



Red Notice

A Monthly Update on Global Investigations and Prosecutions

December 2011

INTRODUCTION

Thank you for reading our holiday edition of *Red Notice*, a publication of Akin Gump Strauss Hauer and Feld, LLP. 'Tis the season to be jolly for the defendants convicted in the first FCPA jury trial, as the judge in the Lindsey Manufacturing case overturned the convictions due to prosecutorial misconduct. Enhanced penalties top the wish list SEC chief Mary Schapiro has sent to the Congress. It might be getting cold outside, but DOJ's investigation of the pharmaceutical industry is heating up. In Antitrust news, while many travelers fork over fares to airlines this time of year, several airlines will be paying considerable sums back to the taxpayers. Prosecutors are also planning to drop coal in the stockings of executives implicated in the investigations of both the auto parts and coastal freight shipping industries.

ANTICORRUPTION DEVELOPMENTS

First FCPA Jury Conviction of a Corporation Overturned

In a surprising turn, US District Judge Howard Matz dismissed the historic conviction of Lindsey Manufacturing Co, and the two of the company's executives in *US v. Noriega et al.*, 2:10-CR-01031-AHM (C.D. Cal.). Last spring, Lindsey Manufacturing became the first company ever convicted of FCPA charges at a jury trial as the company was found to have violated the FCPA by bribing officials in Mexico to win over \$19 million in contracts. Judge Matz's trenchant opinion found that DOJ prosecutors committed far-reaching misconduct in both the trial and the investigation. Particularly, prosecutors were said to have allowed an FBI agent to submit false testimony, materially misstated facts in applications for search warrants, and improperly reviewed emails between a defendant and her lawyer. Read *FCPA Blog's* [coverage](#) and [commentary](#) from *Corruption Currents*.

SEC Seeks Augmented Penalties But New Powers May Not Affect FCPA Enforcement

As SEC Chairperson Mary Schapiro asks Congress to pass legislation that would allow the agency to increase penalties, questions remain as to whether such an increase will affect penalties under the FCPA. Christopher Matthews at *Corruption Currents* [writes](#) that the new powers are unlikely to affect FCPA enforcement as the agency typically opts to impose disgorgement of ill-gotten gain in lieu of imposing civil penalties. The SEC's use of disgorgement, an equitable remedy whereby a company is forced to pay the amount earned from the improper act, to settle FCPA violations has increased over the years, including a settlement earlier this year in which US conglomerate Johnson & Johnson agreed to pay over \$48 million in disgorgement to the SEC in addition to a criminal penalty imposed by the DOJ totaling over \$21 million.

SEC Sets Enforcement Record for FY11, Begins Tracking FCPA Separately

The SEC brought 735 enforcement actions in the last fiscal year, setting a new high bar for the agency. Although enforcement actions were increased, the total amount of penalties and disgorgement fell from \$2.85 billion in FY10 to \$2.81 billion in FY11. The



Paul Butler
Partner
pbutler@akingump.com
202.887.4069
[Download to Outlook](#)



Brady Dugan
Partner
bdugan@akingump.com
202.887.4152 (direct)
[Download to Outlook](#)



Mark MacDougall
Partner
mmacdougall@akingump.com
202.887.4510 (direct)
[Download to Outlook](#)

Editor: [Jacob Weixler](#)

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penalties and disgorgement fell from \$280 million in FY10 to \$257 million in FY11. The new totals also track FCPA violations separately, showing 20 enforcement actions in the past year. Read the SEC's [press release](#), see the [statistics](#), and read *Corruption Currents'* [coverage](#).

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First Report Gives Early Look at Dodd-Frank Whistleblower Program

Though the first annual report of the SEC's Office of the Whistleblower only contained data from the last seven weeks of FY11, the report lists over 300 complaints submitted to the new office. The Office of the Whistleblower was created in 2010 by the Dodd-Frank Act and offers monetary awards to those who voluntarily provide original information that leads to a successful SEC enforcement action. The Office operates pursuant to final rules adopted in August of this year, thus this year's annual report only contains data from early August to the end of September. In the short time since the adoption of these final rules, the Office has received a substantial number of complaints unrelated to market offenses like fraud and insider trading. 51 complaints received by the office related to improper corporate disclosures and financial, while 13 related to bribery or the FCPA. Read the Office of the Whistleblower's [annual report](#).

Pharmaceutical Industry Probe Benefits from Cooperation

The DOJ's and SEC's far-reaching investigation into the US's largest drug companies appears to be the beneficiary of significant cooperation on the part of two drug companies, according to reports. Both Pfizer and Johnson & Johnson have agreed to recently agreed to FCPA settlements totaling \$60 million and \$70 million respectively, amounts which could have been higher if the companies had not agreed to cooperate with the DOJ. According to reports, both companies cooperated by offering information about their competitors. Four major pharma companies have indicated they have received letters of inquiry from DOJ and the SEC: Merck, AstraZeneca, Bristol Myers Squibb and GlaxoSmithKline. Read the [coverage](#) from the *Wall Street Journal*.

Colombia Joins Anti-Bribery Convention

Colombia recently became the 40th nation to join the Organization for Economic Cooperation and Development (OECD) Working Group on Bribery, acceding to the OECD Anti-Bribery Convention and committing to detailed reviews of its anti-bribery laws and enforcement mechanisms. The Convention forbids the bribery of foreign officials in international business transactions in an effort to level the playing field for fair competition. Since 1999, 91 companies and 199 individuals have been sanctioned under the Convention. Read the OECD's [statement](#).

ANTITRUST ENFORCEMENT DEVELOPMENTS

Airline Executive Pleads Guilty to Fixing Post-Disaster Prices

The DOJ announced late last month that an Executive of a Peruvian Air cargo carrier pled guilty to one count of price fixing in connection with an investigation into fuel surcharges on air cargo shipped from the US to Central and South America following Hurricanes Katrina and Rita in 2005. George Gonzalez, former Chief Commercial Officer for Cielos Airlines, joins former Arrow Air President Guillermo Cabeza and Luis Juan Soto, former President of South Winds Cargo, as the third executive to plead guilty in *US v. Cabeza et al.*, 1:10-CR-20790-UU (S.D. Fla.). So far over 40 airlines and executives have been charged in DOJ's airline industry investigation. Read DOJ's [release](#) and the [coverage](#) from the *Miami Herald*.

Auto Parts Investigation Nets Indictments Against Manufacturer, Distributor, and Executive

A federal grand jury in San Francisco indicted a Taiwanese manufacturer, its US-based

subsidiary and its highest-ranking officer as part of the ongoing investigation into the aftermarket auto lights industry (*US v. Hsu*, 3:11-CR-00488-RS (N.D. Cal.)). Eagle Eyes Traffic Industrial Co. Ltd. of Taiwan and E-Lite Automotive of California join two other companies charged in the investigation, while Eagle Eyes' Chairman David Lin joins three other executives facing charges. Last month, Maxzone Vehicle Lighting Corp. pled guilty

and was ordered to pay \$43 million in penalties. Earlier, Maxzone's CEO was sentenced to prison time for his role in the conspiracy. Read DOJ's [release](#) and the [coverage](#) from *Law360*.

China's Ministry of Commerce Discusses Antitrust Merger Enforcement with DOJ, FTC

A delegation from China's Ministry of Commerce (MOFCOM) met with Acting Assistant Attorney General Sharis Pozen and Federal Trade Commission Chairman Jon Leibowitz to discuss antitrust merger enforcement. Earlier this year, the DOJ and FTC signed a memorandum of understanding with China's three antimonopoly agencies, "to promote communication and cooperation" between the agencies in both countries according to the DOJ. MOFCOM is China's antitrust authority charged with reviewing mergers and acquisitions. The FTC, DOJ, and MOFCOM have developed guidance for cooperation between the three agencies when a US agency and MOFCOM are reviewing the same merger. Read the DOJ's [release](#), the [Memorandum of Understanding](#), the [guidance](#) for cooperation, and the [coverage](#) from *China Daily*.

Two Freight Companies Hit With Fines Totaling Nearly \$30 Million, Six Execs Indicted

After Florida water freight company Sea Star Line pled guilty and agreed to pay a \$14.2 last month, fines associated with the DOJ's investigation into price fixing and bid rigging in the coastal water freight industry now total approximately \$29.2 million. Previously, Horizon Lines was fined \$15 million, and five former executives from the two companies were sentenced to a collective total of 11 years in prison. Also last month, Sea Star's former President, Frank Peake, was indicted for his role in the conspiracy (*US v. Peake*, 3:11-CR-00512-DRD (D.P.R.)), possibly making the sixth executive to be sentenced in connection with this investigation. Read DOJ's [release](#) and the [coverage](#) from the *Florida Times-Union*.

Indictment Dismissed Against Shipping Exec Under Formerly-Associated Company's Plea Bargain

Last week, a federal magistrate recommended dismissal of criminal charges filed against a Florida West International Airways executive by finding that the executive was covered under a plea agreement between DOJ and LAN Cargo, *US v. Fla. West Int'l Airways, Inc. et al.*, 1:10-CR-20864-RNS (S.D. Fla.). The magistrate found that LAN Cargo's 2009 agreement precluded the indictment of Rodrigo Hidalgo, an executive at Florida West, because LAN formerly had an ownership interest in Florida West. LAN sold the interest in 2007, two years before the plea agreement, and the agreement does not mention Florida West. The magistrate denied a separate motion by Florida West requesting dismissal of charges against the company. DOJ's price-fixing investigation into the air industry, has led to charges against 22 airlines and 21 executives. Read [the latest](#) on this interesting development.

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M&A and Antitrust: Present Challenges and Future Opportunities

The Metropolitan Corporate Counsel

Akin Gump's Anthony Swisher and David D'Urso are interviewed about recent trends and developments affecting mergers and acquisitions and antitrust law. Click [here](#) for the full article text.

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