

Fighting Back Against Corrupt Foreign Officials

Law360, New York (February 05, 2010) -- One of the continuing frustrations in the Foreign Corrupt Practices Act area is the inability to convince corrupt foreign officials why bribery has consequences for them under U.S. law. A little-known State Department power may provide at least one example that will cause foreign officials to rethink payment demands prohibited by the FCPA.

A 2004 Presidential Proclamation and subsequent supporting congressional legislation, originally passed in 2007, permit U.S. officials to revoke the U.S. visas of foreign officials who have reportedly solicited bribes. Awareness and careful citation of these provisions may provide U.S. businesses a valuable tool in dissuading foreign officials who solicit bribes.

Anti-Kleptocracy Provisions

Section 212(f) of the Immigration and Nationality Act of 1952, codified at 8 U.S.C. § 1182, allows the President of the United States to suspend entry of any alien or class of aliens into the United States if permitting entry “would be detrimental to the interests of the United States.” 8 U.S.C. § 1182(f).

Pursuant to that authority, President George W. Bush signed Presidential Proclamation 7750 in early 2004. The president endorsed the Proclamation, known as the “Anti-Kleptocracy Initiative,” as part of a broader policy aimed at combating international crime and terrorism and ensuring the stability of democratic institutions and U.S. business interests abroad. Proclamation No. 7750, 69 Fed. Reg. 2287 (Jan. 12, 2004).

The Proclamation bars entry into the United States of foreign public officials and former public officials who have solicited or accepted bribes in exchange for some benefit or advantage derivative of the foreign official’s public office.

The Proclamation also bars entry into the United States of any family members or dependents of a corrupt foreign official, if the family members or dependents have benefited in some way from the bribe.

In order to prohibit entry of a foreign official, the Proclamation requires that the bribe seriously harm (1) U.S. business interests overseas, (2) U.S. international assistance programs, or (3) U.S. national security. *Id.* at §§ 1(a), 4.

Finally, the Proclamation charges the Secretary of State with establishing the procedures under which the Proclamation operates. Unfortunately, little, if any, information regarding those procedures has been published to date in the Code of Federal Regulations or otherwise made public.

In 2007, Congress first enacted legislation, authored by Sen. Patrick J. Leahy, D-Vt., to support and strengthen the provisions of the Presidential Proclamation, Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 699L,

121 Stat. 1844, 2373-74 (2007), legislation itself derived from the authority of Section 212(f) of the Immigration and Nationality Act of 1952. 8 U.S.C. § 1182(f).

Since then, Congress has passed superseding legislation, containing almost identical language. 8 U.S.C. § 1182 note (2009). The legislation covers the same basic topic as the Proclamation, but differs in some of its particulars.

The legislation prohibits entry into the United States of foreign government officials and their family members if the Secretary of State has “credible evidence” that an official has been “involved in corruption.” However, unlike the Proclamation, the legislation applies only to corruption in foreign countries that is related to the extraction of natural resources.

Therefore, the legislation is both broader and narrower than the Proclamation. On the one hand, while the legislation encompasses more activities than the Proclamation in its use of the phrase “involved in corruption,” the explicit language of the legislation limits its application to corruption in some way connected to the extraction of natural resources in a country.

On the other hand, unlike the Proclamation, there is no explicit requirement in the legislation that the corruption seriously harm U.S. business interests overseas, U.S. aid programs, or U.S. national security.

The legislation charges the Secretary of State with maintaining a list of the individuals prohibited from entering the United States. The Secretary must also report to Congress every 180 days the evidence used to place an individual on the list.

The legislation permits the Secretary to make these disclosures to Congress in classified form, and there is no requirement that the Secretary publish the list or its criteria.

Use of Provisions in Aid of U.S. Businesses

The State Department does not provide data regarding when it applies these provisions.

While one former State Department official has said that the State Department generally lacks the political will to use the enforcement mechanism in the 2007 legislation,[1] a November 2009 New York Times article reported that a 2007 State Department memorandum stated the Secretary of State had used the Proclamation “dozens” of times to bar corrupt foreign officials from the United States.[2]

And the G8 2009 Accountability Report on Implementation of Anticorruption Commitments also asserted that the United States, since 2008, has denied and revoked visas to corrupt officials, with increased focus on corruption in the extractive industries.[3]

While the State Department does not generally disclose its visa decisions to the public because of privacy concerns, some prosecutions of corrupt foreign officials in their home countries have produced public U.S. visa revocations.

In October 2009, the U.S. ambassador to Kenya, Michael Ranneberger, reportedly denied a visa to Kenya’s attorney general Amos Wako for acting “obstructive in the fight against corruption.”[4]

This visa denial was also unusual because Ambassador Ranneberger publicly invoked Proclamation 7750 as providing the basis for his decision. To our knowledge, that announcement was the first time the United States had publicly acknowledged using the Proclamation.[5]

In January 2008, the visa of a former Tanzanian official was revoked when he was dismissed from his position with the Bank of Tanzania, pending an investigation for possible corruption charges.[6]

Also, the U.S. ambassador to Serbia published the Proclamation in a November 2006 press release, stating that the ambassador “will continue to apply stringently the provisions” of the Proclamation.[7]

In addition to these official accounts, other accounts have emerged of U.S. ambassadors requesting that U.S. businesses report foreign officials who demand any kind of bribe so that the ambassador can investigate the official and possibly place the official on the list for denial or revocation of a U.S. visa.

Corporate and government officials have confirmed that ambassadors in countries where corruption is pervasive, particularly in African countries, routinely ask U.S. businesses to report corrupt behavior so that the ambassador may examine foreign officials’ visas under the general provision of Section 212(f), the statutory authority for the Proclamation. 8 U.S.C. § 1182(f).

These developments, when taken together, demonstrate an effort on the part of the State Department to aid U.S. businesses overseas in rejecting corrupt practices and demands.

In the past, enforcers of the FCPA have simply required U.S. businesses to “just say no,” and, in effect, absorb all the costs and consequences of declining to participate in corrupt practices. Now, U.S. businesses have more options.

First, U.S. businesses may cite Kenya’s attorney general as an example to foreign officials of the possible consequences of corrupt behavior. Some foreign officials have already taken notice — for example — the attorney general of Kenya has threatened to take legal action in the United States for revocation of his U.S. visa.[8]

A second option U.S. businesses have is to reference both the anti-kleptocracy provisions and the FCPA when refusing an official soliciting a bribe.

Finally, companies who refuse to pay bribes and feel that they have lost business to competitors who will pay bribes may submit the name of a corrupt foreign official to the U.S. ambassador for further investigation and possible visa denial or revocation.

The consequences to foreign officials for corrupt behavior have traditionally been quite limited. As a result, the more recent developments in the use of the anti-kleptocracy provisions may finally provide businesses with concrete reasons as to why corrupt behavior has consequences for both parties.

It is unclear how many businesses have tried this strategy. There is little data regarding the extent to which U.S. businesses have informed ambassadors of possible corruption and how ambassadors have acted upon any such information.

Further, a U.S. business would likely resort to actual invocation of the anti-kleptocracy provisions, i.e., asking an ambassador to deny or revoke a certain official’s visa, only as a last resort: Once the provisions are used, any professional relationship with the foreign official, and perhaps the country, may end, and the company may find its own business practices under scrutiny.

Even this uncertainty, however, does not preclude U.S. businesses from citing the anti-kleptocracy provisions as an additional reason why the company cannot accommodate foreign officials who solicit bribes.

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[1] Ian Urbina, Welcoming rich African official, U.S. looks past graft suspicions, N.Y. Times, Nov. 17, 2009, at A1, available at 2009 WLNR 2307791.

[2] *Id.*

[3] U.S. Dep't of State, Bureau of Int'l Narcotics and Law Enforcement Affairs, G8 Accountability Report on Implementation of Anticorruption Commitments: U.S. Submission (Opening) (2009), available at www.state.gov/p/inl/rls/125965.htm.

[4] The FCPA Blog, A Tweet Too Far?, Nov. 9, 2009, www.fcpablog.com/blog/2009/11/9/a-tweet-too-far.html (last visited Dec. 28, 2009).

[5] *Id.*

[6] Press Release, U.S. Embassy to Tanzania, Form BOT Governor's Termination Invalidates U.S. Visa (Jan. 16, 2008), available at tanzania.usembassy.gov/pr_01162008.html (last visited Dec. 28, 2009).

[7] Press Release, U.S. Embassy to Serbia, Corrupt Officials to be Denied Entry to the U.S. (Nov. 24, 2006), available at belgrade.usembassy.gov/policy/global/061124.html (last visited Jan. 18, 2010).

[8] The FCPA Blog, *supra* note 4.