

# Foreign Corrupt Practices Act Alert

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LITIGATION/CONTROVERSY

## Recent Trends in Foreign Corrupt Practices Act Sentencing

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Historically, both the US Department of Justice ("DOJ") and the US Securities and Exchange Commission ("SEC") have pursued not only corporate wrongdoers for Foreign Corrupt Practices Act ("FCPA") violations, but also the individuals responsible for perpetrating the offenses. The last few years, however, have seen a dramatic and deliberate increase in the number of FCPA cases brought against individuals. As Assistant Attorney General for DOJ's Criminal Division Lanny A. Breuer noted, "[t]he prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that [DOJ] will seek to hold you personally accountable for FCPA violations."<sup>1</sup> US enforcement authorities have reiterated this enforcement priority. For example, in a January 2011 speech, Assistant Attorney General Breuer said "we have aggressively pursued individual executives under the FCPA."<sup>2</sup> As part of its effort to deter individual misconduct, the government has urged courts to impose significant prison sentences, but the judicial response has been mixed. In many cases, judges have handed down sentences far less severe than those sought by DOJ. As described below, however, there have been notable exceptions, including when a Miami federal judge imposed the longest prison sentence—15 years—in the history of the FCPA.

### **Bonny Island Sentences**

In early 2012, three sentences were handed down in connection with the so-called Bonny Island bribery cases. At least two of these sentences were significantly less than the prosecution sought. The three defendants, Albert "Jack" Stanley, Jeffrey Tesler, and Wojcieh Chodan, cooperated with the government in the investigation of Kellogg Brown & Root, Inc. ("KBR") and its partners in the TSKJ joint venture. This joint venture allegedly hired two agents to pay bribes to Nigerian officials to obtain contracts related to the building of liquefied natural gas production plants on Bonny Island, Nigeria. DOJ and the SEC obtained more than \$1.7 billion in penalties and forfeiture orders in connection with the Bonny Island cases.

Stanley, the former Chief Executive Officer of KBR, was the alleged mastermind behind the bribery scheme. He was the first of the Bonny Island defendants to cooperate with the government's investigations, however, DOJ criticized the extent of his cooperation. In 2008, Stanley pleaded guilty to FCPA violations, agreed to pay \$10.8 million in restitution to KBR, and received a preliminary sentence of 84 months in prison, which was subject to a downward adjustment for cooperation. In February 2012, US District Court Judge Keith Ellison presided over Stanley's sentencing hearing. At sentencing, Stanley argued that his cooperation helped the government develop one of the largest FCPA cases in history and also sought leniency based on the fact that he had overcome a difficult childhood and substance abuse.

Prosecutors noted that Stanley could have come forward much sooner, said that he had provided misinformation, and made it clear they did not consider Stanley a whistleblower. Judge Ellison sentenced Stanley to 30 months in prison followed by three years of supervised release (the sentencing pleadings were filed under seal so the sentence ultimately sought by the government is not known). Following his release, Stanley will have to pay \$1,000 per month to satisfy the \$1.55 million in restitution he still owes KBR.

Jeffrey Tesler, a UK attorney who helped arrange more than \$130 million in bribes for Nigerian officials on behalf of KBR, pleaded guilty to violating the FCPA in March 2011. Prosecutors had initially requested a sentence of 84 months, but reduced that request to 78 months, while probation officials recommended 54 months. Judge Ellison sentenced Tesler to significantly less time in prison—21 months, with two years supervised release and a \$25,000 fine. As part of his plea, Tesler agreed to forfeit \$149 million held in over a dozen bank accounts in Switzerland and Israel; this was the largest FCPA forfeiture by an individual.

Wojciech Chodan, a dual UK and Polish citizen, who was the UK KBR manager, pleaded guilty to one count of conspiracy to violate the FCPA in connection with the bribes paid to Nigerian officials. The sentencing documents in the Chodan case are filed under seal, thus it is not clear what sentence the prosecution sought. Based on the sentencing guidelines, he could have received a maximum sentence of five years and a \$250,000 fine. Chodan's sentence did not include any incarceration: he was sentenced to one year of unsupervised probation in the UK and fined \$20,000. As part of his plea, Chodan agreed to forfeit \$726,885.

Following the Bonny Island sentences, DOJ issued a statement that the sentences "reflect not only the defendants' illegal acts, but also their substantial cooperation with the government in this case."<sup>3</sup>

### **LatiNode Sentences**

On September 7, 2011, Jorge Granados, the founder and CEO of Miami-based telecommunications company Latin Node, Inc. ("LatiNode") was sentenced for his role in a scheme to funnel more than \$500,000 in bribes to officials at a Honduras state-owned telecommunications provider. Granados pleaded guilty to one count of conspiracy to violate the FCPA, carrying a statutory maximum five-year sentence. Prosecutors sought that maximum, arguing that Granados, whose otherwise applicable guidelines range was 135-168 months, received a built-in 50% discount by operation of the statutory cap. US District Judge Joan Lenard disagreed, sentencing Granados to 46 months imprisonment and two years supervised release. LatiNode itself pleaded guilty in 2009 and paid a \$2 million criminal fine.

Further sentencing in the LatiNode cases is expected in 2012, when Granados' co-defendants, Manuel Salvoch, LatiNode's former CFO; Manuel Caceres, former Vice-President of Business Development; and John Vasquez, former Chief Commercial Officer go before Judge Lenard. Like Granados, Salvoch, Caceres, and Vasquez each pleaded guilty to one conspiracy count. Unlike Granados, the others provided assistance to the government. All three defendants are the beneficiaries of motions filed by the government requesting a downward departure of 40% to reflect their substantial assistance to prosecutors. The prosecution is currently seeking 36 month sentences for each defendant.

### **Haiti Teleco—Longest FCPA Sentence**

In the case of former Terra Telecommunications Corporation ("Terra") executives Joel Esquenazi and Carlos Rodriguez, the court imposed especially stiff prison sentences. After a two-and-a-half-week trial in August 2011, a Miami federal jury convicted the pair on two counts of conspiracy, seven counts of violating the FCPA's anti-bribery provisions, and 12 counts of money laundering. Evidence at trial demonstrated that Esquenazi and Rodriguez caused Terra to pay more than \$890,000 in bribes to Haitian telecommunications officials, routed through shell companies, as part of a scheme to secure favorable call rates. In October 2011, US District Judge Jose Martinez imposed sentences on Esquenazi and Rodriguez of 15 years and seven years, respectively. Esquenazi's 15-year sentence is an FCPA record, although it also covered other charges. Judge Martinez also ordered the defendants to jointly forfeit \$3.09 million, consisting of \$2.2 million in gains to Terra (in the form of reduced costs) in addition to the \$890,000 they had paid in bribes. Esquenazi and Rodriguez are currently appealing their convictions to the 11th Circuit.

Three other individual defendants have also been convicted and sentenced for FCPA-related offenses in the Haiti Teleco case, including Antonio Perez. Perez, the former controller for Terra, was sentenced on January 21, 2011 to 24 months in prison, followed by two years of supervised release, and ordered to forfeit \$36,375, which was the amount he admitted, in connection with his guilty plea, that he had paid in bribes. Perez's sentence was substantially pre-determined when he agreed as part of his plea deal to a guidelines range sentence. Still, probation officials recommended a "minor role" adjustment, which the court ultimately granted, notwithstanding the government's objection. Another Haiti Teleco defendant, Juan Diaz, pleaded guilty to conspiracy to violate the FCPA and money laundering. Diaz, an intermediary, admitted to receipt of over \$1 million in bribes from telecommunications companies. He was sentenced to 57 months in prison, which he is currently serving, and to three years of supervised release following his prison term. Diaz was also ordered to pay \$73,824 in restitution and to forfeit \$1,028,851. Jean Fourcand, another participant in the scheme, pleaded guilty to one count of money laundering and for receiving and transmitting bribes and was sentenced to six months in prison.

### **Other Individuals**

We saw further evidence of judicial resistance to the government's sentencing recommendations in the case of Ousama Naaman, the former Innospec, Ltd. agent who pleaded guilty in June 2010 to bribing Iraqi government officials to secure contracts to supply tetraethyl lead. Naaman's sentence and criminal fine calculations were the subject of heated argument and a flurry of legal filings in 2011. Initially the government sought a \$2.6 million fine, which purported to represent Naaman's profits from the scheme. Naaman argued for a fine of no more than \$175,000. (He had already disgorged more than \$800,000 to the SEC and was required to pay an additional penalty of \$438,038. The amount of his criminal fine will be credited against those sums.) After months of wrangling, US District Judge Ellen Huvelle stated during a status hearing she "[had] never seen a more unnecessarily complicated issue" and would not impose a fine greater than \$250,000.<sup>4</sup> The government and Naaman ultimately agreed to a \$250,000 fine. Still, Naaman's sentence remained hotly contested. Prosecutors initially supported a reduction to 90 months from 120 months, based on Naaman's cooperation during the investigation. Later, the government threatened to withdraw that support, saying that Naaman made false statements to the government. On December 22, 2011, Judge Huvelle sentenced Naaman to 30 months in prison with credit for time served.

In late 2010, Leo Winston Smith, the former director of sales and marketing for Pacific Consolidated Industries, was sentenced for his role in paying \$300,000 in bribes to an official in the UK Ministry of Defense in return for lucrative equipment contracts with the Royal Air Force. (The official pleaded guilty in the UK and was sentenced to two years in prison.) Smith, 75, faced up to five years on a conspiracy charge and three years on a tax-related charge. The government sought a 37-month sentence despite the defendant's age and poor health. Smith, who had spent years on supervised release, including home confinement with electronic monitoring from June 2007 to May 2008, was sentenced by US District Judge Andrew Guilford to six months imprisonment, six months of home confinement, and three years of supervised release.

The high-profile case of Gerald and Patricia Green, a movie producer and his wife who in August 2010 were convicted of bribing Thai officials in a bid to run the Bangkok International Film Festival, came to a surprising end. DOJ, which had sought 10-year sentences for the Greens, appealed the trial court's sentences of six-months incarceration and six-months home confinement. At the time of sentencing Gerald Green was 78 years old and suffered from emphysema. However, in August 2011, the government dropped its appeals altogether. A DOJ spokesperson declined to comment on the reason the appeals were withdrawn.

On November 10, 2009, Frederick Bourke was sentenced to a year and a day in prison, followed by three years of probation, and was fined \$1 million for his role as an investor in an investment consortium headed by Viktor Kozeny, which sought to capitalize on the proposed privatization of Azerbaijan's state oil and gas company. At trial, Bourke was accused by the government of "sticking his head in the sand" and being willfully blind to the fact that Kozeny and the consortium were paying systematic bribes to Azeri officials. DOJ had asked for a ten-year sentence for Bourke. US District Judge Shira Scheindlin expressed some reservations about the case during the sentencing hearing, saying that "after years of supervising this case, it's still not entirely clear to me whether Mr. Bourke was a victim or a crook or a little bit of both." On appeal, the Second Circuit affirmed Bourke's conviction and Judge Scheindlin

subsequently denied his motion for a new trial. Bourke is currently out on bail while he awaits an en banc hearing before the Second Circuit on his appeal.

It appears that DOJ continues to press for lengthy prison sentences for FCPA violations, despite the mixed record of success. With the continuing enforcement focus on prosecuting individuals and a number of key FCPA-related sentencings on the horizon—including the LatiNode defendants and the Shot Show Sting undercover informant, Richard Bistrong—there will be ample opportunity to see whether a clear trend emerges. But it would at least preliminarily appear that many judges are not persuaded that an FCPA conviction merits prison terms as long as those DOJ is typically seeking.

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<sup>1</sup> Lanny A. Breuer, Asst. Attorney Gen., Criminal Div., DOJ, *Prepared Address to the ABA Nat'l Institute on White Collar Crime*, at 2 (Feb. 25, 2010), available at <http://www.justice.gov/criminal/pr/speeches-testimony/2010/02-25-10aag-AmericanBarAssosiation.pdf>.

<sup>2</sup> *Asst. Attorney Gen. Lanny A. Breuer of the Criminal Div. Speaks at the Annual Meeting of the Washington Metro. Area Corp. Counsel Ass'n* (Jan. 26, 2011), available at [www.justice.gov/criminal/pr/speeches/2011/crm-speech-110126.html](http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110126.html).

<sup>3</sup> Press Release, DOJ, *Former Chairman and CEO of Kellogg, Brown & Root Inc. Sentenced to 30 Months in Prison for Foreign Bribery and Kickback Schemes* (Feb. 23, 2012), available at [www.justice.gov/opa/pr/2012/February/12-crm-249.html](http://www.justice.gov/opa/pr/2012/February/12-crm-249.html).

<sup>4</sup> Rachel G. Jackson, *Under Pressure from Judge, U.S. Accedes to Lower Fine for Foreign Bribery Defendant*, Just Anti-Corruption (Nov. 29, 2011), [www.mainjustice.com/justanticorruption/2011/11/29/under-pressure-from-judge-u-s-accedes-to-lower-fine-for-foreign-bribery-defendant](http://www.mainjustice.com/justanticorruption/2011/11/29/under-pressure-from-judge-u-s-accedes-to-lower-fine-for-foreign-bribery-defendant).

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