

THE ASIA PACIFIC TOP TEN FCPA ENFORCEMENT ACTIONS OF 2017

Asia Pacific continues to give rise to a large number of Foreign Corrupt Practices Act (FCPA) enforcement actions. Four of the nine companies that the US Department of Justice (DOJ) Fraud Section includes on its list of 2017 FCPA Enforcement Actions are based or were operating in the region, as were seven of the 15 individuals prosecuted in 2017.

1. KEPPEL GROUP

In late December 2017, enforcement authorities in the United States, Singapore, and Brazil announced a coordinated multi-jurisdiction settlement of bribery charges with a Singaporean-based company, Keppel Offshore & Marine Ltd (KOM) and its wholly owned subsidiaries, KOM USA, and Keppel Corporation Limited FELS in Brazil. This bribery scheme allegedly netted more than US\$500 million in profits over 13 years, through inflated commissions to intermediaries, who then made payments to Brazilian officials and a political party, to obtain contracts with Petrobras and another Brazilian company.

The total fine of US\$422 million was the result of penalty offsets among the countries that collaborated in the investigation: approximately 50% will be paid in Brazil, 25% in Singapore, and the remaining 25% in the United States.

KOM USA pleaded guilty to conspiracy to violate the FCPA, as did Jeffery Chow, a US lawyer working in KOM's legal department in Singapore for 25 years, who admitted to preparing the contracts used to make bribe payments in Brazil. KOM entered into a three-year Deferred Prosecution Agreement (DPA) with DOJ, receiving the maximum discount available for cooperation and remediation, but not voluntary disclosure (25% off the bottom penalty). Similarly, Brazil's Ministério Público Federal offered a Leniency Agreement and Singapore's Corrupt Practices Investigation Bureau served a conditional warning in lieu of prosecution against KOM. Part of the penalty mitigation was due to KOM's remediation, which included causing seven employees to resign, imposing financial penalties of approximately US\$8.9 million on 12 individuals, and issuing warnings to or demoting seven employees.

Key Points: The Keppel prosecution demonstrates how international agencies work together to address cross-border corruption. It also highlights that early cooperation in government investigations and extreme remediation can lessen the severity of the penalty imposed.

2. ROLLS-ROYCE

In January 2017, the DOJ and UK Serious Fraud Office (SFO) announced DPAs with Rolls-Royce and an indirect subsidiary, based on bribes allegedly paid in connection with business in China, India, Indonesia, Malaysia, Thailand, and others. The combined penalty of over US\$800 million was a global resolution involving the UK, United States, and Brazil, following an investigation that also included Austria, Germany, the Netherlands, Singapore, and Turkey. There are reported ongoing investigations in Thailand, Malaysia, Indonesia, India, and China. According to media reports, the investigation arose from an employee whistleblower report.

In November 2017, DOJ announced that five individuals (two former Rolls-Royce executives and an employee, plus a former intermediary and an executive of an international engineering consultancy) were charged with FCPA conspiracy to pay kickbacks to an engineering consultant company, which bribed foreign officials, enabling the Rolls-Royce subsidiary to win contracts connected with the Central Asia-China gas pipeline. One of the executives is a US citizen, the non-US co-conspirators travelled to the United States in furtherance of the scheme, and US bank accounts were used to make corrupt commission payments. Four of the individuals have pleaded guilty, while one remains outside US jurisdiction.

Key Points: This case again emphasises the cooperation between international anti-corruption enforcement authorities, but it also highlights the consequences for individuals involved in bribery. The newly revised FCPA Corporate Enforcement Policy requires internal discipline of executives and employees, as well as full cooperation to identify the culpable individuals to DOJ to secure cooperation credit and consequent corporate penalty discounts.

3. LAS VEGAS SANDS

In January 2017, Las Vegas Sands paid a fine of almost US\$7 million to DOJ, after paying nearly US\$9 million to the SEC in April 2016, to resolve alleged FCPA violations in China and Macao. The fines relate to the approximately US\$6 million Las Vegas Sands is alleged to have paid to a consultant and others to promote its efforts to establish gaming operations in China and Macao, where such activity is heavily regulated. Neither the DOJ Non-Prosecution Agreement (NPA) nor the SEC Cease and Desist Letter charged actual bribery, but because of the inadequacy of Las Vegas Sands' internal books and records, the money could not be properly accounted for, thereby breaching the FCPA books and records provisions and creating the risk that the money was used for improper purposes.

Key Points: DOJ and the SEC need only prove a company has inadequate books and recordkeeping and lacks internal controls to prevent bribery in order to generate significant fines. This investigation may have arisen from allegations made by a former chief executive in a civil breach of contract claim alleging that he was fired for reporting the improper business practices in Macao. He was paid US\$75-100 million to settle his claims, which serves as a warning regarding whistleblower protections, as explained further below.

4. BAN KI SANG

In January 2017, Ban Ki Sang (brother of the former UN Secretary-General, senior executive of South Korean construction company Keangnam), his son, Joo Hyun Bahn (a New York real estate broker), and Malcolm Harris (a US national and the supposed front man for a Middle Eastern sovereign wealth fund), were charged with conspiracy to violate the FCPA, three substantive FCPA violations, and other criminal offences. A fourth individual, also a New York real estate broker, was separately charged with conspiracy. Ban and Bahn allegedly paid US\$500,000 to Harris and promised a further US\$2 million to facilitate the sale of a skyscraper (owned by Keangnam) in Vietnam to the sovereign wealth fund. Unfortunately, it appears that Harris had no actual connection to the fund, allegedly pocketing the funds and taking no action to progress the sale of the skyscraper, thereby demonstrating "*there is truly is no honour among thieves*" (US Assistant Attorney General, Leslie Caldwell). Harris pleaded guilty, admitting to the scheme, and was sentenced to 42 months in October 2017. Bahn pleaded guilty to conspiracy and violating the FCPA in January 2018, admitting to the facts above, and his father remains at large.

Key Points: This case demonstrates that even if a bribery scheme does not, and even cannot succeed, it can form the basis of an FCPA prosecution.

5. ALERE INC.

In September 2017, Alere agreed to pay the SEC more than US\$13 million to settle FCPA books and records charges, among other SEC violations, pursuant to a Cease and Desist Order. Alere's Indian subsidiary paid a 4% commission to an agent in exchange for a fivefold increase in the number of malaria testing kits ordered by a local government. When new management discovered the unreported commission, it recovered the payment, but the failure to accurately record the commission was sufficient to trigger liability.

Key Points: During rapid expansion (such as that undergone by Alere), a parent company should monitor the practices and compliance procedures of its new subsidiaries. The timing of this investigation and settlement, in the context of an M&A transaction, delayed Abbott's acquisition of Alere by almost 18 months and resulted in a lower purchase price.

6. NG LAP SENG

In July 2017, Ng Lap Seng (a Macao national) was found guilty of bribing two United Nations (UN) officials to ensure the UN would choose his construction company to build a conference centre in Macao. Seng paid more than US\$1 million in bribes to a former deputy ambassador of the Dominican Republic and the former UN General Assembly president. Seng was found to have corrupted high-ranking UN officials and "*turned leaders of the league of nations into his private band of profiteers.*" (Acting US Attorney SDNY Joon Kim). Five co-conspirators previously pleaded guilty.

Key Points: UN officials are considered foreign officials under the FCPA, as the UN is a "*public international organisation.*" The court rejected Seng's affirmative defence based on Macao's lack of foreign bribery laws, stating that

this defence only applies where the written foreign law makes bribery lawful — a very tough standard to meet.

7. LAUNDERING BRIBES (MAHMOUD THIAM AND HEON-CHEOL CHI)

On 25 August 2017, Mahmoud Thiam, a New York banker and the former mining minister for Guinea, was jailed for seven years for laundering bribes from Chinese companies. Thiam took US\$8.5 million in bribes from executives of China Sonangol International and China International Fund in exchange for mining rights in Guinea. The bribes were paid through US bank accounts, and were used to pay for renovations to his New York estate, a Steinway grand piano, and private schools.

On 18 July 2017, Heon-Cheol Chi, the Director of South Korea's Earthquake Research Centre, was convicted by a jury of laundering bribes through the US financial system. He had received US\$1 million in violation of South Korean law from a California and a UK company in exchange for providing them confidential information and market intelligence, as well as promoting them in the South Korea seismological market. He was sentenced to 14 months in prison, and ordered to pay US\$15,000.

Key Points: Both of these high-ranking foreign officials received bribes in the United States and used the US financial system, thereby providing the basis for US jurisdiction. While the FCPA is targeted at bribe payers, bribe recipients are not immune from US prosecution.

Of similar note, in March 2017, Juthamas Siriwan (the former governor of the Tourism Authority of Thailand) and her daughter, Jittisopa Siriwan, were sentenced by a Thai court to imprisonment for 50 years and 44 years, respectively, for receiving bribes related to the 2009 Bangkok International Film Festival from US film executives Gerald and Patricia Green. The United States had sought to extradite Siriwan but put the proceedings on hold while Thailand pursued its own prosecution.

8. PATRICK HO AND CHEIKH GADIO

In November 2017, Patrick Ho Chi-ping (former Hong Kong home secretary, head of an Energy NGO) and Cheikh Gadio (former foreign minister of Senegal) were arrested and charged with conspiracy to violate the FCPA, along with money laundering. Together, the two high-ranking officials allegedly offered a US\$2 million bribe to the President of Chad and paid a US\$500,000 bribe to the Ugandan Foreign Minister (the former president of the UN General Assembly) to obtain oil rights. Gadio also received a US\$400,000 kickback for his role in the scheme, which was "*hatched in the halls of the United Nations in New York*" (Acting US Attorney SDNY Joon Kim).

Key Points: Negotiating and furthering bribes in the United States or being an agent of a "*domestic concern*" are two ways the jurisdiction of the FCPA can be established. Additionally, as other cases described above make clear, parent companies who authorise and benefit from their subsidiaries' bribery may also be liable. Indications are that this investigation is continuing.

9. BIO-RAD WHISTLEBLOWER PROTECTION

In February 2017, Sanford Wadler (Bio-Rad's former general counsel) was awarded US\$8 million in back pay, stock compensation, and punitive damages for his dismissal by Bio-Rad. Wadler was fired after sending a memo to the Bio-Rad audit committee in February 2013, expressing concern about FCPA breaches in China. Bio-Rad paid US\$55 million to resolve FCPA violations in 2014.

Key Points: This case and the Las Vegas Sands case illustrate the care with which potential whistleblowers must be handled due to their protection under the Dodd-Frank Act.

10. DECLINATIONS

In June 2017, DOJ closed its investigation of CDM Smith, a Massachusetts company that allegedly bribed officials in India's National Highway Authority to secure contracts. DOJ based its declination on the company's self-disclosure of the matter, its participation in the investigation, and termination of all of the executives and employees who were involved in or directed the misconduct. CDM also agreed to disgorgement of more than US\$4 million in profits.

In November 2017, DOJ announced that, under its revised FCPA Corporate Enforcement Policy, it would continue to decline cases that could have otherwise been prosecuted, based on a company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution.

CONCLUSION

A few of the 2017 enforcement actions brought longstanding prosecutions to a close, but others were just the initial step in what will no doubt be lengthy investigations. It is likely that Asia Pacific will remain a focus of FCPA enforcement actions throughout 2018.

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