

Executives at Risk: Winter 2019/2020

White Collar Alert

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Introduction

This winter, we report on several noteworthy developments in white collar investigations impacting executives.

First, the U.S. Department of Justice (DOJ) has seen an uptick in white collar cases against executives going to trial in recent months. The Department has won some trial victories, particularly in the cartel space where court showdowns are rare, including the convictions of a former CEO in the [canned tuna price-fixing case](#) and currency traders in the [LIBOR](#) and [FOREX](#) manipulation cases. DOJ's trial attorneys also have been busy on the Foreign Corrupt Practices Act (FCPA) front, although trials have produced mixed results: [the conviction of a former Alstom executive](#) (Lawrence Hoskins) after years of jurisdictional challenges was followed by [the acquittal of a Prinvest Group executive](#) in the Mozambique loan fraud and bribery scheme.

In addition, the Antitrust Division has shown rumblings of becoming more active. The Division has [created a new task force](#) charged with ferreting out antitrust crimes in the government procurement process. As of this writing, the Division reports that 102 new investigations have been opened since the task force was created. The Division has also seen a moderate uptick in charges against executives for other cartel-related crimes, including in the [generic drug](#), [freight forwarding](#), and [financial instruments](#) investigations.

There have also been developments in new and spreading investigations. [Under Armour](#) reports that DOJ and the U.S. Securities and Exchange Commission (SEC) have been investigating the sports gear company's accounting practices, and the diesel emissions

cheating investigation has now expanded to [charges against Fiat executives](#).

Finally, in this newsletter, we discuss [noteworthy sentencings](#), [court rulings](#), and [policy developments](#) that impact executives.

Actions Against Executives

FCPA

Executive Acquitted in Mozambique Loan Fraud and Bribery Scheme : In December 2019, a jury in the Eastern District of New York [acquitted](#) a Lebanese executive at Abu Dhabi-based maritime conglomerate Privinvest Group of charges that he conspired to defraud U.S. investors. The government alleged that the Privinvest executive and others diverted approximately \$200 million in loan proceeds to pay kickbacks and bribes to Privinvest executives, bankers, and Mozambican officials to guarantee various shipyard, tuna fishing, and coastline surveillance projects. Although prosecutors argued that dollar-denominated payments made outside the U.S. had passed through correspondent banks in the U.S., jurors who spoke to the press following the verdict indicated that they did not see a connection between the government's case and the New York venue. Three Credit Suisse bankers have pled guilty in connection with the scheme and four additional co-defendants, including Mozambique's former finance minister, are not in U.S. custody.

Former Alstom Executive Convicted of Bribery and Money Laundering : In November 2019, a federal jury in Connecticut [convicted](#) Lawrence Hoskins, a former Alstom executive who worked in France, of multiple FCPA, money laundering, and conspiracy charges. As discussed in [previous issues](#), in 2013, Hoskins was charged in connection with a scheme to bribe Indonesian officials in return for a \$118 million power station contract with Indonesia's state-owned electric utility. Jurisdictional challenges to the government's ability to prosecute a foreign national under the FCPA for his conduct abroad delayed the trial for several years. In 2018, the Second Circuit held that a foreign national operating entirely abroad could not be held liable under the FCPA on a conspiracy or aiding and abetting theory, but allowed the government to proceed under an agency theory of liability. The jury found that although Hoskins was employed by Alstom's parent entity in France, his actions on behalf of its Connecticut subsidiary to help hire consultants to conceal the bribes to Indonesian officials were actions of an "agent" within the meaning of the FCPA. The conviction has broad implications for future FCPA cases against foreign nationals, as the DOJ is likely to now utilize an agency theory of liability to reach non-resident foreign actors who participate in bribery schemes outside of the U.S. Hoskins is scheduled to be sentenced in March.

Former CEO of Braskem Charged with Bribery : In November 2019, the DOJ [unsealed](#) an [indictment](#) against the former CEO of Brazilian petrochemical company Braskem for conspiracy to violate the FCPA and conspiracy to commit money laundering. The former CEO allegedly participated in a scheme to divert hundreds of millions of dollars from Braskem to a secret offshore slush fund used to pay bribes to officials, political parties, and others in Brazil to obtain and retain favorable contracts for Braskem and its parent company, Odebrecht. In his role as CEO, the executive allegedly approved bribes to government officials, agreed to falsify Braskem's books and records by approving the payments to offshore companies as "commissions," and signed false certifications to the SEC regarding Braskem's disclosure of fraudulent conduct and financial reporting. This indictment follows settlements by Braskem and its parent company, Odebrecht, in 2016 with authorities in the U.S., Brazil, and Switzerland, relating to bribes paid to government officials and political parties from the slush fund. The combined \$3.5 billion settlement is the largest corruption-related fine ever paid by a company.

Nuclear Transportation Executive Convicted of FCPA Offenses : In November 2019, a federal jury in Maryland [convicted](#) the former president of Transportation Logistics, Inc. (TLI) on charges arising from his participation in a scheme to bribe a Russian official at a subsidiary of the state-owned Atomic Energy Corporation in order to secure lucrative uranium transport contracts. The former TLI president was found guilty of multiple counts of violating the FCPA, wire fraud, and conspiracy but acquitted on three counts of violating the FCPA and one count of money laundering. As discussed in our [Summer 2018 issue](#), the DOJ previously secured guilty pleas from TLI's former co-president, an intermediary who facilitated the payments, and the official who received the bribes, who has since served his sentence and been deported to Russia. The former TLI president is scheduled to be sentenced in March.

Cartel

Third Executive Charged in Generic Drug Price-Fixing Scheme : In February, a federal grand jury [indicted](#) the former vice president of marketing for Taro Pharmaceutical Industries Ltd. (Taro) 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 Taro executive was also charged with making false statements to the government during the investigation. He is the third executive to be charged in DOJ's ongoing investigation into price-fixing in the generic drug industry. The former CEO and former president of another generic drug company, Heritage Pharmaceuticals Inc. (Heritage), 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. Heritage entered into a [deferred prosecution agreement](#), an unconventional form of resolution for the Antitrust Division, in May 2019 in which the company admitted to fixing the prices of glyburide. The company agreed to pay \$225,000 in criminal penalties and \$7.1 million as part of a separate civil settlement with the government under the False Claims Act.

CEO Convicted of Fixing Prices of Canned Tuna : In December 2019, the former president and CEO of Bumble Bee Foods LLC (Bumble Bee) was [convicted](#) of conspiring to fix the prices of canned tuna after a four-week trial. According to the trial evidence, the former CEO met at offsite locations and used third-party email addresses to communicate with competitors; authorized his subordinates to engage in the conspiracy; and discouraged retention of documents related to the conspiracy, which impacted hundreds of millions of dollars in U.S. sales. The conspiracy was [first uncovered](#) when DOJ was reviewing documents as part of competitor Chicken of the Sea International's (Chicken of the Sea) proposed acquisition of Bumble Bee. Chicken of the Sea was later given immunity in the cartel investigation, avoiding prosecution. Bumble Bee and StarKist Co. have pled guilty to participating in the price-fixing scheme and agreed to pay \$25 million and \$100 million in criminal fines, respectively. Three other individuals have pled guilty to participating in the scheme.

Ex-JPM Trader Found Guilty Of FOREX Price-Fixing at Trial : In November 2019, a New York federal jury [convicted](#) a U.S.-based JPMorgan trader for conspiring to fix foreign exchange (FOREX) rates to boost his earnings. The jury [rejected](#) the trader's main argument that DOJ's case was based on "immature" chatroom banter that was embarrassing but not criminal after only three hours of deliberation. Conversely, we [previously reported](#) that in October 2018, a New York federal jury acquitted three British traders from JPMorgan, Citigroup, and Barclays of charges that they conspired to manipulate FOREX rates. In that case, the traders engaged in almost daily conversations in a private chatroom dubbed "The Cartel" or "The Mafia." However, the jury bought the traders' argument that the chats amounted to immature banter.

Deutsche Bank Traders Convicted Of LIBOR Rigging Avoid Jail : In October 2019, a New York federal judge [spared](#) two former Deutsche Bank AG traders from prison time following their conviction at trial for rigging the London Interbank Offered Rate (LIBOR), noting that they would otherwise be scapegoats for the guilt of the entire banking industry. The judge [sentenced](#) the two traders to time served with terms of home confinement for their "minor" part in the scheme to manipulate the benchmark interest rate. As we [previously reported](#), the traders were convicted of wire fraud and conspiracy in October 2018 for their part in manipulating LIBOR to benefit Deutsche Bank's LIBOR-tied derivatives trades. The judge rejected what she viewed as the prosecutors' attempt to make an example out of the two traders as "proxy wrongdoers." Gavin Black faced up to five to six years in prison, while Matthew Connolly faced up to four to five years under the Sentencing Guidelines. However, the judge sentenced Connolly to two years of supervised release, with six months of it in home confinement, and Black to three years of supervised release, with nine months of home confinement to be served at his residence in the U.K.

Former Financial Services Executive Pleads Guilty to Rigging Bids for Financial Instruments : In November 2019, a former vice president at Industrial and Commercial Bank of China Financial Services LLC (ICBCFS) [pled guilty](#) to criminal antitrust-related charges for participating in a conspiracy to rig bids for financial instruments. The executive [confessed](#) that, from as early as May 2012 until August 2014, the competitor broker-dealers conspired to submit rigged bids to borrow pre-release American Depository Receipts (ADRs), artificially suppressing bid rates. The executive is the fourth to plead guilty in the investigation into bid-rigging of ADRs.

Third Freight Forwarding Executive Pleads Guilty Plea to Price-Fixing Scheme : In October 2019, the president and owner of a Houston-based freight forwarding company [pled guilty](#) to criminal antitrust-related charges for her role in a conspiracy to fix, raise, and maintain prices for freight forwarding services from September 2010 until August 2014. In January, the executive was sentenced to 10 months in prison. Two of the executive's co-conspirators pled guilty in November 2018 and were sentenced to 18- and 15-month prison terms, respectively, for their roles in the scheme.

Securities and Accounting Fraud

Two Biopharmaceutical Company Executives Charged with Securities Fraud : In November 2019, the DOJ unsealed an indictment against the former CEO and COO of MiMedx Group, Inc. (MiMedx), a publicly-traded biopharmaceutical company. The executives were [charged](#) with securities fraud and securities fraud conspiracy for their parts in an alleged scheme to fraudulently inflate MiMedx's revenue. The executives allegedly engaged in "channel stuffing," by entering into contracts with distributors to ship more product than could be sold to end users. As a result, MiMedx reported annual revenue that was allegedly fraudulently inflated by approximately \$9.5 million in 2015. Also in November 2019, the SEC announced a [parallel civil action](#) against the executives, MiMedx, and the company's former CFO.

PixarBio CEO Convicted of Securities Fraud and Obstruction : In October 2019, a federal jury in Boston [convicted](#) the CEO of PixarBio Corp. (PixarBio), a biotech company, of defrauding the company's investors and obstructing an SEC investigation. During a three-week trial, prosecutors detailed a scheme in which the CEO engaged in manipulative trading of the company's shares to artificially inflate the stock's trading price, as well as false and misleading statements about the company's finances, the timeline for U.S. Food and Drug Administration (FDA) approval of its key drug, and the CEO's own background. Prosecutors further contended that the CEO misled the SEC in sworn testimony about the trading and his prior statements. Two co-conspirators, who previously pled guilty to securities fraud and obstruction charges, testified at the trial. All three co-defendants are scheduled to be sentenced in February.

Health Care Fraud

Telemedicine Company Owner Pleads Guilty to \$424 Million Medicare Fraud Scheme : In September 2019, the owner and CEO of several telemedicine companies [pled guilty](#) to participating in a scheme to solicit and receive illegal kickbacks and bribes from patient recruiters, pharmacies, and suppliers in exchange for arranging for doctors to order medically unnecessary orthotic braces for insurance beneficiaries, resulting in more than \$424 million in false and fraudulent claims to Medicare. As part of the plea agreement, the executive agreed to pay \$200 million in restitution. His sentencing is set for April.

Tax

U.K. Broker Pleads Guilty to Tax Fraud Scheme : In November 2019, a former London-based investment manager [pled guilty](#) to conspiring to violate the Foreign Account Tax Compliance Act (FATCA). The former investment manager and others allegedly opened brokerage accounts for an undercover agent who stated his interest in executing stock manipulation deals. He is the third individual to plead guilty in connection with the scheme and will be sentenced in March. His two co-defendants were previously sentenced to time served.

Noteworthy Investigations

Diesel-Emissions Cheating Scandal Spreads as Government Charges First Fiat Executive : In September 2019, an [indictment](#) was unsealed charging a senior manager at Fiat Chrysler Automobiles for allegedly conspiring to manipulate diesel emissions of two car models in order to obtain regulatory approval despite illegal emissions levels. This indictment represents the government's first criminal charges against an individual related to the diesel-emissions cheating scandal at Fiat Chrysler. The indictment alleges that the manager led a team of engineers that calibrated diesel engines for two models that produced fewer emissions of nitrogen oxides —poisonous gases that form when diesel is burned at high temperatures—during federal regulatory tests than when they were driven "in the real world." The manager and other Fiat employees then allegedly lied to regulators in person and in written applications and responses to requests for information. The manager has [pled not guilty](#) and, at the time of unsealing of the

indictment, was still employed at Fiat Chrysler. In January 2019, Fiat Chrysler Automobiles settled with federal and state regulators and private plaintiffs, paying nearly \$884 million in civil penalties related to the diesel-emissions cheating scandal.

DOJ and SEC Probe Under Armour's Accounting Practices : In November 2019, Under Armour [reported](#) that DOJ and the SEC have been investigating the company's accounting practices and related disclosures since 2017. Press reports indicate that the government is probing whether Under Armour "shifted sales from quarter to quarter to appear healthier" and has begun interviewing individuals in Baltimore where the company is headquartered. Under Armour is cooperating in the investigation and has responded to requests for documents. The company has stated that it "firmly believes that its accounting practices and disclosures were appropriate."

Notable Court Rulings

Second Circuit Permits Discovery Abroad for Foreign Legal Proceedings : In October 2019, the Second Circuit [held](#) in *In Re: Application of Antonio Del Valle Ruiz* that litigants in legal proceedings abroad could avail themselves of U.S. courts to obtain documents outside of the U.S. through discovery. In that case, two asset management firms contesting the sale of Spanish bank in a European court petitioned a U.S. court for discovery from the foreign acquiring bank and its U.S. affiliate. The district court denied the application as to the foreign acquiring bank based on lack of personal jurisdiction but granted discovery as to the U.S. affiliate. On appeal, the Second Circuit examined 28 U.S.C. § 1782, a statute that allows a litigant to a foreign proceeding to apply to a U.S. court to obtain evidence for use in the proceeding abroad, and held that the statute could be used to obtain documents outside the U.S. so long as the entity has sufficient ties to the forum in accordance with due process requirements.

Second Circuit Reinstates Conviction of a Former Nomura Trader : In September 2019, the Second Circuit [reinstated](#) the conviction of a former Nomura Securities International Inc. bond trader for conspiring to commit wire and securities fraud related to making false statements to obtain higher profit margins on residential mortgage-backed bond transactions. Although the bond trader was initially convicted by a jury, a District of Connecticut judge granted him a new trial because one of the government's trial witnesses had implied that an agency relationship existed between him and Gramins, which did not. The Second Circuit reversed the district court's order, holding that the witness's testimony did not erroneously claim an agency relationship with Gramins, and the witness's statements could "[not plausibly have prejudiced, misled, or confused the jury.](#)"

Extradition

Air Cargo Executive Extradited on Price-Fixing Charges After 10 Years on the Lam : In January, the former senior vice president of cargo sales and marketing for air cargo company Martinair N.V., a Dutch national, was extradited to the U.S. from Italy to face criminal charges for her alleged role in the long-running air cargo price-fixing conspiracy. The executive was a fugitive for nearly ten years until she was apprehended by Italian officials in July 2019. She initially contested extradition to the U.S. but ultimately waived appeal after an Italian court ruled against her. Upon arrival in the U.S., the executive [pled guilty](#) to the charges and was [sentenced](#) to 14 months in prison with credit for time served in an Italian jail. In total, 22 airlines and 21 executives have been charged in DOJ's investigation into price-fixing in the air transportation industry.

Russian National Extradited for Running Computer Hacking Scheme : In November 2019, a Russian national was [extradited](#) to the U.S. to face charges that he allegedly operated two websites used to facilitate payment card fraud, computer hacking, and other charges. The individual was arrested in Israel in 2015, and an Israeli court approved his extradition in 2017. He was extradited after his final appeal was denied.

Officer and Director Issues

Fourth Ex-KPMG LLP Partner Pleads Guilty to Conspiracy to Steal Government Information : In October 2019, a former KPMG partner [pled guilty](#) to conspiracy to commit wire fraud for his part in a scheme to defraud the Public Company Accounting Oversight Board (PCAOB). As we [previously reported](#), the government announced charges against five former KPMG executives and a former PCAOB employee in January of 2018, alleging that they obtained, disseminated, and used confidential PCAOB

information to assist KPMG in audit inspections. Three of the other KPMG executives pled guilty in October 2018 and October 2019. One former KPMG partner and the PCAOB employee were found guilty after a month-long trial in May 2019. The three individuals who have been sentenced have received jail terms ranging from eight months to a year-and-a-day in prison.

Noteworthy Sentencings

Ex-Och Ziff European Head Sentenced To Three Months in Prison for Making False Statements : In November 2019, a former managing director of U.S. hedge fund Och-Ziff Capital Management (Och-Ziff) was [sentenced](#) to three months in prison and issued a \$250,000 fine. As we [previously reported](#), the former Och-Ziff executive was indicted in 2017 for his alleged role in a fraud and bribery scheme related to the hedge fund's investment in Africa. But, as we also [previously reported](#), the SEC's bid to hold Cohen responsible in parallel civil proceedings was barred by the FCPA's five-year statute of limitations. Cohen ultimately pled guilty to making material false statements to the FBI during its investigation into the hedge fund.

Former Financial Services CEO Sentenced to Guidelines Max of 25 Years for \$400 Million Ponzi Scheme : In October 2019, a federal judge in Miami [sentenced](#) the former CEO of financial services company Woodbridge Group of Companies, LLC (Woodbridge) to 25 years in prison for defrauding 2,600 victims who invested \$400 million in retirement savings with Woodbridge. The former CEO has also been ordered to pay \$479 million in restitution. He and two former Woodbridge directors were charged in April 2019 with orchestrating a massive Ponzi scheme and promoting fraudulent securities to potential investors over a five year period. The former CEO ultimately [pled guilty](#) to conspiracy to commit mail fraud and wire fraud and evasion of payment of federal income taxes in August 2019. The 25-year sentence is the statutory maximum term of imprisonment, as explained in the plea agreement.

Policy Developments

DOJ Launches New Strike Force Targeting Antitrust Crimes in Government Procurement : In November 2019, DOJ announced a [newly formed Procurement Collusion Strike Force](#) (PCSF) charged with identifying, investigating, and prosecuting antitrust crimes in the government procurement process. The new task force combines the expertise and resources of DOJ's Antitrust Division and select U.S. Attorneys' Offices, as well as investigative partners from across the federal government to emphasize deterrence, detection, investigation, and prosecution of antitrust crimes related to federally funded programs. As we [previously wrote](#), contractors should be familiar with the PCSF's [identified procurement-related antitrust red flags](#), particularly during the bidding process. Contractors should also reexamine their antitrust and procurement-focused compliance programs to ensure they are they have the teeth to effectively prevent and detect antitrust violations. Time will tell whether the PCSF will lead to significant, new investigations of government contractors for antitrust crimes or whether it will simply be another new government task force with an unfunded mandate.

DOJ Issues Guidance for Companies' Ability to Pay Fines: In October 2019, DOJ's Criminal Division issued a [memo](#) providing guidance as to how the department will evaluate a company's assertion that it is unable to pay a criminal fine despite having reached a criminal resolution. The memo instructs prosecutors to look at various factors, including the company's ability to raise capital; the circumstances that led to its financial condition; collateral consequences of paying a criminal fine, such as layoffs, product shortages, or disruptions to the market; and the impact on victim restitution. The new guidance seeks to create a uniform set of considerations for prosecutors when companies assert a so-called "inability to pay" argument.

DOJ Clarifies FCPA Corporate Enforcement Policy: In November 2019, DOJ's Fraud Section implemented a [subtle change](#) to its FCPA Corporate Enforcement Policy, which offers companies the presumption that DOJ will decline prosecution if they self-report foreign bribery, fully cooperate with the government's investigation, and remediate the compliance failures. The policy change clarifies what information companies need to disclose and the timing of the disclosure to obtain the policy's benefits. The updated policy now states that a company needs to disclose "all relevant facts known to it at the time of the disclosure." It also requires disclosure of facts "as to any individuals" who played a substantial role in the "misconduct at issue" rather than requiring disclosure of "all individuals" substantially involved in a "violation of law," as the policy previously required. DOJ implemented the

update because "a company may not be in a position to know all relevant facts at the time of a voluntary self-disclosure, especially where only preliminary investigative efforts have been possible."

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