



ANTI-CORRUPTION DIGEST

June 2016

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

Two Companies Settle Chinese Bribery Cases with SEC Non-Prosecution Agreements and DOJ Declination Letters

The SEC recently announced non-prosecution agreements ("NPAs") with two unrelated companies for bribes that their foreign subsidiaries paid to Chinese officials.

The NPAs stipulated that "the companies are not charged with violations of the Foreign Corrupt Practices Act ("FCPA") and do not pay additional monetary penalties." The companies also released letters from the DOJ saying it would not bring enforcement actions against them. These declinations were the first the DOJ has issued under its FCPA Pilot Program. The Pilot Program, announced in April of this year, is intended to encourage companies to self-report potential FCPA violations and cooperate in federal investigations.

Akamai:

Massachusetts-based internet services provider Akamai Technologies agreed to pay about \$652,000 (£445,000) in disgorgement and about \$19,400 (£13,200) in interest. Akamai's foreign subsidiary allegedly arranged \$40,000 (£27,000) in payments to induce government-owned entities to purchase more services than they actually needed. Employees at the foreign subsidiary are said to have violated the company's written policies by providing improper gift cards, meals, and entertainment to officials at the state-owned enterprises to build business relationships.

Akamai self-disclosed its internal investigation to the DOJ and SEC in February 2015 and made a public disclosure about it in the quarterly SEC filing a month later. The SEC reported that Akamai "had possible violations of the books and records and internal accounting controls provisions of the FCPA from at least 2012 through 2015".

Nortek:

Rhode Island-based residential and commercial building products manufacturer Nortek Inc. agreed to pay about \$291,000 (£198,500) in disgorgement and about \$30,000 (£20,500) in interest.

Nortek's subsidiary allegedly paid in the region of \$290,000 (£198,000) in bribes to Chinese officials in order to receive "preferential treatment, relaxed regulatory oversight, or reduced customs duties, taxes, and fees," according to its NPA. The reported bribes are said to have included cash payments, gift cards, meals, travel, accommodations, and entertainment expenses. The SEC said that Nortek had possible violations of the books and records and internal accounting controls provisions of the FCPA from at least 2009 through 2014. Nortek self-disclosed its internal investigation to the DOJ and SEC in January 2015.

The SEC said that both companies cooperated by: reporting the situation to the SEC on their own initiatives in the early stages of internal investigations. Andrew Caresney, head of the SEC Enforcement Division, noted that:

"[w]hen companies self-report and lay all their cards on the table, non-prosecution agreements are an effective way to get the money back and save the government substantial time and resources while crediting extensive cooperation."

"Fat Leonard" Navy Bribery Scandal Continues to Expand

The highest ranking U.S. Navy officer to be charged in the "Fat Leonard" Navy bribery case recently pleaded guilty in federal court to lying to investigators and destroying evidence.

To date, thirteen individuals have been charged in the case, ten have pleaded guilty, and five have been sentenced. An additional three rear admirals, including the commander of naval forces in Japan, announced their retirements in early 2015 after the secretary of the Navy censured them for the bribery scandal. The Washington Post has called the Fat Leonard scandal "perhaps the worst national security breach of its kind to hit the Navy since the end of the Cold War."

All of the charges and allegations relate to the defendants' dealings with Leonard Glenn Francis, also known as Fat Leonard, the former CEO of Glenn Defense Marine Asia (GDMA). The firm provided U.S. Navy ships at ports throughout Asia with food, fuel, cleaning, and other port services

In exchange for travel and entertainment expenses, hotel rooms, and the services of prostitutes, one defendant allegedly arranged diplomatic clearance for GDMA vessels. Diplomatic clearance limited the amount of custom fees and taxes GDMA paid in the Philippines and allowed the vessels to avoid all cargo inspections. The DOJ further alleged that one defendant provided sensitive Navy information, including ship schedules and prices a GDMA competitor charged the U.S. Navy and that another defendant, in exchange for entertainment, meals, and the services of a prostitute, used his position to interfere with NCIS investigations into GDMA.

Eleventh Circuit Rules Statute of Limitations Applies to Disgorgement

The United States Court of Appeals for the Eleventh Circuit recently held, in *SEC v. Graham et al.*, that the five-year statute of limitations in 28 USC § 2462 applies to SEC claims for disgorgement or declaratory relief.

Graham, although not binding outside of the Eleventh Circuit, represents a contradiction to the SEC's stated position that disgorgement is not subject to the U.S. Code's general statute of limitations because it is an equitable remedy.

The decision is significant because of the importance the SEC places on disgorgement to oblige alleged wrongdoers to disgorge their ill-gotten gains. In the last three years, the SEC has demanded more than \$940 million (£640 million) from various companies as part of FCPA-related civil enforcement actions; \$829 million (£565 million) of that amount was from disgorgement.

The SEC's current view, which has been rejected by the Eleventh Circuit, is that no statute of limitations prevents the SEC from seeking injunctions, declaratory judgments, or the disgorgement of ill-gotten gains, regardless of when the conduct occurred, because these remedies are equitable in nature and therefore not subject to the limits of § 2462.

The Eleventh Circuit's ruling creates a circuit split (with the D.C. and Ninth Circuits) on whether § 2462 governs the SEC's use of disgorgement in civil enforcement actions. Because of the circuit split and because of the decision's significant impact on SEC enforcement strategy, the case is likely to be subject to review by the U.S. Supreme Court.

IRS States that FCPA Disgorgement May Not Be Tax Deductible if Punitive in Nature

The IRS recently released an internal Chief Counsel Advice Memorandum that said that Section 162(f) of the Tax Code prohibited an FCPA defendant from deducting the disgorged amount.

In its analysis, the memorandum explained that if "a payment serves both a non-deductible

purpose and a deductible purpose, it is necessary to determine which purpose the payment primarily serves Thus, a payment imposed primarily for purposes of deterrence and punishment is not deductible under section 162(f)."

According to the memorandum, the facts determine whether a disgorgement payment is considered primarily compensatory (and thus, tax deductible) or primarily punitive (and therefore not tax deductible). For example, if the amount of profit disgorged equals the victims' losses or is used as a means to obtain compensation for harmed investors, the disgorgement can be primarily compensatory. On the other hand, if the disgorgement serves primarily to prevent the wrongdoer from profiting from the illegal conduct or is used as a direct substitute for a civil penalty, then it is primarily punitive.

In this situation, the IRS found that, because the taxpayer presented "nothing" to indicate "that the purpose of the disgorgement payment was to compensate the United States government or some non-governmental party for its specific losses caused by Taxpayer's violations of the FCPA," the disgorgement was therefore punitive and non-deductible. This statement indicates that it would benefit companies to structure FCPA resolutions to include a statement that any disgorgement payments are compensatory, and not punitive, in nature.

The memorandum is not precedential but may reflect the position that the IRS would take in future audits involving taxpayers that have made disgorgement payments to resolve FCPA enforcement actions.

■ THE UNITED KINGDOM

SFO widens Rolls-Royce Investigation

It has been reported that Britain's Serious Fraud Office ("SFO") has expanded its investigation into Rolls-Royce to examine allegations of suspected bribery in its former energy operations in Nigeria.

In 2013, the SFO launched an investigation into Rolls-Royce following concerns about possible bribery and corruption in China and Indonesia. A Rolls-Royce spokesperson said:

"We are co-operating with the authorities. We do not comment on the subject of ongoing investigations or on the countries in which those investigations are being conducted. We have made it clear that Rolls-Royce will not tolerate business misconduct of any kind."

Metropolitan Police Officer Removed From Anti-Corruption Unit Over Nigeria Case

Detective Sergeant John Macdonald, an officer for the Metropolitan police, has been removed from his post in the National Crime Agency's International Corruption Unit following allegations that he received payments in return for providing information about a Nigerian politician's case.

James Ibori, a former governor of one of Nigeria's states, was imprisoned in 2012 for 13 years for money laundering. Mr. Macdonald headed the police unit that was conducting the investigation.

The Crown Prosecution Services ("CPS") has confirmed that it has intelligence which "supports the assertion a Met officer was paid for information." Mr. Macdonald denies any wrong doing. The CPS have also removed the prosecution team involved in any ongoing case connected to Mr. Ibori.

Mr. Ibori's defence lawyers have claimed that the CPS "willfully misled" judges about the existence of evidence that Macdonald accepted money in exchange for information regarding the case. Their argument is that the "whole process is infected." In a recent statement issued, the CPS confirmed that they will be conducting a review on certain aspects of the Ibori case.

Mr. Macdonald has been removed from the anti-corruption unit and has returned to the Metropolitan police, where a review of his status is being conducted.

■ THE REST OF THE WORLD

Brazil

Fabiano Silveira, Brazil's Transparency Minister resigned earlier this month after leaked recordings suggested he tried to derail a corruption investigation.

Mr. Silveira took office last month after interim President Michel Temer tasked him with fighting corruption. The same recordings also led to the resignation of Romera Jucá, whom President Temer had named as planning minister.

The recordings were made by a former oil industry executive as part of a plea bargain. In parts of the recording, Mr. Silveira allegedly criticizes prosecutors in an investigation focused on state-controlled oil company Petróleo Brasileiro SA ("Petrobras") which has already implicated many politicians and led to the imprisonment of top executives. In the alleged conversation, which took place prior to Mr. Silveira becoming a Cabinet minister, he advised Senate President Renan Calheiros on how best to defend himself from the Petrobras investigation.

It was also reported that Mr. Silveira spoke with the prosecutors on several occasions to find out what they had on Mr. Calheiros, and then reported back to him.

Whilst Mr. Silveira has resigned, a government source explained that he would stay on in his job “for now”. President Temer is due to meet with Brazil’s prosecutor to discuss the leaked recordings.

China

China has continued its anti-corruption enforcements following a recent announcement by a top prosecutor’s office that it will launch court action against six individuals, including a former deputy sports minister and a former city police chief, for corruption.

Xiao Tian, the former deputy head of the General Administration of Sport, who sat on the Olympics committee, was found to have abused his position and taken bribes. Wu Changshun, the police chief of Tianjin, is suspected of bribery, embezzlement and abuse of power.

This follows a recent visit carried out by inspectors in some of the country’s elite sports training centers, including The Beijing Sports University and the Olympic Training Centre after the Communist Party’s Central Commission for Discipline Inspection (the “CCDI”) berated the sports ministry for not taking the country’s campaign against corruption seriously enough.

The CCDI informed its inspectors to keep an eye out for corruption risks and vulnerabilities as well as improve supervision to create a positive environment for the Rio Olympics.

Democratic Republic of Congo

The trial of former DRC Vice-President Jean-Pierre Bemba began in the International Criminal Court this month.

Mr. Bemba, along with two of his lawyers and an MP from his party, stand accused of presenting fake documents to the court and bribing witnesses in his war crimes trial.

The prosecutors stated that the alleged bribery and forgery was a “sign of how far the accused were prepared to go to hide their illegal behavior.”

Earlier this year, the former DRC Vice-President was found guilty of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape and pillaging). More than 5,000 victims had been granted the right to participate in a hearing, the highest number in any case before the court.

Egypt

Egypt’s health minister’s consultant for medical affairs was arrested this month after being caught receiving bribes, in the form of cheques totaling EGP 4.5 million (\$500,000/£340,000), at the ministry headquarters.

According to the Health Ministry’s official statement, the full results are pending investigation, however, it is believed that he accepted the bribes from a medical equipment company. The Health Minister, Ahmed Emad was quoted saying:

“...there is no place for corruption in the ministry no matter what position someone holds; it will not protect them.”

This comes two days after the former Information Minister Safwat el-Sharif and two of his sons were convicted and sentenced to

between five and ten years in prison for corruption. The Cairo Criminal Court also fined the three a total of EGP 209 million (\$23.5 million/£16 million).

Guatemala

Following the recent bribery matter that forced president Otto Perez to resign, Guatemala's attorney general has now accused Mr. Perez of negotiating hundreds of bribes for public contracts and has ordered the arrest of at least 50 people thought to be part of the scheme.

According to an ongoing investigation that is looking at 450 cases of unlawful contracts, officials and businessmen began using a "mechanism" during the 2011 elections to hide bribes of at least \$130 million (£88 million). This scheme continued until the resignation of Mr. Perez and former vice president Roxana Baldetti. Both are currently in jail pending trial for customs fraud by arranging bribes with a Spanish firm in exchange for a port concession.

To date, five ministers who served in Mr. Perez's government have had charges brought against them by the attorney-general. They are accused of money laundering and unlawful associations to buy gifts for Mr. Perez and Ms. Baldetti through an aide.

Japan

John Coates, the chairman of the International Olympics Committee (the "IOC") has specified that allegations of illegal payments to help Tokyo win the 2012 Olympic Games were being taken very seriously but has explained that there will not be an independent IOC investigation.

There are currently two ongoing investigations, one being conducted by French prosecutors and one by Japanese officials. French prosecutors have alleged that \$2 million (£1.35

million) paid into a Singaporean bank was given to the son of former athletics chief Lamine Diack. Japan then began conducting their own investigation following Prime Minister Shinzo Abe's orders for them to fully cooperate with the French authorities.

Mr. Coates informed reporters that:

"The IOC takes the allegations in respect with the bid very seriously...We have a zero tolerance approach with regards to corruption in the bidding process. We are pleased that they're being investigated at that level. We share the same concerns as the Japanese public do about corruption, but we have decided we won't conduct a parallel investigation."

Liberia

Chairman of the ruling Unity Party Varney Sherman, parliamentary speaker Alex Tyler and former junior mining minister Ernest Jones are all facing charges for bribery. British mining company Sable Mining is also being investigated.

Mr. Sherman, often described as "Liberia's best connected lawyer", was the lawyer for Sable Mining, a British company co-founded by former international cricketer Phil Edmonds, between 2010 and 2012.

Mr. Sherman is accused of channeling handouts to help win Stable iron ore concessions and inserting favorable representatives for key positions of responsibility for licenses and tenders. He has denied all the allegations and is refusing to cooperate with the taskforce set up by President Ellen Johnson Sirleaf.

According to a recent report, Mr. Tyler "helped to get the Sable-friendly legislation through parliament" and received a \$75,000 bribe (£50,000).

Sable's current CEO, Andrew Groves and Richard Tolbert, the former head of the national investment commission of Liberia, were also indicted in connection with the matter.

According to the press conference in which Fonati Koffa, the head of the taskforce set up to overlook the case, Mr. Groves and Mr. Tolbert "are to be arrested and brought to this jurisdiction wherever they can be found." Not enough evidence has been found to indict Mr. Edmonds, however, the prosecution hopes that there will be soon.

Pakistan

The former Federal Minister for Religious Affairs, Saeed Kamzi, was sentenced to 16 years in prison this month over a Haj corruption case.

Rao Shakeel, the Director General of Haj was also sentenced to 40 years in prison whilst joint secretary for Religious Affairs Aftab Aslam was sentenced to 16 years.

They were accused of hiring a substandard building on excessive rent for housing the pilgrims in Makkah, and receiving kickbacks in the process. Roughly 35,000 Pakistani pilgrims were affected due to the disproportionate charges that took place between 2010 and 2012.

Philippines

An official of the Technical Education and Skills Development Authority has been sentenced to 156 years for corruption.

Felicidad Zurbano was found guilty of 13 counts of graft, each with prison terms of between six and 12 years.

It was reported that Ms. Zurbano intervened in the award of supply of materials to CDZ

Enterprises, a company owned by her sister. Ombudsman prosecutors stated that Ms. Zurbano is said to have fixed the procurement process by ensuring that the supplier could submit the lowest price by keeping a blank canvas form and waiting for two other potential bidders to submit their forms first. This meant that the other bidders wouldn't have been able to secure the lowest bid.

As part of the decision, Sandigan Associate Justice Teresita Diaz-Baldos stated:

"It is unlawful for public officials to directly or indirectly have financial or pecuniary interest in any business, contract or transaction in connection with which he or she intervenes or takes part in his or her official capacity."

South Korea

It has been reported that Lotte Group, a South Korean company, could be shelving what was predicted to be the world largest IPO for its hotel unit this year after a member of its founding family became involved in a bribery probe.

Prosecutors are investigating whether Shin Young Ja, one of the chairman's sisters, as well as other executives, took bribes in return for giving Nature Republic, a cosmetics firm, preferential treatment in Lotte's duty free stores.

The company had already rescheduled the IPO to take place next month, however now believes that it will be difficult to meet the deadline.

The investigations come at a time when the hotel unit was planning to raise 5.74 trillion won (\$4.9 billion/£3.3 billion) with its IPO, the largest global deal this year and the largest ever in Korea. The company has already had to

reduce the maximum size of their sale to 5.26 trillion won (\$4.5 billion/£3 billion).

This is not the first challenge that has faced the company's IPO, with disputes over control of the group erupting between members of the founding family and a ban for its home-shopping channel by the Korean government during prime time for six months after the company was accused of omitting two executives names that were convicted of bribery when it applied for its license.

Ukraine

It has been alleged that Viktor Yanukovich, Ukraine's former president, paid bribes worth at least \$2 billion (£1.4 billion) during his four year tenure in office.

According to evidence that was handed to investigators, Mr. Yanukovich kept a detailed logbook of all the bribes he distributed whilst in power. These ranged from individual payments worth millions of dollars to a wristwatch worth \$67,000 (£45,000).

Serhiy Leshchenko, a Ukrainian investigative journalist, turned MP who published the logbook was quoted saying:

“We know it's real because of the minutiae of the detail – that so many of the small details corroborate with events or activities that took place under Mr. Yanukovich.”

European diplomats have voiced their frustration that no criminal case has still been bought against Mr. Yanukovich, two years since his downfall.

CONTACTS

LONDON

Nicholas Burkill

Partner

+44 (0)20 7031 3783

burkill.nick@dorsey.com

Aidan Colclough

Associate

+44 (0)20 7031 3720

colclough.aidan@dorsey.com

Christina Samaan

Trainee Solicitor

+44 (0)20 7031 3710

samaan.christina@dorsey.com

MINNEAPOLIS

Beth Forsythe

Partner

+1 (612) 492 6747

forsythe.beth@dorsey.com

Annie Trimberger

Associate

+1 (612) 492 6786

trimberger.annie@dorsey.com

NEW YORK

Nick Akerman

Partner

+1 (212) 415-9217

akerman.nick@dorsey.com

WASHINGTON DC

Thomas Gorman

Partner

+1 (202) 442-3507

gorman.tom@dorsey.com

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