

The Challenges of Criminal Enforcement of Public Corruption Laws

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The periodic realization that payments and gifts to members of Congress may constitute criminal activity is once again a front page headline. Corruption investigations have already tarnished some members of Congress. The heightened scrutiny is stigmatizing many "traditional" ways of doing business in Washington, DC, and is generating a clamor for change. In addition to the Washington, DC Jack Abramoff scandal, high profile corruption investigations and trials in Atlanta, Chicago, Philadelphia and San Diego have captured the public's attention. As a result enforcement officials, Congress, the public and the press are focusing on what should be done and examining the need for new rules and laws. Companies and lobbyists need to understand the existing rules and to stay abreast of proposed changes which can severely impact their government contracting and can expose them to criminal investigations.

There will be a sea of change in the climate in which businesses, special interest groups and their lobbyists function. The Department of Justice and the FBI have redeployed significant resources to corruption investigations. Congress is in the process of further restricting the benefits its members can take from lobbyists. Likely new restrictions will close some loopholes in an already robust enforcement regimen. Despite these changes, public corruption will never be totally eradicated. The risks for businesses and lobbyists in this overheated environment are very real. Reputations will suffer and valuable time and energy will be spent responding to intrusive investigations and designing compliance procedures to conform to changed rules. Individuals and companies that believe that ethics rules only bind corrupt officials need to consider whether they aided and abetted criminal activity and how they will be judged in the court of public opinion.

Traditionally the Department of Justice has proceeded cautiously in building corruption cases. One major effect of the current clamor will be that investigations which normally took years to develop will now proceed rapidly. The normal reticence to take overt action against public officials will give way to a focused attempt quickly to resolve, either by prosecution or a decision to decline prosecution, investigations that have already been publicly identified. Congressional hearings will also focus on corrupt lobbying conduct creating additional issues for companies and individuals who must respond to multiple inquiries. Based on my years of experience supervising corruption and white collar investigations in the Justice Department, there are certain insights that will help those caught in the crossfire better to understand the best way to respond to the heightened scrutiny.

Defending Against Corruption Investigations

The defense to any corruption investigation begins with the fact that most lobbying activity is legal and protected. Criminal corruption cases are justifiably difficult for prosecutors to prove for several reasons. First, most corruption investigations force prosecutors to draw a fine line between protected legitimate activity and corrupt activity. For example, campaign contributions are entirely legal and are often intended to influence Congressional activity. However, campaign contributions made with an explicit quid pro quo can be illegal. Lobbying activity poses a similar dilemma. Its legitimate purpose is to educate and influence, but a corrupt agreement involving payments and benefits exchanged for official acts can be criminal.

Proving "corrupt" intent is difficult in virtually all corruptions cases. This is particularly true because

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bribe payors and bribe receivers are not coconspirators in the traditional sense because the payment and receipt of a bribe are separate and distinct crimes. Prosecutors will focus on concealment and secrecy to prove intent, but concealment alone does not establish a crime without a wrongful act or agreement. Prosecutors also recognize that a criminal prosecution is an “all or nothing response” to what may be only ethical violations. Defense attorneys constantly remind prosecutors that a career can be destroyed by an indictment even if the official is subsequently cleared.

What Can Companies And Lobbyists Expect When the Government Opens A Corruption Investigation?

Prosecutors and agents now bring to corruption investigations many of the same skills that they use in prosecuting any white collar crime. In many cases, undercover operations are used in corruption investigations because they offer the advantage of keeping the investigation a secret unless and until criminal charges are brought. The government hopes the undercover investigation will yield recorded conversations that will make clear that a quid pro quo was bargained for and obtained.

When an undercover operation is not possible, the FBI and prosecutors generally adhere to a self imposed discipline of conducting a “preliminary” investigation to weed out baseless allegations and to determine if there is reasonable cause to actually focus on the public official. Once past a preliminary investigation, investigators will start issuing subpoenas and conducting interviews but, they will try to keep the investigation low key. However, once the investigation receives publicity, companies and organizations can expect less restraint by the government. Companies should expect that the government will conduct a full examination of relevant financial records. The company’s internal policies will be examined for the restrictions they place on employees and whether appropriate documentation and compliance procedures were followed. The focus of the government investigation will always be on establishing an agreement or quid pro quo connecting a benefit to a specific official act. E-mails, correspondence, and phone records will be analyzed. Prosecutors will try to “flip” bribe payors to become convicted cooperators against the public officials. Convincing prosecutors that an individual or company engaged in no wrongdoing or is most useful as a cooperating witness, and not a defendant, often involves complex negotiations. As in any investigation, destruction of records or lying to the FBI agent may convert what was innocent behavior into an easily prosecutable obstruction case.

What Crimes Do Prosecutors Use In Corruption Cases?

Prosecutors have at their disposal bribery, gratuity and conflict of interest crimes specifically geared to corrupt activity by federal executive and legislative branch officials. They have also used the mail and wire fraud statutes to charge fraud schemes that may include the “deprivation of the right to honest and faithful services” expected of a public official. Tax violations are also often part of any corruption case especially when the government can prove that the public official received money but cannot tie the money to any official act.

If the government can tie a payment or other benefit to an official act then it can charge either bribery or illegal gratuities under 18 USC Section 201. The more difficult case legally is when there are periodic retainer-like payments or gifts that cannot be tied to any particular official act. In the Sun Diamond case, the Supreme Court held that a violation of the gratuity statute required proof of a nexus between a gratuity and an official act. *United States v. Sun-Diamond Grower of Cal.*, 526 U.S. 398, 119 S.Ct. 1402 (1999). In an effort to get around the problem of establishing the necessary quid pro quo or nexus, the government may charge a mail or wire fraud scheme based on the public’s intangible right to the official’s honest services. 18 USC Sections 1341, 1343 and 1346. Prosecutors often allege “honest service” schemes in charging Federal officials when more specific statutes don’t fit, and to Federalize wrongdoing by state and local officials and those try to influence them. However, the courts have struggled to impose an appropriate line between ethical violations and criminal activity when “honest services” mail or wire fraud is charged. Courts have expressed concerns about “the close relationship between lobbying activities that are lawful” and “slightly more extreme versions of such conduct that can constitute federal violations.” *United States v. Sawyer*, 85 F. 3d 713 at 741 (1st Cir. 1996). Many decisions require the government to prove the “honest services” fraud by proving a violation of a fiduciary duty for personal gain. Courts also often require that there be an intent to deceive and defraud the public as well as an intent to deprive the public of honest services. *United States v. Sawyer*, 239 F.3d 31, 41 (1st Cir. 2001).

The conflict of interest statute (18 USC Section 208), post employment restriction statute (18 USC Section 207), and the illegal supplementation of salary statute (18 USC Section 209) are all statutes

that prosecutors consider in evaluating less culpable activity or because they are easier to prove than bribery offenses. These statutes give rise to felony, misdemeanor, and civil enforcement pursuant to 18 USC Section 216. As a result, in recent years, prosecutors have used these sections to obtain guilty pleas and settlements which can be tailored to avoid the stigma and severe sentences called for by the bribery statutes.

The information that charged Jack Abramoff in the District of Columbia illustrates the multiple ways that government can charge bribery type offenses. The conspiracy count charges that Abramoff defrauded his clients and also defrauded his law firm of their right to his honest services. It also charges as an object of the conspiracy that Abramoff bribed a public official and thereby caused a violation of the public official's honest services. Finally, Abramoff is charged with causing a violation of a 1 year ban against lobbying by a former Congressional staff member. Count 2 charges mail fraud in that Abramoff obtained an agreement to take official action from an elected official in exchange for benefits as a violation of the public's right to the official's honest services. Count 3 charges tax evasion.

Conclusion

The intense scrutiny being focused on public corruption means that it is ever more important those who seek to legitimately advance their causes understand the changing rules and where the line should be drawn between legitimate advocacy and public corruption.

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