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The FCPA cases awaiting trial and the issues to watch

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Holland & Knight's Eddie Jauregui, Wifredo Ferrer and Sam Stone examine some of the FCPA cases currently scheduled for trial and how they could affect the meaning of instrumentality, the jurisdictional reach of the statute, and the extent to which government agencies can work together on investigations.

By some measures, 2020 was a blockbuster year for Foreign Corrupt Practices Act (FCPA) prosecutions. The Department of Justice started and ended the year shattering records – announcing a nearly $4 billion global settlement with Airbus in January 2020, and roughly $3 billion settlement with Goldman Sachs in October 2020 to resolve the high-profile 1MDB case. By early December,

Acting Assistant Attorney General Brian Rabbitt noted that the financial penalties assessed in FCPA cases in 2020 to date ($7.76 billion worldwide) had dwarfed the amount assessed in 2019 ($2.83 billion). But these numbers tell only part of the story.

As others have observed, the number of FCPA enforcement actions, resolutions, and individual charges were all down in 2020, likely due to limitations placed on prosecutors and investigators by the covid-19 pandemic. And with the closure of courthouses across the nation, prosecutors were able to try only one FCPA case last year.

This pause on trials has left a number of individual defendants waiting for their day in court. It has also slowed – though not entirely stopped – the development of case law that former criminal division chief Brian Benczkowski predicted over a year ago, when he observed that greater numbers of individual prosecutions would lead to greater numbers of judicial opinions, in turn expanding the "FCPA section" of "white collar crime textbooks."

This article previews some of the key issues to watch as individual FCPA (and related) prosecutions move forward and as trials resume.

The meaning of "instrumentality" under the FCPA

When is a US-based corporation, organised under US laws, an "instrumentality" of a foreign government for purposes of the FCPA? That is the key question in *United States v Jose Luis De Jongh-Atencio*, which is currently set for trial in March in Houston, Texas. Defendant De Jongh is a dual US-Venezuelan citizen and former procurement officer and manager of the Houston-based oil company Citgo. While at Citgo, De Jongh allegedly accepted bribes totaling over $2.5 million from two businessmen, in exchange for helping them obtain business from Citgo and its parent company, Petróleos de Venezuela SA (“PDVSA”). De Jongh is charged with conspiring with these businessmen and others to launder the bribe proceeds and hide the corrupt nature of the payments.

In pre-trial motions, De Jongh has signaled that the only contested issue at trial will be whether he qualifies as a "foreign official" for purposes of the FCPA, which depends on whether Citgo is an "instrumentality" of a foreign government.

De Jongh has noted that Citgo is a Delaware corporation and is based in Houston, Texas.

So how will the government prove that Citgo is an "instrumentality" of a foreign government, particularly when the FCPA does not define the term and there is no controlling Fifth Circuit (the regional appeal circuit) law? Based on past practice, and the government's own updated *Resource Guide to the Foreign Corrupt Practices Act,* we expect the government to focus on Citgo's "ownership, control, status, and function," highlighting the factors set forth in *United States v Esquenazi.* In that case, the court held that, for purposes of the FCPA, an "instrumentality" is "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own." In making that assessment, the court directed fact-finders to focus on factors like the foreign government's financial and management control of the entity at issue, whether the government subsidises the entity in any way, whether the entity provides services to the public at large in a foreign country, and whether the public and foreign government generally perceive the entity to be performing a governmental function.

Here, the indictment alleges that Citgo is a wholly-owned subsidiary of PDVSA, a "Venezuela state-owned and state-controlled oil company," and that Citgo "procured goods and services on behalf of PDVSA through its Special Projects group." The government thus far has refused De Jongh's request for additional clarity on this issue, but at trial expect the government to track the *Esquenazi* factors closely, putting forth evidence of the Venezuelan government's corporate and financial control over Citgo (through PDVSA) and elucidating the functions performed by Citgo. It remains to be seen how the government will establish Citgo's "status" as a Venezuelan governmental entity, or how Citgo serves the Venezuelan public.

Venue and the limits of the FCPA's jurisdictional reach

Perhaps the most anticipated trial of the year is *United States v Ng Chong Hwa* in Brooklyn, New York. Defendant Ng, known also as Roger Ng, is a Malaysian citizen who was formerly employed as a managing director at various Goldman Sachs subsidiaries. The government has charged Ng and others with conspiring to violate the anti-bribery and internal controls provisions of the

FCPA and commit money laundering. In sum and substance, the government alleges that Ng conspired with his former boss, Tim Leissner, and financier Jho Low, to pay bribes to government officials in Malaysia and the UAE in exchange for their assistance in obtaining and retaining business for Goldman. Ng and his co-conspirators allegedly obtained the bribe funds by misappropriating them from 1 Malaysia Development Berhad (1MDB), a development company owned and controlled by the Malaysian government. In all, the government asserts that Ng and his co-conspirators misappropriated $2.7 billion from 1MDB and conspired to pay over $1.6 billion in bribes to foreign officials.

Ng's defence team has mounted a vigorous, multi-pronged attack on the government's case, moving to dismiss the indictment on multiple grounds, including for lack of venue. Ng argues that he cannot be tried in the Eastern District of New York because of the lack of ties between the district and the alleged crimes. He notes that neither he nor his alleged co-conspirators ever set foot in the Eastern District of New York, and that no funds originated, ended up, or were affected in the Eastern District. The fact that a few money wires and phone calls passed through the district is not enough, he says, claiming that no case has found venue under similar circumstances.

Ng also moved to dismiss the FCPA-related charges for, among other things, failing to allege a conspiracy to circumvent an issuer's internal accounting controls. The FCPA makes it a crime to knowingly and willfully circumvent the internal accounting controls of an "issuer," that is, any company with securities registered in the US or that is otherwise required to file periodic reports with the SEC. Ng argues that any "controls" he allegedly skirted are not issuer Goldman Sachs's controls, but rather *non-issuer 1MDB's*, because the alleged bribes were paid with money siphoned from *1MDB*. Even if the funds were originally Goldman's, he claims, they were no longer Goldman's funds at the time the crimes were committed. The government answers that the question is one for trial and that, in any event, it was Goldman's transactions and Goldman's assets that made the bribe scheme possible. Nothing in the statute, the government argues, supports Ng's assertion that "internal accounting controls can only be implicated where an issuer uses its own funds to pay a bribe directly to a foreign official[.]"

Although the court has yet to rule on the motion to dismiss, which raises numerous other issues, this case already seems destined for the white collar crime textbooks. Should the case proceed to trial, these issues will remain front and center, including whether and how Ng conspired to violate Goldman Sachs's internal accounting controls, not 1MDB's.

The scope of the "prosecution team" in parallel investigations

United States v Coburn, et al in New Jersey raises a critical question for defendants subject to "parallel" FCPA investigations by the DOJ and SEC: when are those agencies' investigations truly parallel and when are they one investigation conducted by the same team? In this case, former Cognizant Technology Solutions executives Gordon Coburn and Steven Schwartz are charged criminally and civilly with FCPA violations in connection with their alleged role in approving a $2 million bribe to Indian officials to secure a construction permit in Chennai, India.

The case has already resulted in a significant ruling on an issue of first impression regarding “units of prosecution” under the FCPA, finding that separate emails that were part of the same alleged bribery scheme could constitute separate violations of the FCPA.

The issue to keep watch over as the case moves towards trialis the developing fight over access to the SEC’s file from its parallel civil investigation. The question is whether the DOJ and SEC conducted a joint investigation – making them one prosecution team – or two distinct, "parallel" investigations. The court has granted, in part, defence motions seeking information in possession of the SEC, namely, information regarding the extent of cooperation and joint fact-finding between the agencies. But according to defence filings, DOJ has still refused to answer a number of key questions, including whether the DOJ and SEC debriefed each other concerning witness interviews or meetings with counsel; whether they discussed any witness's potential civil or criminal exposure; and whether the agencies coordinated in resolving their cases against third parties, including the government's key witnesses in the criminal case. If the court determines the agencies were one prosecution team, the DOJ's discovery obligations could significantly broaden to include the SEC's files. One of the government's key witnesses, who settled with the SEC, made

at least one potentially exculpatory statement to the DOJ and the defence is anxious to know what else he may have said to the SEC.

The attorney-client privilege and DOJ's use of "filter" teams

Finally, *United States v Cole, et al*, in Cleveland, Ohio raises important questions concerning the DOJ's use of "taint" or "filter" teams, long a point of contention between the government and defence bar. In this case, the government alleges that defendants Debra Parris, a manager at Ohio-based adoption agency European Adoption Consultants (EAC) and Dorah Mirembe, an EAC attorney, conspired to violate the FCPA by paying bribes to Ugandan officials to procure the adoption of Ugandan children by families in the United States.

During the course of the investigation, DOJ executed search warrants at EAC's properties, seizing vast tranches of communications and information, including communications between EAC and its attorneys. EAC subsequently dissolved but maintained legal status with the state of Ohio for purposes of prosecuting and defending lawsuits.

During grand jury proceedings, the government's filter team challenged privilege designations related to defendant Mirembe, but not 18 other foreign attorneys working for EAC. Nevertheless, the filter team retained 400,000 privileged communications, but sequestered them from the prosecution team.

Post-indictment, the prosecution team moved to allow the filter team to disclose all 400,000 communications to the prosecution team, on grounds that EAC was defunct and thus lacked any privilege interest to maintain. EAC intervened and opposed the government's motion, arguing that the filter team's continued possession of EAC documents was unlawful and that EAC maintained its privilege because it was still legally in existence. In so doing, EAC raised a significant concern involving filter teams – extended periods of retention of privileged documents by prosecutors, who, for various reasons, are considered imperfect guardians of privileged materials. Here, EAC argued, DOJ could (1) review and maintain possession of a company's privileged, but potentially incriminating, materials for years; (2) effectively force the entity out of business through a variety of means; (3) eviscerate the company's privilege; and then (4)

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use the privileged materials to prosecute the company's employees. The issue remains pending.

While this case has a comparatively lower-profile than other FCPA cases, it spotlights important issues, particularly as DOJ ramps up its newly created Special Matters Unit (SMU), which will litigate privilege issues in FCPA cases. While it is unclear whether SMU is, or will become, involved in the case, the case offers a critical insight into navigating the government's possession of potentially privileged materials. Defendants must be mindful of continuing dialogue with the government's privilege team and, where possible, effectively close out privilege issues so that they don't find themselves in EAC's position.

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These are just four of the several individual FCPA prosecutions awaiting trial. Other defendants are undoubtedly raising similarly complex factual and legal questions in their cases, even with courtrooms closed. It is clear that while the pandemic may be slowing the development of FCPA case law, it has not ground it to a halt. Slowly, but surely, the FCPA section of white-collar crime textbooks will continue to grow.

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