



## Duross's FCPA Unit Legacy: Resource Guide, DPA Templates and Expanded Compliance

By Stephen Dockery | April 18, 2014

In his four years at the helm of the Justice Department's foreign anti-bribery unit, Charles "Chuck" Duross left a legacy that includes a more standardized process for settlement negotiations as well as the mammoth *A Resource Guide to the U.S. Foreign Corrupt Practices Act*.

Duross, a former Deputy Chief of the Criminal Division's Fraud Section, left the department in January to head the global anti-corruption practice at Morrison & Foerster LLP. He presided over a period of growth in foreign-anti-bribery resources and a sometimes controversial expansion of legal interpretations underpinning the law.



Charles Duross (photo by Main Justice)

The 1977 foreign anti-bribery law lay mostly dormant until the mid 2000s, when Mark Mendelsohn took over the unit from Peter Clark and expanded FCPA enforcement. Mendelsohn ran what many people likened to a free-form start-up. His scrappy unit with only a few assigned prosecutors laid the groundwork for the industry-shaping enforcement actions by which the unit would be defined.

Duross took enforcement into a new era. His leadership drew praise as well criticism for the types of prosecutions and settlements brought under his leadership. His tenure will continue to shape the foreign anti-corruption landscape for years to come.

"The standardized approaches to settlement negotiations and the Guide -- those are two pretty significant developments," said F. Joseph Warin, a long-time FCPA defense lawyer at Gibson, Dunn & Crutcher LLP.

Fraud Section Deputy Chief Patrick Stokes, named head of the unit in January, becomes only the fourth person to lead the Justice Department's foreign bribery unit in the FCPA's 37-year history.

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Stokes is likely to be tested running a unit that was depleted of some of its most experienced attorneys in recent months and includes fresh hires and relatively new unit prosecutors who have yet to finish their first anti-corruption case, knowledgeable people tell Main Justice.

Main Justice spoke to Duross and more than a dozen people close to the FCPA unit to tell the story of his legacy and the challenges facing the unit moving forward.

## **The Duross Era**

Duross had strong views, sought out debate and was the type of guy to 'get in your face' if needed, former colleagues said. He developed close working relationships with foreign counterparts by meeting them for a beer. Fellow former prosecutors described Duross as non-political and said he would take a hit from the front office to protect his staff, engendering loyalty. "People would crawl over cut glass for him," one former colleague said.

The former chief was aggressive when it came to the unit's case load. In a slow investigation, Duross once showed up to an FCPA unit trial attorney's office to ask what was taking so long and force a move forward.

Dozens of FCPA cases were brought under Duross including several successful courtroom prosecutions in the Haiti Telco cases, but he and the unit suffered noteworthy setbacks as well including the collapsed Africa sting trials, the Lindsey Manufacturing dismissal and the 2012 John O'Shea trial.

O'Shea, an executive with a U.S. subsidiary of the Swiss engineering firm ABB Ltd. was charged with bribing officials at a Mexican electrical utility to secure contracts. Duross pitched in personally on the case as a sign of support for embattled prosecutor Nicola Mrazek after a California judge had singled her out -- unfairly, her colleagues felt - for misconduct in the separate but related Lindsey case.

The non-appealable pre-verdict Rule 29 acquittal for O'Shea by U.S. District Court Judge Lynn N. Hughes in Houston brought Duross to what he calls his lowest point in his career. It was first time Duross, a former Miami Assistant U.S. Attorney, had lost a case at trial.

"It was on the heels of other setbacks and disappointments," Duross told Main Justice. "It was absolutely tough professionally and personally."

Longtime critic of the FCPA unit and author of the FCPA Professor blog Mike Koehler said the Africa sting, Lindsey Manufacturing and O'Shea cases were evidence of the failed direction of a unit that put too much emphasis on settlements and not enough on real prosecution.

"What happens when the DOJ is put into action to prove the elements of an FCPA

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prosecution? During Duross' tenure that happened several times and the results were disastrous," Koehler said.

"This has to be part of the conversation if you are looking back at a person's tenure," Koehler added, while noting the direction of the unit doesn't boil down to one person or one case.

### **Standardization & templates**

Duross' tenure will be remembered by the structure that he brought to the unit as it grew, institutionalizing foreign corruption prosecution practices in a field that had only recently been given priority and resources by the department.

"I think he matured the unit a little bit," Martin Weinstein of Willkie Farr & Gallagher LLP told Main Justice. "They had a much more mature view of [corporate] monitors; they had a much more mature view of the impact of these cases on companies."

Under Duross the unit reined in corporate monitorships to respond to the sophistication of a company's compliance program and started offering hybrid monitorships of 18 months instead of the entire typical 3-year term of a DPA, with self-reporting allowed for the last half of the DPA.

Duross standardized negotiations with companies, worked to create templates for deferred prosecution agreement language and added basic operating procedure to the more chaotic environment under previous head Mendelsohn. Mendelsohn set the sights of his small unit on industry-changing international prosecutions. Duross took the helm with the implicit mandate of putting those grand designs into reality.

"Our goal was to create processes and procedures and materials that would capture institutionally the knowledge and experience that people had gained," Duross said. "To make sure that this wasn't just a fad, to make sure that this was something that would have a lasting impact."

Standardization practices included giving specific language to prosecutors to work from when negotiating with companies under investigation. Previously the unit would start over with each investigation, spending time crafting entirely new documents.

Comparing deferred prosecution agreements under Duross to previous years show a slightly more structured format with clear document sections and language. Many agreements prior to 2010 shared some of the same elements, but there was also a higher degree of variation between agreements that occasionally sprawled unorganized for dozens of pages.

Sentencing guidelines explaining punishments and clearer credits for cooperation with the investigation became a staple of the agreements, as did the more nuanced corporate monitor programs.

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Duross typed out a deferred prosecution agreement for the 2010 Alcatel-Lucent SA case based on an assortment of recent agreements that would serve as the first draft of the agreement template moving forward.

The template stored on the unit's shared server is now the starting point for every negotiated foreign corruption settlement. The language is adapted to the particulars of each case. The template itself is a draft document that is modified based on unit and defense counsel recommendations.

"It's not perfect. Not everything will look always exactly the same," Duross said.

### **'Attachment C' expands**

Over the years, the number of sections in the template for Attachment C - compliance requirements - have grown from around 10 to the current 18. Specific sections were added to strengthen compliance programs:

- Internal reporting and investigations
- periodic risk-based review
- policies and procedures
- proper oversight and independence
- training and guidance
- enforcement and discipline
- third-party relations
- mergers and acquisitions
- monitoring and testing.

The changes made for a clearer and sometimes more demanding compliance program as part of an agreement. Alcatel was the first case in which the template was used.

"I think what we've seen is a refinement of expectations for corporations," Warin said.

The template DPA was praised by people who worked in the unit, but viewed a bit more skeptically by some lawyers sitting on the other side of the table. Several white collar lawyers who worked on FCPA cases saw fewer benefits in the stock language because they would always negotiate the major points of an agreement such as fines and monitors.

The emphasis during Duross' tenure on using the non-trial instrument was unmistakable.

The units use of DPAs have come under criticism as a cop-out in lieu of bringing cases to trial and winning real deterrent penalties. Critics also point out that because publicly traded companies, with duties to shareholders, can't risk going to trial, DPAs don't allow for FCPA legal theories to get a full vetting before juries and judges. But companies like the agreements because they bring order and predictability.

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“He was a person who understood the value of resolution,” Kevin T. Abikoff Hughes Hubbard & Reed LLP said of Duross.

Dozens of cases were settled through deferred prosecution agreements, including the Total SA and Weatherford investigations that were concluded with substantial fines. The department collected \$1.4 billion in FCPA fines and penalties in 2010, more than \$360 million in 2011, \$142 million in 2012 and \$420 million in 2013.

## **The Guide**

A hallmark of the Duross’ standardization effort was the widely praised Resource Guide to the U.S. Foreign Corrupt Practices Act, issued in 2012. The public guidance for companies was a centerpiece of Duross’ effort to standardize the unit and was written without legal jargon for the layperson to understand. It was intended to make foreign anti-bribery enforcement more predictable for corporations looking to comply with the often vague and shifting nuances of the FCPA.

Duross and his counterpart Kara Brockmeyer at the Securities and Exchange Commission led the effort to publish the guide following a recommendation from the Organization for Economic Cooperation and Development’s peer review of U.S. anti-bribery enforcement. It was published at a time of intense complaints from the business community to Congress about a lack of clarity in FCPA enforcement.

Former FCPA unit trial attorney Amanda Aikman, who had left the department and moved to Geneva, Switzerland in 2012, worked on an early draft of the guide in the Justice Department that was built out later in the department and with the SEC .

Many FCPA prosecutors at first viewed the guide skeptically, as a labor-intensive assignment coming on top of the unit’s core workload. But after its positive reception, it is now touted on resumes of nearly anyone who had a hand in it.

The Guide was unveiled to much fanfare in November 2012, including an unusual joint telephone briefing for reporters from then-Criminal Division head Lanny Breuer and former-SEC Enforcement Division chief Robert Khuzami.

The guide and other steps to standardize the unit’s cases made “the prosecution more certain and the consequences more definite,” Abikoff said. “Predictability in business has value.”

Beyond institutionalization, international cooperation is an area where many of Duross’ supporters saw an achievement by the unit. Strong relationships were forged with the Swiss, Australians and British while the Germans, French and Japanese were engaged to build stronger ties. (In the case of Japan, the FCPA unit is still pushing, knowledgeable people say).

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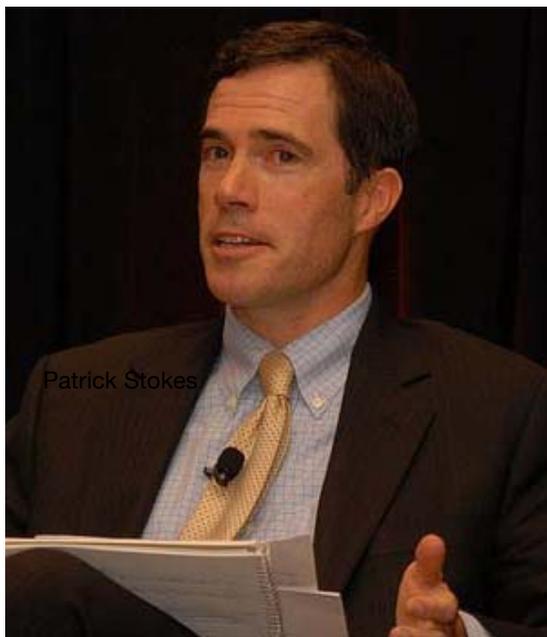
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Yet, not everyone saw the international engagement in the same light. One former prosecutor told Main Justice the department at large, and the FCPA unit by association, has stopped reaching out and engaging internationally like it did in the past.

## Going Forward

Stokes takes over a unit that has been depleted of some of its most experienced attorneys in recent months and is now integrating new hires and other relative newcomers who have yet to finish their first anti-corruption case.

Three other FCPA unit trial attorneys, Joey Lipton, Kathleen Hamann and Stephen



Spiegelhalter, and two other experienced prosecutors who worked with the unit, Adam Safwat and Glenn Leon, also left the department recently.

The large number of prosecutors who haven't finished a case isn't expected to be a major problem for the unit, Kimberly A. Parker from WilmerHale LLP said. "Even if they haven't finished a case there it's not their first time at the rodeo," she said.

Also, the nearly opposite personalities -- Duross was hard-charging; Stokes is more subdued -- will make for a different working environment at the unit. In meetings Stokes can come across as less flexible than Duross about how to do things, and he is more reserved than his predecessor, who would jump at a

chance to hash out an argument, say people who have worked with both men.

But Stokes has a strong record prosecuting complex financial fraud cases, and is known as one of the Criminal Division's top lawyers. His victories include the 2011 conviction of Lee Bentley Farkas, the former chairman of a private mortgage lending company Taylor, Bean & Whitaker in a \$2.9 billion fraud scheme. He also helped to lead a Libor-related case against a subsidiary of the Royal Bank of Scotland plc.

Under Stokes, the unit is expected to keep up a trend of individual corruption prosecutions started under Duross, bringing cases that have been in the pipeline for months or years.

Body wires will become standard fare in the unit's prosecutions, people familiar with the situation say. Such techniques were used prominently in the Africa sting case and against French national Frederic Cilins, who recently pleaded guilty to obstructing the FCPA investigation of Beny Steinmetz Group Resources Ltd.

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Stokes says he has plans to keep expanding the footprint of the unit by working with more attorneys in the department and possibly adding more unit personnel. Individual prosecutions, international cooperation and speedier investigations will be a priority, Stokes has said. Stokes declined an interview request for this article.

## **New Hires**

As Stokes takes the helm of the FCPA unit one of his first acts will be to manage a number of new hires.

Although not the only person involved in hiring, Duross put a premium on Assistant U.S. Attorneys in the unit because of their experience bringing cases to trial and winning convictions and guilty pleas.

Trial experience is often viewed as particularly relevant in the unit where cases are few and long running, and can 'hang around your neck' when they go wrong, people close to the unit say. Prosecutors need to be experienced enough in the courtroom to get it right the first time, because they won't get many more opportunities.

Connecting with the unit and shaping many of the new staff who come from private firms and don't have the 'AUSA edge' is said to be Stokes first challenge.

The unit already brought in Trial Attorney Kevin R. Gingras, who was previously detailed to the FBI and as a Criminal Division appellate lawyer argued in 2009 against a new trial for convicted 9/11 conspirator Zacarias Moussaoui. It also has brought on Trial Attorney Leo R. Tsao, who successfully prosecuted Kurt Mix in New Orleans in 2013 for destroying evidence related to the Gulf of Mexico oil rig explosion in 2010.

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