

Client Alert

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DOJ Turns FCPA Spotlight on Financial Services Sector as Enforcement Efforts in Latin America Continue

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Last week, the U.S. Department of Justice (DOJ) announced the indictment of two employees of a U.S. broker-dealer, Direct Access Partners, and a senior official in Venezuela's state economic development bank, Banco de Desarrollo Económico y Social de Venezuela (BANDES), for violations of the Foreign Corrupt Practices Act (FCPA), the Travel Act and money laundering statutes. This latest indictment signals DOJ's continuing focus on corruption in Latin America, and demonstrates DOJ's willingness to dedicate FCPA enforcement resources to new industries, such as the financial services sector.

The criminal complaint alleges that Direct Access Partners established a Global Markets Group that offered fixed-income trading services to institutional clients, including BANDES. In return for directing BANDES's business to Direct Access Partners, Tomas Alberto Clarke Bethancourt (Clarke) and Jose Alejandro Hurtado (Hurtado) paid bribes in the form of monthly kickbacks to Maria de los Angeles Gonzales de Hernandez (Gonzalez), a BANDES official who oversaw BANDES's overseas trading activity. Clarke and Hurtado paid Gonzalez at least \$5 million, splitting with her a substantial share of the revenue generated by Direct Access Partners for BANDES-related trades. The criminal complaint alleges that these payments were often made through intermediary corporations and offshore accounts located in Switzerland and other places.¹

The U.S. Securities and Exchange Commission (SEC) also filed a civil complaint against Clarke, Hurtado and Gonzalez.² The SEC complaint alleges that Gonzalez received or expected to receive payments closer to \$9.1 million.³

DOJ EXPANDS CONDUCT CHARGED BY COUPLING FCPA COUNTS WITH TRAVEL ACT AND MONEY LAUNDERING VIOLATIONS

The criminal complaint charges conspiracy to violate and substantive violations of the FCPA, the Travel Act, and federal money laundering statutes. The Travel Act charges are consistent with DOJ's recent guidance on the

¹ DOJ Press Release, "Two U.S. Broker-dealer Employees and Venezuelan Government Official Charged for Massive International Bribery Scheme," dated May 7, 2013, available at <http://www.justice.gov/opa/pr/2013/May/13-crm-515.html>. See also *U.S. v. Clarke, et al.*, No. 13-MAG-0683 (S.D.N.Y.) available at <http://www.justice.gov/usao/nys/pressreleases/May13/ClarkeetalComplaintPR/Clarke%20et%20al%20Complaint.pdf>.

² SEC Press Release, "SEC Charges Trades in Massive Kickback Scheme Involving Venezuelan Official," dated May 6, 2013, available at <http://www.sec.gov/news/press/2013/2013-84.htm>.

³ See *SEC v. Clarke, et al.*, No. 13-CV-3074 (S.D.N.Y. May 7, 2013) at ¶39 (available at <http://www.sec.gov/litigation/complaints/2013/comp-pr2013-84.pdf>).

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FCPA, which specifically references the use of the Travel Act as an alternative charging scheme in FCPA cases.⁴

The Travel Act, which criminalizes the use of foreign or interstate commerce for the purposes of carrying out specific unlawful activities, allows the government to charge conduct more broadly than charging criminal wrongdoing under the FCPA alone. The government can apply the Travel Act to situations where it cannot bring or will have more difficulty bringing a substantive FCPA charge. Such situations include charging a foreign official who received a corrupt payment, which is not within the scope of the FCPA. The Travel Act is also a powerful tool because the unlawful act underlying a Travel Act violation need not be a violation of federal law.⁵ In this case, for example, the government charged commercial bribery offenses in violation of New York state law as the underlying offense.

The inclusion of money laundering charges also bolsters both the offenses charged and the government's ability to seek more aggressive penalties in the form of longer prison sentences, steeper fines and larger forfeitures. Money laundering counts are often used to reach individuals whose conduct is outside the scope of the FCPA, such as foreign officials who have received bribes. Money laundering charges also provide the government with another avenue to reach the proceeds of crime through forfeiture actions. In this case, in addition to a criminal complaint, DOJ filed a civil forfeiture action seeking the forfeiture of assets held in several bank accounts associated with the scheme and certain Miami properties. On May 6, 2013, a federal court issued seizure warrants for the accounts and a restraining order relating to the properties.⁶

DOJ TURNS ANTI-CORRUPTION FOCUS TO FINANCIAL SERVICES SECTOR

As DOJ continues its aggressive enforcement of the FCPA, industries not traditionally within the scope of the FCPA, such as the financial services sector, are likely to be the subject of DOJ's broader anti-corruption efforts. The financial services sector is also at greater risk as a result of the heightened scrutiny that regulators, such as the SEC, have placed on financial institutions since 2008.⁷ The criminal investigation of Direct Access Partners, for example, arose from information the SEC learned during a periodic examination. In addition to other reforms, the Dodd-Frank Act recently expanded the SEC's examination authority over regulated entities (such as broker-dealers, transfer agents, investment companies, clearing agencies and SROs) to include municipal advisors, investment advisors to certain private funds, security-based swap dealers and others.⁸

DOJ has investigated and charged financial services employees in the past. Last year, a former managing director based in the Shanghai office of a global financial services firm pled guilty to one count of conspiring to circumvent his employer's internal controls, and was sentenced to nine months in prison. The former managing director conspired to transfer a multimillion-dollar interest in a Shanghai property to a Chinese official in return for

⁴ See "A Resource Guide to the U.S. Foreign Corrupt Practices Act," DOJ (Nov. 14, 2012) *available at* <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>. ("DOJ FCPA Resource Guide").

⁵ 15 U.S.C. § 1952.

⁶ May 7, 2013 DOJ Press Release.

⁷ For example, in November 2009, President Obama established the Financial Fraud Enforcement Task Force. The task force involves more than 20 federal agencies, 94 U.S. Attorneys' Offices and state and local partners; the government refers to this team as the broadest coalition of law enforcement, investigatory and regulatory agencies ever assembled. The Task Force's purpose is to investigate and prosecute financial crimes, ensure just and effective punishment for those who perpetrate financial crimes, and recover proceeds for victims. See description of Financial Fraud Enforcement Task Force, *available at* <http://www.stopfraud.gov/about.html>.

⁸ For more information, see <http://www.sec.gov/about/offices/ocie/ocieoverview.pdf>.

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the official's consent to a purchase of a building. As a result of these transactions, the official recognized an immediate paper profit of approximately \$2.8 million. DOJ specifically cited the financial services firm's compliance program, which "provided reasonable assurances that its employees were not bribing government officials," and its voluntary disclosure of the incident as the basis for the decision not to bring any enforcement action against the financial services firm in the matter.

DOJ's FCPA Resource Guide also specifically references DOJ's expectation that financial services companies will comply with the FCPA and employ appropriate compliance measures. The Resource Guide states that "[b]usinesses whose operations expose them to a high risk of corruption will necessarily devise and employ different internal controls than businesses that have a lesser exposure to corruption, just as a financial services company would be expected to devise and employ different internal controls than a manufacturer."⁹

LATIN AMERICA CONTINUES TO BE A FOCUS OF FCPA ENFORCEMENT

This indictment is also another example of DOJ's increased attention to FCPA-related misconduct in Latin America. DOJ's investigation of bribery at Walmart's largest foreign subsidiary, Wal-Mart de Mexico, has been widely publicized, and *The New York Times* recently won a Pulitzer Prize for the articles that instigated that investigation. Brazilian-based Embraer S.A., the world's third-largest commercial aircraft manufacturer, also recently expanded an internal investigation into potential FCPA violations to five countries.¹⁰

DOJ's concentration on business practices in Latin America is unlikely to diminish as Latin American economies continue to grow, having seemingly avoided the worst effects of the global economic downturn. Brazil is Latin America's largest economy and currently the seventh-largest economy in the world.¹¹ Mexico, Latin America's second-largest economy, is projected by some to overtake Brazil's economy in the next decade.¹² Corruption in both Brazil and Mexico remains prevalent. Transparency International's Corruption Perceptions Index for 2012 ranked Brazil in 69th place and Mexico even lower, in 105th place.¹³

As Latin America's economies continue to grow, state involvement in these economies remains high, and DOJ continues to target corruption overseas, Latin America will remain a high-risk region in which to do business. Companies operating in Latin America should enhance their compliance efforts and be vigilant in addressing and preventing conduct that could come to the attention of DOJ and the SEC. Financial services companies are now on notice that DOJ will employ all of the tools at its disposal to charge conduct creatively and even draw companies not commonly within reach of its FCPA enforcement efforts into the fold.

⁹ DOJ FCPA Resource Guide at 40.

¹⁰ See Embraer S.A. SEC Form 6-K (Report of Foreign Private Issuer) filed March 13, 2013, at 9 ("We received a subpoena from the SEC in September, 2010 In response to this SEC-issued subpoena and associated inquiries into the possibility of non-compliance with [FCPA], we retained outside counsel to conduct an internal investigation on transactions carried out in three specific countries [T]he Company has voluntarily expanded the scope of the internal investigation to include two additional countries").

¹¹ See Philip Aldrick, "UK Reclaims Sixth Largest Economy Slot," *The Telegraph* (Dec. 26, 2012) (projecting that Brazil's economy will overtake the UK again in 2014), available at <http://www.telegraph.co.uk/finance/economics/9764781/UK-reclaims-sixth-largest-economy-slot.html>.

¹² See D.W., "Will Brazil Remain the country of the future?," *The Economist* (Oct. 8, 2012) (projecting that the Mexican economy will overtake Brazil by 2022), available at <http://www.economist.com/blogs/freeexchange/2012/10/growth>.

¹³ Rankings available at <http://cpi.transparency.org/cpi2012/results/>.

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