



ANTI-CORRUPTION DIGEST **September 2015**

Welcome to Dorsey & Whitney's monthly Anti-Corruption Digest. Anti-corruption enforcement crosses boundaries like no other, so keeping up to date is more important than ever. In this digest, we draw together news of enforcement activity throughout the world and aim to reduce your information overload. Our London, Minneapolis, New York and Washington DC offices edit the digest and select the most important material so that you can use this digest as a single source of information.

THE USA

Federal Court Rejects Conspiracy Liability for Foreign Nationals Not Subject to Direct Liability

A United States District Court for the District of Connecticut held that the FCPA does not extend accomplice liability to non-resident foreign nationals who are not subject to direct liability under the FCPA. The holding in *United States v. Lawrence Hoskins*, passed down in the Court's August 13, 2015 Order, is in direct opposition to the position taken by the DOJ in its *Resource Guide to the U.S. Foreign Corrupt Practices Act*. The case is one of the individual prosecutions related to the government's Alstom investigation.

Mr. Hoskins was alleged to have been responsible for authorizing payments to consultants who were retained for the purposes of paying bribes. The money is alleged to have ended up in the hands of Indonesian officials connected to Alstom's bid to build a \$118 million power station for Perusahaan Listrik Negara, the state-owned electricity company.

Mr. Hoskins, a U.K. citizen, was employed by a French subsidiary of Alstom when the payments were authorized.

The court focused on the fact that the text and structure of the FCPA carefully delineated which classes of people were subject to liability, excluding non-resident foreign nationals who are not agents of a domestic concern and did not take actions in furtherance of a corrupt payment while in the United States. The court rejected the government's argument that general principles of accomplice liability are sufficient to support a conspiracy charge against an individual not subject to personal liability, reasoning that allowing such charges would be tantamount to allowing the executive branch to override Congressional intent.

The DOJ filed a motion for reconsideration on August 27, 2015.

DOJ Announces Guilty Plea in FCPA Enforcement Action Linked to Russian Nuclear Industry

The DOJ issued a press release announcing that Vadim Mikerin had pleaded guilty to conspiring

to violate the FCPA and conspiring to commit wire fraud. Mr. Mikerin is a Russian national living in the United States. The charges brought against Mr. Mikerin identified him as a Russian “foreign official” based on his role as Director of the Pan American Department of TENEX, an entity indirectly owned and controlled by the Russian government. TENEX supplies uranium and uranium enrichment services to nuclear power companies worldwide.

The press release also announced earlier plea agreements reached with Daren Condrey and Boris Rubizhevsky in the same matter. According to court documents, Mr. Mikerin received more than \$2 million bribes from Mr. Condrey, Mr. Rubizhevsky, and others to secure improper business advantages for a Maryland-based transportation company doing business with TENEX. The conspirators used consulting agreements and code words in an attempt to conceal the improper payments.

Sentencing hearings are currently scheduled for the fall and winter.

Court Dismisses Securities Fraud Claims Predicated on FCPA Investigation

A United States District Court for the Southern District of Texas granted defendants’ motion to dismiss in *Clinton Parker v. Hyperdynamics Corp.* In September 2013, Hyperdynamics disclosed that the DOJ was investigating whether the company’s activities in Guinea violated the FCPA or money laundering statutes. Prior to the DOJ’s investigation, the company had disclosed a risk of FCPA violations to investors on twenty separate occasions, noting heightened risk from doing business in Guinea as well as from control deficiencies occurring before the management and board of directors were overhauled in 2009.

Plaintiffs brought suit against the corporation for securities fraud, alleging material omission for failure to disclose that FCPA violations

occurred. The court noted that there was no evidence that violations had in fact occurred, reminding plaintiffs that the existence of an investigation does not establish the existence of wrongdoing.

The court’s decision may have been influenced by the fact that Hyperdynamics received a declination letter from the DOJ on May 21. It is unclear whether the suit would have been allowed to proceed if the government’s investigation had been ongoing.

DOJ Deputy Attorney General Sally Yates Gives Speech Emphasizing Individual Accountability for Corporate Misdeeds

The DOJ Deputy Attorney General Sally Yates has delivered a speech at New York University School of Law. The speech was preceded by the release of a memorandum entitled “Individual Accountability for Corporate Wrongdoing.” The speech and the memorandum present holding individuals accountable as one of the most effective means of combatting corporate misconduct. A very similar message was delivered by then-Attorney General Holder in a 2014 speech, also given at New York University School of Law.

Commentators noted the disparity between DOJ’s stated priorities and its behavior, with 75% of DOJ corporate enforcement actions between 2008 and 2014 including no charges against individual employees. The speech identified a number of obstacles to the prosecution of individuals, including the difficulty of finding a cooperating witness to wear a wire, foreign data privacy laws, and limits to the reach of American courts to compel testimony from witnesses living in other countries.

The memorandum, available [here](#), identified six steps the DOJ would be taking to increase its ability to prosecute individual wrongdoers, including withholding any credit for cooperation from companies unless all relevant

facts related to individual misconduct are disclosed. The memorandum also declared that corporate resolutions should not provide protection from criminal or civil liability for individuals, barring “extraordinary circumstances.”

For further discussion, see a Dorsey & Whitney update [here](#).

SEC Clashes with Defense Attorneys in Pre-Motion Letters to Court in *SEC v. Straub*

The SEC and defendants have submitted letters to the court in advance of the SEC’s anticipated motion for summary judgment in *SEC v. Straub*. Straub and his co-defendants are former executives of Magyar Telekom, a Hungarian telecommunications company publicly traded in the United States. The defendants are alleged to have funneled money to Macedonian officials in exchange for favorable influence on the country’s liberalization of the telecommunications market. Magyar Telekom reached a resolution with the government for its actions in 2012, entering into a settlement with the SEC and a DPA with the DOJ.

Defendants’ letter repeats arguments made in their earlier motion to dismiss, arguing the claims are time-barred and the allegations defendants used an instrumentality of interstate commerce are nonviable. The letter argues that the Supreme Court’s decision in *Gabelli v. SEC*, issued after defendants’ motion to dismiss was denied, compels summary judgment based on the statute of limitations. *Gabelli* held that the statute of limitations begins to run for government regulatory agencies when a fraud is perpetrated. The SEC ignored this holding in its opening letter and dismissed it in its reply, arguing that the statute of limitations is suspended whenever offenders are not physically present in the United States.

Defendants also point out that discovery has revealed no instances of two of the defendants

using any instrumentality of interstate commerce, while the third defendant’s only demonstrated use is the passage of a single email through a server based in the United States in the course of transmission from Hungary to Macedonia.

The case is the only SEC FCPA action currently before the courts. The SEC has yet to prevail in a case when put to its ultimate burden of proof.

FIFA Matter Continues to Expand

U.S. Attorney General Loretta Lynch has confirmed the government’s investigation into the FIFA corruption matter, covered in previous issues of the *Digest*, is “active and ongoing, and has in fact expanded since May.” She stated the DOJ anticipates bringing charges against additional individuals and entities. Thirteen of the fourteen defendants initially charged have been arrested, four of whom have already pled guilty.

Former Thai Tourism Chief Indicted

In a move that is likely to end the U.S. prosecution of Juthamas Siriwan and her daughter, Jittisopha Siriwan, Thai prosecutors brought charges against the pair for taking bribes, corruption, and bid rigging. Both were indicted by the DOJ in 2009 in connection with the FCPA case against Hollywood producer Gerald Green and his wife, Patricia Green. The Greens were alleged to have paid Ms. Siriwan \$1.8 million (£1.2 million) in bribes in exchange for awarding the Greens a contract to produce the Bangkok film festival.

Ms. Siriwan and her daughter each face up to twenty years in prison.

Petrobras Denies Rumors of \$1.6 Billion FCPA Settlement

In an August 19 filing with the SEC, Petrobras stated “there are no ongoing negotiations

regarding the eventual payment of a fine for the winding up of civil and criminal investigations in the United States regarding the violation of the anti-corruption legislation.” The announcement was in response to an “exclusive” article published by Reuters the previous day, which stated the company was facing fines as large or larger than the \$1.6 billion Siemens AG paid to US and German authorities to settle bribery charges in 2008. The Reuters article was purportedly based on information from a person who had knowledge of the settlement from Petrobras’ legal advisors.

THE UNITED KINGDOM

International Corruption Unit

A new anti-corruption unit has been established to investigate cases of international corruption and, in particular, the bribery of foreign public officials by individuals or companies from the UK. The International Corruption Unit (the “ICU”) will reportedly be made up of existing units spread across several agencies, including the National Crime Agency, who will manage the new team.

The Department for International Development (“DFID”) is said to be funding the ICU, reportedly providing £21 million (\$32 million) over a five year period. According to a press release from DFID, the new unit is expected to deliver a significant increase in overseas bribery cases and will have a particular focus on preventative action. The NCA has noted that alongside ICU’s investigative work, it will also:

- Trace and recover the proceeds of international corruption;
- Support foreign law enforcement agencies with international anti-corruption investigations;

- Engage with government and business to reduce the UK’s exposure to the proceeds of corruption; and
- Work with business to support increased compliance with the Bribery Act 2010.

The Joint Head of the ICU, Jon Benton, said:

“The work we are doing is absolutely vital for helping countries get back what is rightfully theirs.

The message to individuals and companies who see developing countries as fair game is that the UK has zero tolerance for overseas bribery and corruption.”

Insight into the SFO’s Operations

The Director of the Serious Fraud Office (the “SFO”) made a speech at the 33rd Cambridge Economic Crime Symposium, an event which is attended by top prosecutors from around the globe. Two of the most topical issues addressed by Mr. Green were the introduction of Deferred Prosecution Agreements (“DPAs”) in the UK and an insight as to why SFO investigations take so long to conclude.

According to Mr. Green, it is anticipated that two DPAs will be completed this year. He dismissed concerns raised by a number of watchdogs, that DPAs will be a mechanism effectively permitting companies to buy themselves out of trouble, stating that such inferences are “misplaced and premature”. Mr. Green noted that the “crucial point” relevant to DPAs in the UK is that they are a judicial process and the judge must be satisfied that the DPA is in the interests of justice, and is fair, reasonable and proportionate - “Rubber stamps have no part in the process.”

An interesting issue addressed in the speech is why investigations by the SFO take so long. Mr. Green gave a number of reasons:

- There is often a very large quantity of data involved and claims of privilege need to be tested.
- Witnesses and suspects across the globe need to be identified.
- Some cooperate and others do not.

Whether these are distinct to SFO investigations is debatable, however, Mr. Green notes that “we get there”.

A copy of Mr. Green’s speech can be found [here](#).

■ THE REST OF THE WORLD

Brazil

It has been reported that two senior figures associated with Brazil's ruling Workers' Party will face trial over their alleged roles in the Petrobras corruption matter. According to prosecutors, Operation Carwash, the name given to the investigation into corruption at the oil company, has revealed corrupt payments of nearly \$2 billion (£1.3 billion).

Jose Dirceu, a former chief of staff, stands accused of overseeing the bribery matter which took large sums from the state oil company. Said to be a co-founder of the Workers' Party, Mr. Dirceu is alleged to have taken \$3.1 million (£2 million) in bribes, some of which he reportedly spent on an executive jet. Joao Vaccari Neto, a former treasurer of the Workers' Party is alleged to have been responsible for depositing bribes into Workers' Party accounts.

A date for trial has not yet been set.

Canada

According to reports, Bruce Carson, a former adviser to the Canadian Prime Minister, has gone on trial having been charged with improperly lobbying the federal Indian Affairs ministry in 2010 and 2011. The matter is said to concern the proposed sale of a water filtration system to an aboriginal group. Under Canadian law, former officials are not allowed to lobby for five years after leaving government.

Prosecutors allege that Mr. Carson made assurance to the company selling the equipment that he could make arrangements to get the deal completed. It is further alleged that Mr. Carson discussed booking meetings with two former aboriginal affairs ministers as well as senior officials. "There is no question: if Mr Carson did not have actual influence he certainly pretended he did so," stated the prosecution.

Mr. Carson, who is reported to have pleaded not guilty, claims that he was not acting for any one company in particular but was interested in improving the poor conditions that many aboriginals have to endure.

China

Continental, the German supplier of automobile parts, is reported to have replaced its tyre sales management team in China due to allegations of corruption. The new management, which has been in charge since July, is said not to be commenting on the matter while the investigation is in process.

The matter reportedly involves allegations that members of the previous management team gained financial benefits on a personal level through business deals conducted by the company. Further reports state that the extent to which the former employees allegedly enriched themselves is currently unknown.

Ghana

It has been reported that Ghana's Judicial Council is investigating 34 judges, 12 from the high court and 22 from the lower court, following accusations of bribery. The accusations are said to have stemmed from allegations made by a local investigative journalist, Anas Aremeyaw Anas, who claims to have caught 180 officials on camera taking bribes and extorting money from litigants. The 500 hours of video evidence has reportedly been handed over to the Chief Justice.

Over a two year period Mr. Anas allegedly approached the judges, offering payments in return for setting his purported client free. Reports state that he then followed a constitutional process to ensure that all the judges he named would be officially investigated by petitioning both the president and chief justice.

All of the judges under investigation are due to appear before the Judicial Council.

Egypt

According to the office of President Abdul Fattah al-Sisi, Egypt's government has resigned amid accusations of corruption. A senior government official is said to have noted that the re-shuffle was to "pump new blood" into the government following the arrest of the former Agriculture Minister.

Salah El Din Mahmoud Helal recently resigned from the post of Agriculture Minister on the orders of President Sisi and is reported to have since been arrested. According to a statement issued by Egyptian prosecutors, Mr. Helal stands accused of taking bribes from Ayman Mohamed, another defendant in the matter, in return for easing the legal procedures regarding land licenses for 2,500 acres of land in the Natroun Valley. It is alleged that the bribes

included membership of the El-Ahly club, reportedly worth LE140,000 (\$17,900/£11,500) and residential units in Cairo's 6th October City district worth LE8.25 million (\$1,054,000/£686,370).

The prosecution has not specified for how long the defendants will be detained.

Guatemala

A Guatemalan judge has reportedly ordered the country's former President, Otto Perez Molina, to stand trial on corruption charges. Prosecutors allege that Mr. Molina created a system where businesses paid bribes to officials to clear imports through customs at a low rate of tax.

The matter has been named "La Linea" ("The Line"), referring to the manner in which the bribes were made; a telephone hotline was allegedly called to contact the corrupt officials. It is reported that, according to prosecutors, the matter generated \$3.8 million (£2.5 million) in bribes between May 2014 and April 2015. It is alleged that Mr. Molina received \$800,000 (£520,000) of this sum.

The judge said that there was sufficient evidence for Mr. Molina to face charges of customs fraud, racketeering and bribery following evidence collected by a UN Commission, the International Commission against Impunity in Guatemala (the "CICIG"). The investigation carried out by the CICIG, said to have triggered the public protests which led to Mr. Molina stepping down as President, reportedly gathered evidence from 89,000 wire-tapped telephone calls. The executive director of the Open Society Justice Initiative said, "In investigating the President, Vice-President and other senior officials for corruption, CICIG has punctured the veil of impunity which has reigned at the highest levels of government in Guatemala for decades."

Mr. Molina has reportedly denied any wrongdoing and has stated his intent to cooperate with the investigation. He is said to have told the court, “Your Honor, I am not going to risk my dignity, my work nor all the effort I have made for Guatemala in return for \$800,000”.

India

The Law Commission has submitted a draft anti-corruption bill, the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations Bill 2015 (the “Bill”), to the government. The proposed law makes it a criminal offence for a foreign public official to offer or receive a bribe, contravention of which entails a jail term of up to seven years.

The Bill, which is a revised version of a bill that was introduced in Parliament in 2011, separates active and passive bribery, making it an offence for foreign officials to receive bribes. The chairman of the Law Commission noted that, “very few countries have criminalized the offence of passive bribery”.

According to reports, a foreign public official accused of passive bribery would be prosecuted in India only if the offence is committed wholly or partly in India. This would be further subject to the waiver of diplomatic immunities by the relevant foreign country.

The law panel has recommended that the proposed law must provide a specific provision detailing the defenses and exceptions available against the offences under the law: “This includes an exception for payments made in the course of routine duties or functions of foreign officials, such as for issuing permits or licenses, processing official documents, and similar services.”

International

Transparency International has released its 11th Annual Progress Report (the “Report”) regarding enforcement of the OECD Anti-Bribery Convention (the “Convention”). The Convention establishes legally binding standards to criminalize bribery of foreign public officials in international business transactions and provides a number of related measures that make this effective.

The Report highlights that by signing up to the Convention, governments are committed to investigate and prosecute cross-border corruption, however, according to the report almost half of the signatories are not doing so. The Report calls on the OECD to ensure tangible consequences for non-compliance.

Key points of the Report include:

- 22 of the 41 of the OECD countries signed up to the Convention have failed to prosecute or investigate any foreign bribery cases during the last four years.
- 20 countries with little or no enforcement make up 20% of world exports.
- Between 2011-2014 the four leading enforcers (Germany, Switzerland, the UK and the US) completed 215 cases and initiated 59 new cases while the remaining 35 countries completed 30 cases and initiated 63.

A copy of the Report can be found [here](#).

Kosovo

Vahide Badivuku, a prosecutor in Kosovo, is alleged to have accepted bribes and has been taken into pre-trial detention. Reports state that, following an investigation by the Special Prosecution of Kosovo, Ms. Badivuku, a

prosecutor at the Department of Serious Crimes Prosecutor's Office, is alleged to have received €22,000 (\$25,000/£16,000) in return for releasing a number of seized vehicles with regards to a matter she was investigating. According to reports, Ms. Badivuku was apprehended trying to cross the border into Serbia, carrying €5,000 (\$5,700/£3,500), believed to be part of the bribe money.

Two suspected accomplices have also reportedly been arrested while one more remains on the run. The three arrested suspects may be held by police for 30 days, pending investigations.

Romania

It has been reported that the mayor of Bucharest, Sorin Oprescu, has been arrested for allegedly taking bribes. According to prosecutors, Mr. Oprescu granted public works contracts to companies in return for a percentage of the contract sum. It is alleged that: "Companies kept between 30 – 33 per cent. of the gross profit and the rest was given as bribes to employees of the Bucharest Mayor, with 10 per cent. of the contract's value requested by the accused, Sorin Oprescu."

Reports state that Mr. Oprescu, who is serving a second term as mayor, was caught receiving a €25,000 (\$28,000/£18,000) bribe. The payment is said to have been the first instalment of a €60,000 (\$67,000/£44,000) sum that was allegedly demanded from a group of informants.

Prosecutors will reportedly request a 30 day extension of the arrest warrant, pending a full investigation. Mr. Oprescu's lawyer has reportedly denied any wrongdoing on behalf of his client, claiming that his client had "never asked for money from anybody, directly or indirectly".

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Corruption issues are also addressed in the Anti-Fraud Network's newsletters: see www.antifraudnetwork.com for current and archived material; see also the Computer Fraud website at <http://computerfraud.us> and www.secactions.com.

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