



The NatWest Three: lost their fight against extradition

# Bung patrol

With foreign bribery attracting the attention of the US authorities, in-house lawyers have to be on their toes to keep their companies safe from the long reach of US laws.

By **Matt Morley**

**D**uring the extradition hearings of the 'NatWest Three', the judge observed that it made no difference that the defendants were UK nationals, living and working in England and having allegedly harmed a UK bank. Nor would it have mattered, said the judge, whether 95 per cent of the conduct at issue had taken place in the UK and only 5 per cent in the US. This 5 per cent was sufficient to allow US authorities to take the three men from London, shackled in the rear section of a commercial airliner bound for Houston, home of the now defunct Enron Corporation, to stand trial on fraud charges.

While the fate of the NatWest Three is a particularly dramatic example of the aggressive extension of US law beyond its borders, it is no isolated occurrence. Last month US securities authorities brought a case against three UK citizens, former employees of Swiss company ABB. Two had worked in the UK, and the third in Nigeria. They, along with a US colleague, agreed to pay fines relating to charges that they had violated the US Foreign Corrupt Practices Act (FCPA) by bribing Nigerian officials in connection with the sale of oil drilling equipment. The case, *Securities and Exchange Commission v Samson*, illustrates the

increasingly aggressive anti-bribery efforts of US authorities and the risks faced even by non-US companies.

The Swiss parent ABB had settled similar charges almost exactly two years before. Jurisdiction in that matter rested on the fact that ABB securities are registered with the Securities and Exchange Commission (SEC) and trade on the New York Stock Exchange. The former employees were charged for their roles in the bribery scheme, in which payments were made through a local Nigerian consultant, who was alleged to have issued false invoices for work he did not perform. The invoices had been paid by wiring funds to the consultant's US bank account and then transferring them to US bank accounts held by the Nigerian officials. These US banking transactions provided the SEC with the hook that enabled it to assert jurisdiction over the bribery scheme, as the defendants had allegedly used 'the mails and/or the means or instrumentalities of US interstate commerce'.

#### The long arm of the FCPA

The *Samson* case serves as a cautionary tale that, in the view of US law enforcement authorities, the FCPA's anti-bribery prohibitions extend far beyond US shores. While in *Samson* the alleged bribery scheme had points of contact with the US, such as telecommunications and

banking transactions, there can be still other potential bases for US FCPA jurisdiction.

While it is well known that companies with securities traded on US exchanges are subject to the act, the FCPA's anti-bribery provisions also extend to what it calls 'domestic concerns', which include:

- ▶ any business entity (public or private) organised under the laws of the US or of any state of the US;
- ▶ any business entity with its principal place of business in the US; and
- ▶ any citizen or resident of the US.

Participation in a bribery scheme by any of these parties can subject them to civil and criminal prosecution under the FCPA.

#### Global cooperation

US enforcement officials have been pressing particularly hard on FCPA prosecutions in recent years, but they are not the only source of risk. During the 1990s, the US was the prime mover behind international efforts to outlaw the bribery of foreign government officials. Several international conventions have been agreed upon, including one among the 36 member nations of the Organisation for Economic Cooperation and Development. Each of those countries, including France, Germany,

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Italy, Spain and the UK, have enacted similar legislation, outlawing and criminalising the bribery of foreign officials in connection with obtaining or retaining business.

In order to show its leadership on this issue, the US has made significant efforts to increase enforcement of the FCPA through both the civil authority of the SEC and the criminal authority of the Department of Justice, and in recent years the number of FCPA bribery cases has increased dramatically. European authorities are also feeling pressure, much of it generated by the US, to identify and pursue bribery cases. Prosecutors are likely to be particularly interested in pursuing high-profile defendants, such as major companies and their senior business executives. Such cases come to the attention of the authorities through a variety of means, including tips from disgruntled former employees and business competitors.

## Ensuring compliance

So, how can one best avoid being caught up in this escalating law enforcement campaign?

While nothing can provide complete assurance that a company will not have an anti-bribery problem, the most powerful prophylactic is a strong corporate compliance programme aimed at detecting and preventing bribes. There is no one-size-fits-all solution and any programme must begin with an assessment of the specific areas of risk faced by the company's business. Does the company do business in countries reputed to have particularly high rates of bribery? Does the company make use of consultants and agents in selling its products in foreign countries? Are there adequate internal controls on the approval of contracts and payments made by foreign subsidiaries? An effective compliance programme will focus on minimising these types of specific risks.

Even the best compliance programme cannot assure that a violation will not occur, and if the company discovers a potentially illegal action it must consider carefully what US authorities refer to as 'self-reporting' – that is, approaching regulators with the evidence. While not usually required by law, US regulators put a premium on such 'cooperation', holding out the prospect that a sufficient degree of cooperation will help either avoid prosecution or lessen the punishment for any violations. However, many US lawyers remain sceptical as to whether such self-reporting provides any benefits.

Often the first inkling of an FCPA problem comes when the authorities contact the company and any interactions with US regulators must be handled with great care from the very start. Whatever legal strategy is adopted, it is essential that dealings with the regulator be totally straightforward and unambiguous. Subjects of regulatory inquiries often create their biggest problems after the inquiry begins by failing to conduct thorough searches for responsive documents by discarding evidence, or simply by setting the wrong tone with the regulator. Notably, US celebrity Martha Stewart was jailed not for insider trading (of which she was never convicted), but for obstructing federal investigators who were examining those issues.

The bribery of foreign officials is a priority item for US authorities, which will exploit even the smallest nexus with the US to pursue violators. Given the potentially serious consequences of such matters, companies are well advised to review their procedures for preventing such conduct so as to avoid becoming the next example of vigorous US law enforcement. ■

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