Miller & Chevalier

Executives at Risk: Early Fall 2020

White Collar Alert

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Introduction

Despite the onset of COVID-19 and the impact it has had on courts around the country, significant activity that affects corporate executives has occurred over the past few months. Criminal sentencings have resumed, and investigations are ramping up. As the virus has spread among jails, white collar defendants have increasingly filed to be released to home confinement. Many of those requests have been granted. The U.S. Attorney's office for the Southern District of New York (SDNY) has suffered some significant reputational setbacks as a result of failing to provide defendants with exculpatory and retaliatory tactics. Although it is unclear when courthouses and federal criminal investigations will "return to normal," it appears that investigations, charges, and sentencings are moving forward.

Below we also report on charges of executives in the areas of cartel, securities fraud, and obstruction of justice. In addition, we highlight key cases involving extradition and extraterritoriality issues and discuss noteworthy sentences.

Prosecutorial Misconduct

Federal Judge Strongly Rebukes the Southern District of New York : In September, Judge Alison Nathan in the SDNY ordered the Acting U.S. Attorney to "ensure that all current AUSAs and SAUSAs read" her 34-page opinion excoriating the government's conduct in its prosecution of Ali Sadr Hashemi Nejad (Sadr). The court's September order comes on the heels of its July ruling vacating the jury's verdict against Sadr. Sadr was convicted after a trial in March on charges stemming from Iranian sanctions violations connected with payments for a housing construction project in Venezuela. Sadr moved for acquittal as a matter of law following the trial and, prior to sentencing, the government moved for a "no prosecution" order as to the indictments, concluding amidst posttrial proceedings that "it would not be in the best interests of justice to further prosecute this case."

In September, the court found that disclosure violations "arose shortly after this case was transferred to the Undersigned and have—disturbingly—continued unabated since" and noted that "these errors should be investigated by Department of Justice's (DOJ) Office of Professional Responsibility." Among other incidents, the court described the government's failure to disclose an exculpatory letter until trial had already begun. The letter concerned the first payment charged against Mr. Sadr and showed that Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury had not only been informed of the payment, but also of its potential connection to an Iranian company, in an effort to comply with sanctions-related requirements. The failure to disclose the exhibit until trial was compounded by chats between prosecutors strategizing about "burying" the exhibit in a larger disclosure and the ultimate production of the exhibit in an email that "deliberately obscured" the fact that the exhibit had not been previously produced. The court concluded that the issues "that plagued the prosecution in this case" call for "systemic solutions." The court has requested further information to determine whether sanctions against the prosecutors are warranted.

In July, another federal judge in the SDNY, Judge Katherine Polk Failla, demanded information from the government following defense counsel's assertion that they had obtained potentially exculpatory material through a Freedom of Information Act (FOIA) request after their hedge fund founder client had been convicted and sentenced for fraudulently inflating the firm's value. The government produced additional documents to the defense, upon the Court's order, on September 24.

SDNY Judge Orders Former Trump Lawyer Released from Prison, Citing Prosecutorial Retaliation : In July, Judge Alvin K. Hellerstein of the SDNY ordered former attorney for President Trump, Michael Cohen, released from prison to home confinement after ruling that prosecutors had improperly retaliated against him for exercising his First Amendment free speech rights. Cohen had been released from prison in May to serve the remainder of his three-year sentence for tax evasion and campaign finance violations from home due to the COVID-19 pandemic. As a condition of his release, Cohen was barred from publishing his book, using social media, or engaging with the media. He was ordered back to prison in July for violating the conditions of his release after tweeting about the completion of his book. Judge Hellerstein found the purpose of Cohen's transfer back to jail retaliatory because of Cohen's "desire to exercise his First Amendment rights to publish a book." He "said he had never seen such a gag order in his 21 years on the bench."

Ninth Circuit Reverses Convictions Based on Government's Failure to Disclose Witness' Immunity : In July, the Ninth Circuit reversed the federal mortgage fraud convictions of two individuals due to the government's failure to disclose impeachment evidence regarding a key witness. A key government witness received immunity from the U.S. Attorney in a separate mortgage fraud case, made false statements to law enforcement in that case, and was under investigation by a state agency in connection with her fraudulent activities. This information was revealed to defense counsel in the middle of closing arguments, after one co-defendant's counsel had already completed their closing. Because the evidence could have affected the judgment of the jury, the Ninth Circuit reversed the convictions.

Actions Against Executives

Cartel

Poultry Executives Indicted in Antitrust Conspiracy : In June 2020, a Colorado federal grand jury indicted four current and former executives of two major broiler chicken companies for their role in an alleged price-fixing and bid-rigging conspiracy. From 2012-2017, the CEO of Pilgrim's Pride and three other executives allegedly colluded to manipulate the price of chicken broilers sold to fast food restaurants and distribution centers. The four executives are the first to be charged in an ongoing criminal probe of antitrust conspiracies in the broiler chicken industry. The investigation stems from a class action lawsuit filed in the Northern District of Illinois in 2016, in which DOJ moved to intervene in June 2019.

Securities and Accounting Fraud

Former Investment Executive Pleads Guilty to $18M Pre-IPO Fraud Scheme : In May, the former Chief Operating Officer (COO)of Elm Tree Investment Advisors LLC (Elm Tree), Ahmad Naqvi, pled guilty to a scheme to fraudulently induce more than 50 investors to invest over $18 million based on the false representation that the funds would be invested in tech companies such as Twitter, Alibaba, Uber, and Square before their initial public offerings (IPOs). Of the funds raised, only $7.1 million were invested, Elm Tree lost approximately $3.9 million in trading, and the remainder were used for luxury purchases as well as to repay other investors in a Ponzi-like scheme. The COO fled after his indictment and was arrested and extradited from Canada to the United States in November 2019. In June, the court ordered the COO to pay approximately $12.4 million in restitution and to be removed from the United States following his confinement, if he is sentenced to jail time. His sentencing is set for September. Elm

Tree's founder and manager, who was charged with securities and wire fraud in connection with the scheme, also fled to Canada and was extradited to the United States in January.

CEO of Artificial Intelligence Startup Charged with Securities Fraud : In July, Shaukat Shamim, CEO of an artificial intelligence (AI) startup company, Youplus, was charged in connection with a scheme to fraudulently obtain millions of dollars in venture capital funding by making false and misleading statements about the company's technology and its revenue. The CEO allegedly made false statements about the number of clients that had purchased Youplus' software and its revenue, including by showing investors forged bank statements to conceal Youplus' financial condition. Prosecutors further allege that Youplus had not developed proprietary AI software, as claimed to investors. The U.S. Securities and Exchange Commission (SEC) also charged the CEO with securities fraud violations in connection with the scheme.

Extradition & Extraterritoriality

Cape Verde Court Approves Extradition of Colombian Businessman to U.S. : In July, a court in Cape Verde, a group of islands off the west coast of Africa, approved extradition to the U.S. of a Colombian businessman linked to Venezuelan leader, Nicolás Maduro. As we previously reported, the businessman had been indicted in the Southern District of Florida on money laundering charges related to bribes he allegedly paid to Venezuelan officials in connection with a low-income housing project. He was arrested in Cape Verde on a layover in response to an Interpol notice issued by the U.S. In July 2019, the U.S. government sanctioned the businessman for allegedly using shell companies to hide profits from overvalued food contracts obtained through bribes and kickbacks.

DOJ Extradites Iranian Executive for Violating U.S. Sanctions : In May, DOJ indicted two Iranian nationals, Seyed Sajjad Shahidian and Vahid Vali, and their company, PAYMENT24, for exporting computer software, software licenses, and computer servers from U.S. companies to Iran. The indictment alleges that from 2009 to 2016, PAYMENT24's founder and CEO and the COO circumvented U.S. sanctions by assisting their Iranian clients with making illegal online purchases from U.S.-based businesses. Specifically, the CEO and COO allegedly orchestrated a scheme to sell customers a bundle of products to facilitate purchases. The bundle contained a fictitious PayPal account, a fraudulent identification card, a remote Internet Protocol (IP) address originating in the United Arab Emirates, and a Visa gift card. The complaint alleges that the CEO created over 250 PayPal accounts on behalf of customers in Iran. The U.S. secured the extradition of the CEO from the United Kingdom, and he has pled guilty to one count of defrauding the U.S.; however, the COO remains at-large. This case demonstrates the broad reach of U.S. sanctions laws, which the U.S. government has used here to target foreign individuals and foreign companies selling products abroad.

Obstruction of Justice

Former Uber Chief Security Officer Charged with Obstruction of Justice in Data Breach Coverup : In August, Uber's former chief security officer was charged with obstruction of justice and failing to report knowledge of a felony in connection with covering up a 2016 data breach at Uber by hackers that compromised personal information of 57 million drivers and users. The criminal complaint alleges that instead of reporting the breach to the Federal Trade Commission (FTC), which was investigating Uber at the time related to a prior data breach, the officer paid hackers $100,000 in Bitcoin and sought non-disclosure agreements from the hackers. New management at Uber ultimately discovered the data breach and disclosed it publicly and to the FTC in November 2017. The hackers behind the 2016 breach pled guilty last year to computer conspiracy charges.

Government Contractor Owner Pleads Guilty to Destruction of Records : In May, the owner of C&D Construction, a government contractor construction company, pled guilty to destruction of records in an ongoing federal investigation into an alleged bribery conspiracy related to a Marine Corps procurement involving an unnamed public official. The executive's company had performed work for the public official and another unnamed company involved in the investigation. In March, government agents interviewed the executive as part of the investigation. On the same day, the executive exchanged texts with the unnamed public official providing him with information related to the covert investigation and then deleted the texts. Sentencing has not yet been scheduled.

Noteworthy Sentencings

Former Bumble Bee CEO Receives Sentenced to 40 Months' Incarceration : In June 2020, former Bumble Bee CEO Christopher Lischewski was sentenced to 40 months in prison after a jury convicted him of leading a three-year conspiracy to fix canned tuna prices that affected $600 million in nationwide commerce. As we previously reported, 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. 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 pled guilty to participating in the scheme and testified against Lischewski at trial. The judge sentenced Lischewski well below federal prosecutors' request of eight to 10 years in prison but rejected Lischewski's request of home confinement.

Judge Refuses to Add Sentencing Enhancements for Conduct Attributable to Undercover Agent : In May, a former investment manager at a U.K. brokerage firm received no prison time following his guilty plea on securities fraud charges. The government's Guidelines calculation of 37-46 months included a significant, 16-level enhancement for $1.5 million in intended losses. The defense successfully argued this valuation was improperly based on statements made by the undercover agent. Without the enhancement, the Sentencing Guidelines called for a sentence of zero to six months . The court ultimately imposed three years of probation.

No Prison Time for Cooperator Who Helped Convict Five Pharmaceutical Executives : In June, a manager at pharmaceutical company Insys Therapeutics was sentenced to time served for her role in an opioid kickback scheme. The manager testified extensively at a 10-week trial in 2019, which ended with convictions for five company executives, as previously reported. When the manager pled guilty in 2017, she agreed not to argue for a sentence of less than 18 months. That plea agreement was modified in May 2020, after the executives all received below-Guidelines sentences, between 24 and 66 months.

Second Circuit Vacates Sentence Based Upon Broad, Uncharged Bribery Scheme : In August, the Second Circuit vacated the sentence of a hedge fund founder, holding that the trial court's Guidelines calculation was improperly based on an uncharged bribery scheme. In 2016, the former executive stood trial on honest services fraud charges. After the trial ended in a hung jury, the hedge fund founder pled guilty to a superseding information that narrowly charged him with conspiracy to commit wire fraud based on a single fraudulent invoice. The parties agreed to a Guidelines range of six to 12 months' imprisonment and a loss of just $60,000. Despite arguments from both the government and the defense to the contrary, Judge Hellerstein (SDNY) nonetheless considered the full breadth of the alleged scheme originally weighed by the jury and sentenced the company founder to 30 months imprisonment and $19 million of restitution. The Second Circuit held that it was inappropriate to consider the uncharged fraud and remanded for resentencing.

Biofuel Executive Receives Downward Departure But is Still Sentenced to 84 Months for $10 Million Fraud : In August, a former biofuel executive received a sentence of 84 months for falsely claiming cash bonuses and tax credits worth more than $10 million. The sentence was well below the 210- to 262-month Guideline sentence that the government had requested. The executive had raised a number of reasons for a downward departure, including that his initial counsel had a conflict in representing him and that he provided substantial assistance against his co-defendant. His co-defendant, who pled guilty to a single conspiracy charge in 2017, has yet to be sentenced.

Former Alstom Executive Who Cooperated Against Others Receives Time Served : In July, Alstom SA's former Indonesia Country President was sentenced to time served for his role in a scheme to bribe Indonesian government officials to secure a power plant project in Indonesia. The executive, who pled guilty to a conspiracy charge last summer, testified at former Alstom executive Lawrence Hoskins' trial. As previously reported, earlier this year, Hoskins' bribery convictions were thrown out by the trial court, which nonetheless left in place his money laundering convictions and sentenced him to 15 months in prison. The sentence to time served is consistent with the time served penalties imposed on other cooperators who testified at Hoskins' trial.

No Prison Time for Former Technip and Keppel Consultant Who Cooperated Against Others : In August, a former consultant to Keppel Offshore and Marine Ltd. and Technip S.A. received 18 months of probation and a $50,000 fine arising out of his participation in a scheme to pay $55 million in bribes to Brazilian energy company Petrobras. The consultant, who pled guilty last summer, used a portion of commissions he received from Keppel and Technip to pay bribes to officials. In addition to cooperating with prosecutors in the United States and abroad, he also served time in prison and was fined by the Brazilian authorities.

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