

FCPA Update

December 2009 ■ Vol. 1, No. 5

Former Foreign Officials Charged in FCPA-Related Indictment

Showing no signs of slowing its accelerated pace of FCPA enforcement as we approach the end of the year, the U.S. Department of Justice (“DOJ”) unsealed an indictment on December 7 against two executives, one consultant and two former foreign government officials in connection with alleged bribes related to discounts on telecommunication services in the Republic of Haiti. The case is significant not only because it evidences continued aggressive FCPA prosecution of individuals, but also because of the charges against foreign officials themselves.

In *U.S. v. Esquenazi*, Cr. No. 09-21010 (S.D. Fla. Dec. 4, 2009),¹ Joel Esquenazi and Carlos Rodriguez, the former president and former executive vice president, respectively, of an unidentified private telecommunications company based in Florida, were charged with funneling more than \$800,000 from 2001 to 2005 to two successive directors of international relations of Haiti’s state-owned national telecommunications company, Telecommunications D’Haiti (“Haiti Teleco”), through a number of Florida-based shell companies and co-conspirators. The payments ostensibly were for consulting services, and were recorded as “commissions” and “consulting fees.” One of the shell companies was operated by the sister of one of the foreign officials. The benefits obtained by the scheme for the Florida-based telecommunications company included preferred telecommunications rates, reduced number of minutes for which payment was owed and credits against amounts due.²

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¹ The indictment is available at <http://www.justice.gov/usao/fls/PressReleases/Attachments/091207-01.Indictment.pdf>; see also DOJ Press Release 09-1307, December 7, 2009 - Two Florida Executives, One Florida Intermediary and Two Former Haitian Government Officials Indicted for Their Alleged Participation in Foreign Bribery Scheme, <http://www.justice.gov/opa/pr/2009/December/09-crm-1307.html>.

² The unsealed indictment follows the guilty pleas of Antonio Perez, the former controller of the telecom firm, and Juan Diaz, the president of one of the shell companies, in April and May of this year, to conspiring to violate the FCPA and money laundering. They are scheduled to be sentenced in January 2010. See DOJ Press Release 09-476, May 15, 2009 - Two Florida Businessmen Plead Guilty to Participating in a Conspiracy to Bribe Foreign Government Officials and Money Laundering, <http://www.justice.gov/opa/pr/2009/May/09-crm-476.html>.

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January 13, 2010
8:00 a.m. – 10:00 a.m.

Paul R. Berger
Mark P. Goodman
James E. Johnson
Bruce E. Yannett

Debevoise & Plimpton LLP Seminar
“The Year Just Passed and the Year Ahead: Staying Ahead of the FCPA Enforcement Curve”

Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022

Conference Brochure:
<http://www.debevoise.com/newseventspubs/events/detail.aspx?id=d2d6fafc-ef26-4010-ba77-6a5975c89257>

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Public International Organizations

Corrupt payments to employees of almost 80 public international organizations are considered payments to “foreign officials” under the FCPA.¹ The FCPA designates as foreign officials, *inter alia*, any officer or employee of “an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. § 288)” or of “any other international organization that is designated by the President [of the United States] by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.” 15 U.S.C. §§ 78dd-1(f), 78dd-2(h), 78dd-3(f). This definition tracks the Organisation for Economic Co-operation and Development (“OECD”) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and is found in the implementing legislation of other convention signatories.² “Public international organizations” are published in the Federal Register and the Code of Federal Regulations, and are reprinted here:

- African Development Bank³
- African Development Fund
- African Union⁴
- Asian Development Bank
- Border Environment Cooperation Commission
- Caribbean Organization
- Commission for Environmental Cooperation
- Commission for Labor Cooperation
- Commission for the Study of Alternatives to the Panama Canal
- Customs Cooperation Council
- Council of Europe in Respect of the Group of States Against Corruption
- European Bank for Reconstruction and Development
- European Space Agency [formerly European Space Research Organization (ESRO)]
- Food and Agriculture Organization

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¹ See FCPA Update, Vol. 1, No.1 at 1 n.3 (August 2009), <http://www.debevoise.com/newseventspublications/detail.aspx?id=3143fa0a-cbbb-4dff-a8c1-28b53eb18152>.

² See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Article 1, section 4.a, http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html.

³ All cites for public international organizations are to 19 C.F.R. § 148.87 unless otherwise noted.

⁴ See Exec. Order 13377, 70 Fed. Reg. 20263 (April 13, 2005), recognizing the African Union as a public international organization and revoking the Organization of African Unity’s status as a public international organization. Note that revocations of status appear in the Federal Register and not in the Code of Federal Regulations.

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The two executives and the foreign official's sister (who is a lawful permanent U.S. resident) were charged with conspiracy to violate the FCPA and commit wire fraud, substantive FCPA and money laundering violations, and money laundering conspiracy. The two former foreign officials – Robert Antoine and Jean Rene Duperval – were charged with money laundering conspiracy, and Duperval was charged with substantive money laundering violations.

The most obvious reason the government has rarely in the last two decades charged foreign officials in the context of an FCPA prosecution is that the FCPA itself applies only to bribe payers, not bribe recipients. The Fifth Circuit has also foreclosed the ability to charge foreign officials with conspiracy to violate the FCPA. *See U.S. v. Castle*, 925 F.2d 831, 833 (5th Cir. 1991) (relying on *Gebardi v. U.S.*, 287 U.S. 112 (1932), to hold that where Congress chooses to criminalize the acts of only one party for transactions that inherently require the agreement of more than one party, the other parties cannot be charged with conspiracy for the same conduct).³ Jurisdictional and diplomatic considerations are other reasons the

government might hesitate to charge foreign officials with offenses related to bribery.

In the Haiti Teleco case, however, the former foreign officials were charged with conspiracy to launder money and substantive money laundering, thereby avoiding the prosecution limitations imposed by the FCPA. Further, the DOJ indictment states that the former foreign officials – Antoine and Duperval – held U.S. bank accounts, which would minimize jurisdictional hurdles that are difficult to overcome in many U.S. prosecutions of foreign nationals. The DOJ also apparently did not face diplomatic obstacles to this prosecution, as it has credited Haiti's financial intelligence unit, a specialized department of Haiti's National Police, and the Ministry of Justice and Public Security with "significant cooperation and coordination" in the ongoing investigations, including arresting Duperval in Haiti two days before the unsealing of the DOJ's indictment. Thus, the circumstances of the Haiti Teleco case were ripe for testing the government's prosecutorial power with respect to foreign official bribe recipients.

It remains to be seen whether this enforcement action represents an

isolated incident or portends a trend in FCPA prosecutions toward attempting to recover illicit bribe payments from the foreign officials who receive them. A number of indications suggest the latter. In November 2009, U.S. Attorney General Eric Holder announced in Qatar a "redoubled commitment" by the DOJ to recover

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from corrupt officials the illicit proceeds of their corruption.⁴ And earlier this year, the DOJ filed a forfeiture action against accounts in Singapore alleged to contain the proceeds of bribes paid to the son of the former prime minister of Bangladesh.⁵ The press release stated:

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³ We are aware of only two other instances since the *Castle* case where foreign officials were charged in the context of an FCPA prosecution. In 2002, former World Bank employees Ramendra Basu and Gautam Sengupta each pled guilty to one count of conspiracy to devise a scheme and artifice to deprive another of the intangible right to honest services and to commit wire fraud, and one count of a substantive FCPA violation. The FCPA violation was a result of the defendants facilitating bribes to a Kenyan official. The World Bank employees admitted to receiving kickbacks for steering World Bank consultancy projects toward a Swedish consulting firm. *See* DOJ Press Release 08-341, April 25, 2008 - Former World Bank Employee Sentenced for Taking Kickbacks and Assisting in the Bribery of a Foreign Official, www.justice.gov/criminal/pr/press_releases/2008/04/04-25-08_world-bank-emp-sent.pdf (information and plea agreements not available online, but available upon request from Debevoise).

⁴ Remarks of Attorney General Eric Holder at the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity, Doha, Qatar, November 7, 2009, <http://www.justice.gov/ag/speeches/2009/ag-speech-091107.html>.

⁵ *See* DOJ Press Release 09-020, January 9, 2009 - Department of Justice Seeks to Recover Approximately \$3 Million in Illegal Proceeds from Foreign Bribe Payments, <http://www.justice.gov/opa/pr/2009/January/09-crm-020.html>.

⁶ The use of the term "facilitating payment" is likely an oversight, as "facilitating payments," as defined in the FCPA, are expressly permitted by the statute. *See* 15 U.S.C. §§ 78dd-1(b); 78dd-2(b); 78dd-3(b).

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“This action shows the lengths to which U.S. law enforcement will go to recover the proceeds of foreign corruption, including acts of bribery and money laundering. Not only will the Department, for example, prosecute companies and executives who violate the [FCPA], we will also use our forfeiture laws to recapture the illicit facilitating payments often used in such schemes.”⁶ Continuing to charge foreign government officials with conspiracy and money laundering, and potentially other offenses, such as Travel Act, mail and wire fraud violations, in complaints and indictments that charge the underlying FCPA violation would conform to the principles and goals clearly articulated by the DOJ.

As the Haiti Teleco case unfolds, it may set meaningful precedent as to how the DOJ is able to establish jurisdiction over and obtain convictions against former foreign officials. Success for the DOJ in this

case could add a new layer to future FCPA prosecutions. It also could provide some support for companies solicited for bribe payments by non-U.S. officials – it will be easier to say “no” and not suffer detrimental business effects if one of the reasons is that the official himself or herself could also be charged by U.S. regulators. ■

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⁶ The use of the term “facilitating payment” is likely an oversight, as “facilitating payments,” as defined in the FCPA, are expressly permitted by the statute. See 15 U.S.C. §§ 78dd-1(b); 78dd-2(b); 78dd-3(b).

Upcoming Speaking Engagements

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January 19, 2010
1:00 p.m. - 6:00 p.m.
Paul R. Berger
Lord Goldsmith QC, PC
Bruce E. Yannett

Debevoise & Plimpton LLP Seminar
“Internal Investigations in Switzerland”

Bär & Karrer AG
Brandschenkestrasse 90
CH-8027 Zurich
Switzerland

Conference Brochure:
<http://www.debevoise.com/newseventspublications/events/detail.aspx?id=eb5f3509-3f78-4c16-aa96-01989b849878>

January 26-27, 2010
9:00 am - 5:00 pm
Frederick T. Davis

“The Fundamentals of FCPA Compliance: The Foreign Corrupt Practices Act Demystified”

5th European Forum on Anti-Corruption: Minimising Your Company's Risk

in an Era of Increased International Enforcement

Frankfurt, Germany

Conference Brochure:

<http://www.debevoise.com/publications/Frankfurt%20Seminar.pdf>

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- Global Fund To Fight AIDS, Tuberculosis and Malaria⁵
- Great Lakes Fishery Commission
- Hong Kong Economic and Trade Offices
- Inter-American Defense Board
- Inter-American Development Bank
- Inter-American Institute of Agricultural Sciences
- Inter-American Investment Corporation
- Inter-American Statistical Institute
- Inter-American Tropical Tuna Commission
- Intergovernmental Maritime Consultative Organization
- International Atomic Energy Agency
- International Bank for Reconstruction and Development
- International Boundary and Water Commission, United States and Mexico
- International Centre for Settlement of Investment Disputes
- International Civil Aviation Organization
- International Coffee Organization
- International Committee of the Red Cross
- International Cotton Advisory Committee
- International Cotton Institute
- International Criminal Police Organization (INTERPOL) (limited privileges)
- International Development Association
- International Development Law Institute
- International Fertilizer Development Center
- International Finance Corporation
- International Food Policy Research Institute (limited privileges)
- International Fund for Agricultural Development
- International Hydrographic Bureau
- International Joint Commission—United States and Canada
- International Labor Organization
- International Maritime Satellite Organization
- International Monetary Fund
- International Pacific Halibut Commission
- International Secretariat for Volunteer Service
- International Telecommunication Union
- International Telecommunications Satellite Organization (INTELSAT)
- International Union for Conservation of Nature and Natural Resources
- International Wheat Advisory Committee (International Wheat Council)
- Interparliamentary Union
- ITER International Fusion Energy Organization⁶
- Israel-United States Binational Industrial Research and Development Foundation
- Korean Peninsula Energy Development Organization
- Multinational Force and Observers
- Multilateral Investment Guarantee Agency
- North American Development Bank
- North Pacific Anadromous Fish Commission
- North Pacific Marine Science Organization
- Organization for European Economic Cooperation (now known as the Organization for Economic Cooperation and Development)
- Organization for the Prohibition of Chemical Weapons
- Organization of American States (includes Pan American Union)
- Organization of Eastern Caribbean States
- Pacific Salmon Commission
- Pan American Health Organization (includes Pan American Sanitary Bureau)
- Preparatory Commission of the International Atomic Energy Agency
- Provisional Intergovernmental Committee for the Movement of Migrants from Europe (now known as the Intergovernmental Committee for European Migration)
- South Pacific Commission
- United International Bureau for the Protection of Intellectual Property (BIRPI)
- United Nations
- United Nations Educational, Scientific, and Cultural Organization
- United Nations Industrial Development Organization
- Universal Postal Union
- World Health Organization
- World Intellectual Property Organization
- World Meteorological Organization
- World Tourism Organization
- World Trade Organization

⁵ See Exec. Order 13395, 71 Fed. Reg. 3203 (Jan. 13, 2006).

⁶ See Exec. Order 13451, 72 Fed. Reg. 65653 (Nov. 19, 2007).