Client Alert

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Conviction of First Foreign Official at Trial for Money Laundering Based on Underlying FCPA Bribery Scheme Upheld

By Charles Duross, Stacey Sprenkel, and Amanda Aikman

Following on the heels of its landmark 2014 ruling in *United States v. Esquenazi*,[1] the Eleventh Circuit has issued another important decision addressing the Foreign Corrupt Practices Act (FCPA) in a related case, *United States v. Duperval*.[2]

On Monday, February 9, 2015, the Eleventh Circuit affirmed the conviction and nine-year sentence of Duperval on two counts of conspiracy to commit money laundering and nineteen counts of money laundering. Duperval was the first foreign official to be convicted at trial for money laundering based on an underlying FCPA bribery scheme.

The Eleventh Circuit did not break new ground in rejecting Duperval's argument that he was not a "foreign official" under the FCPA, relying on its previous decision in *Esquenazi* to find that the Telecommunications D'Haiti, S.A.M. ("Haiti Teleco"), a state-owned company, qualified as a government "instrumentality."

Its discussion of the "routine governmental action" exception, however (also known as the "grease payments" or "facilitating payments" exception) represents only the second time an appellate court has addressed this issue[3] and confirms that bribe payments will rarely be found to fall within the ambit of this narrow exception to the FCPA's bribery prohibition.

DUPERVAL RECEIVES BRIBES FROM TELECOMMUNICATIONS COMPANIES

From June 2003 to April 2004, Jean Rene Duperval was the Assistant Director General and Director of International Affairs of Haiti Teleco. Duperval managed Haiti Teleco's contracts with foreign telecommunications companies that provided phone service in Haiti. While in that role, he participated in two separate schemes to launder bribes paid to him by two Miami-based telecommunications companies in exchange for various business favors.

The first scheme involved Terra Telecommunications Corporation ("Terra") and its executives Joel Esquenazi and Carlos Rodriguez. Esquenazi and Rodriguez had an arrangement to pay bribes to Duperval's predecessor at Haiti Teleco, Robert Antoine, in exchange for Antoine's agreement to reduce bills Terra owed to Haiti Teleco. When Duperval replaced Antoine as Director of International Affairs, he became the new recipient of the bribes from the

[1] 752 F.3d 912 (11th Cir. 2014). *For additional background information, see* prior Client Alerts, "Court of Appeals Hands Down Landmark FCPA Ruling Defining the Term 'Instrumentality'"; "Another Successful FCPA Prosecution Against Individuals—More Terra Telecom Execs Appear Headed for Prison for Haiti Bribes"; "Telecom Exec Sentenced to Record Breaking FCPA Prison Term: 15 years"; "FCPA + Anti-Corruption Developments: 2012 End of Summer Round-Up."

[2] *United States v. Duperval*, No. 12-13009 (11th Cir. Feb. 9, 2015).

[3] *See United States v. Kay*, 359 F.3d 738, 750-52 (5th Cir. 2004).

two executives. Terra paid $75,000 in bribes to Duperval through a shell company established as a conduit for the bribes and owned by Duperval's sister, Marguerite Grandison. Duperval also accepted $10,000 and a Rolex watch from Esquenazi.[4]

The second scheme involved Cinergy Telecommunications Inc. ("Cinergy") and its principals Washington Vasconez Cruz, Cecilia Zurita, and Amadeus Richers, who have also been indicted and remain fugitives.[5] Following Antoine's termination from Haiti Teleco, Cinergy hired him as a consultant. In August 2003, Antoine offered to pay Duperval 50 percent of Antoine's consulting fee in exchange for Duperval's help in renewing a Cinergy-Haiti Teleco contract. Duperval agreed but demanded 60 percent of Antoine's fee instead. Haiti Teleco's contract with Cinergy continued, and Cinergy paid Duperval $142,460 through a company owned by Duperval's brother. Cinergy also made additional payments totaling $257,339.68 to Duperval through the shell company held in his sister's name.

Altogether, the two telecommunications companies paid approximately $500,000 to Duperval laundered through the two shell companies in South Florida owned by his siblings. The payments were supported by fabricated documentation including fake consulting agreements. The funds were then disbursed to Duperval and his associates through transfers to his personal account, by check to Duperval and his wife, and by checks used to purchase Duperval's house, pay his mortgage, contribute to his children's college funds, and purchase other personal items.[6]

THE ROAD TO THE ELEVENTH CIRCUIT

In a superseding indictment, Duperval was indicted together with his sister Grandison, Antoine, Esquenazi and Rodriguez, and Patrick Joseph, a former general director for telecommunications at Haiti Teleco. Duperval was tried separately in March 2012, convicted on all counts, and sentenced to nine years of imprisonment. The other two Haiti Teleco officials, Antoine and Joseph, each pleaded guilty to one count of conspiracy to commit money laundering and were sentenced to four years and one year and one day in prison, respectively, for their roles in the Haiti Teleco bribery scheme.[7]

Esquenazi and Rodriguez were tried together on a 21-count indictment charging them with conspiracy to violate the FCPA and commit wire fraud, conspiracy to launder money, and substantive counts of FCPA violations, wire fraud, and money laundering. Following a two-and-a-half week trial in 2011, they were convicted on all counts. On appeal to the Eleventh Circuit, Esquenazi and Rodriguez argued that Haiti Teleco could not be considered an "instrumentality" of the government of Haiti under the FCPA, and that Antoine and Duperval could therefore not be

[4] *See Duperval*, slip op., at 3; *see also Esquenazi*, 752 F.3d at 919.

[5] Fugitive Notice, *United States v. Cruz*, No. 09-cr-21010 (S.D. Fla. Mar. 7, 2013) (issuing fugitive notice concerning Washington Cruz, Amadeus Richers, and Cecilia Zurita).

[6] *See Duperval*, slip op., at 4-5; Press Release, U.S. Dep't of Justice, "Former Haitian Government Official Convicted in Miami for Role in Scheme to Launder Bribes Paid by Telecommunications Companies" (Mar. 13, 2012), *available at* http://www.justice.gov/opa/pr/former-haitian-government-official-convicted-miami-role-scheme-launder-bribes-paid.

[7] *See* Judgment, *United States v. Antoine*, No. 09-cr-21010 (S.D. Fla. June 9, 2010), ECF No. 182; Judgment, *United States v. Joseph*, No. 09-cr-21010 (S.D. Fla. July 10, 2012), ECF No. 845. Antoine's sentence was subsequently reduced to eighteen months based on his cooperation with the government. *See* Amended Judgment, *United States v. Antoine*, No. 09-cr-21010 (S.D. Fla. May 29, 2012), ECF No. 824.

deemed "foreign officials" under that statute. The *Esquenazi* court rejected this argument, finding that Haiti Teleco was an instrumentality under the FCPA. The court defined instrumentality as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own" and provided a non-exhaustive list of factors for courts and juries to consider in assessing the "control" and "function" elements of this definition.[8]

Duperval's appeal of his convictions and sentence, filed prior to the Eleventh Circuit's *Esquenazi* ruling, also challenged Haiti Teleco's status as an instrumentality for purposes of the FCPA. Duperval further argued that the district court had abused its discretion in refusing to instruct the jury on the "routine governmental action" exception under the FCPA and alleged other grounds for appeal related to interference with a defense witness, a decision not to interview a juror about trial publicity, and sentencing errors. The Eleventh Circuit rejected all of Duperval's arguments and affirmed his convictions and nine-year sentence.[9]

THE USE OF MONEY LAUNDERING CHARGES TO PROSECUTE FOREIGN OFFICIALS INVOLVED IN BRIBERY SCHEMES

Although foreign officials cannot be charged with violations of the FCPA itself,[10] the Department of Justice (DOJ) has now successfully used money laundering charges to convict at least four former government officials, including Duperval, Antoine, and Joseph, for conduct relating to their roles as bribe recipients.

The charges against the three Haiti Teleco officials were based on financial transactions involving the proceeds of wire fraud and violations of the FCPA and Haitian bribery laws. According to the DOJ, by pleading guilty in 2010, Antoine became the "first foreign official ever convicted of money laundering in the United States where the specified unlawful activity to which the laundered funds related was a felony violation of the FCPA."[11]

In May 2013, the DOJ filed charges in the Southern District of New York against a Venezuelan government official, Maria Gonzalez, who had accepted bribes while working at Banco de Desarrollo Económico y Social de Venezuela (BANDES), a state-run economic development bank in Venezuela. Gonzalez pleaded guilty in November 2013 to violations of the Travel Act, money laundering, and conspiring to violate the Travel Act and to commit money laundering — all based on an underlying FCPA bribery scheme.[12]

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[8] *Esquenazi*, 752 F.3d at 925-27.

[9] *See Duperval*, slip op., at 1-2.

[10] *See United States v. Blondek*, 741 F. Supp. 116, 117 (N.D. Tex. 1990) ("[T]he [FCPA] does not criminalize the receipt of a bribe by a foreign official."), *aff 'd*, *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991) ("We hold that foreign officials may not be prosecuted under 18 U.S.C. § 371 for conspiring to violate the FCPA.").

[11] U.S. Dep't of Justice, *Steps Taken by the United States to Implement and Enforce the OECD Anti-Bribery Convention* (Information as of February 25, 2013), 76-77, *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/2013-02-25-steps-taken-oecd-anti-bribery-convention.pdf (last visited Feb. 11, 2015).

[12] *See* Press Release, U.S. Dep't of Justice, "Two U.S. Broker-Dealer Employees and Venezuelan Government Official Charged in Manhattan Federal Court for Massive International Bribery Scheme" (May 7, 2013), *available at* http://www.justice.gov/opa/pr/two-us-broker-dealer-employees-and-venezuelan-government-official-charged-massive; Press Release, U.S. Dep't of Justice, "High-Ranking Bank Official at Venezuelan State Development Bank Pleads Guilty to Participating in Bribery Scheme" (Nov. 18, 2013), *available at* http://www.justice.gov/opa/pr/high-ranking-bank-official-venezuelan-state-development-bank-pleads-guilty-participating; Information, *United States v. Gonzalez*, No. 13-cr-901 (S.D.N.Y. Nov. 18, 2013), ECF No. 43.

To what extent these convictions, and the Eleventh Circuit's recent decision affirming Duperval's conviction, signal a new enforcement trend remains to be seen. Prosecutions of foreign officials as bribe recipients are subject to inherent practical difficulties, as evidenced by the stalled prosecution of Juthamas Siriwan, a Thai government official indicted in January 2009 on charges of conspiracy to commit money laundering based on underlying violations of the FCPA and Thai bribery laws. While husband-and-wife film producers Patricia and Gerald Green were convicted in 2009 for their payment of bribes to Siriwan, an extradition request for Siriwan that was filed by the U.S. government in 2011 remains pending.[13] And the DOJ's prosecution of an Indian state government official, K.V.P. Ramachandra Rao, along with five other foreign nationals, appears to be similarly stalled.[14]

Moreover, prosecutions of foreign officials may yet be subject to legal difficulties. Siriwan has argued that money laundering charges, where the specified unlawful activity is a violation of the FCPA, cannot be used to conduct an end-run around the FCPA's limitations — namely, the fact that it does not criminalize the conduct of foreign officials as bribe recipients.[15]

Although this issue does not appear to have been raised in the *Duperval* case, which involved a different theory of money laundering — concealment rather than promotion — the decision to affirm Duperval's conviction means, at the very least, that the use of money laundering and conspiracy charges to pursue charges against foreign officials remains a viable tool in the government's arsenal. Moreover, given the *Esquenazi* court's adoption of an expansive definition of "instrumentality" — an approach reaffirmed in the *Duperval* decision — and given that many FCPA cases also involve money laundering violations, the DOJ will almost certainly continue to pursue these charges where possible.

CONFIRMING THE NARROW SCOPE OF THE FACILITATION PAYMENTS EXCEPTION

The Eleventh Circuit's decision also confirms the narrow scope of the "routine governmental action" exception, following the approach of the Fifth Circuit's 2004 decision in *Kay*.

The FCPA's bribery prohibition includes an exception for "any facilitating or expediting payment" made to expedite or secure a "routine governmental action."[16] The exception thus focuses on the purpose of the payment, rather than the duties of the foreign official. The statute provides specific examples of routine governmental action, such as processing visas and work orders, providing mail pick-up and delivery, providing phone service, power and

[13] *See* Joint Status Report, *United States v. Siriwan*, No. 09-cr-81 (C.D. Cal. Jan. 6, 2015), ECF No. 127; *see also id.*, Transcript of Proceedings, Apr. 2, 2013, ECF No. 115.

[14] Rao and five other foreign nationals were indicted in June 2013 on charges of money laundering involving a violation of Indian bribery laws, money laundering involving a violation of the Travel Act, racketeering conspiracy, and a substantive violation of the Travel Act. The five other defendants were also charged with conspiring to violate the FCPA. While Firtash was arrested in Austria in March 2014 and released from custody after posting a €125 million bond, the other defendants appear to be still at large. *See* Press Release, FBI, "Six Defendants Indicted in Alleged Conspiracy to Bribe Government Officials in India to Mine Titanium Minerals" (Apr. 2, 2014), *available at* http://www.fbi.gov/chicago/press-releases/2014/six-defendants-indicted-in-alleged-conspiracy-to-bribe-government-officials-in-india-to-mine-titanium-minerals. *See* Indictment, *United States v. Firtash*, No. 13-cr-515 (N.D. Ill. June 20, 2013), ECF No. 2; *id.*, Order to Unseal the Indictment, Apr. 2, 2014, ECF No. 17.

[15] *See* Defendants' Notice of Motion and Motion to Dismiss the Indictment, at 3-11, *Siriwan*, Aug. 19, 2011, ECF No. 64.

[16] 15 U.S.C. § 78dd-1(b).

water supply, and "actions of a similar nature."[17] Routine governmental action does not include a decision "to award new business or to continue business with a particular party" or "any action taken by a foreign official involved in the decisionmaking process to encourage a decision to award new business to or continue business with a particular party."[18]

Duperval argued that the district court should have included an instruction on the exception, based on evidence that his role at Haiti Telco merely amounted to "administering a contract." The Eleventh Circuit resoundingly rejected this argument, embracing the language of the *Kay* court, which established the "limited" nature of the exception, encompassing actions that are "'largely non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries.'"[19]

The court found that Duperval's role in administering a multi-million dollar telecommunications contract did not qualify as an "action of a similar nature" under the exception's catchall provision, and that his interpretation was also "in tension" with the FCPA's description of what is not routine governmental action, since a party could circumvent the limitation on paying a decision-maker to continue a contract with the government by simply "'rewarding' the decision-maker for doing a good job in administering the current contract."[20]

While Duperval's relatively high-ranking position and the size of the payments he received were facts that would have been difficult to fit within the exception in any event, the court's analysis confirms the dangers of relying on the exception as a defense to liability.

Moreover, even payments that would qualify for the exception almost certainly still violate local corruption laws in the countries in which the payments are made, and most countries' foreign bribery laws contain no similar exception. The UK Bribery Act, for instance, does not contain an exception for facilitating payments, and Canada has announced that it is removing its facilitating payment exception from its own foreign bribery law.[21] In addition, improperly recording bribe payments as facilitation payments may result in liability under the FCPA's accounting provisions.

KEY TAKEAWAYS

Federal appellate court decisions addressing the FCPA are rare, and the Eleventh Circuit's decision in *Duperval* is noteworthy for that reason alone.

The court did not break new ground in analyzing either the definition of an "instrumentality" under the FCPA, relying on its 2014 decision in *Esquenazi*, or in addressing the facilitation payments exception, in which it emphasized the narrow scope of the exception, embracing the reasoning of the Fifth Circuit in *Kay*. The court's

[17] 15 U.S.C. § 78dd-1(f)(3)(A).

[18] 15 U.S.C. § 78dd-1(f)(3)(B).

[19] *See Duperval*, slip. op., at 18-19 (quoting *Kay*, 359 F.3d at 750-51).

[20] *Id.* at 19-20.

[21] Press Release, Dep't of Foreign Affairs & Int'l Trade Can., Strengthening Canada's Fight Against Foreign Bribery (Feb. 5, 2013), *available at* http://www.international.gc.ca/media/aff/news-communiques/2013/02/05b.aspx?lang=eng.

analysis concerning the facilitation payments exception, however, confirms that companies should continue to be wary about relying on the exception, particularly given the risks outlined above.

Although any strict comparison between Duperval's nine-year sentence for money laundering violations and the sentences of other defendants convicted for substantive FCPA violations would be inapposite — among other reasons, because the maximum sentence for money laundering is twenty years versus five years for violating the FCPA — its relative length in the overall context of FCPA sentences is still noteworthy. After Esquenazi, who received a record-breaking sentence of fifteen years' imprisonment, Duperval's sentence ranks as the second-highest to be imposed for conduct relating to a core FCPA bribery scheme.

The successful use of money laundering charges involving an underlying FCPA bribe scheme to convict a foreign official at trial could pave the way for additional prosecutions of foreign officials as bribe recipients. More importantly, for companies and business executives, DOJ's regular use of money laundering charges (and their much more severe potential prison sentences) highlights the many different prosecutorial tools available to the government when investigating and charging foreign bribery schemes. In the past, DOJ has not been shy about employing money laundering, wire fraud, and tax fraud charges in the same indictment built around underlying FCPA charges, and in the wake of the *Duperval* case, this risk of ancillary enhanced charges (and the potentially draconian sentences arising from conviction) will only increase going forward.

For more information, please contact:

Washington, D.C.

Charles E. Duross
cduross@mofo.com

Demme Doufekias
ddoufekias@mofo.com

San Francisco

Paul T. Friedman
pfriedman@mofo.com

Stacey M. Sprenkel
ssprenkel@mofo.com

New York

Carl H. Loewenson, Jr.
cloewenson@mofo.com

Ruti Smithline
rsmithline@mofo.com

Berlin

Thomas Keul
tkeul@mofo.com

Hanno Timner
htimner@mofo.com

Hong Kong

Timothy W. Blakely
tblakely@mofo.com

Beijing

Sherry Xiaowei Yin
syin@mofo.com

Tokyo

James E. Hough
jhough@mofo.com

London

Kevin Roberts
kroberts@mofo.com

Paul T. Friedman
pfriedman@mofo.com

Singapore

Daniel P. Levison
dlevison@mofo.com

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