

## OUTSIDE COUNSEL

BY MICHAEL J. GILBERT AND WILLIAM GIBSON

### *'Kay III' Highlights Reach of FCPA to Payments Abroad*

**A**n important opinion, adopting a broad view of a statute the government has already been enforcing aggressively, the Foreign Corrupt Practices Act (FCPA), was handed down by the U.S. Court of Appeals for the Fifth Circuit on Oct. 24, 2007. The decision, *United States v. Kay (Kay III)*,<sup>1</sup> further widens the scope of activity that falls within the statute's prohibition against bribery of foreign government officials by U.S.-based entities doing business abroad.

#### Background

The FCPA was enacted in 1977 to deter and punish bribery of foreign officials by American companies, foreign companies whose shares are traded on U.S. exchanges, and foreign businesses if the conduct is directed by U.S. persons.<sup>2</sup> The FCPA makes it a crime to "corruptly" offer any kind of payment to a foreign official "in order to assist...in obtaining or retaining business."<sup>3</sup> The most basic scenario is when a representative of a U.S. company makes payments to a foreign government official in exchange for that government or government entity awarding a significant contract to the U.S. company.

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In recent years both the Securities and Exchange Commission (SEC) and Department of Justice (DOJ) (which share FCPA enforcement responsibility) have stepped up their efforts to enforce the act. Notable recent enforcement actions include a \$26 million fine levied in February 2007 against subsidiaries of ABB Ltd. (a Swiss company with shares traded on the NYSE) for bribery related to a Nigerian oil project and a \$12 million fine against York International, announced last October, for bribes and kickbacks paid to Iraqi-controlled accounts in connection with the U.N. Oil-for-Food program.

Perhaps because many FCPA matters result in guilty pleas, deferred prosecution agreements or settlements with the SEC, there is a paucity of case law addressing some of the intricacies of a statute that is more complex than it might, at first blush, seem. *Kay III* makes clear that courts will give the DOJ substantial leeway to determine what behavior is punishable under the FCPA and will permit prosecution of a wide range of activities.

The *Kay* prosecution, which has generated several thorough opinions on FCPA issues, now including two Court of Appeals decisions, serves as a useful primer for understanding the dangers the FCPA poses to American companies operating abroad. American Rice Inc. (ARI) is a publicly held rice exporting company. During the 1990s, it exported rice to Haiti through its Haitian subsidiary Rice Corp. of Haiti. In 1999, outside counsel preparing for a civil suit interviewed David Kay, ARI's vice president of Caribbean Operations. During this interview, Mr. Kay volunteered that ARI had taken several steps to reduce the taxes it paid to the Haitian government, including underreporting its imports and paying Haitian customs officials to accept the false reports. Mr. Kay explained that these actions were part of doing business in Haiti, and indeed the *Kay III* court noted that "the standard practice of Haitian government officials was to routinely press companies like [ARI] to pay for local service, and almost all companies, including [ARI]'s competitors, paid."<sup>4</sup>

ARI self-reported the bribery to the U.S. government, which launched an investigation and eventually obtained indictments against Mr. Kay and Douglas Murphy, ARI's president. Notably, ARI itself entered into a settlement with the SEC but was not charged criminally. In 2002, the District Court granted Mssrs. Kay and Murphy's motion to dismiss the indictment, holding that payments to reduce customs duties

