Miller & Chevalier

Executives at Risk: Spring 2020

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Introduction

Since the COVID-19 pandemic hit the U.S., both government enforcers and companies have been forced to adjust their strategies to respond to allegations of corporate misconduct. Grand juries have not been convening, travel has been restricted, and many are working from home with potentially limited technology capabilities. It is no surprise that white collar government investigations and prosecutions have slowed in recent months. What is surprising is that this trend long predates the COVID-19 pandemic. A new study from Syracuse University reports that even before the pandemic, white collar prosecutions were at an all-time low and have dropped nearly 25 percent in the past five years. The study further shows that most of these defendants are individuals and the Department of Justice (DOJ) rarely prosecutes corporations for white collar violations. Corporate executives should, therefore, take heed that they are under the microscope even if the overall number of prosecutions has declined.

In this edition, we report on major developments in white collar investigations impacting executives in the first half of 2020, particularly related to cartel, Foreign Corrupt Practices Act (FCPA), securities and accounting fraud, and sanctions. We also report on noteworthy sentencings and policy developments.

Extradition & Extraterritoriality

Five Years Later, Korean Auto Parts Executive Extradited, Pleads Guilty to Price-Fixing Charges : In February, a Korean national and former accounts manager for auto parts manufacturer Continental Automotive Korea Ltd. was extradited to the U.S. and subsequently pled guilty to conspiring to rig bids, allocate customers, and fix prices for instrument panel components sold to auto manufacturers. The manager had been a fugitive for nearly five years before he was arrested in Germany in September 2019 and consented to extradition. The account manager was sentenced to nine months in prison.

The extradition represents only the third extradition exclusively on antitrust charges in U.S. history, but the second in recent months. As we reported in our last edition, in January, a former executive of air cargo company Martinair N.V., a Dutch national, was extradited to the U.S. from Italy and pled guilty to participating in the long-running air cargo price-fixing conspiracy. The Martinair N.V. executive was sentenced to 14 months in prison but was ordered released from prison in May due to the COVID-19 pandemic after filing a compassionate release motion. As we have previously reported, the DOJ Antitrust Division has struggled to successfully prosecute foreign executives, particularly in the auto parts investigation, which overwhelmingly has implicated foreign nationals. This case does illustrate, however, that the threat of extradition may not dissipate with time.

Actions Against Executives

Cartel

More Charges in Generic Drug Price-Fixing Scheme : In February, a former executive of a New Jersey-based pharmaceutical company pled guilty to conspiring to fix prices, rig bids, and allocate customers of generic drugs, including ointments and antifungal creams. The executive is the fourth individual charged and third to plead guilty in the Antitrust Division's investigation into anticompetitive conduct in the generic drug industry. As we previously reported, in February, a federal grand jury indicted the former vice president of marketing for Taro Pharmaceutical Industries Ltd. for his alleged role in a conspiracy to fix prices, rig bids, and allocate customers for medications used to treat arthritis, blood clots, and pain. The former Chief Executive Officer (CEO) and former president of another generic drug company, Heritage Pharmaceuticals Inc., were charged in December 2016 with conspiring to fix prices, rig bids, and allocate customers for doxycycline hyclate, an antibiotic, and glyburide, a diabetes medication.

President of Korean Fuel Company Agrees to Civil Settlement for Bid Rigging Defense Department Fuel Contracts : In April, South Korean logistics company Jier Shin Korea Co. Ltd. (Jier Shin) and its president agreed to pay $2 million to resolve civil antitrust and False Claims Act (FCA) claims against them for their involvement in a bid-rigging conspiracy that targeted contracts to supply fuel to U.S. military bases in South Korea. It is the sixth civil settlement in the investigation. Neither Jier Shin nor the executive pled guilty to any crimes. The case originated from a *qui tam* whistleblower complaint alleging that Jier Shin made false claims about its involvement in the conspiracy. As we previously reported, in March 2019, charges were unsealed against seven South Korean nationals for their roles in allegedly rigging bids on contracts to supply fuel to U.S. military bases in South Korea. The federal government's ability to successfully prosecute these individuals remains uncertain, however, because all seven remain abroad beyond U.S. jurisdiction. Two South Korean oil companies involved in the conspiracy – Hyundai Oilbank Co. Ltd. and S-Oil Corporation – were also charged in the indictment and have agreed to plead guilty.

Japanese Executives Indicted for Disk Drive Component Price Fixing : In February, a federal grand jury indicted two former executives of NHK Spring Co. Ltd., a Japanese spring manufacturing company, for their alleged involvement in a global conspiracy to fix prices of hard disk drive components from 2008-2016. The executives allegedly agreed with their co-conspirators to avoid competition, allocate market share, and exchange pricing information used in negotiations with customers. The executives are both Japanese nationals. It is unclear from the indictment where they are located and whether they will come to the U.S. to respond to the charges if they are abroad.

DOJ Brings More Little, Local Bid-Rigging Cases : The Antitrust Division continues to charge contractors in local procurement bid-rigging schemes. In February, a Connecticut insulation contracting firm owner pled guilty for his role in a conspiracy to manipulate bids on construction projects at universities, hospitals, and other similar entities in Connecticut. This is the fourth guilty plea in an investigation into bid-rigging by regional insulation contractors. Also in February, a Missouri businessman was charged with conspiring to rig online auctions for surplus government equipment, becoming the third individual charged in that investigation.

In addition, in February and March, two Chicago-area commercial flooring executives pled guilty and one was charged with rigging bids for commercial flooring products and services for Chicago-area schools, hospitals, charities, and businesses. It is unclear whether these charges stem from DOJ's newly-formed Procurement Collusion Strike Force, which was created in November 2019 and charged with identifying, investigating, and prosecuting antitrust crimes in the government procurement process.

FCPA

Judge Acquits Former Alstom Executive Hoskins on Some Charges, Cooperator Avoids Jail in Indonesian Bribery Scheme : In March, a federal judge partially overturned the conviction of former Alstom executive Lawrence Hoskins, a British citizen who worked in France, on FCPA charges in connection with a scheme to bribe Indonesian officials in exchange for a $118 million power station contract for Alstom's U.S. subsidiary Alstom Power Inc. (API). As we previously reported, a federal jury convicted Hoskins in November 2019 on both FCPA and money laundering charges. The jury found that Hoskins acted as an agent of API in furtherance of the bribery scheme, which was sufficient to convict him of the FCPA-related charges. Hoskins appealed the conviction in February, and the judge overturned the bribery charges after finding that prosecutors failed to show sufficient evidence to prove that Hoskins was an agent of Alstom's U.S. subsidiary. The judge did not throw out Hoskins' money laundering conviction, and he was sentenced in March to 15 months in prison for those charges.

In April, a former API sales manager who pled guilty and cooperated extensively in DOJ's investigation into Alstom, including by testifying at Hoskins' trial, avoided prison and was sentenced to two years of supervised release. Finally, in February, DOJ unsealed charges against three of Hoskins' co-conspirators – two former executives of Alstom's Indonesian subsidiary and one former executive of Japanese trading company Marubeni – for allegedly funneling bribes to Indonesian officials through consultants hired to perform services on behalf of Alstom and Marubeni.

New Trials for Defendants Convicted in Haitian Bribery Scheme for Ineffective Assistance of Counsel : In March, a federal judge ordered new trials for two U.S. businessmen who were convicted in June 2019 of attempting to bribe government officials in Haiti in exchange for approvals for an $84 million port development project, on which we previously reported. Following his conviction, one of the executives filed a motion for a new trial on ineffective assistance grounds, arguing that his trial counsel failed to conduct an adequate investigation, review documents or consult with experts, or present a coherent defense strategy. The judge agreed, concluding that the lawyer displayed "errors, omissions, and a general lack of diligence" which "fell below an objective standard of reasonableness." The judge also ordered a new trial for the second executive because his counsel had to "play an outsized role at trial rather than pursue his preferred defense strategy" in order to make up for the deficient representation from the other attorney. DOJ has appealed the order to the Second Circuit.

Former Goldman Sachs Executive Charged with Bribing Ghanaian Officials : In April, the U.S. Securities and Exchange Commission (SEC) charged a former Goldman Sachs executive for participating in a $4.5 million bribery scheme to help a Turkish energy company win a contract to build and operate an electrical power plant in Ghana. According to the SEC, the executive arranged for the client to pay at least $2.5 million to a Ghanaian intermediary to pay bribes to Ghanaian government officials in exchange for their approval of an electrical power plant project. He also allegedly received approximately $2 million in kickbacks from the client for arranging the scheme. Notably, the SEC did not charge Goldman Sachs itself with any misconduct – owing primarily to the efforts of its compliance department to review the transaction and ultimately prevent the deal from moving forward.

Miami Businessman Pleads Guilty for Bribing PetroEcuador : In January, an Ecuadorian businessman pled guilty to FCPA and money laundering-related charges for his role in a conspiracy to pay $4.4 million in bribes to public officials at PetroEcuador, Ecuador's state-owned and state-controlled oil company. He also admitted to laundering funds through U.S.-based shell companies and accounts to conceal the bribery scheme. He is the thirteenth individual to be charged or plead guilty in connection with DOJ's ongoing investigation into bribery and money laundering involving PetroEcuador.

Sanctions

Prosecutors Drop Case Against Iranian Executive Found Guilty of Violating U.S. Sanctions : In an unusual development, prosecutors have decided to drop a sanctions case after a jury convicted the defendant due to the government's failure to disclose potentially exculpatory evidence to the defense. The former Iranian bank executive was convicted of violating U.S. sanctions against Iran after his Iranian family business, Stratus Group, entered into a contract with Petróleos de Venezuela S.A. (PDVSA) to build housing units in Venezuela. At trial, the government established that the executive used various front companies to receive U.S. dollar payments on behalf of the business and conceal the Iranian nexus of the payments by, among other things, altering payment vouchers and backdating contracts to mislead U.S. banks about the destination of the funds. This case was an example of the potential long arm of the U.S. government's jurisdiction, even where transactions involve non-U.S. parties for projects occurring outside the U.S.

Securities and Accounting Fraud

Trader Pleads Guilty to Insider Trading : In January, a former vice president at Goldman Sachs pled guilty to conspiracy to commit securities fraud for his involvement in providing material, non-public information related to a potential acquisition of restaurant chain Buffalo Wild Wings Inc., a Goldman client, to a securities trader in Switzerland in exchange for cash and other benefits. The former trader also admitted to taking steps to conceal the scheme, including communicating through prepaid "burner" mobile phones and receiving cash in person and through intermediaries. He is among at least seven defendants charged in an alleged international insider trading scheme and is scheduled to be sentenced in late May.

Charges Dismissed Against Analyst Who Tipped Off SAC Capital : In February, prosecutors dismissed insider trading charges against a former research analyst at Collins Stewart LLC who pled guilty to securities fraud in November 2013 but had yet to be sentenced. The former research analyst admitted that he passed material, non-public information to an SAC Capital Advisors LP fund manager regarding a strategic partnership in internet search and advertising between Yahoo! Inc. and Microsoft Corp. Prosecutors explained in their filing that further prosecution was not in the interest of justice due to changes in insider trading law following the research analyst's guilty plea, the difficulty in securing evidence given the amount of time that had passed since the conduct at issue, and the fact that the former research analyst had received a lifetime ban by the SEC from working for any broker, dealer, or investment advisor, among other things. The SAC fund manager withdrew his guilty plea in June 2019 and prosecutors dropped charges against him in November 2019, also citing changes in insider trading law.

Bank Fraud

OCC Charges Five Former Wells Fargo Executives in Sales Practices Scandal, Settles with Former CEO : In January, the Office of the Comptroller of the Currency (OCC) charged five former Wells Fargo executives for their role in contributing to widespread sales practices misconduct in the community bank, which included opening millions of bank accounts without customer consent. The OCC seeks civil penalties totaling $37.5 million from the former head of Wells Fargo's community bank, the former community bank risk officer, the bank's former general counsel, the bank's former chief auditor, and the bank's former executive audit director, $25 million of which is from the former community bank head. The OCC also announced that it had reached settlements with former CEO John Stumpf and two other former senior bank executives. Stumpf's settlement included a $17.5 million fine and a ban from participating in the banking industry.

Government Contracts

Former Government Contractor CEO Pleads Guilty to Bribing Procurement Official : In May, the former CEO of a Virginia-based information technology government contractor pled guilty to conspiring to bribe the former Director of Procurement for the Pension Benefit Guaranty Corporation (PBGC) through cash, gifts, and the promise of a job in exchange for steering PBGC contracts to his company. The PBGC official also pled guilty for his role in the scheme, which included steering a $3.29 million contract to the government contractor, helping the contractor prepare a bid for a $55 million contract, and assisting the contractor in filing a bid protest when he lost the bid. The two also took steps to conceal the scheme, including by communicating through encrypted software. They are set to be sentenced in September.

Domestic Bribery & Corruption

Executives Convicted of Campaign Finance-Related Corruption and Bribery : In March, a federal jury in North Carolina convicted the chairman of a multinational investment company, Eli Global LLC (Eli Global), and a consultant on public corruption and bribery-related charges for their involvement in a scheme to funnel millions of dollars to the campaign of a commissioner of the North Carolina Department of Insurance in exchange for the removal of another commissioner responsible for regulating an insurance company the executive owns. A third co-defendant, another Eli Global executive, was acquitted by the jury. A fourth co-defendant previously pled guilty to making false statements to the Federal Bureau of Investigation. The Eli Global chairman has since filed a motion for acquittal and a new trial, arguing in part that he was entrapped.

Officer and Director Issues

FinCEN Penalizes Chief Operational Risk Officer : In March, the Financial Crimes Enforcement Network (FinCEN) assessed a $450,000 civil monetary penalty against the former chief risk officer of U.S. Bank National Association (U.S. Bank), which had been fined in 2018 for violating the Bank Secrecy Act (BSA) by implementing weak anti-money laundering (AML) controls that failed to flag suspicious transactions. FinCEN alleged that the executive, who oversaw the bank's AML compliance program in various positions from 2005-2014, failed to prevent U.S. Bank's BSA violations by taking insufficient steps to ensure that the bank's compliance division was appropriately staffed, among other alleged failures.

Noteworthy Investigations

U.S. Accountant and Mossack Fonseca Client Plead Guilty in Panama Papers Investigation : In February, a U.S. accountant pled guilty to federal charges in connection with an alleged money laundering scheme connected to Panama-based law firm Mossack Fonseca, which was closely tied to the 2015 Panama Papers leak. The Panama Papers involve the anonymous leak of nearly 12 million financial records held by the law firm on behalf of clients. The stolen data exposed a network of offshore companies used to hold assets. As we previously reported, the accountant was arrested in the U.S. and originally pled not guilty. He and his co-defendant, a Mossack Fonseca client who also pled guilty in February, are scheduled to be sentenced in June.

Tax Authorities in Five Countries Probe Central American Bank for Tax Evasion : In January, tax authorities in five countries, including the U.S., issued subpoenas and warrants to an unnamed financial institution in Central America as part of a joint investigation into money laundering and tax evasion. The Internal Revenue Service (IRS) described the joint coordination between the U.S., Canada, Australia, the United Kingdom, and the Netherlands as an "unprecedented multi-country day of action to tackle international tax evasion." In addition to issuing subpoenas and warrants, the authorities engaged in coordinated intelligence and information-collecting, including interviews. The investigation marks the first operational activity by the Joint Chiefs of Global Tax Enforcement, known as the J5, which was formed by these five countries in 2018 to combat international tax crime and money laundering.

Two Former Fox Executives Charged in FIFA Bribery Case : In April, two former 21st Century Fox executives were charged with allegedly participating in a scheme to bribe officials from Confederación Sudamericana de Fútbol (CONMEBOL), the governing body for soccer in South America, in return for assisting Fox in obtaining soccer broadcasting rights. The executives allegedly obtained confidential information for the rights to broadcast the 2018 and 2022 World Cups in the U.S., which Fox eventually obtained. In addition, the indictment charges the former co-CEO of Spanish Media company Imagina Media Audiovisual SL, Gerard Romy, and the Uruguayan sports marketing company Full Play Group SA with participating in the scheme. As we previously reported, two South American soccer officials were convicted by a jury in December 2017 and several other executives have pled guilty as part of this long-running investigation into corruption involving the Fédération Internationale de Football Association (FIFA) and international soccer.

Noteworthy Sentences

Company President Sentenced to 41 Months for Bribes to Illinois Mayor : In March, the president of a contracting company received a 41-month jail sentence for paying more than $80,000 in bribes to the mayor of an Illinois town in order to win a multi-million construction contract. The sentence was at the bottom end of the federal Sentencing Guidelines range but well above the sentence of probation that the defense had sought. At the sentencing hearing, the judge said that he wanted to send a deterrence message to other companies thinking of making bribe payments.

Government Contractor Sentenced to Nearly Five Years For $3.7M Procurement Fraud Scheme : In February, a former government contractor was sentenced to nearly five years in prison and ordered to make full restitution for defrauding small businesses out of approximately $3.7 million over nearly 10 years. The contractor admitted to fraudulently inducing at least 35 small business vendors to perform subcontractor work at military bases and national parks for nearly 105 contracts he received from federal agencies. Instead of paying the vendors, he spent the money he received on casinos and nightclubs.

Policy Developments & Trends

White Collar Prosecutions Hit All-Time Low, Further Impacted by COVID-19 : Even before the COVID-19 pandemic hit the U.S, white collar prosecutions were at an all-time low according to a March report issued by Syracuse University's Transactional Records Access Clearinghouse. The report's analysis of DOJ records shows that only 359 defendants were prosecuted in January 2020, down eight percent from last year, down 25 percent from five years ago, and representing an all-time low. Most of these defendants are individuals, as the report also indicates that DOJ rarely prosecutes corporations for white collar violations. This downward trend may be due, in part, to DOJ's shift in focus away from white collar prosecutions to other enforcement areas, such as immigration, the opioid crisis, and anti-terrorism, in recent years. Another Syracuse University report issued in May indicates that law enforcement agencies have referred far fewer criminal cases to federal prosecutors than before the pandemic. While referrals in February and the first part of March averaged around 4,500 per week, referrals fell to only 1,800 during the last week of March, particularly as law enforcement were working under stay-at-home orders.

DOJ Announces COVID-Related Hoarding and Price Gouging Task Force, Brings First Charges : In March, DOJ established the COVID-19 Hoarding and Price Gouging Task Force to investigate and prosecute those involved in the hoarding or price gouging of essential protective medical equipment during the COVID-19 pandemic. The Task Force was sparked by the president's invocation of the Defense Production Act (DPA), which authorizes the Secretary of Health and Human Services to protect scarce health care and medical items and makes it a crime to engage in hoarding or price gouging. Consistent with these directives, in April, the government announced federal charges, following on state charges, against an individual in New York for violating the DPA by hoarding masks, face shields, surgical gowns, and disinfectants and selling at gouged prices out of his sneaker store. It remains to be seen whether the Task Force will result in significant prosecutions stemming from the COVID-19 pandemic.

Editors: Lauren E. Briggerman, Kirby D. Behre

Contributors: Marcus A.R. Childress,* Nina C. Gupta,* Amelia Hairston-Porter,* Ian A. Herbert, Aiysha S. Hussain,* Margot Laporte, Calvin Lee, Abigail T. Stokes*

**Former Miller & Chevalier attorney*
