

# FCPA Update

A Global Anti-Corruption Newsletter



## Also in this issue:

10 1MDB Continued: DOJ Secures Largest Ever Civil Forfeiture While Criminal Actions Remain Pending

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## Individual Accountability and Extraterritorial Jurisdiction: DOJ and SEC Charge Employees of Chinese Subsidiary of U.S. Issuer

The DOJ, following closely on its trial victory in its case against Lawrence Hoskins,<sup>1</sup> recently announced charges of conspiracy to violate the anti-bribery and accounting provisions of the FCPA against two Chinese nationals who were formerly executives at Herbalife's Chinese subsidiaries.<sup>2</sup> The SEC filed a civil suit against one of the individuals on the same day.<sup>3</sup>

[Continued on page 2](#)

1. U.S. Dep't of Justice, "Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy," Press Rel. 19-1,219 (Nov. 8, 2019), [www.justice.gov/opa/pr/former-senior-alstom-executive-convicted-trial-violating-foreign-corrupt-practices-act-money](http://www.justice.gov/opa/pr/former-senior-alstom-executive-convicted-trial-violating-foreign-corrupt-practices-act-money).
2. U.S. Dep't of Justice, "Two Former Executives of the China Subsidiary of a Multi-Level Marketing Company Charged for Scheme to Pay Foreign Bribes and Circumvent Internal Accounting Controls," Press Rel. 19-1,249 (Nov. 14, 2019), [www.justice.gov/opa/pr/two-former-executives-china-subsidiary-multi-level-marketing-company-charged-scheme-pay](http://www.justice.gov/opa/pr/two-former-executives-china-subsidiary-multi-level-marketing-company-charged-scheme-pay).
3. *Securities and Exchange Comm'n v. Jerry Li*, Complaint, Case 1:19-cv-10568, Doc. 1 (S.D.N.Y. Nov. 14, 2019) (hereinafter "Li Complaint").

Individual Accountability and  
Extraterritorial Jurisdiction:  
DOJ and SEC Charge  
Employees of Chinese  
Subsidiary of U.S. Issuer

Continued from page 1

Based on the DOJ indictment (“Li Indictment”)<sup>4</sup> and the SEC complaint (“Li Complaint”), the case against Yanliang (Jerry) Li and Hongwei (Mary) Yang involves a large number of small bribes paid by Chinese employees of a Chinese-incorporated subsidiary of a U.S. company, in Chinese currency, in China, to Chinese “government officials.” While not unprecedented in the context of FCPA enforcement proceedings against individuals,<sup>5</sup> such a fact pattern is more often present in SEC actions against companies under the books and records and accounting provisions than in criminal charges against individuals under the anti-bribery provisions. The criminal indictment for a violation of the anti-bribery provisions offers an example of DOJ’s expansive agency and employee theories of subject-matter jurisdiction over foreign individuals, as well as raising questions about what kind of U.S. nexus is in furtherance of a bribe payment occurring wholly abroad. While the Li Indictment also involves behavior (namely alleged perjury and destruction of evidence) likely to prompt a prosecutor to bring charges, the case should serve as a reminder to foreign employees of foreign subsidiaries of U.S. companies that they have criminal exposure under the FCPA. As such, it will serve as a useful example in compliance training programs as well as potentially posing some interesting legal questions of statutory interpretation should the case ever make it to court.

### The Allegations

Somewhat unusually, both the DOJ and the SEC are proceeding against individuals before reaching a settlement with the U.S. issuer involved. Li and Yang were the former managing director and former head of External Affairs of Herbalife’s Chinese subsidiary. Herbalife (identified as “Company-1” in the Indictment and “Company-A” in the SEC Complaint) announced that it was under FCPA scrutiny in 2017<sup>6</sup> and, in its latest 10-Q, filed at the end of October, the company said that it was continuing to discuss and cooperate with the SEC and DOJ.<sup>7</sup> Herbalife is a multi-level marketing company.<sup>8</sup> Multi-level marketing is illegal in China, but similar practices are permitted in the form of “direct selling,” which, however, requires various provincial level licenses and is subject to policing by provincial level regulators from the Chinese Administrations of Industry and Commerce.<sup>9</sup>

Continued on page 3

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4. *U.S. v. Yanliang Li and Hongwei Yang*, Sealed Indictment, No. 19-Crim-760 (S.D.N.Y. Oct. 22, 2019) (hereinafter “Li Indictment”)
  5. See *infra* at n. 29-33 and accompanying text; see also U.S. Dep’t of Justice, “Eight Former Senior Executives and Agents of Siemens Charged in Alleged \$100 Million Foreign Bribe Scheme,” Press Rel. No. 11-1626 (Dec. 13, 2011), [www.justice.gov/opa/pr/eight-former-senior-executives-and-agents-siemens-charged-alleged-100-million-foreign-bribe](http://www.justice.gov/opa/pr/eight-former-senior-executives-and-agents-siemens-charged-alleged-100-million-foreign-bribe).
  6. Herbalife Ltd., Form 10-K for the fiscal year ended December 31, 2016 at 99 (filed Feb. 23, 2017), [www.sec.gov/Archives/edgar/data/1180262/000156459017002230/hlf-10k\\_20161231.htm](http://www.sec.gov/Archives/edgar/data/1180262/000156459017002230/hlf-10k_20161231.htm).
  7. Herbalife Nutrition Ltd., Form 10-Q for the quarterly period ended September 30, 2019 at 22 (filed Oct. 31, 2019), [www.sec.gov/ix?doc=/Archives/edgar/data/1180262/000156459019038410/hlf-10q\\_20190930.htm](http://www.sec.gov/ix?doc=/Archives/edgar/data/1180262/000156459019038410/hlf-10q_20190930.htm).
  8. Li Indictment at ¶ 1.
  9. *Id.* at ¶ 4, 10.

**Individual Accountability and  
Extraterritorial Jurisdiction:  
DOJ and SEC Charge  
Employees of Chinese  
Subsidiary of U.S. Issuer**

Continued from page 2

The Li and Yang cases together constitute the third action involving such marketing challenges in China, following Avon’s 2014 DPA with the DOJ and settlement with the SEC,<sup>10</sup> and Nu Skin Enterprises’ 2016 settlement with the SEC,<sup>11</sup> neither of which involved charges against individuals.

According to the Li Indictment, because of the need to obtain licenses from each province and to deal with a variety of provincial regulatory agencies, Li and Yang “frequently entertained Chinese government officials ... and provided gifts to Chinese government officials” amounting to \$25 million over the nine-year period between 2007 and 2016.<sup>12</sup> These gifts included red envelopes (i.e., cash) including cash payments of up to RMB 10,000 (approximately \$1,425), round-trip airline tickets for an official of the State Administration for Industry and Commerce (“AIC”) and his wife, a shopping trip and spa visit costing RMB 20,000 (approximately \$2,850),

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and a review for an allegedly fictitious internship sent to the college of the son of an AIC official.<sup>13</sup> Funds for these “gifts” came from reimbursements, many of which Li and Yang obtained through allegedly false receipts. For example, Yang was reimbursed for entertaining over 4,000 officials at 239 meals over a six-month period (i.e., more than once per day).<sup>14</sup> Li and Yang also allegedly ordered 30 tons of food gifts from a vendor in their hometown (without evidence of such food ever being shipped).<sup>15</sup> Other employees obtained fake hotel receipts.<sup>16</sup>

Continued on page 4

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- 10. U.S. Dep’t of Justice, “Avon China Pleads Guilty to Violating the FCPA by Concealing More Than \$8 Million in Gifts to Chinese Officials,” Press Rel. 14-1419 (Dec. 18, 2014), [www.justice.gov/opa/pr/avon-china-pleads-guilty-violating-fcpa-concealing-more-8-million-gifts-chinese-officials](http://www.justice.gov/opa/pr/avon-china-pleads-guilty-violating-fcpa-concealing-more-8-million-gifts-chinese-officials).
  - 11. U.S. Securities & Exchange Commission, “SEC Charges Nu Skin Enterprises, Inc. with FCPA Violations,” Admin. Proc. File No. 3-17556 (Sept. 20, 2016), [www.sec.gov/litigation/admin/2016/34-78884-s.pdf](http://www.sec.gov/litigation/admin/2016/34-78884-s.pdf).
  - 12. Li Indictment at ¶ 5.
  - 13. *Id.* at ¶¶ 15, 18, 20, 21, 22; Li Complaint at ¶¶ 20. The review is only discussed in the Li Indictment.
  - 14. Li Indictment at ¶ 23; Li Complaint at ¶ 32.
  - 15. Li Indictment at ¶ 25; Li Complaint at ¶ 28.
  - 16. Li Complaint at ¶ 26.

**Individual Accountability and  
Extraterritorial Jurisdiction:  
DOJ and SEC Charge  
Employees of Chinese  
Subsidiary of U.S. Issuer**

Continued from page 3

In addition to provincial regulatory authorities, Li and Yang allegedly bribed employees of Chinese (state-owned) media companies to withdraw unfavorable stories about Herbalife China or to report favorably on the company.<sup>17</sup> Li is also alleged to have lied to company auditors about the expenses and to have signed false quarterly and annual certifications relating to Herbalife’s SEC filings between 2008 and 2017.<sup>18</sup> Li and Yang were indicted for conspiracy to violate the FCPA (both the anti-bribery and internal controls provisions).<sup>19</sup> The SEC Complaint also alleges that Li (but not Yang) violated the anti-bribery, internal controls, and accounting provisions.<sup>20</sup>

Additionally, in 2010, Li allegedly instructed Yang and others not to use company email,<sup>21</sup> used his personal Gmail account for company business,<sup>22</sup> and lied about the same, under oath, to SEC investigators, for which he was charged with perjury.<sup>23</sup> He is further alleged to have used wiping software on his computer prior to being interviewed by the SEC, for which he was indicted for destruction of records relevant to federal investigations.<sup>24</sup>

**When are Foreign Employees of a Foreign Subsidiary Employees or Agents of a U.S. Parent?**

Li and Yang were Chinese nationals and employees of a Chinese company - Herbalife’s wholly-owned Chinese subsidiary - not Herbalife itself. Under the Second Circuit’s decision in *Hoskins*, they cannot be charged with violations of the anti-bribery provisions unless they are employees of a U.S. issuer or domestic concern or agents of the same.<sup>25</sup> It is not alleged that either took any act “while in the territory of the United States.” The DOJ’s pleading provides a response to this conundrum.

The DOJ alleges that because Herbalife (the issuer) is a holding company that did business through subsidiaries, each subsidiary “acted as a division of [Herbalife] rather than a separate independent entity” and that, despite having contracts with the subsidiaries, employees of the subsidiaries “were treated as employees of [Herbalife] and were agents of [Herbalife].”<sup>26</sup> This allegation ignores the legal

Continued on page 5

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17. Li Indictment at ¶ 24; Li Complaint at ¶¶ 23-24.  
18. Li Indictment at ¶¶ 14, 26; Li Complaint at ¶¶ 30-36.  
19. Li Indictment at ¶¶ 30-31.  
20. Li Complaint at ¶¶ 37-48.  
21. Li Indictment at ¶ 19.  
22. *Id.* at ¶ 37.  
23. *Id.* at ¶¶ 33-42.  
24. *Id.* at ¶ 49.  
25. *United States v. Hoskins*, 902 F.3d 69 (2d. Cir. 2018).  
26. Li Indictment at ¶ 2.

**Individual Accountability and  
Extraterritorial Jurisdiction:  
DOJ and SEC Charge  
Employees of Chinese  
Subsidiary of U.S. Issuer**

Continued from page 4

fiction of corporate personhood and, if unsupported, would be an affront to basic precepts of corporations law. However, unlike in many earlier cases, the allegation is bolstered by further allegations that justify treating Li and Yang as employees and agents of the issuer. Specifically, it is alleged that they: (i) travelled to Herbalife’s headquarters to meet with senior executives; (ii) had their performance reviewed by Herbalife senior executives; (iii) received promotions or awards determined by Herbalife senior executives; (iv) regularly reported to senior executives; and (v) received stock and cash incentives tied to the value of Herbalife’s stock.<sup>27</sup>

While these five factors are more specific than the boilerplate assertion about corporate form, the definitions of “employee” and “agent” used by the DOJ in the Li indictment remain extremely broad. It is likely that most management-level foreign employees of foreign subsidiaries of U.S. companies meet at least several of these criteria, putting them at risk of criminal indictment for wholly foreign behavior.

**When is There a U.S. Nexus “in Furtherance of” an Improper Payment or Offer?**

In addition to establishing that an individual defendant falls into one of the categories covered by the FCPA, or is an employee or an agent of the same, the DOJ must prove that “the mails or any means or instrumentality of interstate commerce” were used “in furtherance of an offer, payment, promise to pay, or authorization of the payment of . . . anything of value.”<sup>28</sup> This criterion is often called the U.S. nexus requirement. Although there significant guidance as to the meaning of “means and instrumentalities of interstate commerce,” there is less case law relating to the “in furtherance of” requirement. The lack of specific allegations in the Li Indictment raises questions about how proximate to the “offer, promise, or payment” the U.S. nexus needs to be.

In *SEC v. Straub*,<sup>29</sup> a federal district judge in the Southern District of New York found that emails passing through a U.S. server were sufficient to meet the “means or instrumentality of interstate commerce” requirement, even if both sender and recipient were located abroad.<sup>30</sup> However, the *Straub* court did not explore the “in furtherance of” requirement, as it noted that relevant documents sent by email

Continued on page 6

27. *Id.* at ¶¶ 6-7; a somewhat abbreviated version of the same argument is described in the FCPA Resource Guide with regard to civil charges against United Industrial Corp. and the CEO of its subsidiary ACL. See A Resource Guide to the U.S. Foreign Corrupt Practices Act at 28-29 (Nov. 14, 2012), although all relevant entities in that case were domestic concerns and, with regard to the CEO (also a U.S. citizen/resident), the SEC pleaded both direct and aiding-and-abetting liability.

28. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

29. *SEC v. Straub*, 921 F.Supp.2d 244 (S.D.N.Y. 2013); see generally Bruce E. Yannett, Andrew M. Levine, Scott Auby, and Steven S. Michaels, “*Straub/Steffen* District Court Personal Jurisdiction and U.S.-Nexus Rulings: Good News and Bad News for Foreign Individual FCPA Defendants,” FCPA Update, Vol. 4, No. 7 (Feb. 2013), [www.debevoise.com/insights/publications/2013/02/fcpa-update](http://www.debevoise.com/insights/publications/2013/02/fcpa-update).

30. *Straub*, 921 F.Supp.2d at 262-64.

Individual Accountability and  
Extraterritorial Jurisdiction:  
DOJ and SEC Charge  
Employees of Chinese  
Subsidiary of U.S. Issuer

Continued from page 5

in that case “were essentially [the] offers to pay or promises to pay the alleged bribes.”<sup>31</sup> *United States v. Kay*<sup>32</sup> also dealt with the “in furtherance of” requirement, finding that sending documents that had been used to calculate the bribes through interstate commerce was sufficient to satisfy the requirement. In doing so, the court rejected defendants’ argument that the false documents were products of the bribes on factual grounds, without addressing whether sending products of the bribes would satisfy the interstate commerce requirement.<sup>33</sup>

The Li Indictment is unclear as to how the means and instrumentalities of interstate commerce were used “in furtherance of” what appear to be wholly Chinese bribes. In one part of the Li Indictment, it is alleged that Li, Yang, and others obtained “reimbursement from [Herbalife] relating to the illicit bribes,”<sup>34</sup> which presumably would have involved a transfer of funds from the United States. Two paragraphs later, however, the Li Indictment states that the co-conspirators “obtained reimbursement from China Subsidiary,” which presumably would not involve a transfer through U.S. banks. In the SEC’s complaint, unlike in the Li Indictment, the SEC makes the general allegation that Li “communicated telephonically and via email with officers and employees of [Herbalife] in the United States regarding obtaining approvals for entertaining of [sic] Chinese media and Government officials that the defendant used to bribe the officials.”<sup>35</sup> However, the SEC does not provide any examples of such communications. The DOJ could file a superseding indictment making similar allegations, but even then, given the vagueness of the SEC’s general allegation, the Li case could become a vehicle to explore the meaning of “in furtherance of,” should it proceed to trial and appeal.

According to the Li Indictment, prior to 2010, Li and Yang used company email accounts to communicate about the alleged bribes. Thereafter Li used his personal Gmail account. Assuming the servers were located in the United States, either of these would meet the “means and instrumentalities of interstate commerce” prong of the statute under *Straub*. However, it is not clear how many pre-2010 emails relate to allegedly illicit payments (it appears that at least some of the statements cited in the Li Indictment came from audio recordings).<sup>36</sup> With regard to the Gmail account, the Li Indictment refers to Li having sent an article about FCPA

Continued on page 7

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31. *Id.* at 264 n.14.

32. 513 F.3d 432 (5th Cir. 2007).

33. *Id.* at 453.

34. Li Indictment at ¶ 12.

35. Li Complaint at ¶ 10.

36. Li Indictment at ¶ 42.

Individual Accountability and  
Extraterritorial Jurisdiction:  
DOJ and SEC Charge  
Employees of Chinese  
Subsidiary of U.S. Issuer  
Continued from page 6

investigations and communicating with Herbalife's competitors, again, without any specific connection to the allegedly illicit payments.<sup>37</sup>

Finally, in the "Statutory Allegations" portion of the conspiracy section of the Li Indictment, the DOJ alleges that: (i) Li signed false sub-certifications that were transmitted to the United States as part of Herbalife's Exchange Act filings; and (ii) lied to the SEC in testimony in New York. It is unclear if either of these allegations is offered to meet the "in furtherance of" prong of the FCPA. While the *Straub* court found that signing false sub-certifications was sufficient to convey *personal jurisdiction* over a defendant,<sup>38</sup> it did not find the signing and transmittal of sub-certifications was relevant to the either "means and instrumentalities of interstate commerce" or "in furtherance of" requirements of the statute. Both the sub-certifications and the lying to the SEC were attempts to cover up bribery that might be the subject of other charges (Li was charged with perjury). The inclusion of these allegations raises the question whether the DOJ, by charging a "scheme" in association with the conspiracy charge, is arguing that interstate commerce communications relating to a cover-up could be "in furtherance of" a scheme, rather than "in furtherance of" an offer, promise, or payment, as the statutory language provides.

**“While colorfully described in the Li Indictment and Li Complaint, this case involves bribes paid in a foreign country, by foreign nationals, to foreign nationals, in local currency, with no clear nexus to the United States.”**

#### **What is “Anything of Value” Offered “to” a Foreign Official?**

In order to prove a violation of the anti-bribery provisions of the FCPA, the government must show that “anything of value” was offered, promised or provided to “a foreign official” or “any person, while knowing that all or a portion of such ... thing of value will be offered ... to any foreign official.”<sup>39</sup> In connection with the “sons-and-daughters” cases involving the hiring of the children of government officials, the DOJ and SEC have asserted that providing internships and employment to children of foreign officials constitutes “anything of value,” even where all of

Continued on page 8

37. Li Indictment at ¶¶ 37-39.

38. *Straub*, 921 F.Supp.2d at 255-58.

39. 15 U.S.C. § 78dd-1(a)(1), (a)(3).

**Individual Accountability and Extraterritorial Jurisdiction: DOJ and SEC Charge Employees of Chinese Subsidiary of U.S. Issuer**

Continued from page 7

the monetary benefit of the employment goes to the child (as remuneration for labor) and not “to any foreign official.”<sup>40</sup> The Li Indictment takes this reading of the statute even further. Although the Li Indictment includes numerous more conventional allegations of violation of the anti-bribery provisions, Li is also alleged to have approved providing a false review of an internship that never happened to a Chinese University on behalf of the son of a foreign official.

**What is the Future for Li, Yang, and Herbalife?**

There may never be a trial for Li and Yang. It is unclear if they are present in the United States or will come within its jurisdiction in the future. Even if they do, most of the DOJ’s indictments of individuals in the FCPA context are resolved with guilty pleas. Moreover, their presence at a trial, along with that of any other China-based witnesses needed at trial, would raise issues under China’s new International Criminal Judicial Assistance Law, which provides that “no institution, organization, or individual within the People’s Republic of China may provide evidentiary materials and assistance prescribed by the Law to foreign countries” other than by the state-to-state procedures specified in the Law.<sup>41</sup>

Another question is whether there will be any enforcement action against Herbalife. At least with regard to the DOJ, there is the possibility that the company could avoid enforcement action. Echoing the description of Morgan Stanley in the Garth Peterson case (which did not result in enforcement action against Peterson’s employer Morgan Stanley),<sup>42</sup> the Li Indictment makes it clear that Herbalife had a well-documented compliance program. The Li Indictment is replete with detailed allegations of how Li and Yang allegedly knowingly and wilfully circumvented Herbalife’s internal controls and repeatedly lied to auditors. Like the Peterson case, the Li Indictment specifically alleges that “each participated in more than ten in-person and online trainings related to [Herbalife’s] anti-fraud and anti-corruption policies ... Li and Yang both certified repeatedly that they understood and would adhere to [Herbalife’s] Code of Business Conduct and Ethics.”<sup>43</sup> Finally, as with the

Continued on page 9

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40. See, e.g., Sean Hecker, Bruce E. Yannett, Philip Rohlik, and David Sarratt, “The SEC Announces First FCPA Enforcement Action Based on Allegedly Improper Hiring of Relatives of Foreign Officials,” FCPA Update, Vol. 7, No. 1 (Aug. 2015), [www.debevoise.com/insights/publications/2015/08/fcpa-update-august-2015](http://www.debevoise.com/insights/publications/2015/08/fcpa-update-august-2015).
  41. 中华人民共和国国际刑事司法协助法 (Law of the People’s Republic of China on International Criminal Judicial Assistance), Order No. 13 of the President of the People’s Republic of China (Oct. 26, 2018), unofficial translation available at [en.pkulaw.cn/display.aspx?cgid=b1575aa60196e4bdfb&lib=law](http://en.pkulaw.cn/display.aspx?cgid=b1575aa60196e4bdfb&lib=law).
  42. U.S. Dep’t of Justice, “Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA,” Press Rel. 12-534 (Apr. 25, 2012) (“Between 2002 and 2008, Morgan Stanley trained various groups of Asia-based personnel on anti-corruption policies 54 times. During the same period, Morgan Stanley trained Peterson on the FCPA seven times and reminded him to comply with the FCPA at least 35 times.”), [www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required](http://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required).
  43. Li Indictment at ¶ 28.



Individual Accountability and  
Extraterritorial Jurisdiction:  
DOJ and SEC Charge  
Employees of Chinese  
Subsidiary of U.S. Issuer  
*Continued from page 8*

Peterson case, there is at least a hint of self-dealing in the Li Indictment, in that Li and Yang ordered food gifts from a vendor in their home town. Although there could still be DOJ enforcement action against Herbalife, the DOJ's inclusion of these allegations in the Li Indictment suggests that a decision not to pursue Herbalife would be consistent with past DOJ practice.

### **Conclusion**

While colorfully described in the Li Indictment and Li Complaint, this case involves bribes paid in a foreign country, by foreign nationals, to foreign nationals, in local currency, with no clear nexus to the United States. Moreover, unlike the more elaborate schemes in the *Straub* and Siemens executives cases, the alleged bribery in the Li Indictment and Li Complaint is not grand corruption but banal examples of frequent small bribes (unfortunately) still common in much of the world. Such allegations could arguably support violations of the books and records and perhaps internal controls provisions of the FCPA (civil or criminal). Should the anti-bribery charges ever proceed to trial, they could serve as a good vehicle for judicial exploration of the DOJ's post-*Hoskins* reliance on agency and employee theories of jurisdiction, as well as the meaning of "in furtherance of" under the FCPA. Regardless of whether those questions are answered, however, the Li Indictment reflects an aggressive assertion of criminal prosecution towards wholly foreign bribery by employees of foreign subsidiaries of U.S. companies. As such, the indictment can serve as an instructive example for such foreign employees, whether in compliance training or otherwise.

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*Continued on page 10*

## 1MDB Continued: DOJ Secures Largest Ever Civil Forfeiture While Criminal Actions Remain Pending

On October 30, 2019, DOJ announced the settlement of civil forfeiture cases that sought more than \$700 million in assets acquired by Malaysian financier Low Taek Jho (“Jho Low”) and his family.<sup>1</sup> DOJ alleged that these assets had been misappropriated from 1Malaysia Development Berhad (“1MDB”), Malaysia’s state-owned and controlled investment fund. Approved on November 4, the settlement brings the total assets recovered by or with the help of U.S. authorities in forfeiture actions related to the alleged bribery and money laundering schemes involving 1MDB to more than \$1 billion – the largest civil forfeiture ever secured by DOJ.<sup>2</sup>

This forfeiture settlement, though, does not resolve criminal actions charging Low or his alleged coconspirators with FCPA and money laundering violations. Those charges involve alleged schemes to make improper payments to high-ranking government officials in Malaysia and the UAE in order to secure investment banking business from 1MDB and to launder more than \$4.5 billion improperly taken from the investment fund. While the agreement settles the government’s civil, criminal, and administrative asset forfeiture proceedings, it does not constitute an admission of guilt or wrongdoing as to the underlying schemes alleged.<sup>3</sup>

### U.S. Actions Brought in Connection with the Alleged Bribery and Money Laundering Schemes

1MDB was formed in 2009 by the Malaysian government to promote investment and economic development projects in Malaysia. The fund raised money to finance its projects primarily through bond issuances, including approximately \$6.5 billion in three separate bond transactions in 2012 and 2013 that were underwritten by Goldman Sachs and designed in part to raise capital to purchase power generation

Continued on page 11

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1. U.S. Dep’t of Justice, “United States Reaches Settlement to Recover More Than \$700 Million in Assets Allegedly Traceable to Corruption Involving Malaysian Sovereign Wealth Fund,” Press Release No 19-1,176 (Oct. 30, 2019), [www.justice.gov/opa/pr/united-states-reaches-settlement-recover-more-700-million-assets-allegedly-traceable](http://www.justice.gov/opa/pr/united-states-reaches-settlement-recover-more-700-million-assets-allegedly-traceable) [hereinafter “Nov. 2019 DOJ Press Release”]; *United States v. Any Rights to Profits, Royalties and Distribution Proceeds Owned by or Owed Relating to EMI Music Publishing Group*, Stipulation and Request to Enter Consent Judgment of Forfeiture, No. 16-cv-05364-DSF-PLA (C.D. Cal. Oct. 30, 2019), [www.justice.gov/opa/press-release/file/1214051/download](http://www.justice.gov/opa/press-release/file/1214051/download) [hereinafter “Stipulation”].
  2. *United States v. Any Rights to Profits, Royalties and Distribution Proceeds Owned by or Owed Relating to EMI Music Publishing Group*, Consent Judgment of Forfeiture, No. 16-cv-05364-DSF-PLA (C.D. Cal. Nov. 4, 2019) [hereinafter “Consent Judgment of Forfeiture”]; Nov. 2019 DOJ Press Release.
  3. Consent Judgment of Forfeiture ¶ 8.

**1MDB Continued: DOJ  
Secures Largest Ever Civil  
Forfeiture While Criminal  
Actions Remain Pending**

Continued from page 10

companies and joint venture shares.<sup>4</sup> Low, a Malaysian national who advised on the creation of 1MDB's predecessor entity (a Malaysian state sovereign wealth fund) held no formal position with 1MDB. But he allegedly maintained close relationships with high-ranking government officials in Malaysia and Abu Dhabi and worked as an intermediary between 1MDB and the foreign government officials on numerous financial transactions.<sup>5</sup>

According to DOJ's charging papers, between 2009 and 2014, Low conspired with others, including Goldman's former Southeast Asia Chairman Tim Leissner and managing director at certain Goldman subsidiaries Ng Chong Hwa ("Roger Ng"), to promise and pay hundreds of millions of dollars in bribes and kickbacks to government officials in Malaysia and Abu Dhabi (or their families). In return, according to DOJ, the coconspirators expected lucrative business for Goldman Sachs – including the 2012 and 2013 bond transactions – and planned to launder more than \$2.7 billion dollars embezzled from 1MDB, including funds raised through the three bond transactions Goldman underwrote.<sup>6</sup>

The misappropriated funds were allegedly distributed in part as bribes and kickbacks to shell companies controlled by the government officials who helped secure the 1MDB business, and for the personal benefit of the coconspirators and their families.<sup>7</sup> The funds were then allegedly laundered through the U.S. financial system by purchasing, among other things, luxury real estate, expensive artwork, and ironically by helping fund Hollywood's *The Wolf of Wall Street*, the latter via proceeds from the bond deals that were transferred to a U.S. motion picture company owned by the stepson of the former Malaysian prime minister.<sup>8</sup>

Between 2009 and 2011, Leissner and Ng allegedly supported making Low a formal client, believing that he would help deliver lucrative roles in 1MDB transactions, but Goldman's compliance function and legal department rejected the relationship in part grounded on concerns surrounding the sources of Low's wealth.<sup>9</sup>

Continued on page 12

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4. *United States v. Leissner*, Information ¶¶ 25, 36, 41, No. 18-cr-00439-MKB (E.D.N.Y. Aug. 28, 2018), [www.justice.gov/opa/press-release/file/1106936/download](http://www.justice.gov/opa/press-release/file/1106936/download) [hereinafter "Leissner Information"]; see also Kadhim Shubber, *US DoJ Reaches Settlement with Jho Low in 1MDB Forfeiture Case*, FINANCIAL TIMES (Oct. 30, 2019), [www.ft.com/content/d0e1ed4e-fb3e-11e9-a354-36acbb0d9b6](http://www.ft.com/content/d0e1ed4e-fb3e-11e9-a354-36acbb0d9b6).
  5. *United States v. Low*, Indictment ¶ 1, No. 18-cr-00538-MKB (E.D.N.Y. Oct. 3, 2018), <https://www.justice.gov/opa/press-release/file/1106931/download> [hereinafter "Low and Ng Indictment"].
  6. Low and Ng Indictment ¶¶ 2, 17-18.
  7. *Id.* ¶ 18.
  8. *Id.* ¶¶ 15, 41; Yantoultra Ngui & Bradley Hope, "Wolf of Wall Street" Producer Is Charged With Money Laundering in 1MDB Scandal, WALL STREET JOURNAL (July 5, 2019), [www.wsj.com/articles/the-wolf-of-wall-street-leads-to-1mdb-arrest-of-ousted-malaysian-leaders-stepson-11562242252](http://www.wsj.com/articles/the-wolf-of-wall-street-leads-to-1mdb-arrest-of-ousted-malaysian-leaders-stepson-11562242252).
  9. Leissner Information ¶ 23; Low and Ng Indictment ¶ 23.

**1MDB Continued: DOJ Secures Largest Ever Civil Forfeiture While Criminal Actions Remain Pending**  
Continued from page 11

The status of the criminal proceedings in the United States, brought in two separate but related actions, is as follows:

- In June and August 2018, DOJ charged Leissner with conspiracy to commit money laundering and to violate the FCPA's anti-bribery and internal controls provisions in connection with promising and paying bribes to foreign officials to secure business. DOJ also charged him with circumventing Goldman's FCPA and internal accounting controls overseen by the bank's compliance function and legal department.<sup>10</sup> Leissner pleaded guilty in August 2018 and was ordered to forfeit \$43.7 million.<sup>11</sup> He is scheduled to be sentenced in December 2019.

**“The 1MDB matter has spurred investigations in at least 10 countries, including Malaysia, Singapore, Switzerland, and the United States, and resulted in political upheaval in Malaysia, where former prime minister and 1MDB founder Najib Razak faces multiple trials.”**

- In October 2018, Low and Ng were charged with conspiracy to commit money laundering and to violate the FCPA's anti-bribery provisions.<sup>12</sup> Like Leissner, Ng was also charged with violating the FCPA's internal controls provisions in connection with circumventing Goldman's FCPA and internal accounting controls in order to promise and pay bribes to foreign officials to secure business.<sup>13</sup> Ng, arrested in Malaysia in November 2018, pleaded not guilty and has a trial scheduled for May 2020. Despite the forfeiture settlement, Low remains at large.

Continued on page 13

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10. Leissner Information ¶¶ 46-50. DOJ filed a complaint against Leissner in June 2018 before filing a two-count information alleging the same violations in October.

11. U.S. Dep't of Justice, "Malaysian Financier Low Taek Jho, AKA 'Jho Low,' and Former Banker Ng Chong Hwa, AKA 'Roger Ng,' Indicted for Conspiring to Launder Billions of Dollars in Illegal Proceeds and to Pay Hundreds of Millions of Dollars in Bribes," Press Release 18-1429 (Nov. 1, 2018), [www.justice.gov/usao-edny/pr/malaysian-financier-low-taek-jho-aka-jho-low-and-former-banker-ng-chong-hwa-aka-roger](http://www.justice.gov/usao-edny/pr/malaysian-financier-low-taek-jho-aka-jho-low-and-former-banker-ng-chong-hwa-aka-roger) [hereinafter "Nov. 2018 DOJ Press Release"].

12. Low and Ng Indictment ¶¶ 58-60, 64-65.

13. *Id.* ¶¶ 61-63.

**1MDB Continued: DOJ  
Secures Largest Ever Civil  
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Continued from page 12

### Cross-Border Implications

The 1MDB matter has spurred investigations in at least 10 countries, including Malaysia, Singapore, Switzerland, and the United States, and resulted in political upheaval in Malaysia, where former prime minister and 1MDB founder Najib Razak faces multiple trials.<sup>14</sup> Malaysia's government now faces approximately \$10.5 billion in debt repayments that it reportedly is struggling to honor, citing the improper siphoning of more than \$4.5 billion from 1MDB.<sup>15</sup>

In Malaysia, Goldman is challenging charges brought against three of the bank's subsidiaries in the United Kingdom, Hong Kong, and Singapore, and the government has called publicly for a multibillion dollar settlement.<sup>16</sup> Goldman has denied any knowledge of wrongdoing connected to 1MDB by senior management, arguing that 1MDB executives lied about the use of proceeds and the involvement of intermediaries and that any misconduct was of rogue bankers who hid their activities from the compliance and legal functions.<sup>17</sup>

DOJ has described the 1MDB matter as "a model for international cooperation in significant cross-border money laundering investigations," noting the assistance of more than 18 law enforcement agencies and offices in several jurisdictions through which the misappropriated funds were laundered, including Luxembourg, Malaysia, Singapore, and Switzerland.<sup>18</sup>

With an already historic forfeiture secured and numerous ongoing investigations and trials outstanding, we'll continue to monitor and comment on future developments.

**David A. O'Neil**

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14. Shamim Adam, Yudith Ho & Cedric Sam, *How the 1MDB Scandal Led to Goldman's First Criminal Charges*, BLOOMBERG (Dec. 21, 2018), [www.bloomberg.com/graphics/2018-malaysia-1mdb](http://www.bloomberg.com/graphics/2018-malaysia-1mdb).
  15. Stefania Palma & Siddarth Shrikanth, *Malaysia Charges Goldman Sachs Executives Over 1MDB Scandal*, FINANCIAL TIMES (Aug. 9, 2019), [www.ft.com/content/e0dad026-ba6b-11e9-8a88-aa6628ac896c](http://www.ft.com/content/e0dad026-ba6b-11e9-8a88-aa6628ac896c).
  16. Hugo Miller et al., *Malaysia Privately Discusses Goldman Penalty of Just \$2 Billion Over 1MDB*, BLOOMBERG (Oct. 23, 2019), [www.bloomberg.com/news/articles/2019-10-23/malaysia-privately-discusses-goldman-penalty-of-just-2-billion](http://www.bloomberg.com/news/articles/2019-10-23/malaysia-privately-discusses-goldman-penalty-of-just-2-billion).
  17. Ben Walsh, *Malaysia Charges Goldman Sachs Bankers Over Malaysian Fund Scandal*, BARRON'S (Aug. 9, 2019), [www.barrons.com/articles/malaysia-charges-goldman-sachs-bankers-1mdb-51565363654](http://www.barrons.com/articles/malaysia-charges-goldman-sachs-bankers-1mdb-51565363654). According to an email from a Goldman spokeswoman: "We believe the charges announced today, along with those against three Goldman Sachs entities announced in December last year, are misdirected and will be vigorously defended. . . . Certain members of the former Malaysian government and 1MDB lied to Goldman Sachs, outside counsel and others about the use of proceeds from these transactions." *Id.*
  18. Nov. 2019 DOJ Press Release.

# FCPA Update

FCPA Update is a publication of  
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