

Executives at Risk: Summer/Fall 2019

White Collar Alert

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The U.S. Department of Justice (DOJ) continues to focus on cross-border investigations, leading to indictments of not only U.S. businessmen but also executives living abroad. Since our last report, the government [secured guilty pleas](#) from two non-U.S. citizens in connection with a multibillion-dollar loan scheme in Mozambique. The government also indicted two Norwegian citizens in connection with an ocean cargo shipping [cartel scheme](#) and one Indian citizen in connection with an [accounting fraud scheme](#). Domestically, the DOJ's [opioid investigation](#) continues to grow, leading to indictments of not only drug distributors but individual executives. All of these matters, and more, are discussed below.

In addition, the DOJ's Antitrust Division [announced a new policy](#) that allows prosecutors to consider a company's antitrust compliance program at the charging stage and further contemplates the resolution of criminal antitrust cases through deferred prosecution agreements where effective compliance programs are in place.

Noteworthy Investigations

Pharma Executives Charged in Second Criminal Case Involving Improper Opioid Sales : In July, DOJ [indicted](#) drug distributor Miami-Luken, Inc. and two of its executives, former President Anthony Rattini and former compliance officer James Barclay, for allegedly conspiring to distribute controlled substances without a legitimate medical purpose. The indictment alleges that Miami-Luken, Rattini, and Barclay distributed millions of opioids to doctors and pharmacies in small towns in Appalachia, which has been hit hard by the opioid epidemic. The indictment further alleges that they continued distributing addictive drugs even after the Drug Enforcement Administration (DEA) advised them of their responsibilities to ensure that their products were not being diverted for non-medical purposes and to report suspicious orders. This case is DOJ's second criminal case against a drug distributor alleging improper opioid sales. As we [previously reported](#), in May, a jury convicted five pharmaceutical executives of Insys Therapeutics Inc. for paying doctors to prescribe more and higher doses of fentanyl spray, a synthetic opioid.

Actions Against Executives

FCPA

Two Former Credit Suisse Bankers Plead Guilty to Mozambique Loan Fraud Scheme : Two ex-Credit Suisse bankers pled guilty this summer to participating in a \$2 billion fraudulent maritime loan scheme in Mozambique. As we [previously reported](#), Detelina Subeva, a former vice president, and Andrew Pearse, a former managing director, were charged in January with various crimes for allegedly diverting nearly \$200 million in loan proceeds to fund bribes and kickbacks to Mozambique officials. [Subeva](#) and

Pearse pled guilty to the underlying conduct in May and July, respectively. Their sentencing dates have not been set. A third banker, a former managing director at Credit Suisse, Surjan Singh, has not responded to the charges and remains in the U.K. The bankers were charged along with the former Finance Minister of Mozambique, Manuel Chang, who is fighting extradition to both the U.S. and Mozambique. Jean Boustani, an executive of contractor Prinvest, was also charged and is scheduled to go to trial in October.

Two Businessmen Convicted of Soliciting Bribes in Connection with Haitian Construction Project : In June, a federal jury in Boston [convicted](#) two U.S. businessmen of corruption-related charges arising out of an \$84 million port development project in Haiti. Joseph Baptiste was originally indicted in 2017 and Richard Boncy was added a year later in a [superseding indictment](#) charging the businessmen with soliciting bribes from undercover Federal Bureau of Investigation (FBI) agents posing as potential investors in the port development project with the intent that the payments be routed to senior Haitian officials through a U.S. non-profit controlled by Baptiste. Both defendants are scheduled to be sentenced in December.

Cartel

Two Foreign Shipping Executives Charged in Ongoing Ocean Cargo Shipping Cartel Scheme : In June, DOJ's Antitrust Division [indicted](#) two former Norwegian shipping executives for their participation in a conspiracy to allocate customers and routes, rig bids, and fix prices for international ocean shipments of roll-on, roll-off cargo to and from the U.S. The executives' former company, Høegh Autoliners AS, has already pled guilty and been sentenced to pay a \$21 million fine. In total, 13 executives and five companies have been charged in the roll-on, roll-off ocean shipping scheme. Four of the executives have pled guilty and been sentenced, and the remaining nine have not responded to the charges or are located abroad beyond U.S. jurisdiction.

Securities and Accounting Fraud

Judge Acquits Hedge Fund Executive Following Jury Trial, Grants Second Executive New Trial : In July, a federal jury in New York [convicted](#) two former executives of bankrupt hedge fund Platinum Partners L.P. (Platinum) of securities fraud and related conspiracy charges. But in September, a federal judge granted founder and Chief Investment Officer (CIO) Mark Nordlicht's motion for a new trial and co-CIO David Levy's motion for acquittal. The government previously alleged that the executives defrauded the bondholders of a third-party company, Black Elk Energy (Black Elk). The Court ruled that the government failed to meet its burden of proving Levy's criminal intent. As to Nordlicht, the Court ruled that while "the Government adduced sufficient evidence for a judgment of acquittal to be unwarranted, letting the verdict stand against Nordlicht would be a manifest injustice" and therefore granted the request for a new trial.

Platinum's former Chief Financial Officer (CFO) was previously acquitted of all charges. Co-defendants, former Black Elk CEO Jeffrey Shulse and former managing director Daniel Small, are set to go to trial in November 2019 and February 2020, respectively.

Chief Executive Officer of Commodities Trading Company Charged in Accounting Fraud Scheme : In June, Venkata Meenavalli, the CEO of publicly-traded Longfin Corp. (Longfin), a commodities trading company, was [indicted](#) for allegedly devising a scheme to fraudulently report more than \$66 million in revenue from commodities trading and cryptocurrency transactions. Longfin allegedly did not engage in any revenue-producing cryptocurrency transactions and fraudulently recognized revenue from sham commodities transactions with entities controlled by its CEO. Also in June, the U.S. Securities and Exchange Commission (SEC) announced a [parallel civil action](#) against Meenavalli, the company, and a consultant. The SEC previously obtained a [preliminary injunction](#) against Longfin, its CEO, and other related individuals, freezing more than \$27 million in allegedly illicit trading proceeds. Longfin voluntarily delisted from the Nasdaq stock exchange and closed down in 2018.

Two Brixmor Property Executives Charged with Securities Fraud : In August, the former CEO and former CFO of publicly-traded real estate investment trust Brixmor Property Group Inc. (Brixmor), were [charged](#) with securities fraud-related charges for allegedly participating in an accounting fraud scheme to falsely report a key growth metric reported in Brixmor's public filings. The SEC announced a [parallel civil action](#) against them and two other former Brixmor executives alleging similar securities fraud and

disclosure violations. In August, Brixmor agreed to pay a \$7 million penalty in a [settlement](#) with the SEC, neither admitting nor denying the allegations against it.

CFTC's \$103M Yukom Fraud Suit Follows Exec's Conviction: In August, the former CEO of purported Israeli sales and marketing company, Yukom Communications Ltd. (Yukom), was [convicted](#) on charges that she participated in a fraudulent scheme to market \$145 million in binary options to investors. Less than a week later, the Commodity Futures Trading Commission (CFTC) [filed](#) a related \$103 million civil fraud suit against Yukom and associated entities and individuals, including the former CEO. The CFTC suit alleges that the defendants made fraudulent misrepresentations to investors about the options and falsely marketed their interests as aligned with investors when, in reality, the defendants were on the opposite side of the trades, directly profiting when its investors lost. Yukom's former CEO is scheduled to be sentenced in December.

Bank Fraud

Ex-Credit Union Manager Pleads Guilty to \$40M Embezzlement Scheme: In May, former CBS Employees Federal Credit Union manager and trained accountant, Edward Martin Rostohar, [pled guilty](#) to bank fraud for embezzling \$40 million from the credit union over a 20-year period. Rostohar admitted to: using his senior position at the federally insured credit union to make payments to himself through fraudulent online payments, forging employee signatures on checks made payable to himself, using credit union funds to make direct payments on personal credit cards, and creating shell companies to attempt to hide the payments. Rostohar admitted to using the money for gambling, private jets, cars, jewelry, homes, and a \$5,000 weekly allowance for his wife. In September, Rostohar was [sentenced](#) to more than 14 years in prison for his role in the scheme.

Money Laundering

Two Colombian Businessmen Charged with Money Laundering in Connection with FCPA Scheme: In July, the government [charged](#) two Colombian businessmen with money laundering-related charges in connection with violating the FCPA. The [indictment](#) alleges that the two businessmen obtained a contract with the Venezuelan government in 2011 to build low-income housing units and submitted fraudulent invoices for construction materials that were never actually shipped to Venezuela. The indictment further alleges that the individuals made payments to Venezuelan government officials for assistance in approving these invoices and transferred approximately \$350 million to overseas accounts.

Sanctions

Export Company Executive Pleads Guilty to Scheme to Provide U.S. Turbine Parts to Iran: In July, Mahin Mojtahedzadeh, President and Managing Director of the ETCO-FZC (ETCO) export company, [pled guilty](#) to conspiring to supply Iranian customers with U.S. turbine parts in violation of the International Emergency Economic Powers Act (IEEPA) and the Iranian Transactions and Sanctions Regulations. From 2013-2017, Mojtahedzadeh admitted to working with companies in Germany and Canada that had imported U.S. turbine parts to re-export the parts to ETCO in Iran. The scheme supplied Iran with millions of dollars of turbine machinery that directly benefited the nation's infrastructure. Mojtahedzadeh faces up to 20 years in prison and a fine up to \$1 million and is scheduled to be sentenced in November. Two of her German co-conspirators have already pled guilty been sentenced to 24 months and 21 months, respectively.

Trade Secrets

Former Uber Executive Charged with Trade Secrets Theft from Google: In August, former Uber executive and Anthony Levandowski was [charged](#) with trade secrets theft after he allegedly stole confidential files related to Google's self-driving car technology upon his departure from the company. Levandowski was an engineer and a founding member of Google's self-driving car project. His move from Google to Uber in 2017 prompted Google to sue Uber civilly for alleged trade secrets theft, resulting in a nearly \$245 million settlement in 2018.

Notable Court Rulings

Judge Vacates Former SAC Capital Manager's Guilty Plea: In June, a federal judge [vacated](#) a former SAC Capital manager's 2013

guilty plea to securities fraud-related charges, applying the Second Circuit's insider trading precedent in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), partially abrogated by *Salman v. United States*, 137 S.Ct. 420 (2016), to find the plea insufficient. *Newman* explained, among other things, that to establish tippee liability the government must show that the tippee knew of the breach and specifically, "that the tippee knows of the personal benefit received by the insider in exchange for the disclosure . . ." 773 F.3d at 448. Southern District of New York Judge Paul G. Gardephe agreed with Lee that *Newman*, decided a year after his guilty plea, required prosecutors to prove that he, the trader, was aware that the insider received a personal benefit as a result of disclosing the material non-public information. Judge Gardephe ruled that the record supporting the plea did not speak "directly or indirectly to Lee's knowledge of any personal benefit the corporate insiders received" and vacated the plea.

Sixth Circuit Overturns Bank Fraud Convictions Because Mortgage Lenders are Not Banks : In August, the Sixth Circuit [reversed](#) the convictions of a mortgage broker and a homebuilder on bank fraud charges after concluding that the government charged them with the wrong crimes. The pair were [accused](#) of recruiting straw buyers who submitted false information to mortgage companies on loan applications and receiving the proceeds of the loans. The court determined that the misrepresentations did not reach the parent companies of the mortgage lenders, which were federally insured banks. The court applied the straightforward text of the bank fraud statute and ruled that the mortgage companies were not financial institutions under the statute because they did not hold federally insured funds. According to the court, the subsidiary relationship between the lender and the bank alone did not mean that the mortgage company could be viewed as a bank. In dissent, Judge Eugene E. Siler, Jr. stated that "fraud on the mortgage companies is fraud on the banks." The majority and the dissent noted that prosecutors could have brought mail or wire fraud charges but missed the statute of limitations period.

Second Circuit Declines to Extend the "McDonnell Rule" to FCPA Cases : In August, the Second Circuit [ruled](#) in *United States v. Seng*, No. 18-1725-cr (2d. Cir. 2019) that the FCPA does not require prosecutors to show that bribes to foreign officials have been paid in exchange for an "official act." In so doing, the court declined to apply the holding in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), in which the Supreme Court interpreted 18 U.S.C. § 201(a)(3), the general bribery statute, to require an official act connected to the bribe to satisfy the "quo" component of the bribery charge. The defendant in *Seng*, a Chinese real estate developer charged with bribing UN officials, had sought to overturn his conviction and four-year sentence for FCPA-related charges based on the argument that *McDonnell* applied to the FCPA. The Court disagreed, citing textual differences between the bribery statutes, and upheld the defendant's conviction and sentence.

Extradition

Société Générale Banker Living in France Deemed a Fugitive by U.S. Judge : In May, a judge in the Eastern District of New York refused to hear a motion to dismiss criminal charges against the former head of Société Générale SA's Paris treasury desk, Muriel Bescond, because the court found Bescond to be a fugitive. Bescond was [indicted](#) in August 2017 along with the French bank's global head of treasury on allegations that she ordered subordinates to submit false data to the London Interbank Offered Rate (LIBOR), a global benchmark interest rate, to make it look like Société Générale could borrow at a lower interest rate. Bescond, a French citizen who lives in France, [moved](#) to dismiss the indictment on various grounds, but the court [ruled](#) that the equitable "fugitive disentitlement doctrine" barred Bescond from seeking judicial relief. The court found that Bescond met the definition of a fugitive even though she had not been in the U.S. at the time of the alleged misconduct or indictment because a warrant had been issued for her arrest, she would have been arrested if she had entered the U.S., and she avoided arrest by remaining in France.

Obstruction

Former CEO of Two U.S. Government Contractors Pleads Guilty to Falsifying Government Documents : In June, James O'Brien, the former CEO of two U.S. government contractors, Tamerlane Global Services and Artemis Global, [pled guilty](#) to falsifying documents related to logistics contracts the companies had with the U.S. Transportation Command. As part of the contracts, company employees deployed to Afghanistan, which required them to have government-issued letters of authorization (LOAs). O'Brien admitted to altering these LOAs to make them appear as if they were so-called "provisioned" LOAs, entitling the deployed employees to U.S. government-provided benefits, such as military air travel, at no cost. In September, O'Brien was sentenced to six

months in prison.

Noteworthy Sentencings

CEO Sentenced Below Guidelines Range for Restitution Payment to Victims : In June, a court sentenced an investment bank CEO to six and a half years in prison, well below the federal Sentencing Guidelines range, based on his payment of full restitution to victims prior to charges being filed against him. Todd Hitt, former CEO of Kiddar Capital, [pled guilty](#) to securities fraud in February for defrauding investors out of \$20 million in purported venture capital and real estate development investments. Hitt faced between nine and 12 and a half years in prison under the discretionary federal Sentencing Guidelines. However, the [government](#) recommended a six and a half year sentence based on Hitt's cooperation and "the extraordinary restitution payment of \$20 million already made by the defendant's family," a "unique and unprecedented" step designed to make the victims whole.

Pharma CEO Sentenced to 30 Years for \$100 Million Fraud that Took Down Puerto Rico Bank : In July, Jack Kachkar, the CEO of multinational pharmaceutical company Inyx, Inc. was [sentenced](#) to 30 years in prison for participating in a \$100 million scheme to defraud Westernbank of Puerto Rico, a scheme that ultimately led to the collapse of the bank. Kachkar was [convicted](#) for his role in the scheme after a three-week trial in February. According to the [indictment](#), between 2005 and 2007, Kachkar caused Westernbank to enter into more than \$100 million in loan agreements in exchange for a security interest in Inyx's assets. Westernbank then advanced money to Inyx based on fake customer invoices that Kachkar caused Inyx to present as valid. In addition to the 30 years of incarceration, Kachkar was also ordered to pay \$103 million in restitution.

Chief Marketing Officer Nearly Six-Year Sentence for False Loan Applications : In May, a Los Angeles district court judge [sentenced](#) the former chief marketing officer of Mirae Bank to 70 months in prison and ordered him to pay more than \$7.5 million for making false statements to a financial institution. Ataollah "Johnny" Aminpour [pled guilty](#) in November 2017 to submitting false loan applications to now-defunct Mirae Bank in connection with commercial loan applications for the purchases of gas stations and car wash businesses. The loan applications falsely stated the purchase price of the businesses, the source and amount of the down payment, and the borrowers' assets. According to a [DOJ press release](#), in addition to the charged conduct, Aminpour allegedly referred approximately \$150 million in loans to Mirae Bank, the losses on which played a significant role in the bank's collapse.

Policy Developments

Antitrust Division Announces New Policy to Incentivize Antitrust Compliance Programs : In July, Assistant Attorney General Makan Delrahim [announced](#) that DOJ's Antitrust Division will, for the first time, consider a company's antitrust compliance program at the charging stage in criminal antitrust investigations. Previously, DOJ's Justice Manual barred prosecutors from giving credit to companies based on an effective compliance program. The Division also announced that it would consider resolving criminal antitrust cases against companies through deferred prosecution agreements if they have effective compliance programs, among other things. The Division announced revisions to the Justice Manual to reflect its new approach to compliance and issued a [guidance document](#) regarding how Division prosecutors will evaluate antitrust compliance programs.

Editors: Katherine E. Pappas, Lauren E. Briggerman, Kirby D. Behre

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

*Former Miller & Chevalier attorney

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