Debevoise & Plimpton

FCPA Update
September 2019
Volume 11
Number 2

FCPA Update

A Global Anti-Corruption Newsletter

Also in this issue:

13 Decision Permitting Restitution Claims Against Och-Ziff May Signal Increased Litigation Risk for Companies Settling FCPA Actions

Click here for an index of all FCPA Update articles

If there are additional individuals within your organization who would like to receive *FCPA Update*, please email prohlik@debevoise.com, eogrosz@debevoise.com, or pferenz@debevoise.com

Recent FCPA Enforcement Activity: Hiring Practices, Technology Sales Channels, Travel & Entertainment, and Individual Accountability

2019 continues to be an active year for FCPA enforcement. In the period from July to September, the SEC brought corporate enforcement actions addressing hiring practices (Deutsche Bank) and sales of software and network products through third parties (Microsoft and Juniper Networks). The SEC also brought its third case against an individual related to February's enforcement action against Cognizant. Only one of these enforcement actions had a parallel criminal action: DOJ entered into a non-prosecution agreement with Microsoft's Hungarian subsidiary. In addition, DOJ obtained a guilty plea from an individual in a bribery scheme related to adoptions in Africa, and the SEC finally brought its companion case against TechnipFMC plc., based on the same Iraq-related allegations addressed in DOJ's June DPA with the company.

Continued on page 2

Continued from page 1

As discussed below, these enforcement actions provide additional guidance regarding hiring practices, demonstrate yet again the government's virtual strict liability approach to the FCPA's accounting provisions, stress the importance of individual accountability, and raise questions as to how DOJ treats small bribes or facilitation payments in the FCPA context.

Deutsche Bank

Following the earlier actions against JPMorgan Chase[1] and Credit Suisse,[2] on August 22, 2019, Deutsche Bank became the third investment bank to settle FCPA allegations related to hiring practices in China. Without admitting or denying the facts of the SEC's cease & desist order, Deutsche Bank settled charges relating to violations of the accounting provisions of the FCPA, and paid approximately $16 million to the SEC, including a $3 million civil penalty.[3] Unlike the two prior cases, the Deutsche Bank settlement was much smaller, involved Russia in addition to China, and did not have a companion DOJ settlement.[4]

The Deutsche Bank Order found that, between 2006 and 2014, Deutsche Bank offered employment to relatives of foreign officials in China and Russia in order to generate business for the bank. The SEC's Order noted that Deutsche Bank's anti-corruption policy specifically prohibited providing job offers or employment at the request of a foreign official as early as 2009.[5] However, as in the prior cases, bankers in the region allegedly circumvented these controls through a variety of means. The SEC's Order found that senior Deutsche Bank employees in the APAC region used the bank's China-based joint venture to hire candidates who were rejected by the Regional Compliance Head and then seconded or lateraled those candidates to Deutsche Bank's Hong Kong office.[6] In addition, certain employees in the APAC region submitted false documentation, including falsely claiming foreign officials were not the source of the referrals.

Continued on page 3

1. *In the Matter of JPMorgan Chase & Co*, Order Instituting Cease-and-Desist Proceedings, Securities & Exchange Act Rel. No 79335, Accounting and Auditing Enforcement Rel. No. 3824, Admin. Proc. File No. 3-17684 (Nov. 17, 2016) (hereinafter "JPMorgan Order").
2. *In the Matter of Credit Suisse Group AG*, Order Instituting Cease-and-Desist Proceedings, Securities & Exchange Act Rel. No 83593, Accounting and Auditing Enforcement Rel. No. 3948, Admin. Proc. File No. 3-18571 (July 5, 2018) (hereinafter "Credit Suisse Order").
3. *In the Matter of Deutsche Bank AG*, Order Instituting Cease-and-Desist Proceedings, Securities & Exchange Act Rel. No. 86740, Accounting and Auditing Enforcement Rel. No. 4065, Admin. Proc. File No. 3-19373 (Aug. 22, 2019), www.sec.gov/enforce/34-86740-s (hereinafter "Deutsche Bank Order").
4. In this way, the Deutsche Bank case was more similar to the first hiring practices case brought by the SEC against Bank of New York Mellon than the larger JPMorgan and Credit Suisse cases. *See* Sec. & Exch. Comm., "SEC Charges BNY Mellon With FCPA Violations," No. 2015-170 (Aug. 18, 2015), www.sec.gov/news/pressrelease/2015-170.html.
5. Deutsche Bank Order ¶ 5 (controls instituted in 2009). This is similar to the facts in the JPMorgan and Credit Suisse cases. *See* JPMorgan Order ¶¶ 9-11 (controls instituted 2001 through 2011); Credit Suisse Order ¶ 7 (controls instituted 2007-2012).
6. Deutsche Bank Order ¶¶ 12-13.

Recent FCPA Enforcement Activity: Hiring Practices, Technology Sales Channels, Travel & Entertainment, and Individual Accountability
Continued from page 2

As with the prior hiring practices cases, internal communications made clear the link between the referral hires and expected business. In one instance, the co-head of investment banking in China emailed other employees asking for "revenue projections" for recent referral hires. Other internal emails referred to such candidates as "VIPs," requested that colleagues "leverage" one candidate's family connections to obtain business (despite the fact that the candidate's interviewers thought he was one of the worst candidates they interviewed), and described another hire as "a classic nepo situation."[7]

The similarities in requests from Russian and Chinese officials serve as a reminder that such practices are not limited to East Asia. Indeed, one of the faults alleged in the Deutsche Bank Order is that, while Deutsche Bank implemented FCPA guidance with regard to hiring for the Asia Pacific in 2009, it did not do so for the rest of the world until 2015.[8]

"As with the prior hiring practices cases, internal communications [at Deutsche Bank] made clear the link between the referral hires and expected business."

The SEC's Deutsche Bank Order is the latest settlement focused on hiring practices, but it is likely not the last. As the Deutsche Bank Order demonstrates, such practices are not confined to Asia and companies would be well-advised to implement strict procedures for hiring those related to or referred by foreign officials (especially potential customers and regulators) and to remain alert to potential circumvention schemes. Such schemes might include hiring by an affiliated joint venture, as alleged in the Deutsche Bank Order, or shortened contracts, as alleged in the JPMorgan Order.

Unlike the JP Morgan and Credit Suisse actions, there was no parallel case by DOJ. Whether this is because of the relatively small size of the profits ($11 million, compared to $105 million for JP Morgan and $25 million for Credit Suisse[9]) or fading interest by DOJ in the relationship-hire cases, only time will tell.

Continued on page 4

7. *Id.* ¶¶ 19, 26, 32, 37.

8. *Id.* ¶ 15.

9. Deutsche Bank Order ¶ 12; JPMorgan Order ¶ 25; Credit Suisse Order ¶ 15.

Continued from page 3

Microsoft and Juniper Networks

In July and August 2019, the SEC brought enforcement actions against two technology companies, Microsoft[10] and Juniper Networks.[11] In both cases, the companies' foreign subsidiaries sold products through third-party channels to government end users. Together with prior cases brought by the SEC and DOJ in the sector, they demonstrate the risks associated with using third-party channels in high-risk markets where discounts can be used to create slush funds for improper payments.

Microsoft

On July 22, 2019, Microsoft settled its long-running SEC investigation, accepting, without admitting or denying the facts therein, a cease-and-desist order finding violations of the books and records and internal controls violations of the FCPA and ordering approximately $16.5 million in disgorgement and interest. The Microsoft Order found that, between 2012 and 2015, Microsoft's subsidiaries in Hungary, Turkey, Saudi Arabia, and Thailand used third-party agents, including vendors, consultants, distributors, and resellers, to make improper payments or provide improper benefits to government officials. In each case, an off-book fund was developed by granting to channel partners discounts that were not passed on to the end customer. Instead, the funds were allegedly used to for improper payments in Hungary, travel expenses and gifts for government employees in Saudi Arabia, gifts and travel for non-government customers in Thailand, and unknown purposes in Turkey.[12]

At the same time as the settlement with the SEC, Microsoft's Hungarian subsidiary entered into a non-prosecution agreement with DOJ and agreed to pay a $8.5 million penalty, reflecting a 25% discount for cooperation and remediation.[13] The NPA notes that Microsoft had instituted extensive controls over discounts that were intended to avoid improper use of discounts, including requiring approval from a centralized clearing desk for discounts above a certain threshold. However, local executives and employees in Hungary, despite knowing that the end customer would pay at or near the maximum price, repeatedly falsely told Microsoft's centralized

Continued on page 5

10. *In the Matter of Microsoft Corp.*, Order Instituting Cease-and-Desist Proceedings, Securities & Exchange Act Rel. No. 86421, Admin. Proc. File No. 3-19260 (July 22, 2019), www.sec.gov/enforce/34-86421-s-0 (hereinafter "Microsoft Order").

11. *In the Matter of Juniper Networks, Inc.*, Order Instituting Cease-and-Desist Proceedings, Securities & Exchange Act Rel. No. 86812, Accounting and Auditing Enforcement Rel. No. 4069, Admin. Proc. File No. 3-19397 (Aug. 29, 2019), www.sec.gov/enforce/34-86812-s (hereinafter "Juniper Order").

12. Microsoft Order, ¶¶ 16, 24, 25, 27.

13. Letter to Darryl S. Lew and Courtney Hague Andrews, "Re: Microsoft Magyarország Számítástechnikai Szolgáltató és Kereskedelmi Kft." (July 22, 2019), www.justice.gov/criminal-fraud/fcpa/cases/microsoft-hungary (hereinafter "Microsoft Hungary NPA").

Recent FCPA Enforcement Activity: Hiring Practices, Technology Sales Channels, Travel & Entertainment, and Individual Accountability

Continued from page 4

clearing desk that the discounts were required in order to obtain the contract.[14] The fact that the subsidiary concealed the misconduct from its parent did not prevent DOJ from finding that Microsoft failed to exercise "meaningful oversight" over its subsidiary to ensure that discounts were passed onto the end customers rather than being used by intermediaries to facilitate improper payments.[15]

Both the SEC and DOJ settlements credited Microsoft with full cooperation and remediation, citing among other things, that Microsoft: terminated four licensing partners; enhanced its internal controls; took disciplinary actions against four Microsoft Hungary employees; enacted new discount transparency and pass-through requirements; and developed and used data analytics to help identify high-risk transactions.[16]

Juniper Networks

On August 29, 2019, networking and cybersecurity company Juniper Networks settled with the SEC, agreeing to a cease-and-desist order and paying just under $12 million in disgorgement, interest, and civil penalties for violations of the books and records and internal controls provisions of the FCPA. According to the SEC's order, between 2008 and 2013, sales employees of Juniper's Russian subsidiary used third-party channel partners to fund leisure trips for government customers through the use of off-books accounts.[17] The trips included international tourist destinations where there were no Juniper facilities, conferences, or other legitimate business justifications; internal emails made it clear that employees believed that, if the trips were not approved, Juniper would lose sales.

Based on the Juniper Order, it does not appear that Juniper had any centralized approval or oversight process for discounts. According to the Order, a member of Juniper's senior management learned of the off-book accounts in 2009 and instructed employees in Russia to discontinue their use, but the practice failed to stop until 2013.[18]

Continued on page 6

14. *Id.*, Attachment A ¶¶ 12, 20, 23, 28.
15. *Id.* at 2.
16. Microsoft Hungary NPA at 2; Microsoft Order ¶ 33. This may be the first time that we have seen the government call out a company's use of data analytics to assist with risk assessments. Real time data analytics are a powerful and evolving tool in detecting and deterring corruption. Microsoft describes its data analytics program on its website at www.microsoft.com/en-us/legal/compliance/anticorruption/default.aspx. However, for many companies, true use of "big data" remains out of reach, since their accounting systems are not integrated across subsidiaries.
17. Juniper Order ¶ 9.
18. *Id.* ¶ 12.

Recent FCPA Enforcement Activity: Hiring Practices, Technology Sales Channels, Travel & Entertainment, and Individual Accountability
Continued from page 5

The Order also describes a scheme in China, where local employees submitted false agendas to pay for travel and entertainment of foreign officials and other customers.[19] The employees used the false agendas, which understated the true amount of the entertainment, to seek approval for the trips from Juniper's legal department and also gave them to their customers for use in obtaining their own internal approvals to attend the events. The Order also notes that many of these trips were approved after they had occurred, in violation of Juniper's internal requirements for prior approval.[20]

Technology Companies in the Crosshairs?

The Microsoft and Juniper enforcement actions continue a series of SEC (and DOJ) cases in the technology sector.[21] The cases are noteworthy for several reasons:

First, the Microsoft Order is a rare instance of the SEC using the books and records provisions against alleged *commercial* bribery in Thailand. As many companies' compliance programs differentiate between public- and private-sector businesses in their gifts and hospitality policies, the Microsoft Order serves as reminder to issuers that the FCPA's accounting provisions can also apply to private sector bribery.[22]

Second, although the focus in the gifts and entertainment space has traditionally been on lavish *international* travel and entertainment, Juniper Networks is a timely reminder that even unwarranted *domestic* travel and entertainment can present a problem.[23]

Finally, and most importantly, the cases highlight the continuing difficulties the tech sector faces when using third-party channel partners, which can easily be used to create off-the-books funds by manipulating the margins those channel partners receive. It is important for companies to protect themselves by policing discounts when third parties are involved. However, the government's virtual strict liability approach to the books and records and internal controls provisions raises the question of how much credit (if any) companies will get for having such controls once misconduct occurs.

Continued on page 7

19. *Id.* ¶ 14.

20. *Id.*

21. *See also* Sec. & Exch. Comm'n, "SEC Charges Oracle Corporation With FCPA Violations Related to Secret Side Funds in India," No. 2012-158 (Aug. 16, 2012), www.sec.gov/news/press-release/2012-2012-158htm; Sec. & Exch. Comm'n, "SEC Charges Hewlett-Packard With FCPA Violations," No. 2014-73 (Apr. 19, 2014), www.sec.gov/news/press-release/2014-73; Sec. & Exch. Comm'n, "SEC Charges Software Company With FCPA Violations" No. 2016-17 (Feb. 1, 2016) (involving SAP), www.sec.gov/news/pressrelease/2016-17.html; Paul R. Berger, Andrew M. Levine, Bruce E. Yannett, and Philip Rohlik, "SEC Brings First Enforcement Actions of 2016," FCPA Update, Vol. 7, No. 7 (Feb. 2016), www.debevoise.com/insights/publications/2016/02/fcpa-update-february-2016.

22. Of course, many countries have laws that also prohibit private sector corruption, including the U.K. Bribery Act.

23. Juniper Order ¶ 15. *See also* Paul Berger, Andrew M. Levine, Bruce E. Yannett, and Philip Rohlik, "SEC Brings First FCPA Enforcement Actions of 2016," FCPA Update Vol. 7, No. 7 at 12-13 (Feb. 2016) (noting enforcement interest in non-international travel), www.debevoise.com/insights/publications/2016/02/fcpa-update-february-2016.

Continued from page 6

According to both the SEC and DOJ, Microsoft had specific controls over discounts, requiring approval by a centralized "Business Desk" for all discounts above a certain threshold. Both the SEC and DOJ deemed these controls ineffective, presumably because they could be circumvented by employees submitting false representations. It does not appear from the SEC Order that Juniper Networks had a similar control in place. This is not necessarily a fault, given the difference in size between Microsoft and Juniper Networks. In any event, it does not appear that Microsoft received much credit for having such controls, though it may be instructive that Microsoft Hungary's fine was only 60% of the $14.6 million in profits earned[24] while Juniper paid a civil penalty of more than 150% of its profits.

"The [Microsoft and Juniper Networks] cases highlight the continuing difficulties the tech sector faces when using third-party channel partners, which can easily be used to create off-the-books funds by manipulating the margins those channel partners receive."

TechnipFMC

On September 23, 2019, the SEC finally announced a settlement with TechnipFMC. TechnipFMC agreed to a cease-and-desist order finding violations of the anti-bribery, books and records, and internal controls provisions of the FCPA and ordering the company to pay approximately $5 million in disgorgement and interest, as well as submit to a three-year self-reporting period (the "TechnipFMC Order").[25]

The SEC's settlement occurred several months after DOJ's $292 million settlement with the company in June, which we wrote about in our July issue.[26] Although DOJ's case encompassed both Unaoil-related charges involving the former FMC entity and *Lavo Jato*-related charges involving the former Technip entity, the SEC action only involved FMC, presumably because Technip ceased being a U.S. issuer in 2007. With regard to FMC, the TechnipFMC Order is based on the same facts as DOJ DPA.

Continued on page 8

24. Microsoft Hungary NPA at 5. Note that the NPA refers to approximately $14.6 million in profits in Hungary, while the Microsoft Order refers to $13.8 million in profits in Hungary, Saudi Arabia, Thailand, and Turkey.

25. *In the Matter of Technip FMC plc.*, Order Instituting Cease-and-Desist Proceedings, Securities & Exchange Act Rel. No. 87055, Accounting and Auditing Enforcement Rel. No. 4087, Admin. Proc. File No. 3-19493 (Sept. 23, 2019).

26. *See* Kara Brockmeyer, David O'Neil, Philip Rohlik, and Jil Simon, "Skeletons in the Closet: Technip FMC Settles FCPA Allegations Involving Both of its Predecessor Companies," FCPA Update Vol. 10, No. 12 (July 2019), www.debevoise.com/insights/publications/2019/07/fcpa-update-july-2019.

Continued from page 7

Individual Accountability

SEC Settles with Another Cognizant Executive

On September 13, 2019, the SEC announced that it had settled charges against the former chief operating officer of Cognizant for conduct relating to the company's operations in India.[27] The cease-and-desist order alleged that Sridhar Thiruvengadam was one of four Cognizant executives who authorized the bribe and devised a scheme to cover it up.[28] Thiruvengadam also paid a $50,000 civil penalty.[29]

The Order finds that Thiruvengadam violated the books and records provisions by participating in videoconferences at which a bribe was allegedly authorized, violated the internal controls provisions by failing to remediate weaknesses in internal controls of which he became aware, and violated Rule 13b2-2 by signing a false subcertification to the company's management representation letter.

The case is interesting, in part, because it appears that Thiruvengadam's participation was primarily passive (*i.e.*, participating in two videoconferences where the bribe scheme was discussed, failing to remediate internal control weaknesses, and signing a subcertification). Nevertheless, the SEC charged him with causing the company's violations of the accounting provisions, and with directly violating the provisions against knowingly falsifying the company's books and records and lying to the auditors (Section 13(b)(5) of the Exchange Act and Rules 13b2-1 and 13b-2).

DOJ Settlement in Ugandan Adoption Case

In what may be the first FCPA case to involve international adoption, on August 29, 2019, Robin Longoria pled guilty to one count of conspiracy to violate the FCPA for her role in a Ugandan adoption scheme. According to the Information filed with the guilty plea, Longoria worked for an Ohio adoption agency, where she was responsible for overseeing a program to facilitate U.S. adoptions of Ugandan children.[30]

Continued on page 9

27. In February, both the SEC and DOJ settled charges with Cognizant and brought criminal (DOJ) and civil (SEC) against the former CEO and former Chief Legal Officer of the Company. *See* U.S. Dep't Justice, "Former President and Former Chief Legal Officer of Publicly Traded Fortune 200 Technology Services Company Indicted in Connection with Alleged Multi-Million Dollar Foreign Bribery Scheme," Press Rel. No. 19-127 (Feb. 15, 2019), www.justice.gov/opa/pr/former-president-and-former-chief-legal-officer-publicly-traded-fortune-200-technology; United States Securities & Exch. Comm'n, "SEC Charges Cognizant and Two Former Executives With FCPA Violations," Litig. Rel. No. 24402 (Feb. 15, 2019), www.sec.gov/litigation/litreleases/2019/lr24402.htm.
28. *In the Matter of Sridhar Thiruvengadam*, Order Instituting Cease-and-Desist Proceedings, Securities & Exchange Act Rel. No. 86963, Accounting and Auditing Enforcement Rel. No. 4074, Admin. Proc. File No. 3-19446 (Sept. 13, 2019), www.sec.gov/enforce/34-86963-s (hereinafter ("Thiruvengadam Order"). *See* Andrew M. Levine, Andreas A. Glimenakis, and Alma Mozetič, "Individual Accountability and the First FCPA Corporate Enforcement Actions of 2019," FCPA Update, Vol. 10, No. 8 (Mar. 2019), www.debevoise.com/insights/publications/2019/03/fcpa-update-march-2019.
29. Thiruvengadam Order *supra* n. 10 at 6.
30. U. S. Dep't of Justice, "Texas Woman Pleads Guilty to Conspiracy to Facilitate Adoptions From Uganda Through Bribery and Fraud," Press Rel. No. 19-921 (Aug. 29, 2019), www.justice.gov/opa/pr/texas-woman-pleads-guilty-conspiracy-facilitate-adoptions-uganda-through-bribery-and-fraud; *United States v. Robin Longoria*, Information, Document #1 ¶ 6, Case No. 1:19-cr-00482-CAB (N.D. Ohio, filed Aug. 12, 2019).

Continued from page 8

The adoption agency hired a Ugandan attorney to assist it in identifying potential children for adoption, representing its clients in court proceedings, and advising clients in applying for U.S. visas for adopted children.[31] The fees charged by the attorney were passed on to the adoption agency's clients and often totaled more than $10,000.[32] Portions of these funds were used to bribe Ugandan officials, including probation officers to recommend children be placed in an orphanage, court registrars to assign a case to an "adoption friendly" judge, and judges to influence favorable orders. Although the individual bribe amounts were relatively small, amounting to "hundreds of U.S. dollars or more," Longoria and others at the adoption agency allegedly were aware of these bribes and took steps to conceal them from the adoption agency's clients.[33]

International adoptions exhibit two of the principal risks for bribery: the need to deal with numerous foreign officials and time sensitivity. As the Longoria Information shows, there were numerous Ugandan officials involved in each adoption. Moreover, adoptions are inherently time-sensitive, both for the potential parents (who might have a preference for the age of the child they adopt) and the child (who remains in an orphanage for the duration of adoption proceedings). Recognizing these facts, it is unsurprising that adoption previously has been the subject of a DOJ FCPA Opinion Release relating to a trip sponsored by non-profit agencies for foreign officials (including a judge).[34]

Despite these inherent risks, adoption appears never before to have been the subject of an FCPA criminal charge or enforcement proceeding. The Longoria guilty plea is a reminder that the FCPA applies to everyone, not only big businesses and their employees. It also serves as a timely reminder that, just as Walmart and Parker Drilling discovered,[35] even local attorneys in high-risk jurisdictions can be problematic agents.

Continued on page 10

31. *Id.* ¶ 7.
32. *Id.* ¶ 8.
33. *Id.* ¶¶ 9-11.
34. U.S. Dep't. of Justice, Op. Rel. 12-02 (Oct. 18, 2012).
35. *See, e.g.*, Walmart NPA, Attachment A ¶ 28, www.justice.gov/opa/press-release/file/1175791/download (June 20, 2019) (use of *gestores*, "who were attorneys and ostensibly provided legal services but in reality did nothing … other than make improper payments"); *United States v. Parker Drilling Company*, Deferred Prosecution Agreement, Case 1:13CR 176 (E.D.Va. Apr. 16, 2013) ¶ 33 (agent retained through law firm).

Recent FCPA Enforcement Activity: Hiring Practices, Technology Sales Channels, Travel & Entertainment, and Individual Accountability

Continued from page 9

SEC Chair Clayton on the FCPA: Glass Half Empty or Half Full?

On September 9, 2019, SEC Chairman Jay Clayton delivered remarks at the Economic Club of New York that included his first-reported comments on FCPA enforcement since becoming Chairman.[36] Echoing sentiments from a 2011 report of an Association of the Bar of the City of New York committee he chaired at the time,[37] Chairman Clayton stated that "in many areas of the world, our work may not be having the desired effect," due to other countries' failure to enforce their laws.[38] While stating that he has no plans to change the enforcement posture of the SEC, Chairman Clayton noted that he has yet to see "meaningful improvement" in international enforcement and "this experience, including the FCPA-driven withdrawal of U.S. and U.S.-listed firms from certain jurisdictions, illustrates that globally-oriented laws, with no, limited or asymmetric enforcement, can produce individually unfair and collectively suboptimal results."[39]

"While there is still much work to be done, particularly with respect to the demand side of the equation and the need for better international coordination, the anti-corruption developments in many countries over the last decade reflect increasingly global efforts to combat corruption and an uptick in anti-corruption enforcement abroad."

Although corporate anti-corruption enforcement remains non-existent in numerous jurisdictions and has a long way to go in many others, the last decade has witnessed a significant increase in the number of countries enacting and enforcing anti-corruption laws.[40] For example:

Continued on page 11

36. Chairman Jay Clayton, "Remarks to the Economic Club of New York" (Sept. 9, 2019), *available at* https://www.sec.gov/news/speech/speech-clayton-2019-09-09.
37. The Association of the Bar of the City of New York, Committee on International Business Transactions, "The FCPA and its Impact on International Business Transactions – Should Anything Be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption?" (Dec. 2011).
38. *Id.*
39. *Id.*
40. *See* "The Year 2018 in Review: Continued Globalization of Anti-Corruption Enforcement," FCPA Update Vol. 10, No. 6 (Jan. 2019), www.debevoise.com/insights/publications/2019/01/fcpa-update-january-2019.

Continued from page 10

- Major trading partners of the United States have adopted or enhanced their anti-corruption and corporate liability laws to set the stage for increased enforcement, including the United Kingdom, France, Brazil, India, Malaysia, and Singapore.[41]
- In the past three years alone, more than half a dozen countries have brought their first international anti-corruption actions, often joining the United States in coordinated resolutions.[42] The shared recoveries in these cases provide strong monetary incentives, among other incentives, for foreign jurisdictions to play meaningful roles in anti-corruption enforcement.
- More than 20 countries have now formally adopted some form of settlement or alternative resolution process for corporate criminal behavior, including the United Kingdom, France, Canada, Singapore, and even Japan, paving the way for increased enforcement.[43] Indeed, the United Kingdom has now brought four DPAs, France just entered into its sixth CJIP, and Japan announced its first plea deal last year.
- International cooperation continues to rise. In fact, over the last five years, over 40 different countries have been publicly identified by the SEC and DOJ as providing assistance in FCPA enforcement investigations. In a speech last December, SEC Co-Director of Enforcement Steven Peikin noted that "the level of cooperation and coordination among regulators and law enforcement worldwide is on a sharply upward trajectory, particularly in matters involving corruption."[44]
- The likelihood of a multinational corporation being subject to investigations in multiple jurisdictions at once has never been higher. One of the most challenging issues for companies today is how to avoid "piling on" actions that follow months, or sometimes years, after the initial resolutions.

Continued on page 12

41. *See, e.g.*, Sapin II (France), Law No. 2016-1691 (Dec. 9, 2016), https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&categorieLien=id.; The Prevention of Corruption Act (India) (July 19, 2018 Amendment), Gazette Notification No. S.O. 3664(E) dated 26 July 2018; Malaysian Anti-Corruption Commission Act 2009 (Pending Amendments, June 2020), SC to Implement Anti-Corruption Action Plan, *Media Releases and Announcements of Securities Commission Malaysia* (July 22, 2019), https://www.sc.com.my/resources/media-releases-and-announcements/sc-to-implement-anti-corruption-action-plan. *See also* "The Year 2018 in Review: Continued Globalization of Anti-Corruption Enforcement," FCPA Update, Vol. 10, No. 6 (Jan. 2019) (discussing Argentina, Brazil, Chile, and Mexico), www.debevoise.com/insights/publications/2019/01/fcpa-update-january-2019.

42. *See, e.g.*, *U.S. v. Societe Generale S.A.*, Case No. 18-cr-253 (E.D.N.Y. Jun. 4, 2018), www.justice.gov/opa/press-release/file/1068521/download (France); *U.S. v. Keppel Offshore & Marine Ltd.*, Case No. 17-cr-697 (E.D.N.Y. Dec. 22, 2017), www.justice.gov/criminal-fraud/file/1021786/download) (Singapore and Brazil); *U.S. v. Rolls-Royce PLC*, Case No. 16-cr-247 (S.D. Fla. Oct. 24, 2016), www.justice.gov/opa/press-release/file/927221/download (UK and Brazil); *U.S. v. Telia Company AB* (S.D.N.Y. Sep. 21, 2017), www.justice.gov/usao-sdny/press-release/file/997851/download (Sweden and The Netherlands).

43. *See, e.g.*, International Bar Association, "Structured Settlements for Corruption Offences Towards Global Standards?" (Dec. 2018) at www.ibanet.org/LPD/Criminal_Law_Section/AntiCorruption_Committee/Projects.aspx; OECD, "Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Conventions" (2019) at www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf.

44. Steven Peiken, *The Salutary Effects of International Cooperation on SEC Enforcement*, Remarks at the IOSCO/PIFHS-Harvard Law School Global Certificate Program for Regulators of Securities Markets (Dec. 2018), *available at* www.sec.gov/news/speech/speech-peikin-120318.

Continued from page 11

While there is still much work to be done, particularly with respect to the demand side of the equation and the need for better international coordination, the anti-corruption developments in many countries over the last decade reflect increasingly global efforts to combat corruption and an uptick in anti-corruption enforcement abroad.

Kara Brockmeyer

Andrew M. Levine

Philip Rohlik

Jil Simon

Kara Brockmeyer is a partner in the Washington, D.C. office. Andrew M. Levine is a partner in the New York office. Philip Rohlik is a counsel in the Shanghai office. Jil Simon is an associate in the Washington, D.C. office. Full contact details for each author are available at www.debevoise.com.

Continued on page 13

Decision Permitting Restitution Claims Against Och-Ziff May Signal Increased Litigation Risk for Companies Settling FCPA Actions

In an order dated August 29, 2019, and unsealed earlier this month, Judge Nicholas Garaufis of the U.S. District Court for the Eastern District of New York issued a significant ruling on the application in the FCPA context of the Mandatory Victims Restitution Act (the "MVRA"). Judge Garaufis agreed with a group of former investors in the Canada-incorporated mining company Africo Resources Ltd. ("Africo") that they qualified as victims under the MVRA because they had incurred losses as a result of bribes paid by OZ Africa Management GP, LLC ("OZ Africa") to Congolese officials in order to secure control of a Congolese mine.[1] As such, the former Africo investors may be entitled to restitution from OZ Africa.

Restitution claims are unusual after FCPA settlements and typically have not succeeded. Such claims are usually brought by the foreign instrumentality whose employee(s) had been bribed. For example, Venezuela's state-owned oil company ("PDVSA") is currently seeking $600 million in restitution based on the corrupt schemes engaged in by PDVSA employees; that motion has been opposed by DOJ.[2] Similarly, after the Alcatel Lucent settlement in 2011, the Costa Rican electrical utility sought restitution under the Crime Victims' Rights Act.[3] This claim was rejected, at DOJ's urging, because the supposed "victim" was actually a co-conspirator.[4]

Africo is in a different position because it was not a party to the bribe transaction. Its successful claim for restitution may embolden others, further complicating corporate FCPA settlements as companies weigh uncertain litigation risks stemming from a broad and often unclear pool of competitors and third parties that may seek to claim victim status and restitution under the MVRA.

Continued on page 14

1. Mem. & Order, *United States v. OZ Africa Management GP, LLC*, 16-515 (E.D.N.Y. Aug. 29, 2019), ECF No. 51.
2. *See* Motion for Victim Status and Restitution by Republic of Venezuela as to Abraham Edgardo Ortega, *United States v. Guruceaga et al*, 1:18-cr-20685 (S.D. Fl. Apr. 2, 2019), ECF No. 87; Response in Opposition, *Guruceaga* (May 17, 2019), ECF No. 99.
3. 18 U.S.C. § 3771(d)(3). The CVRA is not itself a substantive statutory basis for an order of restitution. *See, e.g., In re* Her Majesty the Queen in Right of Canada, 785 F.3d 1273, 1275 (9th Cir. 2015). Rather, the CVRA's mandate of "full and timely restitution as provided in law" simply ensures compliance with the already existing restitution statutes, including the VWPA and the MVRA. *Id.* at 1275–76 (noting that "full and timely restitution as provided by law" means reliance on restitution statutes independent of the CVRA).
4. *See United States v. Alcatel Lucent, S.A.*, Document 43, "Government's Response to ICE's Petition for Victim Status and Restitution" at 6 ("[W]hile ICE officials and ICE itself could not be charged with extortion or bribery, it does not mean that ICE officials and ICE itself were not, in fact, involved in – and responsible in part for – the criminal conduct."); *In re Instituto Costarricense de Electridad*, Case No. 11-12707-G (11th Cir. June 17, 2011). *See also* 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), www.debevoise.com/insights/publications/2011/06/fcpa-update.

Decision Permitting Restitution Claims Against Och-Ziff May Signal Increased Litigation Risk for Companies Settling FCPA Actions

Continued from page 13

Background

The restitution claims arise from a 2016 resolution in which Och-Ziff Capital Management Group LLC – the parent company of OZ Africa – paid $412 million to settle enforcement actions with DOJ and the SEC. OZ Africa pled guilty to an FCPA violation as part of those settlements.[5]

The Och-Ziff settlement papers described a scheme lasting from 2006 to 2008, in which agents of Och-Ziff allegedly bribed Congolese officials in exchange for beneficial court rulings. As a result of this scheme, Africo lost control over the Kalukundi mine and OZ Africa took over.[6] The restitution theory put forth by the Africo former investors is that they "lost a promising opportunity" and any potential value therefrom. The U.S. enforcement agencies and OZ Africa both opposed an order of restitution.

Judge Garaufis held that the fact that OZ Africa had already entered its guilty plea was not a bar to ordering restitution and that the Africo investors qualified as victims under the MVRA – though he acknowledged their claims are relatively removed from the underlying harm. He explicitly rejected OZ Africa's argument that only Africo, and not its former shareholders, could claim victim status under the MVRA, seemingly based on his finding that Africo is a "defunct" company. OZ Africa has since moved for reconsideration, arguing that Judge Garaufis based his ruling on a factual error and that Africo is not, in fact, a defunct company.[7]

Though Judge Garaufis has yet to rule on the motion for reconsideration, he did order additional briefing by the parties to determine the appropriate restitution calculation. The 50 former investors in Africo claim that their stake would have been worth $1.8 billion had development proceeded without Och-Ziff's corrupt practices. It is unclear at this stage how much any actual restitution amount would be, though Judge Garaufis stated that restitution should be calculated based not on "the full projected value" of the mine investment, but rather "on the value of these mining rights, as of either 2006-2008 or the present day."

Continued on page 15

5. U.S. Dep't of Justice, "Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay $213 Million Criminal Fine" (Sept. 29, 2016); U.S. Sec. & Exch. Comm., "Och-Ziff Hedge Fund Settles FCPA Charges" (Sept. 29, 2016).
6. Deferred Prosecution Agreement, *United States v. Och-Ziff Capital Management Group LLC*, 16-516, A-8 (E.D.N.Y. Sep. 29, 2016).
7. Mem. In Support of Def.'s Mot. For Reconsideration, *United States v. OZ Africa Management Group, LLC*, 16-515 (E.D.N.Y. Sep. 6, 2019), ECF No. 55.

Continued from page 14

The Underlying Facts

In 2006, Africo indirectly held a 75% interest in the Kalukundi mining rights, with the other 25% held by a DRC state-owned entity. During that year, Africo's rights were expropriated and auctioned off in order to satisfy an *ex parte* default judgment obtained by a former Africo employee. Africo did not learn that its rights had been expropriated until April 2007, at which point it fought the expropriation in the DRC courts. Unbeknownst to Africo, a DRC official allegedly orchestrated the expropriation in order to convey the interest in Kalukundi to Dan Gertler, an Israeli billionaire who held other interests in the DRC mining sector.

"It is possible that this decision will embolden companies affected by FCPA schemes, such as competitors and third parties, to seek victim status under the [Mandatory Victims Restitution Act]."

The transaction structure is complicated. At a high level, Gertler and OZ Africa were negotiating the acquisition of Kalukundi rights as well as an investment by OZ Africa in one of Gertler's special-purpose entities. In turn, that special-purpose entity planned a bid to take over Africo, which required the approval of the Africo shareholders. Gertler allegedly paid bribes to DRC officials, including to judges, in order to ensure that Africo did not obtain a favorable decision regarding the expropriation of Africo's rights to Kalukundi, at least prior to the scheduled vote by Africo shareholders on whether to accept the takeover bid by Gertler's company. Africo shareholders accepted the takeover in June 2008. Ultimately, no decision on the expropriation was given because the takeover rendered the case moot.

The Restitution Decision

The dispute over restitution between the Africo investors and OZ Africa focused on: (1) whether restitution could be ordered after the court had accepted OZ Africa's guilty plea; and (2) whether the Africo investors met the definition of "victim" under the MVRA. Judge Garaufis answered both questions in the affirmative.

As to the first issue, Judge Garaufis reasoned that while the court had already accepted OZ Africa's guilty plea, it "has not yet accepted the parties' plea agreement."

Continued on page 16

Continued from page 15

Although OZ Africa was not warned of the possibility of restitution during its plea colloquy, because it was made aware of the possibility of restitution prior to sentencing, it still has the option to withdraw its plea. Judge Garaufis therefore held that the timing of events does not preclude a restitution order at this point.

Regarding the Africo investors' victim status, Judge Garaufis held both that the investors' mining rights in the Kalukundi constituted "property" and that the theft of those rights was the direct and proximate cause of the Africo takeover.

The MVRA requires a defendant to "make restitution to the victim of [an] offense," under Title 18, "including any offense committed by fraud or deceit … in which an identifiable victim or victims has suffered a … pecuniary loss."[8] Substantive FCPA offenses are under Title 15, but if, as is often the case, FCPA charges are coupled with charges under Title 18, such as conspiracy, money laundering, or wire fraud, the MVRA is a viable option for "victims … directly and proximately harmed as a result."[9]

Judge Garaufis relied on the MVRA's broad definition of "victim." The MVRA does not carve out individuals somewhat removed from the harm, such as holders of intangible property rights or individuals who hold their interests through a special-purpose vehicle for tax benefits. He noted that these facts may influence the calculation of the amount of restitution ordered but do not bear on the investors' victim status under the MVRA. Judge Garaufis also referred to Africo as "a defunct company" and stated that it would be "absurd" if Africo could qualify as a victim under the MVRA were it an active company, but its former shareholders could not.

OZ Africa attempted to break the causal connection between the fraudulent scheme and any harm caused to Africo by pointing out Africo's already strained financial position. The court rejected that contention, concluding that because the Africo shareholders accepted the takeover under duress and lost the opportunity to consider the transaction fairly, they experienced harm that must be compensated under the MVRA.

Judge Garaufis has ordered additional briefing from the parties regarding how to calculate the restitution amount, but he has already held that OZ Africa may be liable for restitution for Gertler's acts in furtherance of the scheme, provided OZ Africa knew or reasonably should have known about them.

As noted above, OZ Africa has filed a motion for reconsideration on the basis that Africo is not "defunct" as stated in the opinion. This is important, OZ Africa argued, because if there is a victim under the MVRA, it should be Africo itself, not the more attenuated group of individual former shareholders.

Continued on page 17

8. 18 U.S.C. § 3663A(a)(2).
9. *Id.*

Decision Permitting Restitution Claims Against Och-Ziff May Signal Increased Litigation Risk for Companies Settling FCPA Actions
Continued from page 16

Key Takeaways

While it remains to be seen how this ruling may impact future FCPA cases, the decision raises important considerations for companies and their counsel when evaluating potential risks and costs associated with an FCPA resolution.

It is possible that this decision will embolden companies affected by FCPA schemes, such as competitors and third parties, to seek victim status under the MVRA. If that occurs, companies can expect increased litigation to assess and define the property rights claimed to have been impacted. One reason that restitution claims are rare in FCPA cases could be the challenge of identifying a property right that was impacted as a result of the bribery scheme. This was more easily established for the Africo investors because they already held an interest in Africo and had an active dispute regarding the rights to the Kalukundi mine when the relevant bribery scheme was undertaken. But many FCPA fact patterns do not present quite so clearly a victim with an identifiable, specific property right.

Here, as in many FCPA cases, the party that might qualify as a "victim" under the MVRA (pursuant to Judge Garaufis's opinion) has suffered harm in the form of a missed business opportunity. Establishing the value of that missed opportunity will continue to be a challenge for such parties and will also be a point for litigation depending on the position of a claimant. It will be informative to see how restitution ultimately is calculated for the Africo investors.

Another potential subject for increased litigation in this space concerns whether restitution would impose too great a burden on the sentencing of an entity that has already pled. In the additional briefing that Judge Garaufis ordered on the issue of calculating restitution, he also asked the parties to address whether "determining the complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process."[10] The sentencing for OZ Africa has been on hold pending the restitution decision.

As noted above, the MVRA addresses restitution in sentencing proceedings under Title 18 of the U.S. Code, and the FCPA is codified under Title 15 of the U.S. Code. However, FCPA cases are often accompanied by charges under Title 18, such as conspiracy, money laundering, or wire fraud. This decision could result in defendants in FCPA cases attempting to limit their exposure to restitution under the MVRA by seeking to exclude non-substantive FCPA charges from their settlements. This approach will likely be met with resistance by DOJ, but it may be a new area of focus for companies during settlement negotiations.

Continued on page 18

10. Mem. & Order, *United States v. OZ Africa Management GP, LLC*, 16-515 (E.D.N.Y. Aug. 29, 2019), ECF No. 51.

Decision Permitting Restitution Claims Against Och-Ziff May Signal Increased Litigation Risk for Companies Settling FCPA Actions
Continued from page 17

Finally, the MVRA creates yet another potential collateral consequence of FCPA scrutiny and should be considered carefully by companies and defense counsel, including when deciding whether to self-disclose potential violations to the government.

David A. O'Neil

Philip Rohlik

Jil Simon

David A. O'Neil is a partner in the Washington, D.C. office. Philip Rohlik is a counsel in the Shanghai office. Jil Simon is an associate in the Washington, D.C. office. Full contact details for each author are available at www.debevoise.com.

FCPA Update

FCPA Update is a publication of
Debevoise & Plimpton LLP

919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

London
+44 20 7786 9000

Paris
+33 1 40 73 12 12

Frankfurt
+49 69 2097 5000

Moscow
+7 495 956 3858

Hong Kong
+852 2160 9800

Shanghai
+86 21 5047 1800

Tokyo
+81 3 4570 6680

Bruce E. Yannett
Co-Editor-in-Chief
+1 212 909 6495
beyannett@debevoise.com

Andrew J. Ceresney
Co-Editor-in-Chief
+1 212 909 6947
aceresney@debevoise.com

David A. O'Neil
Co-Editor-in-Chief
+1 202 383 8040
daoneil@debevoise.com

Jane Shvets
Co-Editor-in-Chief
+44 20 7786 9163
jshvets@debevoise.com

Philip Rohlik
Co-Executive Editor
+852 2160 9856
prohlik@debevoise.com

Andreas A. Glimenakis
Associate Editor
+1 202 383 8138
aaglimen@debevoise.com

Kara Brockmeyer
Co-Editor-in-Chief
+1 202 383 8120
kbrockmeyer@debevoise.com

Andrew M. Levine
Co-Editor-in-Chief
+1 212 909 6069
amlevine@debevoise.com

Karolos Seeger
Co-Editor-in-Chief
+44 20 7786 9042
kseeger@debevoise.com

Erich O. Grosz
Co-Executive Editor
+1 212 909 6808
eogrosz@debevoise.com

Jil Simon
Associate Editor
+1 202 383 8227
jsimon@debevoise.com

Please address inquiries regarding topics covered in this publication to the editors.

All content © 2019 Debevoise & Plimpton LLP. All rights reserved. The articles appearing in this publication provide summary information only and are not intended as legal advice. Readers should seek specific legal advice before taking any action with respect to the matters discussed herein. Any discussion of U.S. Federal tax law contained in these articles was not intended or written to be used, and it cannot be used by any taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer under U.S. Federal tax law.

Please note:
The URLs in *FCPA Update* are provided with hyperlinks so as to enable readers to gain easy access to cited materials.