



ANTI-CORRUPTION DIGEST

May 2014

Welcome to Dorsey & Whitney's monthly Anti-Corruption Digest. Anti-corruption enforcement crosses boundaries like no other, so keeping up to date is more important than ever. In this digest, we draw together news of enforcement activity throughout the world and aim to reduce your information overload. Our London, Minneapolis, New York and Washington DC offices edit the digest and select the most important material so that you can use this digest as a single source of information.

■ THE USA

Eleventh Circuit Clarifies Meaning of "Instrumentality"

On May 16, 2014, the Eleventh Circuit Court of Appeals clarified what test to apply in determining whether a person is a "foreign official" within the meaning of the FCPA. The Court's decision is the first by an Appellate Court to consider the meaning of "instrumentality" under the FCPA, i.e., whether an apparently private commercial entity is an instrumentality of a foreign government. The Court offered a two part test to determine whether the entity is an instrumentality of a foreign government: first, whether the entity is "controlled by the government of a foreign country" and, second, whether the entity "performs a function the controlling government treats as its own." *United States v. Esquenazi*, No. 11-15331, at 20 (11th Cir. May 16, 2014). In answering these two questions, the Court provided a list of non-exhaustive factors.

In considering whether a government controls an entity, courts should consider: (1) the foreign government's formal designation of that entity; (2) whether the government has a majority interest in the entity; (3) the government's ability to hire and fire the entity's principals; (4) the extent to which the entity's profits, if any, go directly to the government; (5) the extent to which the government funds the entity if it fails to break even; and (6) how long these indicia have existed.

In considering whether the entity performs a function the government treats as its own, courts should consider: (1) whether the entity has a monopoly over the function it exists to carry out; (2) whether the government subsidizes the costs associated with the entity providing services; (3) whether the entity provides services to the public at large in the foreign country; and (4) whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.

While the opinion provides some clarity to firms doing business abroad as to whether it is transacting with an instrumentality of the government, and therefore a foreign official, it does not announce a bright line rule as many had hoped. In practice, the Court's holding does little to assist businesses in evaluating their obligations and risks because it is difficult to gather information on many of these factors, including how much actual government control is exercised over an apparently private enterprise. In any event, to the extent such information is attainable, companies should be advised to update their current compliance procedures and protocols to consider the factors laid out in the Eleventh Circuit's decision.

The Court's decision is available [here](#).

United States Prosecutors Seek Jail for ex-Guatemala President Convicted of Bribery

On May 12, United States prosecutors requested that U.S. District Judge Robert Patterson in the Southern District of New York sentence former Guatemalan President Alfonso Portillo to almost six years in jail for taking over \$2.5 million in bribes from Taiwan.

Portillo was the president of Guatemala from 2000 to 2004, but was arrested in Guatemala in 2010. After Guatemalan courts cleared him, he was extradited to the United States where he was charged, and eventually pleaded guilty to money laundering conspiracy in March of this year. His guilty plea acknowledged taking \$2.5 million from Taiwan in exchange for the Portillo's promise to recognize Taiwan diplomatically.

According to the Government's allegations, Portillo accepted the first of the bribe payments just four days before being sworn in as president in Guatemala.

United States Authorities Seeking \$3.5 and \$2.6 Billions and Guilty Pleas from BNP Paribas SA and Credit Suisse

The Department of Justice appears to be closing in on a deal with Paris-based bank BNP Paribas SA ("BNP") to resolve allegations that the bank had extensive dealings with sanctioned countries, including Sudan, Iran, and Cuba that may have implications for corruption enforcement. In February, BNP disclosed in a press release that it had set aside \$1.1 billion to settle the case, but it appears it will have to pay much more to settle the case.

U.S. prosecutors have now indicated that they are close to an agreement with BNP that would require both a guilty plea and \$3.5 billion to resolve the charges. If BNP ends up having to pay anywhere near this amount, it could be one of the largest penalties ever imposed for a sanctions violation in United States history. The guilty plea would also send a strong signal as most sanctions cases end in deferred prosecution agreements. But some fear that the strong message might have disruptive effects in the financial markets. Prosecutors have been reluctant to criminally charge large companies after Arthur Andersen's collapse put close to 85,000 people out of work.

Prosecutors told Bloomberg last week that they believe a hefty fine is warranted given how egregious the misconduct was, and the fact that BNP did not fully cooperate with the investigation. The aggressive position taken by the United States appears to stem from criticism that they are intimidated by financial institutions because of their size and influence in the economy. Earlier this month, United States Attorney General Eric Holder addressed the charges against BNP – along with charges pending against Swiss bank Credit Suisse for assisting United States citizens in evading their tax obligations – and issued a public warning that no company is "too big to jail."

In a separate move, it has been reported that Credit Suisse, Switzerland's second-largest bank, pleaded guilty to helping US clients avoid paying taxes to the US government and the bank has agreed to pay a \$2.6bn (c.£1.5bn) fine. This fine more than triples the \$780 million fine UBS paid over similar charges, however, while UBS received a deferred prosecution agreement—criminal charges against it were quietly dropped in 2010—Credit Suisse will receive a felony conviction.

In a statement the US attorney general Eric Holder said it was the largest bank to plead guilty in “20 years”. He told a news conference: “Credit Suisse and its subsidiaries engaged in a wide ranging conspiracy to help US tax payers evade taxes.” Mr Holder told a press conference: “The bank went to elaborate lengths to shield itself, its employees, and the tax cheats it served, from accountability for their criminal actions.” Mr Holder added: “They subverted disclosure requirements, destroyed bank records, and concealed transactions involving undeclared accounts by limiting withdrawal amounts and using offshore credit and debit cards to repatriate funds.”

The cases may therefore signal an increased price for not cooperating with the US government in resulting investigations.

Despite the hefty fine, Credit Suisse agreed a deal with U.S. regulators that it will not lose its licence and Credit Suisse will still be allowed to operate in the U.S. It was reported that, under the deal, Credit Suisse's parent must plead guilty to a conspiracy charge, admitting that it promoted U.S. tax evasion.

Law Firm Patton Boggs Pays \$15 Million to Settle Cover-Up Allegations

In March, the Anti-Corruption Digest reported that New York lawyer Steven Donziger had

bribed Ecuadorean officials, including a judge and court-appointed expert, to help achieve a \$9.5 billion judgment against Chevron in favor of villagers from the Lago Agrio region of Ecuador relating to pollution in the area. Now D.C. law firm Patton Boggs has been implicated, and agreed to pay Chevron \$15 million for its part.

Patton Boggs had been working with Donziger for a few years to collect the Ecuador judgment against Chevron. After Patton Boggs brought a collections action against Chevron alleging bad faith in blocking enforcement of the Ecuador judgment, Chevron counterclaimed against Patton Boggs alleging that the law firm had joined Donziger's fraud to cover-up evidence relating to the bribery. On May 7, a federal judge denied Patton Boggs' motion to dismiss, and held that Chevron's claims against the law firm could continue.

In a statement, Patton Boggs has agreed to pay Chevron \$15 million, and also to cease all representation of plaintiffs in the Ecuador case. There is no indication that Patton Boggs is the subject of any government investigation.

Johnson Controls Discloses FCPA Investigation in China

In a recent SEC filing, Johnson Controls, Inc. announced that it had self-reported to the United States Department of Justice and the Securities Exchange Commission that it commenced an internal investigation in July of 2013 into possible FCPA violations in China. The possible violations date back to 2007.

Johnson Controls is one of the world's largest manufacturers of building maintenance systems and controls, which include temperature and air regulation controls found in most large-scale buildings and industrial facilities. The company also manufactures temperature control systems for vehicles and boats, among others.

According to Johnson Control's disclosure, the focus of the investigation is Johnson Control's "Building Efficiency marine business in China, dating back to 2007," which reported annual sales ranging from \$20 million to \$50 million during this period. No further information has been provided regarding the nature of the possible FCPA violations.

Avon Settles FCPA Allegations for \$135 Million

On May 1, the beauty products company Avon announced that it had "reached an understanding" with the Department of Justice and SEC to resolve allegations that the company had violated the FCPA. Of the \$135 million, \$68 million will go to the DOJ, and \$67 million to the SEC. The deal includes a three-year deferred prosecution agreement with the DOJ, and the institution of a compliance monitor for at least 18 months.

The agreement resolves charges relating to alleged bribes of Chinese foreign officials as evidenced by a 2005 internal audit report that concluded Avon employees may have been engaging in conduct in China that violated the FCPA relating to dollars spent on "travel, entertainment and other expenses" in convincing Chinese officials to allow the door-to-door direct marketer to enter the Chinese market.

By the end of 2013, Avon had reportedly spent approximately \$300 million on its internal FCPA investigation, and as a result of the fallout after its initial disclosure in 2012, CEO Andrea Jung was asked to leave the company in 2012.

SEC Threatens Enforcement Action against Qualcomm

On April 24, Qualcomm, Inc., the world's largest mobile chipmaker, disclosed in an SEC

filing that it was the subject of an SEC investigation relating to allegations that the microchip giant had bribed officials in China's state-owned firms. The disclosure announced that Qualcomm had received a Wells Notice from the SEC on March 13, recommending an enforcement action against the company.

The Wells Note stems from an SEC investigation that started in 2012 after a whistleblower complaint informed the SEC that Qualcomm had conducted an internal investigation and unearthed evidence of "special hiring consideration, and gifts or other benefits" provided to Chinese officials. Qualcomm's disclosure estimates the value of the possible benefits in question to be "less than \$250,000, excluding employment compensation."

Goldman Sachs Being Probed For Hiring Practices

Earlier this month Goldman Sachs Group, Inc. disclosed in its Form 10-Q that it was the subject of an ongoing FCPA investigation by the SEC regarding its hiring practices outside the United States. The investigation centers around Goldman's practice of hiring relatives of well-connected officials in Asia, and whether such hiring may run foul of the FCPA.

The inquiry into Goldman's hiring practices is part of a larger investigation into the hiring practices of other international banks, including Credit Suisse, Morgan Stanley, Citigroup, and UBS AG. In 2013, several news reports surfaced regarding the hiring practices of Wall Street banks in China.

A recent example is JP Morgan's hiring of Wen Ruchun, the daughter of Wen Jiabao, a former Chinese prime minister. Wen Ruchun allegedly received \$75,000 per month from JP Morgan via a consulting company – Fullmark Consultants. Last year, The New York Times reported that the "practice of hiring the

children of government officials was so widespread that banks competed to see who could hire the most politically connected recent college graduates.”

■ THE UNITED KINGDOM

Former Barclays executives are questioned by the Serious Fraud Office

The United Kingdom’s Serious Fraud Office (the “SFO”) has reportedly increased its investigation efforts into Barclays Plc’s dealings with Qatar.

Two former chief executives of Barclays, Bob Diamond and John Varley, and other senior members of Barclays former management are reportedly scheduled to be questioned under caution by the SFO.

The report stated that the questioning of the former Barclays executives is said to be an acceleration of the SFO’s probe into the bank’s arrangements with Qatar as a part of Barclays’ emergency cash demands in 2008.

Ukraine Corruption

The Director of the SFO has stated that the SFO has opened a criminal investigation into potential money laundering arising from suspicions of corruption in Ukraine. Further, the SFO states that it has obtained a restraint order, pursuant to the Proceeds of Crime Act, freezing approximately \$23 million of assets in the UK in connection with this case.

UK executive accused in GlaxoSmithKline China probe

Further to April’s digest which reported corrupt practices conducted by GlaxoSmithKline (“GSK”) in Poland and Iraq, it was reported further that Chinese police have accused a

British GSK executive of allegedly ordering staff to bribe hospital officials to use its medical products.

Reports state that Mark Reilly (GSK’s former head of China operations) and two other colleagues are also suspected of allegedly bribing government officials in Beijing and Shanghai.

In a statement, GSK said it took the allegations “very seriously” and that it would co-operate with the authorities over the matter.

It was stated that, the police ministry accused Mr Reilly of personally running a “massive bribery network”. He is alleged to have persuaded sales teams to make payments to doctors, hospital officials and health institutions to use GSK products, resulting in payments amounting to hundreds of millions of dollars.

Investigators stated at a news conference that the cost of drugs sold by GSK in China was much higher (sometimes up to seven times higher) than that of similar drugs sold by GSK in other countries.

The investigators were quoted in a report stating, that while the company itself had been “very responsible and has given us their full support”, GSK’s operation in China “tried to pay bribes” in order to “obstruct” their efforts “in exposing their bribery behaviours”.

■ THE REST OF THE WORLD

Australia

It has been alleged that New South Wales’ state police minister, Mike Gallacher, resigned after being connected to a scheme to illegally channel political donations from a property development group, Buildev, owned by Australian tycoon, Nathan Tinkler.

New South Wales prohibits property developers from making political donations and the scheme was allegedly devised to evade the rules in order to influence the government with unlawful payments.

In a statement, Mike Gallacher said: “I have made the decision that I should not remain in this office when such a serious allegation has been made against me”.

Mike Gallacher is reportedly the latest official to be caught up in the wide-reaching state investigation into corruption that has led to questioning of other officials from Prime Minister Tony Abbott's Liberal Party.

The report states that Senator Arthur Sinodinos, who stood aside as assistant treasurer in the national government, and former New South Wales state Premier Barry O'Farrell, also resigned after it was revealed that he had allegedly misled the inquiry about accepting a Aus\$3,000 (c. US\$2,800) bottle of wine as a gift.

Canada

It is reported that, the Ontario Superior Court of Justice concluded in *Chowdhury v. H.M.Q.* 2014 ONSC 2635, that Canada does not have jurisdiction over a foreign national alleged to have breached the Corruption of Foreign Public Officials Act (the “CFPOA”).

In the case it is alleged that the former Interior Minister and Minister of State of Bangladesh, Abul Hasan Chowdhury, influenced the selection committee for a bridge project in favour of a Canadian company, SNC Lavalin. Mr Chowdhury is a Bangladeshi citizen and resident of Bangladesh, is not a Canadian citizen nor has he ever been resident. The report states that there is no evidence to suggest that Mr Chowdhury has ever been to Canada.

Justice Nordheimer considered whether the CFPOA either expressly or by necessary implication extends Canada's jurisdiction over foreign nationals whose conduct occurred outside Canada in relation to an offence over which Canada has properly assumed jurisdiction. Justice Nordheimer answered the question in the negative and found that there is nothing in the charging provision in the CFPOA (section 3) that expressly makes foreign nationals subject to it, despite the fact that section 3 prohibits “every person” from giving or offering, directly or indirectly, a benefit of any kind to a foreign public official with the ultimate purpose of obtaining or retaining a business advantage. Justice Nordheimer held that the phrase “every person” does not encompass foreign nationals in the circumstances of this case.

China

For further allegations against GlaxoSmithKline relating to the China operations, see the UK section of this Digest.

For allegations against Johnson Controls, Inc. Avon and Qualcomm, Inc. relating to their operations in China, see the US section of this Digest.

Germany

It is reported that German prosecutors have disputed claims by Bernie Ecclestone (Formula 1 president and CEO) that he was blackmailed into paying \$45m (c.£27.5m) to a German banker.

Reportedly, the Munich court was told that Mr Ecclestone was not able to give firm details to back up his claim. Mr Ecclestone is accused of bribing the banker to secure the sale of a stake in the F1 business to a company he favoured. Gerhard Gribkowsky reportedly told the Munich court that Mr Ecclestone had bribed

him when they worked together in the motor sport.

Mr Ecclestone claims that he was the victim of blackmail as the banker had threatened to reveal false details of his tax affairs. According to reports, Mr Ecclestone admits paying Gerhard Gribkowsky, who was on the board of Bayern Landesbank, but denies any wrongdoing. Mr Gribkowsky is serving a jail sentence for receiving the payment.

The payments were made between July 2006 and December 2007. According to the report, prosecutors state Bernie Ecclestone bribed Gribkowsky to ensure that a stake in F1 was sold to a particular private equity group.

The trial continues. If convicted, Mr Ecclestone could face up to 10 years in jail.

Hong Kong

According to reports, two of Hong Kong's wealthiest tycoons went on trial on Thursday 8 May 2014 in the city's biggest corruption case to date.

Brothers Thomas and Raymond Kwok, who jointly chair the development company Sun Hung Kai Properties, and Hong Kong's former chief secretary Rafael Hui were arrested in connection with alleged bribes payments and unsecured loans amounting to HK\$34 million (c.\$4.38 million).

According to reports, five people were arrested in connection with the payments. The others include another Sun Hung Kai director, Thomas Chan, and Francis Kwan, the former non-executive director of the investment company, New Environmental Energy Holdings.

As stated in a Department of Justice indictment, Sun Hung Hui, faces eight charges,

some of which relate to receiving payments in return for being “favourably disposed to Sun Hung Kai Properties... and Thomas Kwok and Raymond Kwok” while in office. The charges against Sun Hung Hui reportedly also relate to rent-free use of luxury apartments and acceptance of unsecured loans.

Thomas Kwok, is reported to face three charges of conspiracy to commit misconduct in public office and his brother Raymond to have been charged with four offences including furnishing false information, according to the document.

The arrests have renewed discussion on links between wealthy tycoons and officials in the Asian financial centre that have raised public suspicion for some time. The head of Social Sciences at the Hong Kong Institute of Education told AFP is quoted saying: “This case will reinforce the public perception that the Hong Kong government has been vulnerable to the possible influence of the capitalist class”.

It is said that former Hong Kong chief executive Donald Tsang ended his term in June 2012 after admitting to accepting gifts from tycoons such as trips on luxury yachts and private jets. According to reports, Hong Kong billionaire Joseph Lau was found guilty in March of this year of bribing a former minister in the gambling district of Macau in an attempt to purchase a prime development site.

The hearing took place at Hong Kong's High Court on 8 May 2014.

Indonesia – Jakarta

According to reports, the trial of Banten Governor Ratu Atut Chosiyah, who was accused of assisting in the bribing of former Constitutional Court chief justice Akil Mochtar, was set to begin on 6 May 2014.

Ratu Atut Chosiyah and her brother Tubagus Chaeri Wardana, who was also indicted in the case, allegedly paid Rp 1 billion (c.US\$87,000) to Akil Mochtar in exchange for a favourable court ruling for Lebak deputy regent Amir Hamzah in an election dispute case.

According to reports, the siblings, Ratu Atut Chosiyah and Tubagus Chaeri Wardana, are also suspects in another case regarding the procurement of medical equipment by the South Tangerang regency and Banten provincial administrations.

The report indicates that the Corruption Eradication Commission (the “CEC”) intends to increase its investigation into the medical equipment case to determine if Ratu Atut Chosiyah had laundered money she allegedly collected from the procurement projects. The CEC has reportedly charged Tubagus Chaeri Wardana with money laundering.

It is reported that Ratu Atut Chosiyah is being charged under Article 6 of Law No. 31/1999 on corruption for her alleged role in the bribery case. The sentence carries a maximum sentence of 15 years in prison.

In a statement, Dahnil Anzar, of Sultan Ageng Tirtayasa University said: “I am sure that if the [CEC] charges her with money laundering then it will uncover other parties involved in the alleged crimes, such as Atut’s family members, local politicians and local businessmen in Banten,”...“The money laundering charge is very important to reveal other corruption crimes allegedly committed by Atut’s dynasty”.

The report indicates that Dahnil explained that Atut abused her position to help alter several government projects worth billions of rupiah.

Italy

Police arrested seven people including public officials on charges of alleged bid rigging and corruption related to the upcoming Expo Milano in 2015.

It is alleged that those arrested include the Expo Milano 2015 procurement planning manager Angelo Paris, and Antonio Rognoni, former manager of an infrastructure company owned by the local government of Lombardy region, of which the capital is Milan. Antonio Rognoni had already been detained in March for alleged bid rigging and connected fraud against the regional authorities.

According to reports, judicial sources were quoted by ANSA news agency stating that prosecutors in Milan have discovered a “mafia commission” to “influence contracts, some of which related to Expo, by promising career advancements to public officials thanks to political protection.”

Reports indicate that Angelo Paris was quoted saying in a wiretap by ANSA “I will give you all contracts you want if you favour my career”.

According to Milan-based joint research center on transnational crime Transcrime, Lombardy region’s mafias have a daily turnover allegedly in excess of 10 million euros.

Netherlands

It has been alleged that the Irish Minister resigned in connection with the reported corruption involving Royal Dutch Shell plc (“Shell”), Anglo–Dutch multinational oil and gas company headquartered in the Netherlands and incorporated in the United Kingdom, in relation to OSSL allegations concerning Shell sponsored corruption involving hundreds of Garda officers, including senior officers such as Supt Joe Gannon.

The Garda Commissioner has already resigned in connection with other allegations against the Irish police.

OSSL directors who have allegedly admitted distributing free alcohol to Irish police at the order of Shell, will be raising the explosive subject at the forthcoming Royal Dutch Shell Plc AGM, according to reports.

Singapore

According to reports, Choo Wee Khiang, the former member of parliament, was granted a discharge amounting to an acquittal on three corruption charges allegedly committed during his term as the president of the Singapore Table Tennis Association (STTA).

The three charges related to allegations that Choo Wee Khiang accepted cash payments of S\$1,500 and US\$600 (S\$750) in 2005.

In a statement, the Attorney-General's Chambers said, "After careful consideration, the prosecution decided that a stern warning in lieu of prosecution would be appropriate with regard to these three charges, and Mr Choo accepted the stern warning," said the AGC in a statement.

Spain

The Spanish Civil Guard is reported to have arrested nine people for alleged irregularities in the construction of the high-speed AVE train linking Madrid and Barcelona that led to extra costs of around 6 million euros (c.\$8.3 million).

The special prosecutor's office for corruption cases said in a statement that suspects are officials of Adif (the agency responsible for managing infrastructure projects in Spain) and executives of a construction company who

allegedly colluded to earn profits on the AVE train project to which they were not entitled.

Prosecutors apparently suspect that documents were altered to state that the contractor had done more work on the project than it actually performed and that a Corsan executive may have authorised payments to the Adif officials for their role in the scheme.

The report indicates that investigators are also examining whether the awarding of the contract itself was done under unusual conditions.

The Isolux Corsan company was quoted in a report stating, for its part, it has offered its "full cooperation" to authorities.

Vietnam

Vietnamese police are reported to have arrested four officials of the state-owned Vietnam Railways Corporation (the "VRC"), for their alleged involvement in a suspected bribery case, in which the leader of a Japanese consultant firm said it had paid over US\$780,000 in payments in exchange for an ODA-funded project order in Vietnam. Among the four people arrested is Tran Quoc Dong, a deputy general director of the VRC.

Mr Dong has been reportedly charged with "negligence of responsibility, causing serious consequences" under Article 285 of the Penal Code.

Mr Dong was appointed director of the Railway Project Management Unit (the "RPMU") under the VRC by the general director of the corporation on 1 October 2009. Before his election Mr Dong was head of the VRC's international relation board and on 1 June 2011, the VRC's Board of Management appointed him deputy general director of the corporation.

The other three people who have been arrested are reported as Pham Quang Duy and Pham

Hai Bang, who are deputy directors of the RPMU, and Nguyen Nam Thai, head of the corporation's project office. These three have been allegedly charged with "abusing positions and/or powers while performing official duties" under Article 281 of the Penal Code.

Reports state that the alleged bribery was discovered when Japan's Yomiuri Shimbun newspaper reported in March 2014 that Tamio Kakinuma, president of Japan Transportation Consultants, Inc., had admitted allegations that the firm paid ¥80 million (s.\$782,640) in bribes in return for an official development assistance project order worth ¥4.2 billion (\$41,088,600) in Vietnam.

Corruption issues are also addressed in the Anti-Fraud Network's newsletters: see www.antifraudnetwork.com for current and archived material; see also the Computer Fraud website at <http://computerfraud.us> and www.secactions.com.

CONTACTS

LONDON

Nicholas Burkill

Partner

+44 (0)20 7826 4583

burkill.nick@dorsey.com

Sarah Dalton

Trainee Solicitor

+44 (0)20 7031 3755

dalton.sarah@dorsey.com

MINNEAPOLIS

Beth Forsythe

Associate

+1 (612) 492 6747

forsythe.beth@dorsey.com

Mike Stinson

Associate

+1 (612) 492 6624

stinson.mike@dorsey.com

NEW YORK

Nick Akerman

Partner

+1 (212) 415-9217

akerman.nick@dorsey.com

WASHINGTON DC

Thomas Gorman

Partner

+1 (202) 442-3507

gorman.tom@dorsey.com

This update is provided for general informational purposes and is not intended to constitute advice. If you require advice on any of the matters raised in this update, please let us know and we will be delighted to assist.