketeering. The Travel Act is aimed at prohibiting interstate travel or use of an interstate facility in aid of a racketeering or an unlawful business enterprise. It prohibits the use of communications and travel facilities to commit state or federal crimes, but until now was mostly known for its use in prosecutions for domestic crimes. Its impact to the FCPA is that the Travel Act applies to foreign as well as interstate commerce; it can be also used to prosecute those US companies and individuals which engage in bribery and corruption of foreign officials AND commercial bribery and corruption of private foreign citizens.

The Travel Act elements are: (1) use of a facility of foreign or interstate commerce (such as email, telephone, courier, personal travel); (2) with intent to promote, manage, establish, carry on, or distribute the proceeds of: (3) an activity that is a violation of ***state or federal bribery***, extortion or arson laws, or a violation of the federal gambling, narcotics, money-laundering or RICO statutes. This means that, if in promoting or negotiating a private business deal in a foreign country, a sales agent in the United States or abroad offers and pays some substantial amount to his private foreign counterpart to influence his acceptance of the transaction, and such activity may a violation of the state law where the agent is doing business, the Justice Department may conclude that a violation of the Travel Act has occurred. For instance, in the state of Texas there is no minimum limit under its Commercial Bribery statute (Section 32.43, TX. Penal Code), which bans simply the agreement to confer a benefit which would influence the conduct of the individual in question to make a decision in favor of the party conferring the benefit. As noted below, the state of California bans payment of more than $1,000 between private parties for the purposes of influencing a business decision.

The Travel Act was most recently used when four executives of Control Components, Inc. ("CCI") were indicted on April 8, 2009 for alleged violations of the FCPA's anti-bribery provision and the Travel Act. According to the indictment, the defendants conspired to make hundreds of corrupt payments with the purpose of influencing the recipients to award contracts to CCI or skew technical specifications of competitive tenders in CCI's favor. The Travel Act came into play as the DOJ alleged the CCI employees violated or conspired to violate California's anti-bribery law (California Penal Code section 641.3), which bans corrupt payments anywhere of more than $1,000 between any two persons, *including private commercial parties.* In the indictments, the Travel Act charges relied on alleged violations of California's anti-corruption law.

On July 31, 2009, CCI itself pleaded guilty to substantive FCPA anti-bribery charges and to conspiring to violate both the FCPA and the Travel Act. CCI admitted that, between 2003 and 2007, its employees made more than 150 corrupt payments, totaling approximately $4.9 million, to officials of state-owned enterprises in China, Korea, Malaysia, and the United Arab Emirates, and paid $1.95 million in bribes to officers and employees of foreign and domestic private companies in violation of the Travel Act. CCI agreed to pay a criminal fine of $18.2 million and to retain an independent compliance monitor for three years.

In July 31, 2009 Press Release announcing CCI's guilty plea, the DOJ referenced the Company's private overseas bribery. It said:

According to the information and plea agreement, from 1998 through 2007, CCI violated the FCPA and the Travel Act by making corrupt payments to numerous officers and employees of state-owned and privately-owned customers around the world, including in China, Korea, Malaysia and the United Arab Emirates, for the purpose of obtaining or retaining business for CCI. Specifically, from 2003 through 2007, CCI paid approximately $4.9 million in bribes, in violation of the FCPA, to officials of various foreign state-owned companies and approximately $1.95 million in bribes, in violation of the Travel Act, to officers and employees of foreign and domestic privately-owned companies. [DOJ Press Release: http://www.justice.gov/criminal/pr/press_releases/2009/07/07-31-09control-guilty.pdf

The CCI matter was not the first case to use the Travel Act in conjunction with the FCPA. As reported in the FCPABlog, is the mater of *U.S. v. David H. Mead and Frerik Pluimers*, (Cr. 98-240-01) D.N.J., Trenton Div. 1998. In this case defendant Mead was convicted following a jury trial of conspiracy to violate the FCPA and the Travel Act (incorporating New Jersey's commercial bribery statute) and two counts each of substantive violations of the FCPA and the Travel Act. In its 2008 article entitled, "The Foreign Corrupt Practices Act: Walking the Fine Line of Compliance in China" the law firm of Jones, Day reported the case of *United States v. Young & Rubicam, Inc*., 741 F.Supp. 334 (D.Conn. 1990), where a Company and individual defendants pled guilty to FCPA and Travel Act violations and paid a $500,000 fine. In addition to the *Mead* and *Young and Rubicam* cases, the DOJ's website on "A Lay Person's Guide to the FCPA, specifically states that "other statutes such as the mail and wire fraud statutes, 18 U.S.C. § 1341, 1343, and the Travel Act, 18 U.S.C. § 1952, which provides for federal prosecution of violations of state commercial bribery statutes, may also apply..." to US companies doing business overseas. See: http://www.justice.gov/criminal/fraud/docs/dojdocb.html

What does this mean for US companies doing business overseas? The FCPA Professor and others have written extensively on the broadening of the definitions of who is a 'foreign official' and what is a 'state owned entity' under the FCPA. However with the incorporation of the Travel Act into FCPA prosecutions, these broad definitions may be completely blurred away if all foreign private citizens can be brought in under the FCPA by application of the Travel Act. US companies doing business overseas, which have a

distinction in their FCPA compliance policies between gifts for and travel and entertainment of employees of private companies, and employees of state owned entities or foreign officials should immediately rethink this distinction in approach. The new decade is upon us the Kennedy-era statute of the Travel Act may become as relevant in overseas law enforcement in the 20-teens as it was in the domestic arena for the past 50 years.
