

FCPA Update

A Global Anti-Corruption Newsletter



Also in this issue:

7 “Logrolling” and
Corruption:
What the *McDonnell* and
Blagojevich Decisions Say
About U.S. Anti-Bribery Law

[Click here for an index of
all FCPA Update articles](#)

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The Latest FCPA Deferred Prosecution Agreement: Will Congress’s New DPA Procedures Reach FCPA DPAs, and Will Non-U.S. Governments Sue as “Crime Victims” Under the CVRA?

On July 17, the Department of Justice (“DOJ”) announced a settlement of FCPA allegations against Louis Berger International, Inc. (“LBI”), a privately-held consulting firm that provides engineering, architecture, program, and construction management services.¹ In connection with alleged bribery-related misconduct in India, Indonesia, Kuwait, and Vietnam, the DOJ and LBI agreed to a three-year Deferred Prosecution Agreement (“DPA”) containing conditions that include

[Continued on page 2](#)

1. *United States v. Louis Berger International, Inc.*, No. 15-3624 (MF), Complaint (D.N.J. filed July 7, 2015); Order for Continuance, *id.* (D.N.J. July 7, 2015).

The Latest FCPA Deferred Prosecution Agreement: Will Congress's New DPA Procedures Reach FCPA DPAs, and Will Non-U.S. Governments Sue as "Crime Victims" Under the CVRA?

Continued from page 1

the appointment of a compliance monitor. As part of resolving FCPA conspiracy charges, the company also agreed to pay a \$17.1 million penalty.²

Several factors, including LBI's self-reporting, cooperation, and remediation, were cited by the DOJ as reasons for entering into a DPA instead of a plea agreement, and to provide the presumptively maximum five-point reduction to LBI's culpability score for purposes of calculating the financial penalty portion of the settlement. The resolution follows a previous settlement with the U.S. government for alleged improper billing, and LBI's one-year conditional debarment by the World Bank in February 2015.³

The same day the LBI DPA was announced, the DOJ also announced that two former LBI Senior Vice Presidents had each pleaded guilty to one count of conspiring to violate and one substantive count of violating the FCPA's anti-bribery provisions.⁴

And even beyond its debarment and future obligations to its monitor, LBI's difficulties may be far from over. In particular, the case raises important and interesting questions regarding enforcement of the recently-enacted Justice for Victims of Trafficking Act of 2015 (the "JVTA"),⁵ which altered the United States District Courts' procedures for handling DPAs. Under the JVTA, as of May 29, 2015, the Crime Victims Rights Act (codified at 18 U.S.C. §§ 3771 *et seq.*) has been amended to establish for each "crime victim" "[t]he right to be informed in a timely manner of any plea bargain or deferred prosecution agreement," thus facilitating any "crime victim's" "right to full and timely restitution as provided in law,"⁶ providing, in addition, for appellate review of any denial of restitution by a trial court under "ordinary standards of appellate review."⁷

Continued on page 3

2. DOJ Press Rel. 15902, Louis Berger International Resolves Foreign Bribery Charges (July 17, 2015), <http://www.justice.gov/opa/pr/louis-berger-international-resolves-foreign-bribery-charges>.
3. See *id.*; see also World Bank IBRD Press Rel., World Bank Group Debars Louis Berger Group (Feb. 4, 2015), <http://www.worldbank.org/en/news/press-release/2015/02/04/world-bank-group-debars-louis-berger-group>.
4. See DOJ Press Rel. 15902.
5. Pub. L. 114-22 (May 29, 2015).
6. *Id.*
7. *Id.* These provisions, while worded generally, were intended to encourage crime victims to come forward and be heard. See 161 Cong. Rec. S1467 (2015) (remarks of Sen. Hoeven); *id.* S1653 (2015) (remarks of Sen. Klobuchar). The amendment's author in the House of Representatives stated that the amendment's purpose was to ensure that crime victims' rights were respected throughout the criminal investigation process, rather than only at the trial stage. See "Franks' Crime Victims Amendment Passes House as Part of Justice for Victims of Trafficking Act," (May 20, 2014), <https://franks.house.gov/press-release/franks-crime-victims-amendment-passes-house-part-justice-victims-trafficking-act> (last visited July 21, 2015). Furthermore, the amendment is intended to ensure that victims are notified of the resolution of cases even when no formal criminal charges are filed, as is the case when a DPA is pursued. *Id.*

The Latest FCPA Deferred Prosecution Agreement: Will Congress's New DPA Procedures Reach FCPA DPAs, and Will Non-U.S. Governments Sue as "Crime Victims" Under the CVRA?

Continued from page 2

The fact that the LBI DPA did not provide for restitution to any of the governments involved in LBI's alleged bribery raises the question of whether the DPA, which was approved promptly after it was submitted to the District Court for the District of New Jersey, will withstand challenge should restitution be sought by any of the governments involved. That question turns, in part, on whether foreign governments may ever seek restitution under the CVRA, an issue that remains open in the federal courts of appeals, and also whether foreign governments have standing to seek restitution in circumstances in which the DOJ resolves a criminal matter by a DPA rather than by plea.

“Despite the U.S. government’s repeated statements that foreign bribery deprives the citizens of foreign countries of the value of the honest services of their own officials, driving up costs of public procurement overseas, the DOJ’s record in supporting foreign government efforts to obtain restitution for the losses they have suffered by reason of conduct that violates U.S. law is far more mixed.”

Below, we review these issues in light of the history of non-U.S. government efforts to seek restitution in FCPA cases, and risks the JVTA poses for FCPA and other white collar settlements in which non-U.S. governments may be interested as “victims.”

Past Foreign Government Restitution Claims and Implications Under the JVTA

Despite the U.S. government’s repeated statements that foreign bribery deprives the citizens of foreign countries of the value of the honest services of their own officials, driving up costs of public procurement overseas, the DOJ’s record in supporting foreign government efforts to obtain restitution for the losses they have suffered by reason of conduct that violates U.S. law is far more mixed. In the principal case to have been decided in connection with FCPA-related claims for restitution, the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit each rejected, at DOJ’s urging, claims by Costa Rican public power company Instituto Costarricense de Electricidad (“ICE”) that it had been a victim of FCPA bribery offenses committed by the French telecom company Alcatel Lucent SA.⁸

Continued on page 4

8. Bruce E. Yannett, Philip Rohlik, and David M. Fuhr, “Victim or Villain: A Costa Rican State Entity’s Claim for Restitution from Alcatel,” *FCPA Update* Vol. 2, No. 11 (June 2011), <http://www.debevoise.com/insights/publications/2011/06/fcpa-update>.

The Latest FCPA Deferred Prosecution Agreement: Will Congress's New DPA Procedures Reach FCPA DPAs, and Will Non-U.S. Governments Sue as "Crime Victims" Under the CVRA?

Continued from page 3

Applying the deferential standard applicable to petitions for mandamus, the Eleventh Circuit let stand the District Court's conclusion that ICE's management had been so thoroughly involved in the corruption that it would be improper to award ICE restitution, and, in addition, computing the appropriate restitutionary amount would be unduly complex in that ICE had received at least some value for the goods sold to it.⁹

The Eleventh Circuit's decision did not address even more basic questions of whether non-U.S. governments may seek restitution at all under the CVRA and its sister statute, the Mandatory Victims Restitution Act ("MVRA"),¹⁰ which requires restitution for any "offense against property" under Title 18, to any "victim," defined as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern."¹¹

In May of this year, the United States Court of Appeals for the Ninth Circuit avoided that question, rejecting a claim by Canada for restitution following a conviction of an individual for fraudulent schemes involving renewable fuel credits, holding that "Canada's claim for restitution is based on events that are insufficiently related to the schemes set forth in the indictment and the facts supporting [defendant's] guilty plea."¹²

Yet only a few weeks later, the United States Court of Appeals for the First Circuit joined five sister courts of appeals in holding that the United States may be a "victim" under the CVRA and MVRA, notwithstanding the general rule that the word "person" does not include the sovereign, suggesting that, in the appropriate circumstances, there may well be non-U.S. governments able to invoke the same logic to secure restitution in the FCPA context.¹³

Even so, foreign governments seeking restitution will continue to face obstacles. FCPA conspiracy charges should, all else being equal, trigger a right to mandatory restitution because they constitute "an offense against property under this title," *i.e.*, Title 18 of the United States Code, obviating the need to shoehorn FCPA

Continued on page 5

9. *Id.* (citations omitted).

10. 18 U.S.C. §§ 3663A *et seq.*

11. *Id.* § 3663A(a)(2).

12. *In re Her Majesty the Queen in Right of Canada*, 785 F.3d 1273, 1276 (9th Cir. 2015).

13. See *United States v. Zhang*, No. 14-1382, 2015 WL 3652602, at *2 (1st Cir. June 15, 2015) (citing cases).

The Latest FCPA Deferred Prosecution Agreement: Will Congress's New DPA Procedures Reach FCPA DPAs, and Will Non-U.S. Governments Sue as "Crime Victims" Under the CVRA?

Continued from page 4

offenses into a category that would otherwise trigger the restitution provisions of federal law. But, issues of complicity on the part of foreign governments in bribery scenarios as well as the complexity of calculating restitution, as in the *ICE* matter, will undoubtedly haunt foreign government restitution claims in such cases. In DPA cases such as *LBI*, an even more serious obstacle lies in the fact that, absent a guilty plea or conviction after trial, there is no apparent *right* to restitution, which the MVRA renders contingent upon a District Court's action in "sentencing a defendant convicted of an [applicable] offense."¹⁴

In sum, while the JVTA potentially grants victims of bribery, including, possibly foreign governments, "the right to be informed in a timely manner" of any DPA that the United States is considering seeking to have approved, the question whether any breach of this mandate is subject to redress remains to be litigated. Foreign sovereigns seeking restitution orders in a context in which the DOJ wishes to simply settle and end an investigation likely would face significant opposition arguing that they lack a protectable property interest in a restitution award.¹⁵ In this context, it is hardly surprising that the *LBI* DPA was approved with little fanfare, and, to date, there have been no filings by foreign governments seeking to upset it. Foreign governments could still potentially seek to undo the DPA on the ground that they had, at a minimum, a statutory right to be heard before the Court approved the DPA, a point that appears possibly to have been overlooked by the DOJ, at least based on the public record of communications as evidenced on the Court's docket. Unless a collateral challenge is made to the DPA, however, it will be difficult to know what actions the DOJ took, if any, to comply with the provisions of the JVTA, or whether DOJ believes that there is some other basis upon which the JVTA's DPA-notice obligations are inapt.

For now, it seems that the larger risks to DPAs and other forms of settlement of FCPA criminal proceedings are those arising from the views of district judges who oversee their entry and the sense of those judges that particular DPAs are fair and just. As the United States Court of Appeals for the D.C. Circuit weighs whether to uphold a District Court's decision to reject

Continued on page 6

14. 18 U.S.C. § 3663A(a).

15. In the past, some courts held that foreign sovereigns were "persons" within the meaning of the Fifth Amendment, applying the "minimum contacts" analysis for personal jurisdiction. See *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1207 (C.D. Cal. 2001). More recently, courts have held that sovereigns are not "persons" in that context and that certain enterprises that are wholly-owned by foreign states are foreign instrumentalities that are not entitled to constitutional due process protections. See *Howe v. Embassy of Italy*, 68 F. Supp. 3d 26, 32 (D.D.C. 2014); see also *Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 399 (2d Cir. 2009); *GSS Group Ltd. v. National Port Authority*, 680 F.3d 805, 814 (D.C. Cir. 2012) (foreign state-owned corporations that are sufficiently independent so as not to be "agencies or instrumentalities" still able to constitutionally challenge the assertion of personal jurisdiction). It is not entirely clear that this analysis of the due process rights of foreign states and state-owned entities would govern CVRA/MVRA issues.

The Latest FCPA Deferred Prosecution Agreement: Will Congress's New DPA Procedures Reach FCPA DPAs, and Will Non-U.S. Governments Sue as "Crime Victims" Under the CVRA?

Continued from page 5

a DPA in the *Fokker Services BV* sanctions matter, it seems more likely that judicial independence, rather than additional claims by foreign nations, will upset the prevailing modes of resolving corporate FCPA matters through settlements.

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Continued on page 7

“Logrolling” and Corruption: What the *McDonnell* and *Blagojevich* Decisions Say About U.S. Anti-Bribery Law

Within the last month, the United States Courts of Appeals for the Fourth and Seventh Circuits addressed appeals by the former governors of Virginia and Illinois, respectively, affirming bribery-related convictions of the former and partially vacating those of the latter. In their rulings in *United States v. McDonnell*¹ and *United States v. Blagojevich*,² these courts provided guidance in a number of areas, including the definition of “official act” and the scope of actionable *quid pro quo* bribery, which are of central relevance to the FCPA, for which judicial construction of such key statutory terms is hard to find.

The underlying facts at issue in these two domestic bribery cases had been well-publicized at the time of trial. In the case of former Virginia Governor Robert McDonnell, the government proved at trial that McDonnell and his wife “accepted money and lavish gifts in exchange for efforts to assist a Virginia company in securing state university testing of a dietary supplement the company had developed.”³ In 2014, McDonnell was convicted on eleven corruption-related counts, and the court of appeals affirmed both his convictions and his two-year sentence.⁴

In the case of former Illinois Governor Rod Blagojevich, the record included “overwhelming” evidence of corruption in connection with multiple schemes involving the trading of political favors for campaign contributions. This also included acts involving Blagojevich’s seeking a favor from then President-elect Obama in the form of an appointment to the cabinet, assistance in finding a private sector job, or a contribution to a campaign fund that Blagojevich could control and convert to his personal use, in exchange for appointing Obama’s campaign aide Valerie Jarrett to the United States Senate.⁵ The Seventh Circuit affirmed Blagojevich’s convictions on a number of counts charging him with “rais[ing] money in exchange for the performance of official acts, even though federal law prohibits any payment (or agreement to pay), including a campaign contribution, in exchange for the performance of an official act.”⁶ But because

Continued on page 8

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1. No. 15-4019, 2015 WL 4153640 (4th Cir. July 10, 2015).
 2. No. 11-3853, 2015 WL 4433687 (7th Cir. July 21, 2015).
 3. *McDonnell*, 2015 WL 4153640, at *1.
 4. *Id.* at *8, *33.
 5. *Blagojevich*, 2015 WL 4433687, at *1.
 6. *Id.* at *2.

**"Logrolling" and Corruption:
What the *McDonnell*
and *Blagojevich*
Decisions Say About
U.S. Anti-Bribery Law**
Continued from page 7

the jury charges related to the Senate appointment matter permitted a conviction if the jury believed that Blagojevich had asked only for an appointment to the cabinet, thus permitting the jury to convict based on "a proposal to trade one public act for another,"⁷ the related convictions had to be vacated and remanded for a potential retrial on those counts. Blagojevich's sentence of 168 months was also vacated.

Relevance of the *McDonnell* and *Blagojevich* Decisions to FCPA Compliance

Although chronicling the seamy side of U.S. domestic politics, and, in turn, some of the intricacies of federal domestic anti-bribery criminal laws, the decisions in the *McDonnell* and *Blagojevich* cases also carry some important lessons for FCPA compliance.

A. The *McDonnell* Case and the "Official Act" Requirement of Bribery Law

This is particularly true in the *McDonnell* matter. In *McDonnell*, whether the governor's recommendation of a product for further study by a state university was an "official act" was at the heart of the Fourth Circuit's decision. The main charges at issue were for honest-services wire fraud, which draws its essential elements from the federal official anti-bribery statute, 18 U.S.C. § 201(b), which provides that public officials "may not 'corruptly' demand, seek, or receive anything of value in return for . . . being influenced in the performance of any official act."⁸ Similar language focusing on obtaining benefits in exchange for "official acts" supported Governor McDonnell's conviction for Hobbs Act extortion under 18 U.S.C. § 1951(a).⁹

The FCPA, which criminalizes bribe-paying abroad, has as its target the making or offering of corrupt payments for the purpose of "influencing any act or decision of [a] foreign official in his official capacity," "inducing any such official to do or omit to do any act in violation of the lawful duty of such official," or "inducing such foreign official to use his influence with a foreign government or instrumentality thereof to influence any act or decision of such foreign government."¹⁰ Thus, under the federal domestic bribery statute, the Hobbs Act, and the FCPA, a corrupt

Continued on page 9

7. *Id.* at *3.

8. *McDonnell*, 2015 WL 4153640, at *19.

9. *Id.*

10. See, e.g., 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). The FCPA also targets "securing an improper advantage," irrespective of the specific role of any "official act" by a foreign official. See *id.* In this respect, the literal language of the FCPA is susceptible of a potentially broader interpretation than that of certain domestic bribery crimes, including Section 201(b), though the principle of *noscitur a sociis*, which requires as a practical matter that a list of terms be construed as embodying a unifying underlying legislative principle and purpose, arguably counsels reading the "improper advantage" language as requiring an "official act" as well.

“Logrolling” and Corruption:
What the *McDonnell*
and *Blagojevich*
Decisions Say About
U.S. Anti-Bribery Law
Continued from page 8

payment unrelated to an “official act” (for example, a payment to an official to undertake some improper activity in his or her personal capacity as, say, a private landowner or investor) could not be prosecuted as it would be beyond the reach of that law’s anti-bribery prohibition.

In the *McDonnell* case, the former governor did not argue the public/private distinction, but rather contended that merely making a recommendation that some other state actor – here, a state university – take action was not a cognizable “official act.”

“For companies and individuals alike, the *McDonnell* decision highlights a recurring risk under the FCPA, particularly in countries in which decision-making is diffused and final government decisions are the product of many steps in a chain of actions, from the framing of, say, tender specifications, tender clarifications, and public bid evaluations, to project funding, contract drafting and execution, and contract and claims management.”

In rejecting this view, the Fourth Circuit found that “an action may be ‘official’ . . . even if it is not prescribed by statute, rule, or regulation,”¹¹ and includes “settled practices,” including, potentially, acts incident to the giving of “receptions, public appearances, and speeches.”¹² While conceding that “job functions of a strictly ceremonial or educational nature will rarely, if ever, fall within this definition,” the Fourth Circuit observed that such activities could constitute official acts if they “relate, in some way, to a ‘question, matter, cause, suit, proceeding, or controversy,’” including actions “taken in furtherance of longer-term goals.”¹³ Because the trial court’s jury instructions lawfully defined the kinds of acts that could be the subject of the former governor’s federal convictions, the court of appeals ruled it could not set aside the verdict, given the evidence adduced that *quid pro quo* gifts had been given to secure the former governor’s recommendations. In this regard, the Fourth Circuit emphasized that “an ‘official act’ may pertain to matters outside the bribe recipient’s control,”¹⁴ thus reaffirming the notion that acts of recommendation even by decision-makers without final authority or officials without decisional authority at all (as the governor contended he was with respect

Continued on page 10

11. *McDonnell*, 2015 WL 4153640, at *20 (citation omitted).

12. *Id.* at *22.

13. *Id.* at *19 (citation omitted).

14. *Id.* at *23.

"Logrolling" and Corruption:
What the *McDonnell*
and *Blagojevich*
Decisions Say About
U.S. Anti-Bribery Law
Continued from page 9

to the particular product study at issue) can be the target of bribery.

For companies and individuals alike, the *McDonnell* decision highlights a recurring risk under the FCPA, particularly in countries in which decision-making is diffused and final government decisions are the product of many steps in a chain of actions, from the framing of, say, tender specifications, tender clarifications, and public bid evaluations, to project funding, contract drafting and execution, and contract and claims management. While leaving some room to argue that payments in exchange for very general "official" statements outside of the context of particular decisional matters could be beyond the reach of federal bribery laws, the Fourth Circuit's broad interpretation of the definition of "official acts" is a warning to any FCPA-covered firm or individual considering making payments to a foreign official, regardless of the object of such payments.

B. The *Blagojevich* Case's Observations on "Traditional Logrolling"

While affirming most parts of the judgment of conviction of former Illinois Governor Blagojevich, the Seventh Circuit, in a colorful opinion by Judge Easterbrook, took the District Court to task for framing and giving a jury instruction that permitted a conviction for honest services fraud based merely on "traditional logrolling." The court contrasted the classic understanding of bribery, in which "a public official performs an official act (or promises to do so) in exchange for a private benefit, such as money," with "a political logroll," which is "the swap of one official act for another."¹⁵

Analyzing the skein of federal statutes that prohibit bribery in its various forms, the court observed that "it would not be possible to describe a political trade of favors as an offer or attempt to bribe the other side," even if one side in the political arena flat out lied about the motivation for the trade.¹⁶ To call this honest-services fraud, the court held, "supposes an extreme version of truth in politics, in which a politician commits a felony unless the ostensible reason for an official act is the real one."¹⁷ Even if Governor Blagojevich sought a post in the President's cabinet for himself, his "cabinet" scheme was not illegal,¹⁸ because the transaction he intended to complete lacked a "public act in return for a valuable return promise."¹⁹

While providing a useful lesson in some of the dividing lines between conduct that merely offends general notions of how politicians should behave and criminal

Continued on page 11

15. *Blagojevich*, 2015 WL 4433687, at *3.

16. *Id.* at *4.

17. *Id.* at *5.

18. *Id.* at *6.

19. *Id.*

**"Logrolling" and Corruption:
What the *McDonnell*
and *Blagojevich*
Decisions Say About
U.S. Anti-Bribery Law**
Continued from page 10

conduct, the Seventh Circuit's decision also raises important questions about what constitutes a "private benefit" for purposes of federal anti-corruption law. Reaffirming the notion that "the interest in receiving a salary from a public job is not a form of private benefit under federal criminal statutes," the Seventh Circuit's decision in the *Blagojevich* matter raises serious questions whether some of the broader theories invoked by the government in FCPA cases (or by government officials in published remarks) are valid.

These include the notion that an FCPA case could be brought based on a private company's provision of "public benefits" requested by a foreign official, such as, for example, the provision of investment funds to a microfinance company in exchange for a government contract, or even the accession to a request that bona fide charitable contributions be made as a condition of receiving a government contract. The 2012 "Resource Guide," jointly published by the U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC"), goes to lengths to identify the kinds of detailed due diligence and internal (and external) controls that are necessary in connection with these kinds of project conditions, lest the DOJ and SEC draw a negative inference from their absence.²⁰

By shining a light on the "public benefit" concept, Judge Easterbrook's opinion may rein in at least some broad theories of FCPA liability for provision of benefits of this nature, and should cause the government to rethink the extent of appropriate due diligence and controls actually required in practice in order to vindicate the goals of the FCPA when dealing with such impact fees and corporate responsibility efforts.

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20. DOJ & SEC, *A Resource Guide to the FCPA* 16-19 (Nov. 14, 2012), <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

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