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FCPA & ANTI-MONEY LAUNDERING

A SPECIAL REPORT

The U.S. Department of Justice remains committed to enforcement of the Foreign Corrupt Practices Act—despite a sharp drop last year in the number of cases—and increasingly to the Bank Secrecy Act, with a focus on anti-money laundering compliance. The feds have shown an interest in pursuing ever more actions against individuals—raising new questions about the liability of compliance officials and forcing general counsel to navigate uncharted waters.

Feds Expand Strategy to Trace Bribery Funds

Recent anti-kleptocracy cases highlight the Justice Department's new approach to fighting corruption.

BY GARY DIBIANCO AND KARA ROSEEN


U.S. DEPARTMENT OF JUSTICE

The U.S. Department of Justice has long pursued enforcement actions against bribe payers under the Foreign Corrupt Practices Act. Over time, the DOJ has expanded its approach to bribery schemes, including prosecuting government officials and pursuing recovery of the bribes paid. In so doing, the DOJ has employed a number of tools, including charging related federal crimes against foreign officials and pursuing civil forfeiture actions against the funds themselves.

This expanded toolkit has involved cooperation with a number of domestic and foreign enforcement agencies, as the DOJ seeks to trace funds and defendants across the globe. It appears that this cooperation has been mutually beneficial, as the DOJ has used these tools not only to seek the return of funds to the United States, but also to return forfeited funds to foreign governments.

BANDES

The actions pursued by the Justice Department in relation to an alleged kickback scheme between a U.S.-based broker-dealer and Venezuelan bank are exemplary of the agency's expanded strategy to pursue all the persons and entities involved in a bribery scheme, as well as recovery of the funds involved.

The essence of the scheme involved payments by employees of broker-dealer Direct Access Partners to Maria Gonzalez, an official at Banco de Desarrollo Económico y Social de Venezuela (Bandes), in exchange for trading business.

As to the Direct Access employees, the DOJ pursued theories of bribery of a public official (under the FCPA), commercial bribery under New York law (federalized under the Travel Act) and money laundering (for transportation of funds

to promote the FCPA and commercial bribery offenses).

Three employees of the broker-dealer pleaded guilty to conspiring to violate the FCPA and the Travel Act, conspiring to commit money laundering, and to substantive counts of all three offenses. Two others pleaded guilty to conspiracy to violate the FCPA and the Travel Act.

As to Gonzalez herself—whom the DOJ considered a "government official" by virtue of her employment at a state-owned bank—the DOJ asserted Travel Act and money laundering violations. The Travel Act charge was based on an underlying claim of violations of the New York commercial bribery law; the money laundering charges were based on transportation of funds to promote the Travel Act and FCPA violations. Following a guilty plea, Gonzalez was sentenced to time served.

Concurrent with Gonzalez's 2013 arrest (and the arrest of two Direct Access employees), the DOJ filed civil forfeiture charges against assets held by Gonzalez, her co-defendants and relatives, including funds held in Swiss bank accounts. The civil action was stayed in fall 2013 pending the resolution of the criminal matter.

In her January 2016 sentencing, Gonzalez was ordered to forfeit $8,347,849, representing funds involved in the violations, as well as property derived from the violations.

MERCATOR

In December 2015, the Justice Department marked the conclusion of another long-running effort to pursue both bribe payers and funds paid to foreign officials.

Mercator, a New York merchant bank, pleaded guilty in 2010 to an FCPA violation for payments made to Kazakh officials, including President Nursultan Nazarbayev, in connection with lucrative oil- and gas-related contracts.

Mercator chairman James Giffen was charged with FCPA violations, wire fraud, and money laundering; Giffen pleaded guilty in 2010 to a related tax violation.

The Kazakh officials have not been publicly charged to date. However, in 2007 the Asset Forfeiture and Money Laundering Section of the DOJ and the U.S. Attorney for the Southern District of New York filed a civil forfeiture action seeking $84 million alleged to represent proceeds traceable to the bribe payments and wire fraud. The funds were held in a Swiss bank account under the name of the Treasury of the Ministry of Finance of the Republic of Kazakhstan; DOJ alleged that the funds had previously been held in accounts beneficially owned by Nazarbayev, but were moved when Giffen learned of an investigation into the funds by Swiss authorities.

At the time the action was filed, the U.S., Switzerland, and Kazakhstan entered into agreements directing the funds to be transferred to a foundation for the benefit of impoverished youth and families in Kazakhstan.

In December 2015, DOJ announced that it had moved to dismiss the forfeiture action following the final distribution of funds.

REPUBLIC OF KOREA

The Justice Department has also pursued civil forfeiture in connection with foreign corruption cases.

In November 2015, DOJ returned $1,126,951.45 in forfeited assets to the government of the Republic of Korea. The funds represented profits from a corrupt scheme by former Korean President Chun Doo-hwan, who was convicted of corruption by a Korean court in 1997. The funds were laundered into the U.S. by associates and family members of Chun and were the subject of a money laundering case opened by Korean prosecutors in 2013.

The Asset Forfeiture and Money Laundering Section opened its own investigation into the funds in cooperation with the FBI and the U.S. Immigration and Customs Enforcement—including the agency's regional attaché office in Seoul—and the funds were recovered in a February 2015 settlement agreement. DOJ's press release regarding the forfeitures noted prosecutors' close cooperation with Korean authorities, including the Seoul Central District Prosecutor's Office, the Supreme Prosecutor's Office and the Ministry of Justice.

These matters are illustrative of the DOJ's strategic efforts to pursue these matters in a manner that maximizes available theories and fosters multi-jurisdictional cooperation.

The concurrent use of FCPA and Travel Act charges allow the Justice Department to pursue federal charges based on a kickback or bribery theory regardless of whether the recipient of the funds is a government official. Money laundering charges facilitate Mutual Legal Assistance Treaty requests, particularly with regard to traditional banking secrecy jurisdictions, such as Switzerland.

Civil forfeiture actions, as actions in rem, avoid some of the more difficult jurisdictional issues associated with in personam actions against foreign individuals located abroad, as it allows DOJ to proceed against the assets directly. Further, in a civil forfeiture action, the DOJ's burden of proof is to establish, by a preponderance of the evidence, that the property is subject to forfeiture; this is a substantially lower burden of proof than the "beyond a reasonable doubt" burden placed on a prosecutor in relevant criminal actions, including money laundering and Travel Act violations.

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