



THE PETROTIGER INVESTIGATION

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I'm going to be blunt. If you want full cooperation credit, make your extensive efforts to secure evidence of individual culpability the first thing you talk about when you walk in the door to make your presentation. Make those efforts the last thing you talk about before you walk out. And most importantly, make securing evidence of individual culpability the focus of your investigative efforts so that you have a strong record on which to rely. Corporations do not act criminally, but for the actions of individuals. The Criminal Division [of the US Department of Justice] intends to prosecute those individuals whether they're sitting on a sales desk or in a corporate suite.

Former principal deputy assistant attorney general Marshall Miller, criminal division, Department of Justice, 17th September 2014.

The US Department of Justice (the Department) has now made clear – including in Marshall Miller's late 2014 speech – that corporations under investigation seeking to maximise credit for their cooperation must provide all available facts about culpable employees, and that the Department will make efforts to prosecute those employees where there is sufficient evidence to do so. With respect to the Foreign Corrupt Practices Act (FCPA) in particular, figures provided by the Department reflect that, between 2009 and the end of 2014, over 50 individual defendants were convicted in FCPA and FCPA-related cases; and that since 2013 alone, the Department has brought public cases against 25 individuals. The vast majority of those individuals charged have pleaded guilty prior to trial.

The Department's focus on individual prosecutions stands to benefit those corporations that cooperate swiftly,

voluntarily and extensively – and in so doing facilitate prosecutions of employees involved in misconduct. However, individual prosecutions, particularly in the FCPA context, can pose serious challenges for the Department if and when a defendant proceeds to trial, notwithstanding such cooperation. The Department's June 2015 prosecution of Joseph Sigelman, former co-chief executive of PetroTiger Ltd (a British Virgin Islands oil and gas company with operations in Colombia and offices in New Jersey) exemplifies some of these challenges. Despite PetroTiger's extensive cooperation – including voluntarily disclosing facts that the Department characterised as implicating two CEOs and a top in-house counsel – the Department's case against Sigelman faltered at trial, resulting in a mid-trial plea on very favourable terms for the defence.

It remains to be seen whether the *Sigelman* case will lead the Department to demand even more evidence of individual culpability from corporations seeking cooperation credit, or to be even more cautious in its approach to individual prosecutions, no matter how much evidence a cooperating corporation can provide.

PETROTIGER'S VOLUNTARY DISCLOSURE AND COOPERATION

According to public press reports, in March 2011 the PetroTiger board of directors removed co-CEOs Sigelman and Knut Hammarskjold in the wake of a dispute concerning whether to grow the company despite its recent poor financial results. The board subsequently reviewed the company's financials and discovered a "consulting" invoice paid to the wife of an official of Ecopetrol SA, a state-owned oil company in Colombia

responsible for approving contracts to drill or perform services on oilfields in that country. The board hired a US-based law firm to conduct an internal investigation, and in July 2011 voluntarily disclosed its findings to the Department. Partly due to the cooperation provided by PetroTiger, the Department subsequently charged Sigelman and Hammarskjold, as well as the company's former general counsel, Gregory Weisman, for their alleged participation in a bribery scheme to obtain a \$39 million contract in violation of the FCPA, to defraud PetroTiger in a "kickback" scheme relating to an acquisition, and to launder the proceeds of their crimes.

As a result of PetroTiger's voluntary disclosure, full cooperation, and remediation, among other factors, the Department declined to prosecute the company. The Department publicly announced the declination – a rare event – and publicly praised the company not only for its timely and voluntary disclosure of wrongdoing, but for providing facts about culpable individuals, information implicating its co-CEOs and a top in-house counsel. The Department highlighted in public statements that it not only declined to file charges against PetroTiger, it also did not require the company to agree to a non-prosecution agreement, contrasting PetroTiger with another international corporation that declined to cooperate and was charged and pleaded guilty to violating the FCPA for its conduct, along with a number of its culpable employees.

While cooperation does not guarantee that the Department will forgo charges and/or a non-prosecution agreement with a company under investigation for FCPA violations, the Department's public statements are intended to convey the Department's view that the type of

cooperation provided by PetroTiger – prompt, voluntary and extensive, including the disclosure of relevant facts about culpable individuals – remains an entity's best hope of securing a full declination. As the *Sigelman* prosecution shows, however, such cooperation does not guarantee a successful outcome for the government should those individuals proceed to trial.

THE CHARGES AGAINST JOSEPH SIGELMAN

Joseph Sigelman was the first FCPA defendant to go to trial since the Department's failed 2010 prosecution in the so-called *African Sting* case. In that case, the Department indicted 22 executives and employees of military and law enforcement products companies on FCPA-related charges, based on a sting operation in which the defendants agreed to pay bribes to FBI agents acting undercover, in order to secure sales contracts. By early 2012, after failing to convict a single defendant after two separate trials lasting a total of six months, the government moved to dismiss the charges against the remaining defendants pending trial.

Sigelman was arrested in January 2014 on charges that he conspired to commit wire fraud, to violate the FCPA and to launder money, and that he committed substantive violations of the FCPA. His co-conspirator and co-CEO Hammarkjold was arrested in late 2013 on the same charges.

Simultaneously with its announcement of Sigelman's arrest, the Department disclosed that co-conspirator (and former PetroTiger general counsel) Weisman had previously pleaded guilty to conspiring to violate the FCPA and to commit wire fraud. Several months after Hammarkjold's arrest he too pleaded guilty. It was later revealed that Weisman and Hammarkjold were to be witnesses for the government at Sigelman's trial and that prior to pleading guilty, Weisman had cooperated with the government, including by surreptitiously recording a conversation with Sigelman relating to the charged crimes. The availability of two cooperating witnesses – Sigelman's co-CEO and his general counsel – and recorded statements of the defendant Sigelman, indicated a strong case for the prosecution.

The complaint against Sigelman, unsealed in early 2014 in the District of New Jersey, alleged in detail two separate unlawful schemes, and indicated that the government had secured significant documentary evidence that would corroborate the statements of any witnesses – such as e-mails between the defendant and his co-conspirators, other PetroTiger corporate documents, and bank records.

As alleged in the complaint, the first scheme (unrelated to the FCPA) involved fraud on PetroTiger in which Sigelman, Hammarkjold and Weisman, while negotiating an acquisition for PetroTiger, colluded to secure kickback payments from the target company. The three used various means to conceal the scheme – depositing payments (referred to in code as "Manila Split") into Sigelman's bank account in the Philippines and creating a "side letter" with a false justification for those payments. The second scheme (in violation of the FCPA) involved bribing David Duran, an official at Ecopetrol – a state-owned entity with authority for approving oil service-related contracts in Colombia – in order to secure approval of a PetroTiger contract with an energy company. Sigelman, Hammarkjold and Weisman arranged for three separate payments to Duran exceeding \$300,000, disguised as consulting payments for Duran's wife.

In June 2015, Sigelman proceeded to trial, facing a maximum penalty of over 20 years' imprisonment on a six-count indictment.

SIGELMAN'S DEFENCE STRATEGY

One key aspect of the defence strategy was to persuade the jury that the government's two cooperating witnesses – Hammarkjold and Weisman – were key to the government's case, and were both untrustworthy and uncorroborated. In its pretrial motions, the defence counsel raised an issue that would become critical at trial: a claim that Weisman's efforts to gather information from Sigelman as part of Weisman's cooperation with the government, while remaining general counsel to one of Sigelman's companies (Atlantic Gulf) and serving at times as Sigelman's personal counsel, were improper.

In particular, Weisman surreptitiously videotaped a discussion with Sigelman in December 2012 concerning the alleged bribes to Duran, and provided that videotape to the government. Defence counsel moved to suppress the video on grounds that it was protected by the attorney-client privilege, and that the government had improperly exploited the Weisman/Sigelman attorney-client relationship, in violation of Sigelman's constitutional rights. While the judge denied the motion and permitted the government to offer the recording in evidence at trial, defence counsel would raise the issue again during Weisman's cross-examination – this time pressing the point that Weisman had an ethical conflict when he continued to work at Atlantic Gulf as its general counsel, while simultaneously cooperating against Sigelman.

Weisman initially testified that a government official had directed him to continue working at Atlantic Gulf as general counsel after he cooperated against Sigelman, and also told him when he could leave Atlantic Gulf. According to the defence counsel's public statements following the conclusion of the case, defence counsel then asked that the government identify the agent that conveyed that message to Weisman, or acknowledge that Weisman's testimony was false. The government acknowledged that these statements were false.

When Weisman's testimony continued, Weisman admitted that his prior statements were false, but then claimed that he had simply "misremembered", causing the judge to exclaim: "Misremembered? Did you have a hallucination?" With the credibility of its key witness seriously damaged (not only by this line of cross-examination, but also by questions revealing Weisman's other criminal conduct, his motives for testifying and the discrepancies between his testimony and the FBI's notes of his prior statements) the government opted to negotiate a mid-trial plea deal with Sigelman's counsel.

RESOLUTION AND SENTENCE

That deal was overwhelmingly favourable to the defence – a guilty plea to one count of conspiring to violate the FCPA

and a stipulated sentence ranging from a term of probation (with no prison term), to a prison term of one year.

At sentencing – which took place one day after the plea – the government argued for a period of incarceration, noting, among other things, the need to deter conduct in violation of the FCPA and the “difficult nature of building these cases” in the FCPA context. Ironically, PetroTiger’s cooperation doomed this argument, to which the judge responded: “You had PetroTiger ... basically dump ... the case in your lap ... and two co-conspirators [Weisman and Hammarskjold] plead guilty early on cooperating ... and thousands and thousands of ... pages of documents provided to you by PetroTiger.”

The Court, critical of the government’s requested term of incarceration, sentenced Sigelman to probation and a fine, finding, among other

things, that a sentence of probation – and a felony conviction – would have a significant deterrent effect both generally and with respect to Sigelman in particular.

Despite PetroTiger’s extensive cooperation, the Department’s focus on individual prosecutions and the seemingly strong case against Sigelman, the trial plainly did not proceed as the Department had planned. After facing over 20 years’ imprisonment pretrial, Sigelman will serve no jail time – and indeed the court was sharply critical of the government’s request for a sentence of even one year of incarceration.

Time will tell how the *Sigelman* case may impact the Department’s future approach to individual prosecutions in the FCPA context. PetroTiger appears to have provided substantial evidence of

individual culpability in the course of its cooperation – including evidence that led to the guilty pleas of Sigelman’s alleged co-conspirators, who became cooperating witnesses. The Department could demand yet more evidence of individual culpability from entities cooperating in future cases, or could be more willing to resolve cases against individuals on defence-favourable terms prior to trial. For clues to the Department’s approach, FCPA practitioners should watch closely the case against Lawrence Hoskins, former senior vice president of Alstom, a French power and transportation company that pleaded guilty to FCPA violations in December 2014, scheduled for trial in November 2015. Three other Alstom executives charged with FCPA violations have already pleaded guilty, but Hoskins appears ready and willing to put the government to its proof in court.