Akin Gump
STRAUSS HAUER & FELD LLP

# Red Notice

A Monthly Update on Global Investigations and Prosecutions

**June 2016**

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## IN THIS ISSUE



## ANTICORRUPTION DEVELOPMENTS

### Additional Individual Pleads Guilty in Connection with Bribery of Venezuelan State-Owned Energy Company

On June 16, 2016, the Department of Justice (DOJ) announced that Roberto Enrique Rincon Fernandez ("Rincon") pleaded guilty to foreign bribery charges in connection with a scheme to secure contracts from Petroleos de Venezuela S.A. (PDVSA), Venezuela's state-owned energy company. Rincon admitted to working with another businessman, Jose Shiera Bastidas ("Shiera"), to pay bribes to PDVSA employees in order to win contracts. Shiera previously pleaded guilty to related charges in March. Rincon pleaded guilty to one count of conspiracy to violate the FCPA one count of violating the FCPA, and one count of making false statements on his 2010 federal income tax return. Rincon's sentencing is set for September 30, 2016.

The DOJ has now reached plea agreements with six individuals concerning bribery of PDVSA officials. See our previous coverage of the PDVSA-related bribery scheme here.

Learn more at the *FCPA Blog*, *Reuters*, and the *WSJ*.

### World Bank Integrity Vice President Emphasizes Effectiveness of Settlement Agreements

Ahead of the Annual International Anti-Corruption Practitioner Conference hosted in Paris from June 14-16, Leonard McCarthy, Integrity Vice President of the World Bank Group, authored an article on the World Bank's approach to today's corruption challenges, emphasizing the World Bank's strategy to use settlement agreements to encourage compliance. McCarthy highlighted the principle of partnership with stakeholders, and he focused on the important role that settlement agreements play in creating partnerships. Specifically, McCarthy pushed back against the idea that settlements "let large companies off the hook" by noting that settlements can carry stiff monetary penalties and debarment. Settlements also provide flexibility, however, allowing the World Bank to craft agreements to provide restitution in kind or in cash, depending on the particular needs of the parties. Most importantly, according to McCarthy, settlements frequently require corporate reforms that include correcting misconduct and launching more thorough integrity and compliance controls that can lead to a cultural change throughout the organization. The World Bank is receptive to settlement resolution in a range of situations – whether the corrupt entity is large or small, or international or local. McCarthy's comments indicate that the World Bank sees settlement agreements not only as an effective way to punish current misconduct, but also as an important tool to prevent future corruption and to promote a culture of compliance.

To learn more, click here.

### SEC Awards Whistleblower Second Largest Award in Agency's History

On June 9, 2016, the Securities and Exchange Commission (SEC) announced a whistleblower award of more than $17 million after the individual provided "unique and useful" information that assisted the SEC in its investigation and resulting enforcement action. The award is the second largest since the agency began its whistleblower program in 2011; the largest award was $30 million in 2014. The SEC is required to keep the identity of a whistleblower confidential and may not disclose information that might directly or indirectly reveal his or her identity. In announcing the recent award, Sean X. McKessy, the chief of the SEC's Office of the Whistleblower, noted that the agency has awarded whistleblowers more than $26 million in the past month. McKessy explained that the large awards are intended to encourage company insiders, who are well positioned to provide key information on corporate wrongdoing, to share with the SEC their knowledge of any suspected violations. To be eligible for an award—which can range from 10 percent to 30 percent of the money collected when the monetary sanctions exceed $1 million—a whistleblower must voluntarily provide the SEC with unique and useful information that leads to a successful enforcement action.

To learn more, see coverage in the *FCPA Blog*.

### 11th Circuit Holds that Five-Year Statute of Limitations Applies to SEC Disgorgement Claims

Last month the 11th Circuit held that the five-year statute of limitations established by 28 U.S.C. § 2462 applies to the SEC's claims for disgorgement or declaratory relief. In *SEC v. Graham et al.*, the court rejected the SEC's contention that § 2462 does not apply to disgorgement claims because disgorgement is an equitable remedy. The *Graham* decision is significant because the SEC relies heavily on disgorgement actions in civil dispositions. In fact, disgorgement accounts for the vast majority of financial penalties that the SEC has imposed for FCPA violations in the last 10 years. *Graham* is also significant because it creates a circuit split with the D.C. and 9th Circuits on whether § 2462 applies to SEC disgorgement claims.

To learn more, click here.

### Akamai and Nortek Resolve FCPA Allegations with SEC and DOJ

Nortek, Inc. ("Nortek"), a Rhode Island-based residential and commercial building products manufacturer, and Akamai Technologies ("Akamai"), a Massachusetts-based Internet services provider, entered into separate Non-Prosecution Agreements (NPAs) with the SEC in connection with alleged bribes by foreign subsidiaries in China. The SEC announced the NPAs after the companies each self-disclosed their misconduct to the SEC and DOJ; shared the results of their internal investigations with the government; and took corrective actions, including terminating responsible employees. Nortek will pay $291,403 in disgorgement plus $30,655 in interest, and Akamai will pay $652,452 in disgorgement plus $19,433 in interest. Under the NPAs, neither company is charged with violations of the FCPA or is subject to further monetary penalties.

After the SEC announced the NPAs, Akamai and Nortek also released declination letters that they received from the DOJ—the first issued under the FCPA Pilot Program announced in April 2016. In declining to bring charges against the companies, the DOJ acknowledged the fact that the companies voluntarily self-disclosed the misconduct and fully cooperated with the government.

See the *FCPA Blog* and *Reuters* for more information.

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## EXPORT CONTROL AND SANCTIONS ENFORCEMENT

### Medical Supply Company Agrees to Pay Over $100,000 in Civil Penalties in Connection with Apparent Violations of Iran Sanctions

On June 23, HyperBranch Medical Technology, Inc., a North Carolina company, agreed to pay $107,691 to the Office of Foreign Assets Controls (OFAC) to settle apparent violations of the Iranian Transactions and Sanctions Regulations (ITSR). The apparent violations stem from two separate shipments of medical sealants exported to Iran through the U.A.E. in 2011. HyperBranch voluntarily disclosed to OFAC the shipments and indicated that its former CEO and former international sales manager were aware that the company's U.A.E.-based distributor re-exported the goods to Iran, yet continued to conduct business with the distributor.

The penalty amount was significantly less than the statutory maximum civil penalty of $1,129,912, in part, because the company submitted a voluntary disclosure. In issuing its civil penalty determination, OFAC also considered the following mitigating factors: the export of medical end-use products posed limited harm to U.S. sanctions objectives; the company has no prior sanctions violations in the preceding five years; the company took remedial steps, including implementation of an OFAC sanctions compliance program; and the company cooperated with OFAC during its investigation.

For additional information, see the OFAC press release.

### DDTC Announces Consent Agreement in Relation to Chinese National Employee's Access to ITAR-Controlled Technical Data

On June 22, 2016, the U.S. Department of State, Directorate of Defense Trade Controls (DDTC) announced a consent agreement with Massachusetts-based Microwave Engineering Corporation (MEC) regarding allegations of the unauthorized export of technical data to a foreign person employee. For two years, MEC employed a citizen of the People's Republic of China as a research scientist who was working in the United States on an H-1B visa. Despite an approved Technology Control Plan and compliance instructions provided to the employee's supervisors, the employee was apparently given repeated access to controlled technical data related to five different projects.

MEC settled with DDTC without admitting or denying the allegations, but agreed to pay a $100,000 civil penalty, reduced from a maximum penalty of $500,000 per violation and the possibility of debarment. In determining the penalty, DDTC considered the following mitigating factors: MEC's voluntary disclosure, acknowledgement of the serious nature of the violation, investigative cooperation and implementation of extensive remedial measures.

For more information, see the State Department press release, proposed charging letter and coverage in *Law360*.

### CEO of a New York-Based Metallurgical Company Pleads Guilty to Conspiring to Export Metals to Iran

On June 14, the Department of Justice (DOJ) announced that Erdal Kuyumcu, CEO of New York-based Global Metallurgy LLC, pled guilty to one count of conspiring to violate the International Emergency Economic Powers Act (IEEPA) in connection with alleged exports of specialty metals from the United States to Iran without a license. According to the indictment, Kuyumcu and others conspired to export more than 1,000 pounds of a cobalt-nickel powder used in aerospace, missile and nuclear applications to Iran. To hide the destination of the goods from the U.S. supplier, they arranged for the metallic powder to be shipped first to Turkey and then to Iran. In addition to OFAC restrictions on the export to Iran, the Department of Commerce controls the export of the powder for national security and nuclear proliferation reasons. Kuyumcu faces up to 20 years in prison and a $1 million fine.

For additional information, see the DOJ press release and coverage in *Reuters*.

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## EXPORT CONTROL AND SANCTIONS DEVELOPMENTS

### OFAC Issues FAQs Clarifying Scope of Iran Sanctions for Non-U.S. Companies and Financial Transactions

On June 8, 2016, OFAC released an updated set of Frequently Asked Questions (FAQs) regarding the implementation of the Joint Comprehensive Plan of Action (JCPOA). The update responds to questions relevant to companies operating under General License H, as well as financial and banking institutions.

Among other things, OFAC clarifies that, consistent with its prior guidance, U.S. persons employed by, or serving

on the board of, a non-U.S. entity (including a U.S.-owned or -controlled foreign entity doing business under General License H) must be recused or "walled off" from the Iran-related business of that entity. The FAQs also state that OFAC will aggregate the interests of multiple U.S. persons in determining whether a foreign entity is U.S. -owned or -controlled for purposes of the OFAC sanctions. However, OFAC may not consider non-U.S. publicly traded companies or companies with dispersed ownership interests to be U.S. -owned or -controlled if U.S. persons, in the aggregate, passively hold more than 50 percent of the company's shares but no one U.S. person holds a controlling share in the company.

Regarding financial transactions, OFAC specified that it is permissible for U.S. financial institutions to transact with non-U.S., non-Iranian finance and banking institutions that do business with Iranian entities that are not on the Specially Designated Nationals list, so long as the Iran-related transactions are not routed through the United States or involve U.S. persons.

To learn more, you can find the updated OFAC FAQ here.

### DDTC and BIS Revise Key Definitions

On June 3, 2016, DDTC and the Bureau of Industry and Security (BIS) issued changes to the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR) in line with the administration's Export Control Reform (ECR) initiative to update and harmonize export controls, facilitate compliance and reduce unnecessary regulatory burdens. Among other things, the changes under the ITAR and the EAR amend definitions of fundamental terms such as "export," "re-export," "release" and "transfer." The changes also seek to address ambiguities in key terms, such as "directly related" and "technical data" under the ITAR, although work remains to reconcile historical differences in approaches and interpretations between the agencies on core concepts and issues. Both rule changes are effective September 1, 2016. BIS published its changes as a final rule, but is accepting comments on a continuing basis. DDTC published its changes as an interim rule, is accepting comments until July 5, 2016, and anticipates issuing additional rule changes.

For further information, see the DDTC Interim Rule and BIS Final Rule, and discussion in the Akin Gump International Trade Alert from June 10, 2016.

### DDTC Increases Civil Penalty Authority Under the ITAR

On June 8, 2016, DDTC increased its penalty authority under the ITAR from $500,000 to $1,094,010 per violation to conform to the requirements of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. This is the first time since 1985 that civil penalty authority, which is set out in the Arms Export Control Act at $500,000 per violation, has been increased. The new penalty authority is effective August 1, 2016.

To learn more, click here and here.

### BIS Issues Updated Enforcement Guidelines

On June 22, 2016, BIS issued a final rule revising its guidance regarding penalty determinations in the settlement of administrative enforcement cases based on violations of the EAR. The final rule outlines, among other things, the factors that BIS will consider in determining the appropriate administrative response and setting penalties in enforcement cases.

Consistent with the approach used by OFAC, BIS will consider the following factor categories in determining administrative penalties: aggravating, mitigating, general, or other. Aggravating factors include the degree of willfulness, awareness of conduct and harm to regulatory program objectives. Mitigating factors include the presence and adequacy of remedial responses, exceptional cooperation, and whether a license for the conduct was likely to be approved. General factors can be aggravating or mitigating, depending on the circumstances, and include individual characteristics, such as commercial sophistication, the value of the transaction and the history of trade-related regulatory violations. BIS considers other factors on a discretionary basis, including the presence of concurrent violations on a single export transaction; presence of multiple unrelated violations of the same rule; and pendency of other enforcement actions by federal, state or local authorities. The rule also underscores BIS' continued encouragement of voluntary self-disclosures, which can result in a reduction in base penalties by half.

The guidance builds on comments received from industry in response to a proposed rule, which we reported on in the January edition of *Red Notice*. The guidance forms part of the larger ECR initiative and aims to make penalty calculations more predictable and better aligned with OFAC penalty determinations.

For more information, see the Final Rule in the *Federal Register* and the January 2016 issue of *Red Notice* regarding the proposed rule.

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## WRITING AND SPEAKING ENGAGEMENTS

On July 20 and 21, Natasha Kohne and Kelli Kiernan will speak at the Association of Corporate Counsel's program "How Legal & Risk Management Can Address Your Top Two Cyber Threats" in Palo Alto and San Francisco, CA.

On July 20, David Turetsky will speak on The Knowledge Group's webinar "The Internet of Things (IoT) Cybersecurity Risks: Is Your Firm's Security Strategy Effective?" For more information, please click here.

If you would like to invite Akin Gump lawyers to speak at your company or to your group about anticorruption law, compliance, cybersecurity, enforcement and policy or other international investigation and compliance topics, please contact Mandy Warfield at mwarfield@akingump.com or +1 202.887.4464.

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