

CLIENT ALERT

Are Commercial Bribes the "Broken Windows" of the FCPA?

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The Department of Justice has a long history of prosecuting commercial bribery uncovered in FCPA cases under the Travel Act (18 U.S.C. § 1952), which prohibits the use of interstate commerce in furtherance of any "unlawful activity" such as commercial bribery in violation of state law. *See United States v. Control Components Inc.* (C.D. Cal. July 31, 2009). Similarly, the UK Bribery Act prohibits both commercial bribery and bribery of foreign government officials.

By contrast, the SEC traditionally has been reluctant to pursue purely commercial bribes. The SEC's position first shifted some 18 months, and is now confirmed again with Goodyear Tire & Rubber's \$16 million settlement with the SEC on Tuesday, which resolved allegations that Goodyear subsidiaries in Kenya and Angola paid more than \$3.2 million in bribes, and "falsely recorded [the bribery payments] as legitimate business expenses in [their] books and records." Highlighting the agency's renewed interest in pursuing liability based on commercial bribery, Scott W. Friestad, Associate Director of the SEC's Enforcement Division said in a press release that "[t]his settlement ensures that Goodyear must forfeit all of the illicit profits from business obtained through bribes to foreign officials *as well as employees at commercial companies* in Angola and Kenya." Notably, the Goodyear case was settled without any civil monetary penalty as Goodyear was required only to disgorge ill-gotten gains and pay pre-judgment interest.

In light of the apparent trend, Tuesday's settlement raises some key questions: Are the books and records provisions the SEC equivalent of the Travel Act? Do commercial bribes portend bribes to government officials such that they are the "broken windows" of SEC FCPA enforcement?

We certainly now have a good sense of how the SEC would answer these questions.

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