

Additional Information

- **Dorsey's *Anti-Corruption Digest*, July, 2018**
Available at: <https://sites-dorsey.vuture.net/99/1013/uploads/july-2018-anti-corruption-digest-final.pdf>
- **Dorsey eUpdate: *Foreign-Owned U.S. Subsidiaries Face Imminent Reporting Deadline For Federal Survey***
Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2018/05/foreign-owned-us-subsidiaries-federal-survey>
- ***Section 232: Importers Have Limited Opportunities to Challenge Tariffs and Quotas*, Global Trade Magazine, By T. Augustine Lo (February 20, 2018) (reprinted with permission)**
Available at: <http://www.globaltrademag.com/global-trade-daily/section-232-importers-limited-opportunities-challenge-tariffs-quotas>
- **Dorsey Blog: *Third Circuit: False Claims Act Liability Premised on an Anti-Kickback Statute Violation Requires Proof that at Least One Federal Claim Resulted from an Improper Referral or Recommendation*, By Ben Kappelman (February 7, 2018)**
Available at: <https://dorseyfca.com/third-circuit-false-claims-act-liability-premised-on-an-anti-kickback-statute-violation-requires-proof-that-at-least-one-federal-claim-resulted-from-an-improper-referral-or-recommendation>



ANTI-CORRUPTION DIGEST

July 2018

Keeping ahead of global anti-corruption trends is critical in today's business markets. The Dorsey Anti-Corruption Digest, which puts global trends at your fingertips, puts you ahead. The deep experience of the Dorsey Anti-Corruption team, drawn from the DOJ, the SEC and years in private practice, will keep you ahead.

NORTH AMERICA

THE UNITED STATES

SocGen Pays Over \$1 Billion to U.S., French to Resolve FCPA, LIBOR-Rigging Charges

Société Générale agreed to pay \$860 million to the Department of Justice (DOJ) and France's Parquet National Financier (PNF) to resolve FCPA and LIBOR rigging charges. The Paris-based bank will also pay the Commodity Futures Trading Commission \$475 million in regulatory penalties and disgorgement related to the LIBOR-rigging.

The firm also entered into a deferred prosecution agreement with the DOJ regarding to the FCPA charges. In connection with the agreement, the bank's wholly-owned subsidiary, SGA Société Générale Acceptance, N.V. (SGA), also pled guilty to a one-count criminal information charging it with conspiracy to violate the FCPA, 15 U.S.C. §§

PREPARED BY:

Tom Gorman
Partner

Kim Frumkin
Associate

Joseph Lewin
Associate

Michelle Ng
Associate

Chad Richards
Associate

78dd-2, 78dd-3. *U.S. v. SGA Société Générale Acceptance, N.V.*, No. 18-cr-274 (E.D.N.Y.) (filed June 5, 2018); *U.S. v. Société Générale S.A.*, No. 18-cr-253 (E.D.N.Y.) (filed June 5, 2018).

The charges stem in part from bribes paid to Libyan officials. A number of financial institutions, including Société Générale, were very interested in securing financial investments by Libyan State Authorities between 2005 and 2011 after broad economic sanctions were lifted against the country, according to the charging papers. Between 2005 and 2009, Société Générale paid a Libyan Intermediary \$90.74 million for supposed “introductory” services, portions of which were passed on to high-level Libyan officials. As a result of the bribes paid to the officials, Société Générale obtained investments from the Libyan state institutions worth approximately \$3.66 billion. The bank earned profits of approximately \$523 million.

Société Générale did not receive credit for voluntarily and timely disclosing the conduct at issue, but did receive substantial credit for cooperating with the DOJ. It did not receive the full cooperation credit because of issues that resulted in a delay during the early stages of the investigation, which caused the DOJ to have to undertake its own investigation. In deciding the penalty, the DOJ also took into account the remedial activities undertaken by the bank, such as terminating the employees involved and creating a new anti-bribery and corruption compliance program. The nature and seriousness of the offense, which included the lengthy timespan of the illegal conduct, the high dollar value of the bribes and resulting gains, the high-risk jurisdiction, and the participation by high-level employees, as well as their awareness of the misconduct, was also considered. The fine paid represents a 20% discount off of the bottom of the U.S. sentencing guidelines fine range. Société Générale will not be required to hire an independent monitor, but will be monitored via its resolution with the PNF.

Legg Mason Resolves FCPA Investigation

Legg Mason, Inc. entered into a non-prosecution agreement, agreeing to pay \$64.2 million in penalties and disgorgement to the DOJ to conclude its corruption investigation into the company’s participation, through its former subsidiary Permal Group Ltd., in a Libyan bribery scheme with Société Générale.

Permal Group Ltd., a former Legg Mason subsidiary, entered into an agreement with Société Générale to pay bribes to Libyan officials via a Libyan Intermediary, according to the charging papers. As a result of the bribes paid between 2005 and 2008, Société Générale sold the Libyan state agencies seven structured notes worth approximately \$950 million that were linked to funds managed in whole or in part by Permal. Société Générale paid the Libyan intermediary approximately \$26.25 million relating to these notes, and Permal earned net revenues of approximately \$31.5 million.

Legg Mason did not receive credit for voluntarily and timely disclosing the conduct. The firm did receive full cooperation credit for its efforts following the discovery of the conduct and its remediation. The DOJ also took mitigating factors into account, including that the employees involved were mid-to-lower level employees of a subsidiary, have not been employed by the subsidiary for over four years, that Société Générale, and not Permal, initiated, led, and maintained the scheme, and that the profits earned by the company were less than one tenth of those earned by Société Générale. Legg Mason also had no history of misconduct. Based on these and other considerations, the DOJ decided to give Legg Mason a 25% discount off of the bottom of the otherwise applicable U.S. sentencing guidelines fine range. Legg Mason will not be required to hire an independent monitor.

Aruban Official Sentenced to Three Years for Money-Laundering Conspiracy

The Aruban official who received bribes for his assistance in helping U.S. telecom companies win bids from Aruba's state-owned telecommunications provider, Servicio di Telecomunicacion di Aruba N.V. (Setar), was sentenced to three years in prison and ordered to pay \$1.3 million in restitution. The official, Egbert Yvan Ferdinand Koolman, pleaded guilty to money-laundering conspiracy and admitted to obtaining about \$1.3 million in bribes over about ten years. In return for the bribe money, Mr. Koolman provided favored vendors with confidential bid information. The case is *U.S. v. Koolman*, No. 18-cr-20276, (S.D. Fla.) (filed April 9, 2018).

Lawrence W. Parker Jr., a telecom executive, previously pleaded guilty to one count of conspiracy to violate the FCPA in December 2017 in connection with the case. He was sentenced in April 2018 to 35 months in prison and to pay about \$700,000 in restitution. Mr. Parker controlled five telecom companies in Florida that won over \$24 million in orders from Setar.

KPMG Says 2010-2012 Audits of 1MDB Cannot Be Relied On

KPMG told 1Malaysia Development Berhad (1MDB) that it is retracting its audit reports for the years 2010-2012 because the audits do not represent a "true and fair" assessment of the troubled fund. According to 1MDB, the auditor came to this decision after examining the recently declassified auditor general's report on 1MDB and other relevant documents that the fund had withheld from KPMG. KPMG further told the fund that, had KPMG been given access to these documents, they would have materially impacted the financial statements. 1MDB is being investigated for money laundering in six countries, including the U.S.

CANADA

AG of BC: BC Failed to Prevent Money Laundering in Casinos

Attorney-General David Eby said in June that British Columbia has failed to prevent massive money laundering from taking place in the region's casinos, despite taking steps to implement recent reforms. Mr. Eby released the findings of an independent report initiated last September. He hopes it will hinder the ability of organized crime to launder money. The investigation began after a report found that a major casino in British Columbia had accepted \$13.5 million in \$20 bills within one month.

Mr. Eby pointed to the arrest of an international casino money-laundering suspect Dan Bai Shun Jin last month as evidence of progress. Mr. Jin is suspected of laundering \$855 million through Australian casinos. There is also a warrant for his arrest in the United States tied to an alleged fraud involving over \$1.4 million in the state of Nevada.

British Columbia has also introduced new disclosure rules for gamblers requiring the disclosure of the source of their funds, Mr. Eby said.

Former Construction Tycoon Found Guilty in Corruption Trial

Construction magnate Tony Accurson was found guilty of fraud and corruption, among other charges, following a jury trial. The charges are based on a fraudulent scheme involving a municipal construction contract in Laval. The kickback scheme involved former Laval mayor Gilles Vaillancourt and more than two dozen others. Mr. Vaillancourt previously pleaded guilty to demanding kickbacks from construction companies for awarding municipal contracts and was sentenced to six years in jail.

Prosecutors alleged that between 1996 and 2010 Mr. Accurso participated in the kickback scheme which was designed to eliminate competition for municipal contracts in Laval. Mr. Accurso has consistently denied any involvement in the scheme, claiming that he had heard rumors about it but was not involved in the day-to-day operation of his construction companies. Mr. Accurso's conviction is subject to appeal.

EUROPE

UNITED KINGDOM

India's Canara Bank Fined in U.K. for AML Failures

The U.K.'s Financial Conduct Authority (FCA) fined the U.K. division of Canara Bank, one of India's largest financial institutions, £896,000 (US\$1.2 million). The regulator has also prohibited the bank from accepting new deposits for about five months. The FCA concluded that the bank had systematic AML anti-money laundering (AML) failures. The FCA has given the bank warnings about these failures since 2012.

The failures resulted from Canara's secondment of staff from its head office in India to senior management roles in the U.K., without giving them proper training so as to make them aware of local AML rules, according to the FCA. These issues have been resolved, according to the bank.

SFO Commences Criminal Proceedings Against Unaoil Group Companies

The U.K.'s Serious Fraud Office (SFO) commenced criminal proceedings against Unaoil Monaco SAM and Unaoil Ltd. Both the Unaoil entities have been accused of two offenses of conspiracy to give corrupt

payments, in relation to payments allegedly made to secure the award of contracts in Iraq.

Unaoil Ltd is alleged to have made payments in relation to contracts worth \$733 million, in order to secure its award to Leighton Contractors Singapore PTE Ltd. The contract calls for the construction of two oil pipelines in southern Iraq. Unaoil Monaco SAM is alleged to have made the payments to secure the award of contracts in Iraq to SBM Offshore, one of Unaoil's clients. The companies will appear at court on July 18, 2018.

The SFO's investigation into Unaoil began in March 2016. To date, four individuals have been charged with conspiracy to make corrupt payments to secure contracts in Iraq.

New Economic Crime Compensation Principles Published

Three crime fighting agencies in the U.K. have established a common framework to compensate overseas victims of economic crime (whether the victims are countries, companies or people) where appropriate. The Crown Prosecution Service (CPS), National Crime Agency (NCA) and Serious Fraud Office (SFO) have also committed to working collaboratively to identify potential victims and to return money in a transparent and suitable manner to minimize risk of re-corruption.

Elizabeth Baker, Head of Proceeds of Crime at the SFO, commented: "The CPS, NCA and SFO worked together to agree how we can best do this: transparently, consistently, and in a way which develops and shares best practice."

'Wolf of Wimbledon' Receives Additional Jail Term

Jeffrey Revell-Reade, also known as the "Wolf of Wimbledon," has received an extension of four years to his prison sentence. The extension is based on his failure to pay a

£7,535,802 (US\$9.9 million) confiscation order.

Mr. Revell-Reade, together with Anthony May, was involved in what is thought to be one of the largest boiler-room fraud schemes in the U.K. Messrs. Revell-Reade and May sold shares in U.S.-listed companies from Madrid. Many investors later discovered the shares were worthless, having either been placed in shell companies or companies that did not operate at all. Seven other individuals have also been convicted and sentenced in connection with the fraudulent scheme.

At the activation of the default sentence, District Judge Snow commented: "I have no doubt at all that given his record of offending, given his failure to meet the order, given the lies he has told previously and given the bogus high court claim, that the assets are available to Mr. Revell-Reade as found by the Crown Court and that the reason for his behavior is that he is willfully refusing to settle his order."

Mr. Revell-Reade is currently serving a nine and a half year sentence in prison.

SFO Names New Director

The SFO has named Lisa Osofsky as its new director. Ms. Osofsky is due to begin the role on September 3, 2018, for a renewable term of five years.

Ms. Osofsky is a dual U.S. and U.K. national and is a former FBI lawyer. While working as a prosecutor of white collar crime, she prosecuted over 100 cases for the U.S. government.

Currently, the SFO Director position is held on an interim basis by Mark Thompson. Mr. Thompson will return to his permanent role as Chief Operating Officer once Ms. Osofsky takes over.

IRELAND

Irish Anti-Corruption Legislation to Create New Offences

Anti-corruption legislation in Ireland will be strengthened by the passing of the Criminal Justice (Corruption Offences) Bill 2017, Minister of Justice Charlie Flanagan has stated. The bill, which has been approved by the Seanad Éireann, the Upper House of the Legislature of Ireland, is said by Mr. Flanagan to represent a "complete modernisation" of Ireland's anti-corruption laws.

The bill repeals seven anti-corruption acts and creates new offenses. The new offenses include making payments to a third party with the knowledge that the payment will be used for a bribe and a corporate liability offence whereby a body corporate may also be guilty of an offence if anyone acting on its behalf is found guilty of a corruption offence. The bill also introduces a presumption that a donation is corrupt if it is not disclosed or returned in certain circumstances. The "very strong penalties," according to Mr. Flanagan, will include imprisonment for up to ten years, unlimited fines and forfeiture of any bribes. The bill is with the President for approval.

SPAIN

Spanish Prime Minister Forced From Office

Spanish Prime Minister Mariano Rajoy has been forced out of office by a vote of no-confidence following his party's implication in a corruption scandal. He is the first prime minister in modern Spanish history to have been ousted in such a way.

Mr. Rajoy was the leader of the conservative People's Party (PP). A week before Mr. Rajoy's ousting, former PP treasurer Luis Bárcenas was convicted of receiving bribes, money laundering and tax crimes, resulting in

a 33-year prison sentence. The crimes related to a secret campaign fund run by the PP from 1999 until 2005.

Socialist leader Pedro Sánchez filed the motion of no-confidence against Mr. Rajoy, claiming he had failed to take responsibility for the PP's part in the corruption scandal. Mr. Sánchez has now replaced Mr. Rajoy as Prime Minister.

Spanish King's Brother-in-law Imprisoned

The Spanish King's brother-in-law, Inaki Urdangarin, began serving his prison sentence on June 18, 2018. He has been granted a reduced prison sentence on appeal to the Spanish Supreme Court.

Mr. Urdangarin was originally sentenced to six years and three months in prison for overcharging regional governments in relation to public contracts relating to sports and tourist events and tax fraud. He was found to have used his royal connections to take advantage of regional governments. Mr. Urdangarin's sentence has now been reduced to five years and ten months.

FRANCE

Chief of Staff to French President Faces Corruption Inquiry

The French financial prosecutor's office announced that French President Emmanuel Macron's chief of staff, Alexis Kohler, is under investigation. Mr. Kohler is suspected of influence-peddling and conflict of interest.

French anti-corruption watchdog, Anticor, filed a criminal complaint against Mr. Kohler. Mr. Kohler may have breached civil service rules while handling issues relating to the Mediterranean Shipping Company (MSC), to which his family has links, according to the complaint. MSC secured several state contracts while Mr. Kohler worked in the

economy ministry as a senior official. Mr. Kohler was also finance director at MSC Further while working on Mr. Macron's presidential bid.

Mr. Kohler, who is said to be the only aide with real influence over President Macron, denies wrongdoing.

GERMANY

Deutsche Bank Investigates Hiring Practices

Deutsche Bank may be investigating whether its hiring practices breached anti-bribery rules, according to a lawsuit filed by former executive Mr. Al-Bassam.

The bank has yet to file a defense to Mr. Al-Bassam's lawsuit, which was filed in London.

ITALY

Shell and Eni Appeal Rejected

The Italian Supreme Court has rejected an appeal by Shell and four of its former managers, in relation to a corruption trial that also concerns Eni's chief executive, Claudio Descalzi.

The trial centers around alleged corruption in Nigeria. In 2011, Eni and Shell purchased Nigeria's OPL-245 offshore oilfield for \$1.3 billion. Nine current and former executives or contractors, including Mr. Descalzi, are alleged to have paid bribes to secure the licence to explore OPL-245. Each defendant has denied wrongdoing.

The purpose of the rejected appeal was to move the trial back to the preliminary hearing stage, based on alleged procedural errors.

CROATIA

Croatian Former Football Chief Sentenced to Prison on Corruption Charges

Zdravko Mamić, former chief of Croatia's Dinamo Zagreb football club, has been sentenced to six years and six months in prison for abuse of power and graft. The verdict is not final, but under Croatian law if a sentence is for over five years, the person must go to prison immediately.

Also found guilty were Mr. Mamić's brother and former Dinamo Zagreb coach Zoran Mamić, former club director Damir Vrbanović, and a tax inspector. Each was convicted of using fictitious deals relating to player transfers to embezzle cash. The corruption reportedly cost Dinamo over €15 million (US\$17.4 million) and the state €1.5 million (US\$1.74 million). The defendants were not present when the verdicts were returned.

UKRAINE

Independent Corruption Court Legislation Adopted

The Verkhovna Rada, Ukraine's parliament, adopted legislation to establish the High Anti-Corruption Court (HACC). The HACC will be an independent anti-corruption court located in Kyiv. The legislation follows repeated pressure from the International Monetary Fund (IMF).

Ukrainian President Petro Poroshenko signed the "On the High Anti-Corruption Court" bill into law. It came into force on June 14, 2018. There is hope that the establishment of HACC will result in the unfreezing of the \$17.5 billion aid program by the IMF. Indeed, IMF Managing Director Christine Lagarde praised the adoption of the HACC law, although she noted that amendments would be needed to ensure that the HACC will adjudicate all cases under its jurisdiction.

Ukrainian Prime Minister Volodymyr Hroisman recently threatened to resign if the anti-corruption court was not established in accord with the IMF's requests.

Corruption Park Opens in Ukraine

An EU Anti-Corruption Initiative has created a pop-up "Corruption Park" in Ukraine. It showcases the extent of corruption in the country and its cost to the government and citizens.

The park includes interactive exhibits, displays of the gains of corruption such as a \$46,000 crystal falcon and a \$300,000 limited edition car, and a tent in the shape of the gold loaf of bread found at ex-President Viktor Yanukovich's home after he fled Ukraine in 2014.

The park cost €140,000 (US\$162,000) and comes at a pivotal time for Ukraine, which has just passed legislation to adopt an independent anti-corruption court, as detailed further above.

ROMANIA

Corruption-related Protests in Romania

Several protests have recently occurred in Romania related to corruption. On one occasion, for example, protestors gathered in Bucharest to oppose official corruption, yelling "justice, not corruption!"

Another protest took place the day after Romania's parliament adopted amendments to the code of criminal procedure, with cries of "thieves" and "we will not give in." The amendments have been criticized as protecting offenders, and include a reduction in the number of charges for which a person can be remanded and drastic reductions to how long investigations can be conducted for.

The Romanian government has been accused of hijacking the justice system after it decided to dismiss Romania's chief anti-corruption prosecutor. Nevertheless, the day before the protest, more than 100,000 government supporters staged a protest in the same place based on their belief that anti-corruption prosecutors have too much power, as Romania's anti-corruption authority successfully prosecuted 713 officials in 2016.

Romanian Leader Sentenced for Corruption

The leader of Romania's leading Social Democratic party, Liviu Dragnea, has been convicted of abuse of power and sentenced to three and a half years. It is expected that Mr. Dragnea will appeal the ruling.

Prosecutors accused Mr. Dragnea of keeping two women, who were employed by his party and admitted to the same, on the payroll of a family welfare agency. The conviction was welcomed by crowds in Bucharest, but the Social Democratic Party maintains that Mr. Dragnea should be considered innocent pending the final verdict.

Mr. Dragnea was banned from becoming prime minister as he was previously convicted of vote-rigging, but is still widely regarded as the most powerful man in Romania.

Following the conviction of Liviu Dragnea, the leader of Romania's leading Social Democratic Party, Romanian President Klaus Iohannis announced that he will seek a new term in office in order to fight against corruption, recognizing that public confidence in the Romanian government is low. President Iohannis' mandate expires in 2019.

Former Romanian Chief Prosecutor Convicted of Graft

Romania's High Court for Cassation and Justice has convicted former chief prosecutor Alina Bica of abuse of office.

Ms. Bica was sentenced to four years in prison after it was found that she had intervened to help suspects in two cases. The wife of one suspect testified that Ms. Bica instructed prosecutors to ask for a suspended prison sentence for the suspect in exchange for a Rolex watch and \$2,000 purse. Ms. Bica was also accused of instructing a prosecutor to unfreeze assets belonging to an economy minister who was suspected of fraud.

Ms. Bica was not in attendance at her sentencing and is thought to be living in Costa Rica.

Arrests Made on Corruption Charges Tied To New Italian Stadium

Nine people have been arrested on corruption charges tied to the proposed Roma stadium, including the stadium's main constructor Luca Parnassi. Cash payments and false billing statements are alleged to have been used.

The Roma stadium was supposed to be ready for the 2016-2017 season. Construction has yet to begin, however, due to environmental concerns, bureaucracy and criticism over public funding.

LATVIA

Latvian Prosecutors Take Over Central Bank Governor Bribery Case

Latvia's anti-corruption body, the Corruption Prevention and Combating Bureau (KNAB), has requested that prosecution be commenced against two persons. Neither individual was identified, but state media reported that one of the individuals is Bank of Latvia governor Ilmars Rimsevics.

Mr. Rimsevics, a member of the European Central Bank Governing Council, is suspected of soliciting and accepting a bribe of at least

€100,000 (US\$116,000). On June 29, 2018, the prosecutor is obliged to decide whether to prosecute, ask for additional evidence or cease the case.

In the interim, Latvian authorities have forbidden Mr. Rimsevics from working as Bank of Latvia governor. He is also blocked from participating in European Central Bank meetings.

SWITZERLAND

POSCO Probed In Connection With Corruption Scandal

The Swiss Federal Tax Administration published a notice with a view to informing Korean multinational POSCO of a request for information on Swiss accounts that may be linked to POSCO Engineering and Construction, a subsidiary of POSCO.

POSCO can appeal against the Swiss Federal Tax Administration's final decision regarding whether to share information on the financial transactions.

MIDDLE EAST

ISRAEL

Prime Minister's Wife Charged with Fraud and Breach of Trust

Sara Netanyahu, wife of the Prime Minister, was charged with fraud and breach of trust. The charges are based on claims that she ordered meals worth over \$130,000 at the public's expense between 2010 and 2013. According to the justice ministry, Ms. Netanyahu falsely instructed staff to claim that there were no chefs available at the prime minister's residence, forcing her to order from Jerusalem establishments. Ms. Netanyahu denies any wrongdoing.

Hadera Mayor, Others Questioned

Hadera Mayor Zvi Gendelman and three others, two elected officials and one businessman, were questioned by police anti-fraud. Mr. Gendelman was arrested on suspicion of electoral bribery, fraud, forgery, among other offense. The three other individuals were arrested on suspicion of abusing their positions to advance other people's interests. Among other allegations being investigated, the police are looking into whether Mr. Gendelman promoted construction of a hospital in exchange for electoral support.

ASIA

SINGAPORE

Prosecutor Sought Prison Sentence for Senior U.S. Navy Employee for Bribery and Fraud Conspiracy

Sharon Rachael Gursharan Kaur, a former senior contractor to the U.S. Navy base in Singapore, pleaded guilty to bribery and fraud conspiracy. Ms. Kaur received \$150,000 as a bribe from Leonard Glenn Francis, who previously pleaded guilty to bribing U.S. Naval employees in the U.S. to secure contracts. Ms. Kaur leaked confidential information about 16 U.S. Navy contracts to Mr. Francis, such as pricing and fee estimates submitted by competitors. Using this information, Mr. Francis was able to secure 11 out of the 16 contracts, which had a collective value of \$48 million.

Following trial, the prosecutor argued that Ms. Kaur should receive at least a three year and seven month prison sentence because her conduct fell "short of the high standards of integrity demanded of her public office and

[since she] flagrantly abused her position for substantial personal gain." Ms. Kaur's attorney asked for no or minimal prison term given Ms. Kaur's poor health condition.

CHINA

ZTE Bribed PNG Prime Minister to Secure Government Contract

ZTE, a Chinese phone company, paid \$1 million bribe to the former PNG Prime Minister, Sir Michael Somar, according to authorities from Papua New Guinea (PNG) and Singapore. According to court filings by the Singaporean authorities, ZTE set aside \$4.7 million of funds to pay bribes in order to secure a \$36 million contract to provide telecommunications services across certain regions in PNG, authorities found. The telecommunications firm routed the money through the British Virgin Islands and then to Mr. Somare's Standard Chartered bank account in Singapore, according to the court papers. Mr. Somare denied the allegations.

China Releases Information on the Fifty-Most-Wanted Individuals

The Chinese government published detailed information on fifty individuals currently sought by authorities for committing corruption, embezzlement and bribery. A number of the people were either former government officials or management from large Chinese companies. The government revealed the gender, ID, passport number, former position in the government or company and identified the crime committed. The information shows that twenty-three of the fifty fugitives fled to the United States, Canada and New Zealand. This is the second time the Chinese government has published the list.

Former Provincial Government Official Confessed To Accepting Bribes

Liu Shanqiao, former vice chairman of Hubei Provincial Committee of the Chinese People's Political Consultative Conference, was on trial for accepting bribe money of over 17.9 million yuan (US\$2.79 million). The trial evidence revealed that Mr. Liu used his position to help certain individuals and businesses obtain government contracts in exchange for the bribes. Mr. Liu confessed his crimes and appeared remorseful in the courtroom. A formal verdict is pending.

MALAYSIA

Malaysian Police Officer Arrested for Corruption

The Malaysia Anti-Corruption Commission (MACC) arrested an Assistant Commissioner of Police and an Assistant Superintendent of the Special Task Force for Anti-Vice, Gambling and Gangsterism (STAGG) at a car workshop. The MACC alleged that the officers received bribe money and were storing it in various places, including the car shop. During the arrest, the MACC found RM 341,000 (US\$84,353) of cash on the police officers.

Following the arrest, the two police officers led the MACC to a condominium that they used as a safe house. There MACC officers seized additional cash worth RM1.1 million (US\$272,107). In addition to the cash, the MACC also seized five cars, including a Ferrari, a Mercedes Benz, a Mini Cooper and a BMW from the car shop. The value of the cars totaled RM3 million (US\$742,110).

The two officers are currently detained pending further investigation.

Government Seeks Task Force to Investigate French Submarine Deal

The Malaysia Defense Ministry has proposed creating a task force to investigate the 2002 purchase of two French submarines by the former Defense Ministry.

The purchase was made under the leadership of former Prime Minister Najib Razak. Mr. Najib lost re-election earlier this year, and is currently under investigation for corruption and looting the Malaysian state funds better known as 1MDB. While the government has not publicly charged Mr. Najib with any wrongdoing, many believe that he received kickbacks in connection with the purchase.

Abdul Razak Baginda, Mr. Najib's aid who oversaw the submarine deal, is currently under investigation by French prosecutors for his involvement in the purchase as well.

Additional Arrests Made In Connection with the 1MDB Scandal

The MACC ordered the arrest of four individuals, including Low Taek Jho, a financier, and Roger Ng, a former Goldman Sachs banker, for their involvement in the 1MDB scandal. The MACC has not formally charged any of the individuals.

Prime Minister Mahathir Mohamed revealed that the MACC's current primary target is Mr. Low, who has fled to a country that does not have an extradition treaty with Malaysia. An associate professor at the University of Malaya believes that the MACC arrested the individuals in an effort to secure testimony against Mr. Najib. Mr. Najib continues to deny any wrongdoing, calling the probe "political revenge."

Amhari Efendi Nazaruddin, a special officer of Mr. Najib during his administration remains in custody in connection with the investigation.

He is the owner of Orb Solutions, a "web management and communication strategies solutions" company. The firm is alleged to have received RM 2 million (US\$495,320) of 1MDB funds in 2014. Authorities believe that Mr. Amhari took a key role in the 1MDB scandal.

Ex-Goldman Sachs Banker to be Arrested in Connection with 1MDB

Roger Ng, a former banker at Goldman Sachs, is to be arrested for his alleged involvement in the looting of 1MDB. Investigations revealed that Mr. Ng introduced several central figures in the 1MDB scandal, including Mr. Low, to his superior, Tim Leissner. Mr. Leissner was formerly Southeast Asia Group Chairman at Goldman Sachs and the lead banker who handled three bond sales for the 1MDB. Together, Mr. Ng and Mr. Leissner helped transfer \$577 million that should have gone to the 1MDB funds to an offshore account in Switzerland.

Mr. Leissner has been barred from working in the financial industry in Singapore. Mr. Ng's arrest appears imminent. He is currently barred from traveling abroad by the MACC. In the meantime, the Malaysia government is also seeking to confiscate \$600 million Goldman Sachs collected in fees from the deals it did for the 1MDB.

INDIA

Travel Foods and Services Chairman Questioned In Connection with the AirAsia Investigation

Sunil Kapur, the Chairman of Travel Foods and Services, has been taken for questioning by the Central Bureau of Investigation (CBI) in connection with the CBI's investigation of

AirAsia. The CBI alleges that AirAsia's management bribed government officials to lower the licensing requirement so that it could obtain international flying licenses despite being unqualified. The CBI alleges that AirAsia used Travel Foods and Services as agents to connect with the lawmakers responsible for setting the aviation rules. To date the CBI has named the AirAsia Group's CEO, Tony Fernandes, India Director R. Venkataramanan and Deputy CEO T. Kanagalingam and others as defendants in its complaint.

TAIWAN

Kinmen County Mayor Sentenced to Eleven-Year Imprisonment for Bribery

Chen Chi-Te, the Mayor of Jinsha Township, was sentenced to an 11-year imprisonment term for accepting a NT280,000 (US\$9,380) bribe in 2012, when he was a police officer. In return, Mr. Chen helped the person enter Xiamen, China, illegally so that she could pursue employment opportunities. At the time, the woman was banned from entering China because of suspicion of fraud.

Information about the bribe surfaced recently when the woman attempted to re-enter Taiwan in order to receive cancer treatment. The border patrol alerted the authorities when they could not find records of her leaving Taiwan.

At the hearing, the Court found that Mr. Chen abused his authority. He was convicted of "Crimes Against Official Duties." Mr. Chen received a prison sentence of 11 years and a fine of NT280,000.

THAILAND

Renewed Crackdown on Corruption Involving High-ranking Buddhist Monks

Following the arrest of five senior monks in the Sangha Supreme Council—leaders of Buddhist monks in Thailand—Thai police has continued to investigate allegations of corruption, bribery and embezzlement by monks and local temples. So far, 30 temples are suspected of being involved in the corruption. One monk the investigator has been pursuing fled to Germany, where he is seeking asylum. Additional arrests are expected to be made in the near future.

In addition to police investigation, the Thai government has also implemented measures to monitor the finances of the temples and require monks to carry an identification card to identify their background.

The current raids have increased the public distrust of the temples, whose reputation was already at an all-time low. One local resident said "I don't go to temples much these days. I don't feel I believe in them."

VIETNAM

Former Chiefs of PetroVietnam Subsidiaries Arrested as Police Continues to Crackdown on Corruption

Four former officials of the subsidiaries of PetroVietnam, a state-owned oil company, have been arrested by the police on allegations of "abusing [their] power to appropriate property." Those arrested were Dinh Van Ngoc, former general director of Binh Son Refinery and Petrochemical LLC; Tu Thanh Nghia, former chief executive officer of Vietsovpetro; Vo Quang Huy, former chief accountant of Vietsovpetro, and Nguyen Tuan

Hung, former finance chief of PVEP. Following the arrests, the authorities stated that the investigation is continuing “under the direction of the central steering committee for anti-corruption.”

These arrests are just the latest of a wider crackdown by the government on corruption involving PetroVietnam. Earlier this year, former chairman of PetroVietnam’s construction group, was tried among twenty other defendants and sentenced to life imprisonment after being convicted of embezzlement and economic mismanagement.

LATIN AMERICA

BRAZIL

Police Request President Temer’s Phone Records in Operation Car Wash Corruption Investigation

Federal police in Brazil requested the phone records of President Michel Temer and two high-ranking members of his cabinet in early June. The request was presented to Supreme Court Justice Edson Fachin. President Temer, Presidential Chief of Staff Eliseu Padilha, and Minister of Mines and Energy Moreira Franco are being investigated as part of the massive Operation Car Wash corruption probe. It involves construction giant Odebrecht. The scandal has been sweeping Brazil and Latin America, as previously reported in the Digest.

Former Odebrecht executive Claudio Melo Filho told police he met with President Temer to request a \$2.6 million payment in exchange for favorability in awarding the company public contracts. President Temer has admitted meeting with Mr. Melo Filho but denied requesting money.

JBS SA Shareholder, Senior Executive, and Former Federal Prosecutor Charged with Corruption

Federal prosecutors in Brazil charged meatpacking giant JBS SA shareholder Joesley Batista, former company executive Francisco Assis, and former federal prosecutor Marcello Miller with corruption in late June. Prosecutors allege that Mr. Batista paid Mr. Miller \$185,415 to help him and Mr. Assis reach plea deals while Mr. Miller was serving as a federal prosecutor. As previously reported in the Digest, Brazil’s Supreme Court is weighing whether to annul the plea deals after the alleged misconduct became known.

Brazilian Authorities Arrest 15 in Corrupt Highway Contracts Investigation

Authorities in Brazil arrested 15 people in June as part of an investigation into alleged corruption in public highway contracts in Sao Paulo. The investigation stems from an alleged scheme in which Sao Paulo’s state government was overbilled by more than \$157 million for construction work done on a major highway.

Laurence Casagrande Lourenco, the former head of the company in charge of Sao Paulo’s highways, state-run Dersa was arrested in connection with the investigation. Other targets included former executives of Dersa and of construction companies OAS SA and Mendes Junior Engenharia SA.

EL SALVADOR

Arrest of Former President Mauricio Funes, Others Ordered in Corruption Investigation

An El Salvadorian judge ordered the arrest of 31 people, including former President Funes, in June. The individuals are suspected to have been involved in a corruption ring led by ex-President Funes in which the former president used public funds to pay for personal expenses, including travel, homes, and hospital bills. The corruption ring allegedly led to the siphoning of over \$350 million in public funds. The arrests also included Mr. Funes' private secretary, long-time partner Ada Michelle Guzman Siguenza, his ex-wife Regina Canas, and two of Mr. Funes' sons. Mr. Funes, who served as president from 2009 to 2014, has been living in exile in Nicaragua since 2016. He claims the charges are designed to settle political scores, responding on Twitter. Prosecutors said they would seek his extradition.

NICARAGUA

World Bank Debars Construction Company and Consultant for Fraudulent Practices

The World Bank announced in mid-June that it had debarred a Nicaragua-based construction company and a consultant for fraudulent practices related to two separate projects. Constructora Quintero S.A.—CONSTRUQUINSA was debarred for 15 months, and consultant Jelua del Carmen Abdalah Ramirez was debarred for 18 months.

According to the World Bank, Constructora Quintero “misrepresented its credentials and submitted a forged document to win contracts for the construction and improvement of two schools, which is a fraudulent practice under

World Bank procurement guidelines.” Ms. Ramirez “falsified procurement documents in favor of two companies bidding on contracts to build public facilities as part of the project,” according to the Bank. Both acknowledged responsibility for the underlying practices.

AFRICA

KENYA

President Orders Polygraph Tests for Public Employees to Combat Corruption

President Uhuru Kenyatta ordered all state procurement personnel to undergo lie-detector tests as part of an attempt to combat corruption after 54 people—including the public service ministry's principal secretary—were detained for allegedly stealing public funds. The charges are related to the siphoning of nearly \$100 million in public funds at the National Youth Service, as previously reported in the Digest.

President Kenyatta said that “[a]ll heads of procurement and accounts in government ministries, departments, agencies and parastatals will undergo fresh vetting including polygraph testing, to determine their integrity and suitability,” in a statement released by his office. Those who fail the tests will be suspended.

In total, 24 people were arrested and pleaded not guilty in early June, with the remaining suspects at large. The director of criminal investigations also said that 10 large financial institutions were under investigation, including KCB Group and Standard Chartered's Kenyan unit.

SOUTH AFRICA

Corruption Inquiry into South African Fund Manager Goes Forward

The Public Investment Corporation (PIC), Africa's largest fund manager, has been implicated in a growing corruption investigation. Allegations against the firm were referred to President Cyril Ramaphosa. In a letter to the opposition party leader, Bantu Holomisa stated that the government must look into questionable investments made by PIC that may have been intended to benefit the friends and allies of its chief executive, Dan Matjila.

PIC, which manages \$160 billion of assets on behalf of South Africa's government employee pension fund completed an internal investigation focused on Mr. Matjila last year. He was cleared of wrongdoing. South Africa's finance minister recently requested information from PIC about the incident, however, reigniting questions about him.

Fall Out from Corruption Scandal Leads to Layoffs at KPMG in South Africa

After losing several major clients due to fallout from the corruption scandal in South Africa, KPMG said in early June it would lay off up to 400 employees in the country. The global auditing company said it would consolidate its South African business unit to four business hubs— Johannesburg, Cape Town, Durban and Port Elizabeth—and will appoint executives from KPMG International to its South African unit's board.

Some work done by KPMG for the Gupta family, who have been accused of corruption linked to former president Jacob Zuma, has been under heavy scrutiny. The Gupta family and former president Zuma have denied

wrongdoing, as previously reported in the Digest.

Following the scandal, the Auditor General said he would terminate all government contracts with KPMG. Barclays Africa also announced it would stop doing business with the firm as did 12 other South African companies.

KPMG has taken steps to restore its reputation in South Africa, including changes to its management and measures designed to improve risk management.

South African Police Raid Bank of Baroda in State Corruption Probe

Police in South Africa raided the offices of India-based Bank of Baroda in early June as part of the corruption investigation into former President Jacob Zuma and the Gupta family. Police raided bank branches in Johannesburg and Durban, seizing documents showing transactions involving South African state companies. A representative for the elite police unit that conducted the raid said "[w]e are of the view that Bank of Baroda was used as a conduit for the transfer of illicit funds. The raids are happening as part of 'state capture' investigations." The bank said it is cooperating with investigating agencies and has shared all relevant documents.

As previously reported in the Digest, an inquiry into former President Zuma and the Gupta family will begin formal hearings in August.

GHANA

Ghanaian FIFA Council Member Resigns Amid Corruption Investigation

FIFA Council member Kwesi Nyantakyi has resigned after a Ghanaian television

documentary showed him taking \$65,000 in cash from undercover reporters to secure favor with Ghana's President Nana Akufo-Addo. Mr. Nyantakyi denies any wrongdoing. FIFA's ethics committee previously suspended Mr. Nyantakyi for 90 days during its investigation of the incident.

NIGERIA

Nigerian Senator Jailed on Corruption Charges

A court in Nigeria sentenced a sitting senator, Joshua Dariye, to 14 years in prison in June after he was convicted of diverting \$3.3 million while serving as governor of the north-central Plateau State. Mr. Dariye was convicted of 15 counts of breach of trust and misappropriation of public funds. The ruling follows the sentencing of another former governor, Jolly Nyame, for corruption. Nigeria's President Muhammadu Buhari has promised to root out corruption in the country. Mr. Dariye's case may still be appealed up to the country's Supreme Court.

AUSTRALIA

Commonwealth Bank of Australia Settles Money Laundering Case for Record Amount

The Commonwealth Bank of Australia (CBA) agreed to pay the largest financial penalty in Australian corporate history—approximately \$529.3 million—to settle money laundering charges brought by Australia's financial intelligence regulator. The record penalty is widely seen as signaling a tougher regulatory

environment for Australian banks after revelations last year of widespread misconduct in the country's financial sector, as previously reported in the Digest. Australia's biggest bank by total assets, CBA admitted to failing to maintain proper risk procedures, reporting, monitoring, and customer due diligence.

According to regulators, between 2012 and 2015, the CBA failed to timely report more than 50,000 suspicious transactions, leaving a loophole for drug gangs to launder large amounts of cash. The settlement is subject to approval by an Australian court. CBA's CEO, Matt Comyn, said of the settlement, "[o]ur agreement today is a clear acknowledgment of our failures and is an important step towards moving the bank forward. I apologize to the community for letting them down." The CBA previously said a coding error in its computer systems was at fault for the reporting failure.

Ex-Perth City Council Member Sentenced to Jail for Corruption, Bribery

Brett Edward Kenny, a former Perth City Council member, was sentenced to nearly two years in jail after he pled guilty to steering public electrical contracts to a friend in exchange for more than \$25,000. Between 2012 and 2014, Mr. Kenny used his position to send his friend Hervey Harms and his electrical firm nearly \$350,000 in public contracts. During his trial, the court listened to intercepted phone calls in which Mr. Kenny was heard discussing how he intended to avoid detection from authorities. He was sentenced to 22 months in jail, with a possibility of parole in December



ARTICLES OF NOTE

Bunkanwanicha, Pramuan and Greusard, Olivier, The Deterrent Effect of Anti-Bribery Law Enforcement on the Quality of Earnings (June 22, 2018). LabEx ReFi Working Paper Series No. 2017-20. Available at SSRN.

Based on a sample of FCPA cases between 1978-2015, this paper makes the argument that the enforcement actions have a positive effect on the accounting process of peers of targeted firms. The article can be downloaded [here](#).

DORSEY ANTI-CORRUPTION GROUP

The Dorsey Anti-Corruption team's deep experience from government and private practice fortified by a critical knowledge of key areas of the world such as:

- Africa
- Asia Pacific
- Europe
- Middle East
- Latin America

On anti-corruption issues, the Dorsey tools and Dorsey experience puts you ahead; the Dorsey team keeps you ahead.

Dorsey, Always Ahead

This update is provided for general informational purposes and is not intended to constitute advice. If you require advice on any of the matters raised in this update, please let us know and we will be delighted to assist.

ANTI-CORRUPTION GROUP CO-CHAIRS

Nick Akerman, Partner

akerman.nick@dorsey.com

Former Watergate Special Prosecutor

Author, Computer Fraud/Data Protection

<https://computerfraud.us/>

Beth Forsythe, Partner

forsythe.beth@dorsey.com

Former Big Four Accountant

Thomas Gorman, Partner

gorman.tom@dorsey.com

Former SEC Enforcement Official

Author, SECActions

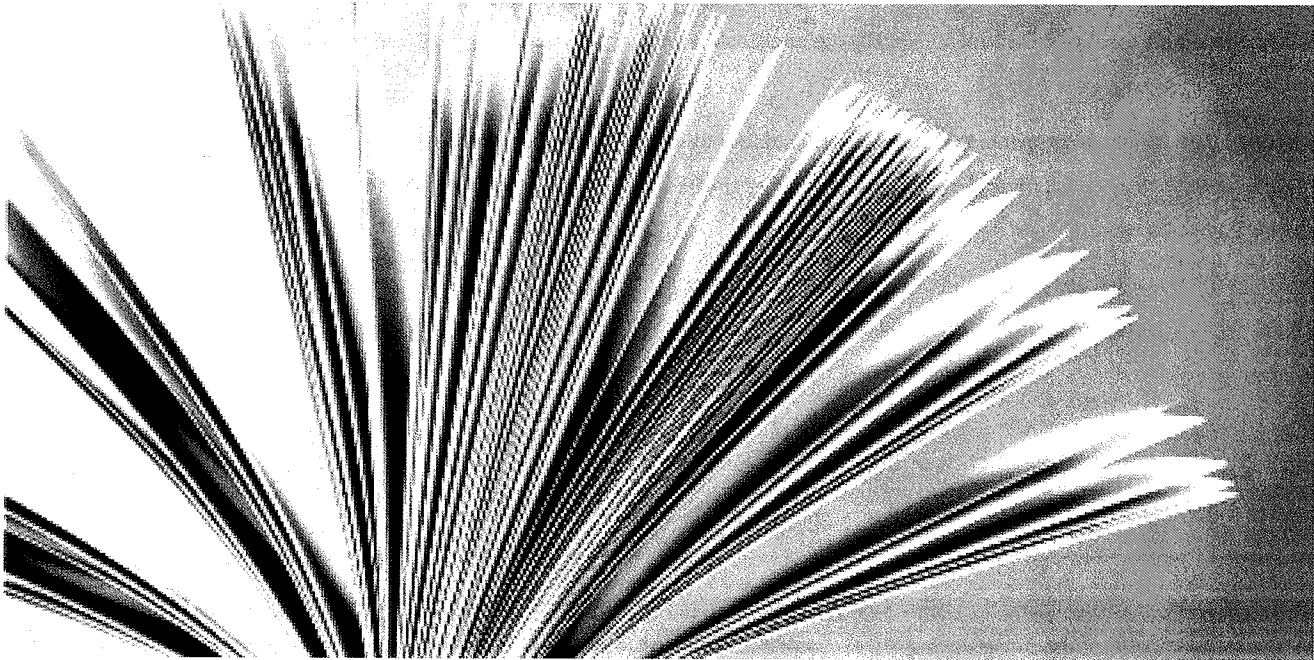
<http://www.secactions.com/>

PUBLICATIONS

Foreign-Owned U.S. Subsidiaries Face Imminent Reporting Deadline For Federal Survey

May 25, 2018

Nelson G. Dong



Under the International Investment and Trade in Services Survey Act ("IITSSA"), 22 U.S.C. Section 3101, the Bureau of Economic Analysis ("BEA") within the U.S. Department of Commerce mandates that, every five years, certain U.S. subsidiary companies must file an official Benchmark Survey of Direct Foreign Investment in the United States report ("Benchmark Report"). The affected U.S. subsidiary companies are those in which a foreign person owns or controls, directly or indirectly, 10 percent or more of the company's voting securities if the U.S. subsidiary company is incorporated or in which a foreign person holds that same degree of ownership or control through other means if the U.S. subsidiary company is unincorporated.

The IITSSA filing deadlines are imminent. A reporting U.S. subsidiary company's Benchmark Report must be filed under penalty of perjury using one of several versions of the BEA Form BE-12 and must be filed by May 31, 2018 if made by a hard copy (paper) filing or by June 30, 2018 if made electronically by means of BEA's eFile online system.

Unlike previous BEA survey years, BEA has announced this year that all U.S. subsidiary companies with foreign owners at or above the 10 percent threshold must complete the 2017 Benchmark Report, even if they have not been specifically contacted by BEA to ask for such a filing to be made. As compared to previous survey years, the latest Benchmark Report rules have also augmented some of the data sought by the BE-12 form regarding sales and finances but have also deleted some data sought in earlier survey forms that cover manufacturing and trading activity.



If a U.S. subsidiary company with a foreign owner has been affirmatively contacted by BEA to ask that the company file such a BE-12 report and believes it is not actually subject to the requirement, then the U.S. subsidiary company should file a BE-12 Claim for Not Filing in lieu of a full BE-12 survey form.

For foreign-owned or controlled U.S. subsidiary companies subject to the BE-12 reporting requirement, BEA provides three different versions of the Form BE-12 (designated as "A," "B" and "C" versions) based on various U.S. subsidiary company financial metrics for its 2017 fiscal year. This official BEA website explains those metrics and provides links to the various BEA forms.

According to the BEA, federal law protects the confidentiality of the information reported in a BE-12 report and prevents that information from being used by the U.S. Government for any regulatory, tax or investigative purposes. A U.S. subsidiary company that believes it cannot make its required BE-12 report filing by the applicable deadlines may also seek an extension of time to file from BEA if it asks for such an extension before May 31, 2018.

Under the IITSSA, BEA has the legal authority to impose civil penalties for failure to file a timely report and can even refer such a failure to the U.S. Department of Justice for criminal prosecution that could lead to a criminal fine and/or imprisonment for the company officials who fail to make a timely filing of such a Benchmark Report.

Dorsey & Whitney attorneys are available across the United States to assist U.S. subsidiary companies or their foreign owners in reviewing these BEA reporting requirements under the IITSSA and in completing the relevant BE-12 report form or Claim for Not Filing, as may be applicable.

Section 232: Importers Have Limited Opportunities to Challenge Tariffs and Quotas Uses a Different Process Than Case-by-Case Commerce Investigations

The Commerce Department last week reported publicly the findings of two investigations undertaken last year about steel and aluminum imports under Section 232 of the Trade Expansion Act of 1962. Section 232 authorizes the US government to examine any harmful effects of imports on strategic industries that are deemed essential to national security.

The Commerce Department's report focuses on the supposed minimum production levels that US steel and aluminum producers need to stay in business and thus to support the defense industrial base within the US economy. It proposes harsh new tariffs and import quotas on all foreign-made steel and aluminum, regardless of country of origin, that will then theoretically compel American steel and aluminum users to purchase those products from domestic steel and aluminum producers to match such minimum output levels and prevent US producers from going out of business. President Trump will have until April 2018 to decide whether he agrees with the recommendations and to issue his decision, which will then have the force of law.

If adopted, these measures would be in addition to the recently announced punitive tariffs on imports of certain solar products and household washing machines, which were also regardless of the country of origin. These Section 232 across-the-board tariffs and quotas

would also be in addition to the existing trade remedies that the United States already imposes on certain imports of steel and aluminum products from China and other countries to address alleged trade abuses. Unlike Section 232, a different part of the Commerce Department issued those earlier tariffs after conducting case-by-case investigations that were prompted by specific complaints regarding specific products from specific countries. Those earlier tariff cases gave US importers and other interested persons an opportunity to argue whether such added duties are justified and an opportunity to seek judicial review of agency decisions. However, because Section 232 arises out of national security concerns and uses a different process, adversely affected importing companies may not have those same opportunities to oppose or challenge the new tariffs and quotas if adopted by the president.

Besides domestic lawsuits that might be expected from adversely affected US importers of steel and aluminum, these new proposed trade restrictions could also spawn multiple international disputes. Numerical quotas are generally inconsistent with the requirements of Article XI of the General Agreement on Tariffs and Trade of 1947 (GATT), and so the United States may need to defend such measures under the national security exception under Article XXI of GATT. Moreover, because these new proposed measures target imports from all countries that supply steel or aluminum to the US market, several or perhaps even all those countries may seek to initiate proceedings against the United States at the World Trade Organization (WTO), which enforces the GATT. If President Trump adopts the new Commerce Department proposals, there could be serious trade disputes with several US trading partners and potential disruptions to global trade for years to come.

T. Augustine Lo is an attorney at the international law firm Dorsey & Whitney who specializes in commercial litigation, government enforcement actions, and customs compliance matters.



HOME DORSEY.COM



FALSE STATEMENT / HEALTHCARE / KICKBACKS



Third Circuit: False Claims Act Liability Premised on an Anti-Kickback Statute Violation Requires Proof that at Least One Federal Claim Resulted from an Improper Referral or Recommendation

BY BEN KAPPELMAN · FEBRUARY 7, 2018

Federal scrutiny of charities that assist patients with accessing prescription drugs has increased with rising prescription drug prices. Some prescription drug charities receive funding from medical providers or drug manufacturers, which can raise questions about whether the charities' funders are using the charities to generate improper recommendations or referrals. In December 2017, the U.S. Department of Health and Human Services Office of Inspector General rescinded a 2006 advisory opinion that had assured a patient-assistance charity that its subsidies for individuals' prescription drug purchases would not subject it to federal Anti-Kickback Statute liability. The OIG's rescission could signal shifting federal policy towards increased scrutiny of drug charities funded by drug manufacturers.

SHARE

0



0



Amidst these changes, a new decision from the U.S. Court of Appeals for the Third Circuit is a

good reminder that AKS compliance issues do not automatically translate into FCA violations.

In *United States ex rel. Greenfield v. Medco Health Sols., Inc.*, — F.3d ----, 2018 WL 473158, at *1 (3d Cir. Jan. 19, 2018), the court held that an FCA claim premised on an AKS violation must show that a particular patient was exposed to an illegal recommendation or referral and that a claim for payment for care for that patient was submitted to the government. *Medco* concerned Accredo Health Group, Inc., a specialty pharmacy servicing patients with hemophilia. Accredo supported hemophilia charities, two of which allegedly recommended Accredo as a preferred provider through communications to their members. The relator alleged that this amounted to an AKS violation, which gave rise to an FCA claim because Accredo had certified compliance with the AKS when submitting its reimbursement claims to government payors. Accredo successfully argued to the trial court that the relator's claim failed because he could not show any evidence that any beneficiaries of federal programs chose Accredo because of its alleged improper payments to the charities. On appeal, the relator argued that this amounted to a requirement that he show each patient subjectively sought Accredo's care because of Accredo's charitable donations.

The court in *Medco* set out to identify "what 'link' is sufficient to connect an alleged kickback scheme to a subsequent claim for reimbursement: a direct causal link, no link at all, or something in between." The United States, as amicus curiae in support of neither party, urged the court to hold that no proof of a patient's subjective intent to utilize Accredo because of the charities' recommendation was required to establish an FCA violation. The court agreed, holding that proof of an FCA violation required evidence that at least one of Accredo's claims sought reimbursement for care provided in violation of the AKS, but that a patient's subjective reason for choosing Accredo need not be proven.

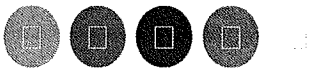
Nevertheless, the referral or recommendation that violated the AKS must be the referral or recommendation that resulted in the false claim. The court held the relator had failed to show that any of Accredo's 24 federally insured patients were exposed to the recommendation of the hemophilia charities or that they were even members of the charities. The court explained that "[a] kickback does not morph into a false claim unless a particular patient is exposed to an illegal recommendation or referral and a provider submits a claim for reimbursement pertaining to that patient." The court rejected the relator's request that the court infer the patients were members of the charities based on the relator's assertion that "[e]ssentially all hemophelics" in the geographic area Accredo served were members of the charities to which Accredo donated. This inference was not enough because it was impossible to rule out the chance that none of

the patients was a member and that none was exposed to the charities' recommendation. Thus, the relator's evidence failed to "link Accredo's alleged kickback scheme to any particular claim" and so Accredo did not face FCA liability.

The court pointed out several issues it did not address in its opinion. It expressed no view as to whether Accredo's relationship with the charities was an AKS violation in the first place. Nor did the court reach the issues of whether the relator could satisfy the FCA's materiality requirement, even if he had shown a link between the patients exposed to the charities' recommendation and Accredo's claims. And although not addressed by the court, the low number of federally insured patients at issue—24—means the court did not have an opportunity to address claims against a provider who services a large number of federally insured patients.

Medco does not explain what evidence would be sufficient to show at least one of a large number of patients were exposed to an improper referral or recommendation. Still, the *Medco* decision is a useful reminder that the AKS and FCA have separate elements, and an AKS violation does not automatically translate to FCA liability. Organizations in the healthcare space—particularly charities—should take heed.

Share this:



Tags: 3rd Circuit



Ben Kappelman

Ben has represented clients asserting patent infringement and invalidity as well as disputing the assignment of patent rights and licensing of inventions. His trade secrets experience includes extensive analysis of the Uniform Trade Secrets Act as adopted by multiple jurisdictions. Ben also represents clients in the construction industry as well as Native American tribes and other governmental entities. Like those in his intellectual property practice, these clients face complex administrative regulatory regimes, which Ben helps them understand during litigation and as they strategically plan their business activities.

[View all posts by Ben Kappelman →](#)