

Executives at Risk: Spring 2019

White Collar Alert
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This spring, we report on several noteworthy developments in white collar government investigations impacting executives. Highlights include:

- In the foreign exchange (FOREX) currency manipulation investigation, the government suffered a major blow when a federal judge granted a former Barclays trader's motion for acquittal mid-trial
- Five executives were convicted in the first successful prosecution of top pharmaceutical executives in the opioid bribery scheme
- Two executives became the first to be charged criminally under the Consumer Product Safety Act (CPSA) for failing to report defective products they were selling from China
- Two executives were extradited from Asian countries to face white collar charges in the United States, one of whom was a Japanese national sentenced to 50 years in prison

We also discuss noteworthy sentencings and court rulings, including a U.K. court decision barring a U.S. company from producing to U.S. authorities documents obtained in the U.K. Finally, we report on revisions the U.S. Department of Justice (DOJ) has made to its Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy addressing ephemeral messaging applications, which impacts how companies and their executives handle government investigations.

Actions Against Executives

FCPA

Two Cognizant Executives Charged with Bribing Indian Officials: In February, the former President and the former Chief Legal Officer of Cognizant Technology Solutions Corporation (Cognizant) were [indicted](#) for allegedly directing a construction contractor to pay a \$2 million bribe to Indian officials in exchange for a construction permit for Cognizant's Indian subsidiary. In an effort to conceal the scheme, the executives also allegedly directed Cognizant employees to reimburse the construction company for making the bribe on Cognizant's behalf and to disguise the payments by creating false invoices and

change order requests for purported cost overruns from the project. The U.S. Securities and Exchange Commission (SEC) has [announced](#) a [parallel civil action](#) against the two executives alleging similar FCPA violations, as well aiding and abetting the company's illegal conduct and making false statements to auditors. Cognizant itself has agreed to pay \$25 million to the SEC and to disgorge an additional \$3 million to the DOJ.

Former First Daughter of Uzbekistan Charged in Bribery Probe: In March, Gulnara Karimova, the former first daughter of Uzbekistan, was [charged](#) with soliciting and accepting over \$865 million from three major telecom companies in exchange for helping them to secure necessary business licenses in Uzbekistan. The payments allegedly were facilitated by a former executive of Mobile Telesystems PJSC (MTS), Russia's largest telecommunications company, who has been charged with FCPA and money laundering-related violations but remains at large. The former first daughter has been under house arrest in Uzbekistan since 2014 on unrelated charges and has not been seen publicly in several years. The same day Karimova was charged, MTS agreed to an \$850 million settlement with DOJ and the SEC over bribes it paid to secure telecommunications licenses in Uzbekistan. In addition to MTS, VimpelCom Ltd reached a \$695 million resolution with U.S. and Dutch prosecutors in 2016, and Telia Company AB (Telia) settled with the U.S., Dutch, and Swedish authorities for \$965 million in 2017, related to their payment of bribes to Uzbekistan's first daughter.

Three More Individuals Charged in PDVSA Bribery Investigation: Since we [last reported](#) on DOJ's long-standing investigation into bribery at Venezuela's state-owned-and-controlled oil company, Petróleos de Venezuela S.A. (PDVSA), three more individuals have pled guilty or have been indicted in the bribery and money laundering scheme. In May, a dual U.S.-Venezuelan citizen who controlled multiple U.S.-based suppliers to PDVSA [pled guilty](#) to paying more than \$600,000 in bribes to Venezuelan officials who allegedly helped direct contracts toward his companies. In February, DOJ [unsealed](#) indictments against the president and sales representative for a PDVSA supplier of industrial equipment who allegedly conspired to bribe PDVSA officials in exchange for contracts and inside business information. The indictment also alleges that the two Venezuelan nationals received several hundred thousand dollars in kickbacks. Two of the PDVSA officials who pled guilty to accepting the bribes were recently sentenced to three years in prison and probation, respectively. To date, 21 defendants have been charged and 16 have pled guilty in the PDVSA investigation.

New Indictments Unsealed in Mozambique Construction Loan Bribery Scheme: Since our [last report](#), charges have been unsealed against three more individuals in DOJ's ongoing investigation of a sprawling \$2 billion fraudulent maritime loan scheme in Mozambique. According to the newly unsealed [indictment](#), the CFO of maritime contractor Privinvest and two Mozambican officials have been charged with money laundering-related violations for helping to divert over \$200 million in loan proceeds for maritime construction projects to companies controlled by the government of Mozambique. The funds allegedly were diverted as a bribe to ensure that the Mozambican government would guarantee the loans.

Cartel

Seven South Koreans Indicted in Fuel Supply Bid-Rigging Scheme: Consistent with its continued focus on cross-border investigations, in March DOJ [unsealed an indictment](#) charging seven South Korean nationals for their roles in allegedly rigging bids on contracts to supply fuel to U.S. military bases in South Korea. The federal government's ability to successfully prosecute these individuals remains uncertain, however, because all seven remain abroad beyond U.S. jurisdiction. Two South Korean oil companies involved in the conspiracy — Hyundai Oilbank Co. Ltd. and S-Oil Corporation — were also charged in the [indictment](#) and have [agreed to plead guilty](#).

Judge Acquits Former Barclays Trader Mid-Trial: In a blow to the government's FOREX currency manipulation investigation, in March a federal judge [granted](#) a former Barclays trader's motion for acquittal mid-trial, ruling that no reasonable jury could convict him based on the evidence prosecutors presented. Robert Bogucki, the former head of Barclays' foreign exchange trading desk, was accused of manipulating the price of foreign currency to defraud a Barclays customer. Prosecutors argued that Bogucki had made material misstatements or omitted material facts that misled the customer, but the judge concluded

that none of these facts were material. Additionally, the prosecutors had argued that Barclays owed a duty of trust to the customer, but the court disagreed, concluding that the agreement between the parties evidenced that they were acting in their own interests. The government had "pursued a criminal prosecution on the basis of conduct that violated no clear rule or regulation, was not prohibited by the agreements between the parties, and indeed was consistent with the parties' understanding of the arms-length relationship in which they operated." This acquittal comes on the heels of a New York federal jury's October 2018 acquittal of three London-based former FOREX traders, on which we [previously reported](#).

Health Care Fraud

Jury Convicts Executives in RICO Opioid Bribe Scheme: In May, a jury [convicted](#) five executives of pharmaceutical company Insys Therapeutics Inc, including its founder, for paying doctors for prescribing more and higher doses of the company's fentanyl spray. Fentanyl is a synthetic opioid, certain grades of which are blamed for the current opioid epidemic. These convictions mark the first successful prosecution of top pharmaceutical executives related to illicit marketing and prescribing of opioids. During a 10-week trial, prosecutors detailed a scheme by Insys executives to bribe doctors and mislead insurers about patients' need for the drug. The jury deliberated for 14 days before issuing its verdict. On the eve of trial, two former Insys executives pled guilty to charges in connection with the scheme.

Consumer Fraud

Executives Charged in First-Ever Criminal Prosecution for Failure to Report Under the Consumer Product Safety Act: In March, DOJ [announced](#) charges against Simon Chu and Charley Loh for failing to furnish information required under the CPSA and for defrauding the Consumer Products Safety Commission (CPSC). Chu was co-owner and Chief Administrative Officer of two corporations in California that sold Chinese-made dehumidifiers that Chu and Loh allegedly knew were defective, dangerous, and flammable. The defendants failed to report this information to the CPSC for at least six months while continuing to sell the products to retailers for resale to consumers. This is the first criminal prosecution for failure to report under the CPSA, which requires manufacturers, importers, and distributors of consumer products to immediately report to the CPSC information that a product contains a defect that could create a product hazard or creates an unreasonable risk of serious injury or death.

Extradition and Extraterritoriality

Japanese Nationals Extradited to U.S. in Connection With Charges Related to Ponzi Scheme: In April, Japanese nationals Junzo Suzuki and Paul Suzuki were [extradited](#) from Japan to the U.S. in connection with their alleged roles in a \$1.5 billion Ponzi scheme. The father-and-son pair were charged in a July 2015 [indictment](#) alleging that Junzo Suzuki, Executive Vice President of Las Vegas-based MRI International, and Paul Suzuki, the company's General Manager for Japan Operations, fraudulently solicited investments from thousands of Japanese residents by falsely claiming that any money invested with MRI would go towards the purchase of a type of asset known as medical accounts receivable. When MRI collapsed, it allegedly owed investors more than \$1.5 billion. In November 2018, the Suzukis' co-defendant, Edwin Fujinaga, was convicted on charges of fraud and money laundering in connection with the scheme. Fujinaga was sentenced in May to [50 years](#) in prison.

Former Goldman Sachs Exec Extradited to U.S. to Face Charges in 1MDB Corruption Scheme: In May, former Goldman Sachs executive Ng Chong Hwa was extradited from Malaysia to the U.S. to face charges in the alleged \$2.7 billion fraud on Malaysia's sovereign wealth fund, 1Malaysia Development Bhd (1MDB). Ng, who also faces charges in Malaysia, did not challenge his transfer to the U.S. Ng has pled not guilty to FCPA and money laundering charges pending in the Eastern District of New York.

Prosecutorial Misconduct

Court Finds No Fifth Amendment Violation Where the Government Did Not Make Use of Compelled Testimony from Outsourced Investigation:

In May, the Chief Judge of the Southern District of New York [rejected arguments](#) made by Gavin Black, a former Deutsche Bank employee convicted in October 2018 of manipulating the London Interbank Offered Rate (LIBOR), that the court should dismiss the indictment against him because the government violated his Fifth Amendment right against self-incrimination by outsourcing its investigation to bank lawyers who compelled him to sit for at least three interviews "upon pain of losing his job." (We have previously covered Black's case [here](#) and [here](#).) The court found that the bank's internal investigation was attributable to the government because there was little evidence of an independent government investigation and, instead, outside counsel "did everything that the Government could, should, and would have done had the Government been doing its own work." The bank "was told by the Government to conduct an internal investigation into a particular matter, to do so in a particular fashion, to interview particular people (including Black), to share its findings with the Government on a regular basis, and to carry out governmental investigative demands that were generated by its earlier efforts." "[F]acing ruin," the bank "complied with the Government's directives in every particular." The court also concluded that Black's statements were in fact compelled, as he was presented with the choice to either sit for multiple interviews with outside counsel or find a new job. But because the government did not make direct or indirect use of Black's interview statements at trial or before the grand jury and did not make direct or indirect non-evidentiary use of the statements during its own investigation, the government's case against him was not tainted. According to the court, the government's case depended not on any investigatory lead derived from Black's interviews with outside counsel, "but rather on his incriminating messages and the testimony of cooperators — none of which was tainted." Black is scheduled to be sentenced on October 24.

Obstruction

Former Hedge Fund Executive Pleads Guilty to Lying to Investigators As Prosecutors Drop Underlying Fraud Charges:

In May, the former European head of publicly traded hedge fund Och-Ziff Capital Management Group LLC [admitted to lying](#) to the Federal Bureau of Investigation (FBI) when he misrepresented a letter he now admits was backdated. As a result of his guilty plea, the government agreed to drop the remaining nine fraud-related [charges](#) against him based on allegations that he made material misrepresentations and omissions to a firm client, a charitable organization and investor, in order to obtain their consent to purchase stock. The plea comes nearly a year after the SEC's civil suit against Cohen and another former Och-Ziff executive was [dismissed](#) as barred by the FCPA's statute of limitations.

Officer & Director Issues

Former KPMG Partner and Public Company Accounting Oversight Board (PCAOB) Employee Convicted on Wire Fraud Charges:

As we [previously reported](#), a federal grand jury charged five former KPMG executives and one former employee of the PCAOB, the body that oversees the audit industry, with conspiracy and wire fraud in connection with an alleged scheme to obtain, disseminate, and use confidential PCAOB information to assist KPMG in audit inspections conducted by PCAOB. On May 11, following a month-long trial, David Middendorf, a former KPMG partner, and Jeffrey Wada, a former PCAOB employee, were [convicted](#) on wire fraud charges and acquitted on other charges. Wada and Middendorf have separately moved for a judgment of acquittal or for a new trial. Sentencing for the two men is set for August 9. Two codefendants, former KPMG executive Cynthia Holder and former KPMG partner Thomas Whittle, pled guilty to related charges in October 2018. Holder is scheduled to be sentenced on June 21 and Whittle on September 13. The remaining codefendant, former KPMG partner David Britt, is scheduled for trial in October.

Noteworthy Investigations

Two Individuals Convicted in NCAA Bribery Trial: Since [we last reported](#) on the NCAA bribery scandal, a former Adidas consultant and a sports agent were [convicted](#) of conspiring to pay college basketball coaches to steer players with NBA potential to sign with their sports agency. The sports agent faces a maximum sentence of 15 years in prison, while the Adidas consultant faces a maximum of five years. As we [previously reported](#), the two individuals, along with a former Adidas executive, were convicted at

trial last year on fraud charges relating to their roles in directing top players to Adidas-sponsored universities. The two were sentenced to six months in prison, while the Adidas executive received a nine-month prison term. Meanwhile, this spring, a [former NBA referee](#) and [former Auburn University coach](#) pled guilty to conspiracy to commit bribery for their involvement in the college basketball bribery scheme.

Noteworthy Court Rulings

U.K. Court Declines to Allow Production of Documents to U.S. Government: In February, a U.K. court [denied permission](#) to a U.S. company to produce to U.S. authorities tens of thousands of documents obtained in civil litigation in England. The documents in question relate to the federal government's investigation into Autonomy Corporation's former CEO, Mike Lynch, and former VP of Finance, Stephen Chamberlain, who were charged in the U.S. in November 2018 with fraud in connection with the U.S. company's 2011 acquisition of Autonomy for \$11 billion. The U.S. company obtained the documents from Lynch and Chamberlain in civil proceedings in the U.K., and later received a grand jury subpoena seeking the same documents. The U.S. company sought permission of the U.K. court to produce the documents, which were subject to rules of civil procedure limiting use of the documents to the U.K. proceedings. The court ruled, however, that the U.S. company failed to show that producing the documents to the U.S. was "necessary for the U.S. process" or that it was under compulsion to share the documents with the U.S.

U.S. Supreme Court Says Securities Laws Reach the Dissemination of False or Misleading Statements: In March, the Supreme Court [held](#) that an individual who is not a "maker" of a false or misleading statement can nonetheless be held liable under federal securities laws for disseminating a misstatement made by someone else. The SEC alleged that Francis Lorenzo, the former director of investment banking at a registered broker-dealer, violated the Exchange Act, the Securities Act, and Rules 10b-5(a) and (c) when he sent two emails to potential investors which contained statements Lorenzo knew to be false. Lorenzo argued that he could not be held liable because he had sent the emails at the direction of his boss and he was not therefore the "maker" of the statements in light of the Court's decision in *Janus Capital Group, Inc. v. First Derivative Traders*, 511 U.S. 164 (1994). In a 6-2 decision (Justice Kavanaugh did not participate), the Court disagreed. Writing for the majority, Justice Breyer reasoned that the relevant provisions of Rule 10b-5 were "sufficiently broad to include within their scope the dissemination of false or misleading information with the intent to defraud," even if the disseminator of the information was not the maker of the statement. Justices Thomas and Gorsuch dissented, arguing that *Janus* allows only "makers" of false statements to be held primarily liable and that an individual without the required "ultimate authority" should be held secondarily liable as an aider and abettor.

Noteworthy Sentencings

Cooperator Avoids Prison in LIBOR-Rigging Case: In February, a former Deutsche Bank trader avoided a prison sentence for his role in manipulating LIBOR and [was ordered](#) to serve three years of supervised release based on his substantial cooperation. Timothy Parietti [admitted](#) that he and other Deutsche Bank traders solicited inaccurate LIBOR contributions (*i.e.*, the estimated expected interest rate) as part of a scheme to rig LIBOR rates. Prosecutors advocated for a reduced sentence based on Parietti's substantial cooperation in the underlying LIBOR case against co-conspirators Matthew Connolly and Gavin Black, who were [convicted](#) in October 2018. In their [sentencing memorandum](#), prosecutors stated that Parietti sat for more than a dozen interviews and trial preparation sessions, listened to hundreds of hours of audio recordings, analyzed thousands of documents for the government, and provided two days of testimony at Connolly and Black's trial. Connolly and Black are scheduled to be sentenced on October 24.

Policy Developments

DOJ Refines Stance on Ephemeral Messaging Apps: In December 2017, DOJ [first took aim](#) at messaging apps in its FCPA Corporate Enforcement Policy, and required companies to prohibit employees from "using software that generates but does not appropriately retain business records or communications." Companies failing to do so were to be disqualified from receiving full

credit — *e.g.*, the presumption of a declination — for timely and appropriate remediation in the context of cooperating with a government investigation into potential FCPA violations. The policy, which reflected DOJ's view that communications exchanged by company employees through messaging apps are a potentially important source of information in FCPA investigations, and the agency's expectation that companies would take some type of action to facilitate the preservation, collection, and review of such communications, sparked debate. In March, DOJ updated the relevant provision regarding messaging apps to [refine its stance](#). The agency clarified that it does not expect companies to *prohibit* employees from using ephemeral messaging apps (which may not store communications) such as WhatsApp, Snapchat, Signal, and Viber, but instead requires them to implement appropriate guidance and controls over such communications.

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