

WHITE-COLLAR CRIME

Expert Analysis

1MDB Scandal Tests Justice Department On FCPA and Corporate Prosecutions

In 2015, Malaysia's former Prime Minister, Najib Razak, was accused of siphoning hundreds of millions of dollars from a government run strategic development company, 1Malaysia Development Berhad (1MDB), to his personal bank accounts. The fallout from the 1MDB scandal has been international in scope, most recently resulting in a high-profile indictment and the guilty plea of a senior investment banker in the U.S. District Court for the Eastern District of New York.

The Justice Department's prosecution of the 1MDB case illustrates how despite early predictions otherwise, Trump administration enforcement of the Foreign Corrupt Practices Act is alive and well. Events seem to have a way of forcing the hand of even the most pro-business administrations. In the early 2000s, the Enron and WorldCom scandals forced the George W. Bush Administration's Justice Department to overcome any instinctive qualms and vigorously



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pursue criminal prosecutions of corporate accounting frauds. The high profile, grand scale and sensational nature of some of the

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alleged misconduct in the 1MDB case seems likewise to have overridden any misgivings the Trump Justice Department may have had about relying on the FCPA in combatting business-related crime.

The 1MDB case also poses a test of Justice Department attitudes on prosecuting corporations. Although

federal prosecutors thus far have focused on individual wrongdoing, portions of the charging documents suggest that potential corporate charges are on their radar. But allegations illustrating the robustness of the investment bank's compliance structure and indicating that the individuals charged repeatedly lied to circumvent those controls suggest that if the Justice Department intends to be true to its announced intention to be restrained in prosecuting corporate actors, the 1MDB case could be well-suited for a corporate declination.

Despite Forecasts, No Decline In FCPA Cases

Prior to taking office, signals from the Trump Administration suggested a reduced reliance on the FCPA. Trump publicly had stated his belief that the statute harmed American companies' economic interests and limited their ability to compete in a global market. Similarly, Jay Clayton, Trump's appointee as chairman of the Securities and Exchange Commission, previously had led a bar committee that issued

a report stating that FCPA enforcement was ineffective at combating global corruption and created an international “asymmetry in regulation and enforcement.”

Forecasts of a decline do not appear to have come to fruition, however. Not only has the Justice Department continued steadily its pursuit of FCPA cases, enforcement efforts by other countries—perhaps in response to the lucrative recoveries the United States has had—have increased as well. In the United States, the Justice Department filed 29 FCPA cases in 2017 and had filed 11 such cases as of mid-2018. The SEC brought 10 FCPA actions in 2017 and had filed six enforcement actions as of early July 2018. Recent enforcement numbers exceed those from the period 2012 to 2015, and are more comparable to figures from 2009 to 2011, when FCPA enforcement was at its highest level, with the Justice Department filing an average of 32 cases actions and the SEC bringing an average of 22 enforcement actions annually.

The 1MDB Scandal

As described by the government, 1MDB was created to pursue investment and development projects for the economic benefit of Malaysia. The indictment and a related two-count information filed by federal prosecutors in the Eastern District of New York highlight connections between the 1MDB scandal and the United States. The documents allege that between 2009 and 2014, a well-connected Malaysian

financier, Jho Low, conspired with senior Malaysian and Abu Dhabi government officials, two former senior Goldman Sachs executives, Tim Leissner and Roger Ng, and others to misappropriate \$2.7 billion in funds from 1MDB, to use those funds in part to pay bribes and kickbacks, and to launder such funds through the U.S. financial system.

Leissner pled guilty on Aug. 28, 2018, to a recently unsealed two-count information charging him with conspiring to launder money and conspiring to violate the FCPA in connection with the 1MDB scandal, and is reported to be cooperating with U.S. authorities. Leissner is the former Southeast Asia Chairman and was a participating managing director, typically referred to as a “partner,” of Goldman Sachs. During his time at Goldman, Leissner was the banker in charge of the 1MDB account. Before leaving Goldman in 2014, Ng, a Malaysian national and Goldman managing director, worked with Leissner on the account.

Goldman was retained to raise approximately \$6.5 billion in three separate bond offerings to support 1MDB projects. According to the government, Low, Ng and their co-conspirators instead misappropriated more than \$2.7 billion of the funds raised to be used as bribes and kickbacks to government officials in Malaysia and Abu Dhabi and for the conspirators’ personal benefit, including the personal benefit of Leissner and Ng. According to the government, the misappropriated 1MDB funds were laundered

through a series of complex transactions and fraudulent shell companies with bank accounts located in various countries, including the United States. The funds then were used to acquire and invest in assets located in the United States.

The nature of some the personal benefit received by the conspirators and their relatives is more fully detailed in three separate civil forfeiture actions filed by the government in 2016 and 2017. Those complaints detail how a portion of the money was used to purchase, among other things, interests in high-profile movies such as “The Wolf of Wall Street” and “Dumb and Dumber To,” high-end real estate and hotel properties in New York and Los Angeles, artwork by Van Gogh, Monet, Picasso and Basquiat, a \$260 million “megayacht,” a \$35 million aircraft, and diamond jewelry.

Leissner Plea

The redacted transcript of Leissner’s guilty plea offers some more color to the scheme. At his plea, Leissner admitted to conspiring to commit money laundering and violations of both the anti-bribery provision and the accounting provisions of the FCPA. Regarding the anti-bribery violation, Leissner stated that he took part in and was aware that some of the funds would be used to pay bribes and kickbacks “to influence the government officials to take official action so that Goldman Sachs would receive business from 1MDB.” Leissner explained that funds would be diverted to him and others through

shell companies beneficially owned and controlled by him and others.

As an example, in October 2014, Leissner caused \$4.1 million to be wire transferred from a foreign bank account he controlled to the U.S. bank account of a New York jeweler to pay for jewelry for the wife of a Malaysian government official, reported to be Rosmah Mansor, the wife of Najib Razak. Leissner understood that the payment was intended to benefit Najib in order to influence him to take official acts that would help provide 1MDB business to Goldman. Leissner also admitted to violating the internal control provisions of the FCPA by concealing facts from compliance and legal officials at Goldman.

In his plea agreement, Leissner agreed to forfeit \$43.7 million. Leissner faces a maximum prison term of five years on the conspiracy to violate the FCPA count and 20 years on the conspiracy to commit money laundering count. For their part, Ng was arrested in Malaysia in early November and Low is a fugitive.

Potential Corporate Liability

The charging documents and elements of Leissner's plea allocution suggest that the Justice Department may be considering potential future charges against Goldman. The charges refer to Ng and Leissner as "agents acting within the scope of their employment" and "with the intent, at least in part, to benefit" their employer. The documents also refer to others at Goldman who are claimed to have

participated in the illegal activity—most are unidentified, but the Leissner Information also identifies "Co-conspirator 4" as another Goldman partner, to whom Ng allegedly revealed that bribes would be paid to Malaysian and Abu Dhabi government officials. Leissner's plea allocution, the language of which would have been negotiated with the government as part of his cooperation, also includes his assertion that his actions in concealing facts from compliance and legal officials were "very much in line [with the] culture of Goldman Sachs."

But the charging documents also recite a number of facts that point toward Goldman having a robust compliance structure. It is alleged

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that Leissner tried on three occasions to have Goldman approve doing business with Low, but was rebuffed each time because of concerns with the sources of Low's wealth. Because Goldman would not loosen its controls despite Leissner's repeated requests, as the charging documents allege, in order to carry out their misconduct, Leissner and his cohorts

were forced repeatedly to lie to compliance and legal officials and various committees responsible for reviewing the bond issuances. Indeed, Low and Ng are specifically charged with violating the FCPA by conspiring to circumvent Goldman's accounting controls, in a count that cites repeated instances of Leissner lying to and hiding facts from Goldman in-house legal staff and other senior officials about Low's role in the transactions.

Further, the allegations against the additional Goldman partner, Co-conspirator 4, are sparse, and the fact that the government did not charge him suggests the proof against him is thin. With the claims that Leissner and Ng stole extensively in order to line their own pockets, Leissner's claim about Goldman's culture rings rather hollow and self-serving. The allegations strongly suggest that Leissner and Ng were bad actors engaged in the kind of intentional and surreptitious misconduct that is extraordinarily difficult for even the best functioning compliance system to prevent.

The day after the individual charges were announced, Goldman filed a Form 10-Q disclosing that it was cooperating with the ongoing 1MDB investigation, which it described in some detail. The filing noted that the firm had received subpoenas and requests for information in connection with the investigation and that its former employees had been implicated. It further recited language from the indictment alleging that Goldman's

internal accounting controls could be easily circumvented, and the government's claim that the firm's business culture "at times prioritized consummation of deals ahead of the proper operation of its compliance functions." The 10-Q states that "any proceedings by the DOJ or other governmental or regulatory authorities could result in the imposition of significant fines, penalties and other sanctions against the firm."

While otherwise a bellwether because of its high profile, how the government treats Goldman in the 1MDB case also will be of particular interest in light of the Justice Department's special FCPA Corporate Enforcement Policy, announced last year. That Policy created a presumption that companies will receive a declination of prosecution for misconduct where they voluntarily disclose and cooperate; but to qualify, such voluntary disclosure has to occur "prior to an imminent threat of disclosure or government investigation," which may not be the case in the long-running 1MDB saga. The Policy also provides that the presumption may be overcome where there were aggravating circumstances, such as "a significant profit to the company from the misconduct." If the presumption of a declination were applicable, it would be interesting to see if the government asserted that the alleged \$600 million in fees Goldman earned constituted such an aggravating circumstance.

Aside from the FCPA Corporate Enforcement Policy, observers will

be watching to see whether the Justice Department insists on a corporate guilty plea and if so from what entity, or accepts a deferred prosecution or non-prosecution agreement, and of course, the magnitude of any fines, disgorgement and restitution. Also of interest will be the involvement of the SEC and any foreign authorities in any resolution, and the extent to which the authorities insist on any further remediation, including any changes to Goldman's compliance structure.

The background music guiding the dance between Goldman and the Justice Department will be the prosecutorial guidance commonly referred to as Principles of Federal Prosecution of Business Organizations. These principles, which were subject to much-discussed modifications in 2015 pursuant to the Yates Memorandum authored by then-Deputy Attorney General Sally Yates, are codified in the newly issued "Justice Manual"—the new name for the former United States Attorneys Manual. Last week, current Deputy Attorney General Rod Rosenstein announced a tweak to the Yates Memorandum that makes it easier for companies to obtain cooperation credit without having to provide information about every individual involved in the wrongdoing, but only those "substantially involved in or responsible for the misconduct at issue." See Remarks of Deputy Attorney General Rod J. Rosenstein at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018). The

Justice Manual also incorporates Rosenstein's new policy to reduce "piling on" of repeated punishments on highly regulated industries. These changes reflect recent shifts in the Justice Department's views regarding the criminal prosecution of corporations. See "Sessions' Justice Department's Pragmatic Approach to Corporate Accountability," N.Y.L.J. (June 8, 2018).

Conclusion

Because of Goldman's prominence and the high profile of the 1MDB scandal, it will be of great interest to see the extent to which the Justice Department adheres to the Administration's declared intent not to "employ the hammer of criminal enforcement to extract unfair settlements" from corporations. Regardless of the outcome for Goldman Sachs, 1MDB confirms the government's continued forceful use of the FCPA, and its extensive coordination with partners in international law enforcement to prosecute global bribery and related white-collar crimes.