Executives at Risk: Key Developments - Fall 2017

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Since we last reported, several important developments in government investigations highlight the complications inherent in cross-border criminal prosecutions because of limits on extraterritoriality and extradition. These developments include:

- The Second Circuit’s decision overturning two convictions in the Department of Justice’s (DOJ’s) London Interbank Offered Rate (LIBOR) currency manipulation investigation, which came as a result of DOJ’s reliance on testimony compelled by a foreign jurisdiction.

- DOJ’s minimal success in prosecuting foreign nationals located abroad in its Volkswagen auto emissions falsification investigation and LIBOR currency manipulation investigation.

- Conversely, the decision of three British foreign exchange currency (FOREX) traders to waive extradition to face currency manipulation charges in the U.S. after the U.K. closed its parallel investigation into the same conduct.

- Sluggish prosecutions of individuals in international cartel cases and a shift in prosecutions toward smaller, domestic investigations.

We also highlight key court decisions – in particular, the Supreme Court’s influential Kokesh decision, which could significantly impact the Securities and Exchange Commission’s (SEC’s) ability to seek disgorgement in civil enforcement actions – and noteworthy sentencings.

Noteworthy Investigations

Falsification of Auto Emissions Data

United States

Some Overseas Executives Remain Out of Reach in U.S. Emissions Probe: The U.S. government has faced difficulties in prosecuting foreign-based individuals in the Volkswagen emissions case. Of the eight individuals charged in the scandal, six are foreign nationals located abroad who have been not been extradited to the U.S. to face charges. Most recently, DOJ charged Giovanni Pamio, an Italian national who worked for Audi, which is a Volkswagen subsidiary. Pamio, who was arrested by German authorities in July, is alleged to have designed faulty emissions control systems for certain Audi vehicles.
Also in July, Oliver Schmidt, Volkswagen’s emissions compliance manager for the United States, pled guilty to conspiracy charges related to the falsification of emissions data. Schmidt is only the second individual to plead guilty in the emissions fraud investigation. We previously reported that Schmidt, a German national, had been arrested in the United States and charged in January. He will be sentenced in December.

In August, Volkswagen engineer James Liang was sentenced to 40 months in prison for his role in the same investigation, four months more than the government sought. As we previously reported, Liang pled guilty in September 2016 to conspiring to create an emissions defeat device. He was the first VW employee to plead guilty or be charged in the scandal.

Germany

Germany Makes First Arrests, Expands Its Emissions Probe: Germany has made the first two arrests in its own emissions investigation. In July, as discussed above, German authorities arrested Italian national Giovanni Pamio. The second arrest came in September, when German authorities arrested Wolfgang Hatz, the former head of engine development at Volkswagen. Hatz, who also worked at Audi and Porsche (another Volkswagen subsidiary), was reportedly held without bail.

It also appears that Germany has expanded the scope of its domestic investigation. In June, the press reported that German prosecutors had expanded their emissions probe of Volkswagen to include Audi and Porsche AG. The investigation now also includes auto parts supplier Bosch and three Bosch employees who allegedly aided and abetted the emissions fraud. German prosecutors are additionally investigating whether Volkswagen’s current CEO Matthias Müller, his predecessor Martin Winterkorn, and Porsche chairman Hans Dieter Poetsch, failed to timely disclose to investors various government investigations into the alleged emissions fraud.

German Court Halts Prosecutors’ Access to Seized Law Firm Documents: In July, Germany’s highest court temporarily blocked German prosecutors from accessing documents seized during the March raid of Jones Day, the law firm representing Volkswagen’s supervisory board in the emissions scandal. The court ordered the German authorities to place the documents seized from Jones Day in the custody of the local court in Munich while the high court considers Volkswagen’s legal challenge. As we previously reported, the Munich prosecutor’s office conducted the raid purportedly because of a lack of cooperation by Volkswagen. We also previously reported that, after the raid, Volkswagen initiated proceedings to prevent prosecutors from reviewing the seized materials, but the local and regional courts ruled that the raid was lawful.

FIFA Corruption Scandal

Four More Executives Plead Guilty in FIFA Corruption Scandal: Since we last reported on the Fédération Internationale de Football Association (FIFA) corruption scandal, four additional executives have pled guilty, bringing the total number of guilty pleas in the U.S. to 24. In June, former banker Jorge Luis Arzuaga admitted to facilitating more than $25 million in bribes to soccer officials. Hector Trujillo, a former Guatemalan judge and general secretary of the Guatemalan soccer federation, also pled guilty and admitted to accepting kickbacks from a sports marketing company in exchange for certain marketing rights. In May, Costas Takkas, the former general secretary of the Cayman Islands Football Association, pled guilty to money laundering in connection with bribing FIFA vice president Jeffrey Webb, who previously pled guilty. Finally, in April, President of the Guam Football Association and FIFA Audit and Compliance Committee member Richard Lai pled guilty to wire fraud conspiracy in connection with schemes to bribe soccer officials. Trujillo and Takkas face sentencing in October and Arzuaga will be sentenced in January 2018. A sentencing hearing has not yet been scheduled in Lai’s case.

FIFA Releases Internal Investigation Report Following Leak: In June, FIFA released the results of its two-year internal investigation into the bidding process to host the 2018 and 2022 world cup tournaments. The so-called “Garcia Report,” prepared by FIFA’s ethics committee, identified multiple instances of improper conduct with regard to the bidding process and recommended initiating formal investigative proceedings against certain individuals, including current and former members of
FIFA’s executive committee. FIFA initially refused to publicly release the report and only did so after it was leaked to a German newspaper.

Wells Fargo Sales Practices Fraud Investigation

Wells Fargo Claws Back Additional $75 Million From Two Former Execs: In April, Wells Fargo’s board of directors announced that it was clawing back an additional $75 million in compensation from two former top executives — John Stumpf (the bank’s former CEO) and Carrie Tolstedt (former head of Wells Fargo’s Community Bank unit, which provides services to individual customers). Stumpf and Tolstedt were at the bank’s helm while widespread sales abuse practices occurred, which included opening millions of bank accounts without customer consent. The board previously clawed back more than $60 million in bonuses and stock awards from both executives. In its April action, the board also retroactively fired Tolstedt, who had been on a leave of absence. The announcement came on the heels of the board’s release of a 110-page report by its outside counsel about the root causes of the sales practices abuses. The report found Stumpf “too slow” to respond to the sales practice problems and that Tolstedt “paid insufficient regard to the substantial risk” of the improper sales practices.

Criminal Actions Against Executives

Currency Manipulation

Convictions Overturned in LIBOR Case: In July, the Second Circuit overturned the convictions of two former Rabobank traders, Anthony Allen and Anthony Conti, in a case in which DOJ alleged that the two had manipulated LIBOR, a benchmark rate that leading banks charge each other for short-term loans. At trial, prosecutors offered the testimony of a witness who had reviewed transcripts of Allen’s and Conti’s compelled “interviews” conducted by the U.K.’s Financial Conduct Authority in the course of the U.K.’s parallel LIBOR investigation. The Second Circuit held that, pursuant to the Fifth Amendment, a defendant’s prior testimony, when compelled abroad, cannot be used against him or her in a criminal trial in a United States court. The court further held that, when the government calls a witness who had substantial exposure to a defendant’s compelled testimony, it is required under Kastigar v. United States, 406 U.S. 441 (1972) to prove that a witness’s exposure to the defendant’s compelled testimony did not influence the government’s evidence. In this particular case, the court concluded that the witness provided tainted testimony warranting reversal of the two defendants’ convictions. As we previously reported, Allen and Conti had been sentenced to two years and one year in jail, respectively.

Two French Bankers Charged in LIBOR Case Remain Beyond U.S. Reach: In August, two French bankers were indicted for their roles in conspiring to manipulate LIBOR rates. The bankers, Danielle Sindzingre and Muriel Bescond, allegedly instructed their subordinates to submit inaccurately low LIBOR contributions to make it appear that their bank, Société Générale Paris, was able to borrow at more favorable rates than it actually was. Both bankers are located abroad and it is unclear whether they will be extradited to the United States to face charges.

Three British Traders Waive Extradition to Face FOREX Rigging Charges: In July, three former British currency traders waived extradition and appeared in New York federal court to plead not guilty to charges that they conspired to rig the FOREX market. Rohan Ramchandani (a former Citigroup Inc. trader), Richard Usher (a former JPMorgan Chase & Co. trader), and Christopher Ashton (a former Barclays Plc trader) were released on bond and scheduled for trial in June 2018. Usher’s attorney released a statement criticizing the U.S. government for charging his client for conduct solely undertaken in the United Kingdom. The U.K.’s Serious Fraud Office previously closed its parallel FOREX investigation without bringing charges against any individuals.

Cartel

Prosecutions of Executives in DOJ Cartel Cases Remain Sluggish and Focused on Smaller, Domestic
Investigations: Since we last reported, DOJ has not charged or secured any guilty pleas from corporate executives in large-scale, international investigations. On the domestic front, DOJ has obtained only three executive guilty pleas since the Spring 2017. In June, Stephen Hodge, a former senior vice president of sales for Starkist Co., pled guilty to conspiring to fix prices of packaged seafood. Hodge is the fourth executive to plead guilty in the packaged seafood cartel investigation, which we have previously covered. In addition, two executives have pled guilty in DOJ’s newly revealed cartel investigation into online sales of wristbands and lanyards. Azim Makanojiya, president of Zaappaz Inc., and Christopher Angeles of Custom Wristbands Inc., pled guilty in August to conspiring to fix prices for customized promotional products sold online in the United States. DOJ also continues to dedicate its resources to investigating allegations of bid-rigging in localized real estate foreclosure auctions, which typically do not implicate corporate executives.

Indictment of Heir Location Services Executive Barred by Statute of Limitations: In August, the U.S. District Court for the District of Utah dismissed an indictment brought against Daniel Mannix, vice president and owner of Kemp & Associates, Inc., on statute of limitations grounds. As we previously reported, Mannix was indicted in August 2016 on charges of conspiring to allocate customers in the heir location services industry. The court concluded that the allegedly illegal agreement between Mannix and a competitor to allocate customers ended in July 2008, eight years before the filing of the indictment, and therefore outside the five-year statute of limitations under the Sherman Act.

Court Concerned That Japanese Capacitors Manufacturer Pressured Its Executive to Plead Guilty: In May, a California federal judge postponed the sentencing of a Matsuo Electric Co. Limited (Matsuo) executive for his role in the capacitors price-fixing cartel after raising concerns that his employer pressured the executive into accepting a guilty plea. As we previously reported, Satoshi Okubo pled guilty in February, making him the first and only executive to plead guilty in the capacitors investigation. Under the plea agreement, he agreed to serve a year and a day in prison. The company also pled guilty and agreed to pay a $4.17 million fine. During Matsuo’s plea hearing in May, Judge James Donato expressed concern about “corporations hanging executives out to dry in exchange for leniency, which appears to be the deal here.” Judge Donato declined to accept Matsuo’s guilty plea and rescheduled the plea hearing and Okuba’s sentencing for October.

Former Telecom General Manager Sentenced to Time Served for Violating the FCPA in Haiti Teleco Case: On July 19, 2017, former fugitive Amadeus Richers pled guilty to paying $3 million in bribes to officials at Haiti Teleco, Haiti’s state-owned telecommunications company, more than 10 years ago. See Miller & Chevalier’s coverage in the Spring 2012, Winter 2012, and Autumn 2011 FCPA Reviews for background on the Haiti Teleco case and related prosecutions. According to the DOJ’s press release, Richers, who was indicted on July 12, 2011, was arrested in Panama and extradited to the United States on February 23, 2017. On September 27, 2017, he was sentenced to time served and a three-year term of supervised release. To date, nine individuals have been convicted in connection with the Haiti Teleco scandal, including six on Foreign Corrupt Practices Act (FCPA) counts.

Consulting Company Owner Gets Five Years in Jail for FCPA Violations: In July, Dmitrij Harder, the former owner and president of the Pennsylvania-based Chestnut Consulting Group, Co. and Chestnut Consulting Group, Inc., was sentenced to 60 months in prison after pleading guilty to two counts of violating the FCPA. As we previously reported, Harder, a Russian national and U.S. legal resident, pled guilty to participating in a scheme to pay more than $3.5 million in bribes to Andrej Ryjenko, a banker at the European Bank for Reconstruction Development through Channel Islands bank accounts.

Chinese Billionaire Faces Up to 20 Years in Prison for Bribery and Money Laundering Convictions: In July 2017, a federal jury found Chinese billionaire real estate developer Ng Lap Seng guilty of violating and conspiring to violate the FCPA, paying illegal bribes and gratuities, and conspiring to commit money laundering. As reported in Miller & Chevalier’s FCPA Spring Review 2016, Ng Lap Seng was alleged to have bribed United Nations diplomats in exchange for their support for the construction of a multi-billion dollar U.N. conference center in Macau. At his December 2017 sentencing hearing, he faces up to five years in
prison for the FCPA-related offenses, up to 10 years in prison for the domestic bribery conviction, and up to 20 years in prison for the money-laundering charges.

Government Contracts Fraud

Federal Judge Overturns Fraud Conviction, Finding Evidence Did Not Support Jury’s Verdict: In August, a federal judge overturned the 2016 fraud conviction of Larry Davis, the CEO of DCM Erectors, a company that specialized in erecting structural steel for office buildings. In large construction projects worth over a million dollars, the New York Port Authority has participation goals for minority-owned and woman-owned business enterprises (MWBEs). At trial in his case, prosecutors alleged that Davis fraudulently obtained contracts to work on the construction of One World Trade Center, in violation of MWBE requirements. The jury found Davis guilty, but the court set aside the verdict, issuing a 100-page opinion holding that the evidence was insufficient to support the conviction. The court observed that while the Port Authority required its contractors to make a good faith effort to meet MWBE participation goals, those goals were merely “aspirational” and therefore were not an essential element of the bargain. The court ultimately found that the Port Authority got “exactly what it paid for.” The court also concluded that the evidence did not support the government’s allegation that some of DCM’s MWBE subcontractors did no work, and that “no rational jury” could have reached that conclusion.

Defense Contractor’s Owners and CFO Plead Guilty to Fraud and Tax Evasion: In June, the owners of Ibis Tek LLC, Thomas and John Buckner, pled guilty to major fraud against the government and tax evasion relating to the inflation of material costs on government contracts and unreported income from sales of scrap aluminum. Ibis Tek manufactured emergency escape window kits for use in High Mobility Multipurpose Wheeled Vehicles (Humvees) purchased by the U.S. Department of Defense (DOD). CFO Harry Kramer also pled guilty to major fraud and filing false tax returns on behalf of Ibis Tek. As part of the scheme to defraud the government, the Buckners paid more than $1 million in illegal gratuities to Anthony Shaw, an Army civilian project manager, who pled guilty to demanding and receiving illegal gratuities, income tax evasion, and making false statements. DOD’s losses totaled more than $6 million. The defendants will be sentenced in October and November 2017.

Biofuels Company President and CEO Indicted on Conspiracy and False Statement Charges: Continuing the government’s crackdown on biofuel credit schemes, Keystone Biofuels Inc. President Ben Wooton and CEO Race Miner were indicted on conspiracy and false statement charges relating to a scheme to defraud the U.S. Environmental Protection Agency (EPA). Keystone was a registered renewable fuel producer that processed animal fats and vegetable oils into biodiesel. Keystone participated in the EPA’s Renewable Fuel Standard program and received renewable fuel credits for biodiesel that it allegedly produced. From 2009-2013, Keystone sold fuel credits attributable to “off spec” biodiesel that did not meet the EPA’s standards for renewable fuel credits. The indictment asserts that Wooton, Miner, and other Keystone employees generated false documents and doctored fuel samples in furtherance of a conspiracy to falsely claim more than $10 million in renewable fuel credits.

Campaign Finance Violations Get Executives Nine Months in Jail: Two former executives of Birdsall Services Group (BSG), an engineering and energy consulting firm, pled guilty in June in New Jersey State Court to illegally disguising corporate political campaign contributions as personal contributions of the company’s employees. Under New Jersey law, companies that make political donations to campaigns and political organizations are disqualified from obtaining public contracts with certain government agencies. While continuing to be awarded such contracts, BSG made political donations in the names of its employees. BSG collected personal checks from the employees, sent them to the politicians, and then reimbursed the employees through bonus payments. The former executives, Robert Gerard and James Johnston, admitted that they were involved in devising and carrying out the scheme and were each sentenced to serve 270 days in jail, to be followed by two years’ probation. Both men are also barred from bidding on New Jersey public contracts for 10 years. As we previously reported, three other Birdsall executives have been sentenced for their role in the scheme.
Former Credit Suisse Bankers Receive No Prison Time in Conspiracy Case: In July, Susanne Rüegg-Meier, a former manager of the North American Desk at Zurich-based Credit Suisse, pled guilty to participating in a conspiracy to assist U.S. taxpayers in evading federal taxes. Rüegg-Meier assisted clients in structuring withdrawals from their accounts, arranged for withdrawals at locations outside of Switzerland, and assisted clients in concealing the ownership of their accounts by using nominee entities. After Credit Suisse began closing U.S. customer accounts, Rüegg-Meier helped clients close their accounts and move them to other Swiss banks. On September 8, she was sentenced to five years of unsupervised probation. Rüegg-Meier’s sentence mirrored that of former Credit Suisse banker Michele Bergantino, who pled guilty in 2016 and was also sentenced to a five-year term of unsupervised probation.

Enforcement Actions Against Legal and Compliance Officers

Former Chief Compliance Officer Banned for Three Years and Fined for Failure to Prevent Massive Money Laundering Violations: In May, Thomas Haider, former CCO of money transfer company MoneyGram International, Inc., settled civil claims brought by the Financial Crimes Enforcement Network (FinCEN) concerning allegations that Haider failed to prevent MoneyGram from making fraudulent transfers and from committing other money laundering-related violations. Haider agreed to a three-year ban on serving as a money transmitter compliance officer and a $250,000 fine, one of the largest fines FinCEN has ever imposed on an individual. In a statement released announcing the settlement, Acting FinCEN Director Jamal El-Hindi noted that “[c]ompliance professionals occupy unique positions of trust in our financial system. When that trust is broken, . . . [h]olding [the individual] personally accountable strengthens the compliance profession.” In 2012, MoneyGram entered into a deferred prosecution agreement with DOJ and agreed to pay $100 million to fraud victims to resolve its involvement in the scheme.

Former General Counsel Pleads Guilty to Health Care Fraud: In June, Thaddeus Bereday, the former general counsel of health insurance provider WellCare, pled guilty to one count of making a false statement to the Florida Medicaid program. As part of his plea, Bereday admitted that he, along with others, knowingly and willfully caused the submission of a false expenditure report for behavioral health care services to the Florida Medicaid program. Four other WellCare executives previously were charged for their alleged involvement in the scheme. Todd Farha (CEO), Paul Behrens (CFO), and William Kale and Peter Clay (former vice presidents) were convicted of certain health care fraud-related charges in 2013 after a 13-week trial. They were sentenced to prison terms between one and three years.

Noteworthy Court Rulings

Supreme Court Reins in SEC’s Ability to Collect Disgorgement in Civil Enforcement Actions: In June, the United States Supreme Court in Kokesh v. SEC, unanimously held that the five-year statute of limitations set forth in 28 U.S.C. § 2462 applies to claims for disgorgement brought by the SEC. Prior to this decision, the SEC argued — and many courts agreed — that disgorgement is an equitable remedy not subject to § 2462, which applies the five-year statute of limitations to any SEC “action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture.” Many FCPA enforcement actions brought by the SEC have involved disgorgement amounts that dwarf the civil penalties imposed; in the past five years alone, the SEC’s FCPA enforcement actions against companies have yielded more than $2 billion, approximately 80 percent of which was from disgorged profits. For additional analysis of the Supreme Court’s decision in Kokesh, see Miller & Chevalier’s related alert.

Noteworthy Sentences

Two Former Executives Get Lengthy Sentences in Navy’s “Fat Leonard” Bribery Scheme: Two former executives of Singapore-based Glenn Defense Marine Asia (GDMA) — Neil Peterson (GDMA’s Vice President for Global Operations) and Linda Raja (the company’s General Manager for Singapore, Australia, and the Pacific Isles) — were sentenced for their roles in a vast bribery scandal involving U.S. Navy contracts awarded to GDMA, a port services contractor. As we previously reported, Peterson and Raja, both nationals of Singapore, were extradited to the United States to face charges that they were involved in
submitting $5 million in false claims and invoices to the U.S. Navy. Peterson and Raja were sentenced to 70 and 46 months, respectively. So far, 27 individuals have been charged in the so-called “Fat Leonard” scandal, named after Leonard Glenn Francis, GDMA’s CEO and the alleged ringleader of a $35 million scheme to bribe Navy officials with cash, prostitutes, and lavish parties to ensure that Navy ships stopped at ports where GDMA operated.

**Judge Criticizes Sentencing Guidelines as “Number-Crunching Gibberish,” Slashes Sentence for Former Portfolio Manager:** In June, Stefan Lumiere, a former analyst and portfolio manager, received an **18-month prison sentence** – a cut of more than six years from the non-binding eight-year Federal Sentencing Guidelines recommendation. A jury convicted Lumiere of securities fraud, wire fraud, and conspiracy in January for defrauding investors by over-valuing an investment fund focused on the health-care sector. At sentencing, U.S. District Judge Jed Rakoff called the recommended sentence of eight years "ridiculous, absurd, [and] barbaric.” He added, “these guideline sentences would be much more typical to a brutal regime than a proud, American legal system.” In addition to the 18-month prison term, Lumiere was ordered to pay a $1 million fine.

**Studies Analyzing Individual Enforcement Actions**

**Enforcement Agencies Continue to Focus on Individual Defendants, Study Shows:** In its annual Global Enforcement Review, financial services firm Duff & Phelps reports that financial regulators around the world are continuing to focus on individual misconduct. Within the United States, the SEC last year brought a record 868 enforcement cases, up from 807 cases in 2015 and 755 in 2014. This increase in overall activity is attributed partly to the agency’s focus on not just major cases, but also small infractions – an approach championed by former SEC chair Mary Jo White and often referred to as SEC’s “broken windows” policy. Of last year’s enforcement cases, 319 were brought against individuals, as compared to 304 the previous year. The Commodity Futures Trading Commission (CFTC) last year brought individual enforcement actions against 90 people, an increase from 50 cases brought in 2015, while the Financial Industry Regulatory Authority (FINRA) barred or suspended 1,244 individuals, a slight increase over the previous year’s total.

Enforcement agencies abroad followed the same trend. The study’s authors report that the U.K.’s Financial Conduct Authority, now under new leadership, remains committed to targeting individuals. Hong Kong’s Securities and Future Commission, meanwhile, brought 91 cases against individuals as compared to 55 the previous year.

**Editors:** Dawn E. Murphy-Johnson, Lauren E. Briggerman, Kirby D. Behre

**Contributors:** Adam W. Braskich*, Sarah A. Dowd, Ian A. Herbert, Aiysha S. Hussain, Jonathan D. Kossak, Nicholas R. Metcalf, Dwight B. N. Pope

*Former Miller & Chevalier attorney

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