Hogan Lovells

SEA View

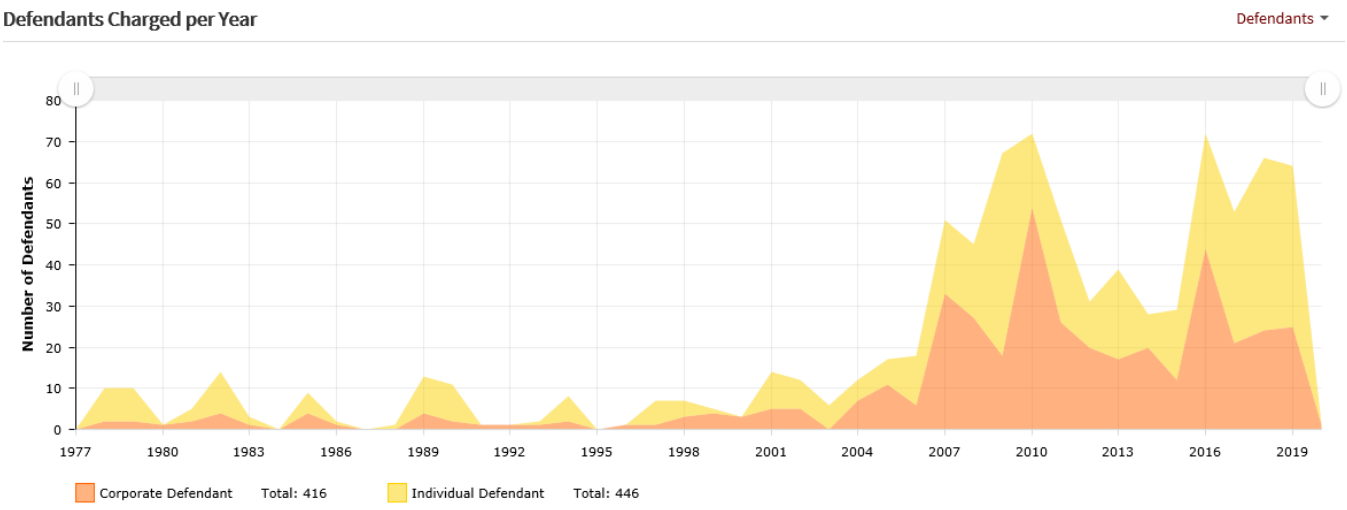
Individual prosecutions under the FCPA – more trials and more caselaw

SEA View, Article XII: August 2020

This month's analysis looks at individual prosecutions under the Foreign Corrupt Practices Act (FCPA). Prosecutions have markedly increased over the last five years, and this will better define local, regional, and international enforcement.

Prosecutions of individuals under the FCPA have seen a rapid uptick over the course of the last five years. In the first half of the past decade, charges were brought against 84 individuals and 137 corporations. From 2015-2019, 144 individuals were charged, as compared to 126 corporations.

The number of individuals charged represents a clear shift from 2010-2014 when about 38 percent of all FCPA charges were against individuals – that number rose to 53 percent over the past five years. But not only has the prosecution mix changed towards individuals, the absolute number of prosecutions of individuals has increased. The average number of individual FCPA prosecutions per year has increased from 16.8 to nearly 29 over the same respective periods, while the number of corporate prosecutions has more or less stayed the same, dipping slightly from an average of 27 to an average of 25. The following chart from the Stanford Law School FCPA Clearinghouse illustrates this shift:



This increased focus on individual prosecutions is a trend that is playing out worldwide, including in South and Southeast Asia. Businesses and persons from, or operating in the region should especially take note. For example, in 2019, former Asia-based Goldman Sachs partner Tim Leissner agreed to a settlement with the Securities Exchange Commission (SEC) and pleaded guilty to criminal charges as part of his role in the 1MDB scandal, which involved the payment of unlawful bribes to various government officials with the objective of securing lucrative contracts. That same year, Chinese national Jerry Li was charged with bribing government officials in China on behalf of his former employer, Herbalife, an NYSE-listed multi-level marketing company. C-Suite executives of S&P 500 technology company Cognizant also ran afoul of the FCPA in South Asia, allegedly authorizing US$2.5 million in bribe payments to a government official in India according to a February 2019 indictment.

What's more, this increase in the prosecution of individuals has led to more FCPA trials, with at least four trials taking place in 2019 alone. Companies are naturally more hesitant to take cases to trial given the reputational risk, extensive legal costs, and the certainty of a financial payment and enhanced compliance measures in a settlement with the government. Indeed, the recent €3.6 billion Airbus resolution, despite lapping prior FCPA settlements in terms of the financial payment, has been hailed as precedential because it allowed the company to settle with three countries – France, the United Kingdom, and the United States – in one fell swoop. Individuals, on the other hand, have liberty interests on the line, including the possibility of jail time. In addition, some individuals may also have their legal fees advanced by their employers under indemnification agreements, which removes one incentive to settle.

So far, these courtroom challenges have had a mixed record of success for defendants. For example, Mark Lambert, the former president of Transportation Logistics Inc., was convicted of four counts of violating the FCPA in November 2019 after a three-week trial in the District of Maryland. The evidence at trial showed that Lambert bribed a Russian official in order to secure contracts for his firm. Sentencing was set to take place in March 2020 but appears to have been delayed due to the ongoing pandemic.

However, with more cases being brought against individuals – and individuals being more willing to go to trial – FCPA case law is poised to develop significantly over the coming years. Judges may finally get the opportunity to decide the meaning and scope of many of the statute's key provisions, as well as associated legal theories that have been used in prosecution, and in defense.

Two trials that took place in 2019 reflect this pattern. In November 2019, Lawrence Hoskins was convicted of FCPA violations after a two-week trial in Connecticut. Hoskins's conviction marked the end of a lengthy prosecution, originally indicted in 2013 for acts that occurred between 2002 and 2009, that involved an interlocutory appeal to the Second Circuit. That appeal focused on the question of whether the FCPA contemplated conspiracy and aiding and abetting liability for someone like Hoskins, a British citizen who never set foot in the United States and never was employed by a U.S. company. The Second Circuit found that Hoskins could not be tried on conspiracy or aiding and abetting theories – because there was no such liability without another basis for jurisdiction under the FCPA – but that he could be found criminally liable under an agency theory. Ultimately, that is what the jury found – Hoskins was an agent of the U.S. subsidiary of the company for which he worked, even though he was employed by the parent company and never by the subsidiary.

After the jury verdict, Hoskins moved for acquittal based on insufficient evidence. In February 2020, Judge Arterton overturned the jury verdict as to the seven FCPA-related charges, finding that the Department of Justice (DOJ) failed to present sufficient evidence that Hoskins was an agent of the U.S. subsidiary. The government's appeal on the FCPA charges is currently pending in the Second Circuit, but Hoskins was sentenced to 15 months in prison on related money laundering charges in March 2020.

In a somewhat parallel case, Jean Boustani was acquitted by an Eastern District of New York jury in December 2019. Although not charged with FCPA violations himself, Boustani was charged with wire fraud and securities fraud as part of a scheme to sell Mozambican debt to investors that was supposed to be used for development projects. Significant portions of the loans' proceeds were actually used to pay kickbacks to Mozambican government officials and others involved. Boustani, a Lebanese citizen working for a UAE shipbuilding group – who, like Hoskins, never set foot in the U.S. – took the stand in his own defense and admitted to making the payments. Boustani's defense team argued in its opening that the United States is "not the world's policeman." That argument resonated with the jury, which acquitted him in five hours after a seven-week trial. Members of the jury said after the trial that they felt that the venue was improper – the case's only connection to the United States was that illicit payments made passed through correspondent bank accounts in New York.

These two trials have provided new guidance on the scope of DOJ's ability to reach defendants with limited U.S. connections. Another case, which is currently pending in the District of New Jersey, has shed some light on the unit of prosecution of the FCPA. Two C-suite executives of a major U.S. technology company, Cognizant, are being tried based on their alleged role in implementing and covering up a bribery scheme at an Indian subsidiary. Federal prosecutors charged one of the defendants, Gordon Coburn, with three counts of violating the FCPA – one for each email he sent to alleged co-conspirators. Coburn argued that because there was only one bribe involved, he should only be charged once. In a 14 February 2020 opinion, U.S. District Judge Kevin McNulty agreed with the government that the operative statutory language criminalized, "making use of" interstate facilities such as email to facilitate a bribe, leading to his conclusion that Coburn could indeed be prosecuted for each email sent rather than the single bribe he facilitated. As this was a novel issue, Judge McNulty's opinion is a major

step forward in demarcating how the government charges FCPA violations – but might not ultimately have any effect on the sentence that is imposed under U.S. sentencing laws should there be a conviction.

To be sure, many individual defendants are still settling with the government rather than choosing to go to trial, in line with the pattern in most federal prosecutions in the U.S. But the fact that FCPA trials are now taking place may allow defendants to more credibly telegraph that they will not take a deal, potentially yielding better plea offers from the government. For example, Frank Roberto Chatburn Ripalda, who had originally been charged under the FCPA, pleaded guilty on the eve of trial to a conspiracy to commit money laundering charge. Prosecutors agreed to a reduction in the sentencing guidelines for acceptance of responsibility, and Chatburn was ultimately sentenced to only three-and-a-half years in prison, despite facing a statutory maximum of 20 years. Chatburn's plea was part of a series of prosecutions related to bribes paid to officials at PetroEcuador, Ecuador's national oil company. Another individual involved in the scheme, Armengol Alfonso Cevallos Diaz, also pleaded guilty just days before his trial was set to begin. Cevallos's sentencing is scheduled this month (August 2020).

DOJ has stated that its focus on individual prosecutions is, "not an outlier or a statistical anomaly," according to former Assistant Attorney General Brian Benczkowski in a speech given on 4 December 2019, at the annual FCPA conference in Washington, D.C. From his remarks, it appears that this trend is likely to continue. What is less clear is what legal theories may or may not be available to the government as FCPA caselaw continues to develop. Former AAG Benczkowski made reference to the Second Circuit's Hoskins decision in his speech and re-affirmed that DOJ would continue to use agency as a means of prosecuting FCPA cases – which the statutory language makes explicit as a basis for liability. But he also stated that "each case and application of agency liability will need to be evaluated on its own," refusing to make any delineation. Former AAG Benczkowski noted that agency liability is a fact-based determination, saying that, "a person or entity may be an agent for some business purposes and not for others." In July 2020, DOJ released a new version of its FCPA guide, updated for the first time since 2012, which briefly discusses the Hoskins case but, similar to former AAG Benczkowski's speech, does not provide a clear-cut position. With Benczkowski stepping down from his position and Brian Rabbitt now serving as Acting Assistant Attorney General for the Criminal Division, it remains to be seen whether Benczkowski's statements will stand.

Clearly, DOJ seems to prefer leaving the law as open as possible until courts have the opportunity to demarcate various boundaries – which they are likely to have the opportunity to do, given the discussion above. Further, with more prosecutions of individuals and their willingness to take cases to trial, there is also the distinct possibility that cases might reach different outcomes in different circuits on the same issue. If circuit splits do arise, then there is a small –but potentially growing – possibility of a first Supreme Court case interpreting the FCPA. Regardless, more FCPA caselaw shedding clarity on open issues will be a boon to lawyers, judges, and scholars seeking to understand the contours of a complex statute, the elucidation of which has previously been almost the sole province of the enforcers. It may also inform local and regional enforcement trends – including those in Southeast Asia – as regulators frequently look to their American colleagues' actions to inform behavior.

Authors

Peter Spivack
Partner
Washington, D.C.
T +1 202 637 5631
peter.spivack@hoganlovells.com

Ann C. Kim
Partner
Los Angeles.
T +1 310 785 4711
ann.kim@hoganlovells.com

Thanks also to former Hogan Lovells Associate Karl Lockhart, now on judicial clerkship in Mississippi.

SEA View

Since April 2019, our monthly periodical has featured investigation, compliance, and regulatory developments in Southeast Asia (SEA). Each article will showcase our insights on particular developments in the region, liaising with our extensive global network. We draw on the firm's market-leading practices, including our assembled Global Regulatory team, to lead clients' businesses through challenges encountered in and out of SEA. SEA View is horizon spotting in practice.

Find our previous insights here.