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The 1st FCPA Case Of 2015

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The U.S. Department of Justice wasted no time announcing its first Foreign Corrupt Practices Act case of 2015. On Jan. 6, 2015, just two days into the first full week of the new year, Dmitrij Harder, the former owner and president of Chestnut Consulting Group Inc. and Chestnut Consulting Group Co. (generally referred to as the "Chestnut Group"), was indicted by a federal grand jury.[1] Harder was charged with violating the FCPA and Travel Act and participating in a scheme to launder the proceeds of those crimes. This case continues the trend of enforcement actions against individuals. It also involves the rarely used "public international organization" element of the FCPA's definition of "foreign official."

The Allegations

Between 2007 and 2009, Harder allegedly engaged in a scheme to pay approximately $3.5 million in bribes to an official of the European Bank for Reconstruction and Development ("EBRD") in order to obtain favorable reviews of clients' financing applications.[2]

Harder and the Chestnut Group provided consulting services to companies seeking financing from multilateral development banks like the EBRD.[3] As described in the indictment, "[t]he EBRD was a multilateral development bank headquartered in London and was owned by over 60 sovereign nations. Among other things, the EBRD provided debt and equity financing for development projects in emerging economies, primarily in Eastern Europe. On or about June 18, 1991, the president of the United States signed Executive Order 12766 designating the EBRD as a 'public international organization.' The EBRD was thus a 'public international organization,' as that term is defined in the FCPA."[4]

At issue in the indictment are the services provided by the Chestnut Group to two corporate clients. The clients entered into financial services agreements with the Chestnut Group for consulting and other services, including assistance in obtaining project financing.[5] The agreements, signed by Harder, included a "success fee" of a certain percentage of the funds obtained by the companies from the EBRD.[6]

Harder allegedly knew a senior banker working in the EBRD Natural Resources Group from prior business dealings.[7] The EBRD official was responsible for the review of applications submitted to the EBRD for project financing. In this role, the EBRD official allegedly was responsible for the applications of Harder's two corporate clients, as well as negotiating the terms and conditions of their financing.[8] Based upon the recommendation of the EBRD official, the EBRD ultimately approved the companies' applications for project financing, including an $85 million equity investment with a €90 million senior loan for one company and a $40 million equity investment with a $60 million convertible loan for the other company.[9]

After receipt of the success fees, Harder allegedly caused wire transfer payments to be made to a bank account belonging to the EBRD official's sister.[10] The transfers to the EBRD official's sister were purportedly for payment of consulting and other business services to the Chestnut Group, but it is alleged that no such services were provided.[11] Instead, it is alleged that the payments were bribes paid for the benefit of the EBRD official to corruptly influence actions taken with regard to the clients' financing applications and to corruptly influence the EBRD official to direct business to Harder and the Chestnut Group.[12] To cover up the alleged corrupt payments, Harder and the EBRD official's sister created false paperwork, including invoices for the sister's purported services provided to the Chestnut Group.[13]

In total, Harder and the Chestnut Group earned approximately $8 million in "success fees" and paid the EBRD official's sister more than $3.5 million for alleged consulting services.[14] Harder faces a maximum possible statutory sentence of 190 years in prison and fines of up to $1.75 million, twice the value of the property involved in the transaction, or twice the value gained or lost.[15]

Key Takeaways

As an initial matter, this action reflects the DOJ's tenacity and determination in bringing cases against individuals. The DOJ has been pursuing this matter for years, and this indictment comes less than two months after the U.S. Supreme Court denied certiorari in an appeal in the matter. [16] That certiorari petition challenged the Third Circuit's decision to apply the crime-fraud exception to the attorney-client privilege. And after a blockbuster month in December, the quick announcement of this matter will surely keep FCPA front of mind for many.

The Harder case also presents yet another opportunity to challenge DOJ in a courtroom and generate much-needed case law concerning the FCPA and related statutes. For example, in the Harder case, the DOJ chose to charge the identical five wire transfers as violating both the FCPA (counts 2-6) and the Travel Act (counts 7-11). The DOJ was faced with a serious challenge to its Travel Act charges previously in the Eastern District of Pennsylvania in United States v. Nguyen, and it will be interesting to see how this case develops.[17]

Finally, the Harder case should be a reminder to companies and businesspeople that: (1) officials at public international organizations[18] like multilateral development banks (e.g., EBRD, World Bank) and other international organizations like the United Nations qualify as foreign officials under the FCPA; and (2) the DOJ continues to use the Travel Act to pursue commercial bribery as a backstop to FCPA charges. As such, it is important to include the concept of "public international organization" in employee training and as part of third-party due diligence. It is also worth remembering that, via the Travel Act, the DOJ has the ability to charge bribery under state commercial bribery statutes.

—By Paul T. Friedman, Stacey M. Sprenkel and Julie A. Nicholson, Morrison & Foerster LLP

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[1] Indictment, United States v. Harder, Case No. 15-cr-00001-PD (E.D. Pa. Jan. 6, 2015) (hereinafter "Harder Indictment"), available at http://www.justice.gov/sites/default/files/usao-edpa/press-releases/attachments/2015/01/06/indictment_-_harderd.pdf; DOJ Press Release, Former Owner and President of Pennsylvania Consulting Companies Charged with Foreign Bribery (Jan. 6, 2015), available at http://www.justice.gov/opa/pr/former-owner-and-president-pennsylvania-consulting-companies-charged-foreign-bribery.

[2] Harder Indictment ¶ 2.

[3] Id. ¶ 1.

[4] Id. ¶ 3.

[5] Id. ¶¶ 6-7, 13, 26.

[6] Id. ¶¶ 13, 26.

[7] Id. ¶ 4; U.S. Attorney's Office, Press Release, Former Owner of Bucks County Financial Consulting Firm Charged with Bribing Foreign Official (Jan. 6, 2015) (hereinafter "USAO Press Release"), available at http://www.justice.gov/usao-edpa/pr/former-owner-bucks-county-financial-consulting-firm-charged-bribing-foreign-official.

[8] Harder Indictment ¶ 4, 10.

[9] Id. ¶¶ 14, 19, 27.

[10] Id. ¶¶ 18, 22-23, 28-29.

[11] Id. ¶¶ 23, 29.

[12] Id.

[13] Id. ¶ 31.

[14] Id. ¶¶ 21, 23, 28-29; USAO Press Release.

[15] USAO Press Release.

[16] In re Grand Jury Subpoena, 745 F.3d 681 (3d Cir. 2014), cert. denied sub nom. Corp. & Client v. United States, 135 S. Ct. 510 (2014). Although the target of the investigation was not named, the allegations in that matter as set forth in the Third Circuit decision, which involve potential FCPA violations by a consulting firm headquartered in Pennsylvania, and reference, for example, success fees of $8 million and improper payments of $3.5 million to a bank official's sister, id. at 685, seem clearly to relate to Harder.

[17] United States v. Nguyen, Case No. 08-CR-522-TJS (E.D. Pa).

[18] Under the FCPA, a "public international organization" is defined as, "an organization that is designated by Executive order pursuant to Section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register." See 15 U.S.C. §§ 78dd-1(f)(1)(A)-(B), 78dd-2(h)(2)(A)-(B), 78dd-3(f)(2)(A).