



Red Notice

A Monthly Update on Global Investigations and Prosecutions

October 2011

INTRODUCTION

Welcome to the October edition of *Red Notice*, a publication of **Akin Gump Strauss Hauer & Feld LLP**. In this month's anti-corruption developments, court filings provide some clarity on the DOJ's view of the elements of the FCPA. In addition, a new chief takes the helm of the FCPA enforcement unit at the SEC, and we highlight interesting statistics regarding the DOJ's prosecutions of individual defendants on FCPA charges. In international antitrust developments, the multidistrict litigation against LCD manufacturers highlights the differences between class actions and state *parens patriae* actions. The Ninth Circuit makes clear that defendants can be made to defend both a federal class action and a state *parens patriae* action arising from the same conduct. The European Commission has opened a new investigation into attempted standards-setting by banks involved in e-Payments. Finally, a federal judge has set a date for the trial of the DOJ's suit to block AT&T's acquisition of T-Mobile from Deutsche Telekom.

ANTI-CORRUPTION DEVELOPMENTS

DOJ Agrees That Knowledge of Foreign Official Status is Required by FCPA

Late last month, prosecutors in *U.S. v. Carson*, No. 09-cr-00077 (C.D. Cal.), responded to a question from the judge asking whether a defendant must know that the individual being bribed is in fact a government official. In a written response, the government and defense counsel agreed that the question must be answered in the affirmative. Read the [story at the FCPA blog](#). In a related development, Carlos Rodriguez, convicted of bribery in *U.S. v. Esquenazi et al.*, No. 09-cr-21010 (S.D. Fla.), has moved for acquittal, claiming in part that the government did not prove that he knew that the officials were "acting in their official capacity." This is likely the first time a defendant has used the government's recent admission in the Carson case regarding the knowledge requirement. Read the [story at Main Justice](#) (subscription required).

Former Head of Nigeria Bribery Investigation Named Chief of SEC FCPA Unit

The Securities and Exchange Commission's Division of Enforcement named Kara Novaco Brockmeyer its Chief of the Foreign Corrupt Practices Act Unit. The former Assistant Director in the Enforcement Division is only the second chief of the FCPA unit, and partly earned her reputation for her leadership on one of the largest FCPA investigations to date. Brockmeyer and her team investigated companies involved in a joint venture to construct a Nigerian gas plant, resulting in \$1.5 billion in penalties and disgorgement. Read the [release from the SEC](#) and [coverage at Corruption Currents](#).

Interesting Statistics Regarding DOJ's Prosecution of Individual FCPA

Defendants

At last year's National FCPA Conference, Assistant U.S. Attorney General Lanny Breuer highlighted the importance of individual prosecutions in capturing "the attention of the



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highlighted the importance of individual prosecutions in capturing the attention of the business community." (Read the speech [here](#).) However, the circumstances under which the DOJ will either seek or decline an individual FCPA prosecution have not been articulated by DOJ. *The FCPA Professor* blog recently assembled some interesting statistics regarding individual FCPA prosecutions. There appears to be a correlation between cases in which the DOJ entered a non-prosecution or deferred-prosecution agreements with a corporation appear to correlate with a significantly reduced likelihood that individuals will be prosecuted. By contrast, when the DOJ charges the company, the likelihood of individuals being charged appears much higher. Read the full analysis [here](#).

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ANTITRUST ENFORCEMENT DEVELOPMENTS

State AGs Suing LCD Manufacturers Are Not Appropriate Plaintiffs in a Federal Class Action

As we have previously reported, LCD screen manufacturers have been accused of participating in an international price-fixing cartel in a pending MDL class action, MDL No. 1827 (N.D. Cal.). Separately, the Attorneys General of California and Washington filed *parens patriae* suits on behalf of computer or mobile device consumers in their states. The defendants removed both actions to federal court, arguing that the *parens patriae* actions were merely class actions in disguise. On appeal, the Ninth Circuit ruled this week that the AGs' *parens patriae* suits are not class actions within the definition of the Class Action Fairness Act, and must be remanded to state court. Read more from *Thomson Reuters* [here](#) and [the Ninth Circuit's decision here](#).

European Commission Opens Standards-Setting Investigation in E-payment Market

The European Commission has opened an investigation into whether a standards setting process for payments over the internet developed by the European Payments Council is anticompetitive. The new process attempts to create an "integrated payments market" through a self-regulatory effort known as the "Single Euro Payments Area." The Commission is investigating whether the standardization process will restrict competition, particularly by excluding payment providers who are not linked to a bank. Read the [Commission's release here](#). Earlier this year, the Federal Trade Commission began studying whether the use of patented technology in standards setting can be anticompetitive. Information on the initiative can be found [here](#).

AT&T, T-Mobile Merger Hearing Set for February

The federal district court trial, *U.S. v. AT&T Inc.*, No. 11-01560 (D.D.C), on the Justice Department's motion to enjoin AT&T's \$39 billion acquisition of T-Mobile from Germany's Deutsche Telekom is set for mid-February. If it does not settle before then, this will be the most significant merger trial that the DOJ has litigated in many years. Read the [coverage at the Washington Post](#).

AKIN GUMP PUBLICATIONS AND SPEAKING ENGAGEMENTS

FCPA Due Diligence in Cross-Border M&A: How to Avoid Buying a Felony

Risks under the Foreign Corrupt Practices Act (FCPA) should never be taken lightly. By their nature, international acquisitions are complex and coupled with the time pressures and geographical speed bumps, U.S. companies and issuers should always plan for FCPA due diligence to ensure the law is followed. Akin Gump Strauss Hauer & Feld LLP, along with Merrill Corporation, presents a panel discussion of best practices for due diligence in cross-border M&A Deals. This seminar will cover: uncovering possible corrupt

practices during the financial and legal pre-M&A due diligence; red flags in M&A to avoid exposure to FCPA sanctions; and possible delays or cancellations of a deal that can result from failing to perform due diligence. For more information or to register, [click here](#).



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