Eleventh Circuit Upholds the U.S. DOJ's Expansive Approach to Anti-Corruption Enforcement

On February 9, 2015, the Eleventh Circuit affirmed Jean Rene Duperval's convictions for money laundering and conspiracy to commit money laundering,[1] approving the U.S. Department of Justice's ("DOJ") expansive approach to prosecuting international bribery schemes. While serving as Director of International Relations for Telecommunications at D'Haiti S.A.M. ("Haiti Teleco"), Duperval accepted nearly $500,000 in bribes. The DOJ successfully argued that even though Duperval was a "foreign official" and therefore not eligible for prosecution under the U.S. Foreign Corrupt Practices Act ("FCPA"), he nevertheless violated the U.S. Money Laundering Control Act ("MLCA") by receiving the illegal bribes. The Eleventh Circuit's holding also clarified that the FCPA's limited exception for "facilitating or expediting" payments does not cover payments to officials administering international contracts.

I. The Telecommunications Bribery Scheme

Haiti Teleco controlled a monopoly on landline telephone services in Haiti, and Duperval was responsible for negotiating and awarding telecommunications contracts with the company's foreign customers. Between 2003 and 2006, Duperval received bribes from Terra Telecommunications Corporation ("Terra") in exchange for preferred telecommunications rates, favorable contracts, and other business advantages. The bribes were concealed through a complex series of payments to a shell company established by Duperval and a music company owned by Duperval's brother. To paper over the bribes, Terra fabricated invoices for consulting services and international call minutes that were never provided.

Six other defendants were convicted in connection with the corruption scheme, including Joel Esquenazi, the former CEO of Terra. Esquenazi was sentenced to fifteen years in prison, the longest sentence ever imposed in a FCPA case. Esquenazi appealed his conviction, arguing that Haiti Teleco was not controlled by the Haitian government and Duperval was not a "foreign official" under the FCPA.[2] In 2014, the Eleventh Circuit rejected Esquenazi's claims and found that Haiti Teleco, as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own," qualified as an "instrumentality" of the Haitian government. Thus, Duperval, Haiti Teleco's employee, was a "foreign official" under the FCPA. The Eleventh Circuit developed guidelines to determine whether any entity is an instrumentality of a foreign government, including: whether the government has a majority interest; the government's ability to hire and fire principals; if entity has a monopoly over the function it exists to carry out; and the length of time these indicia have existed.

II. Duperval's Conviction and Appeal

Having established that Duperval was a "foreign official," the DOJ could not prosecute him under the FCPA. Instead, the DOJ creatively used the *Esquenazi* evidence to prosecute Duperval, establishing at trial that the bribes Duperval received were proceeds of FCPA violations that had been laundered through the U.S. financial system, in violation of the MLCA.

On appeal, Duperval argued that the FCPA's exception for facilitation payments applied to his administration of the Haiti Teleco contracts at issue. The FCPA's anti-bribery provision does not prohibit a

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[1] *United States v. Duperval*, No. 12-13009, 2015 WL 507906 (11th Cir. Feb. 9, 2015).

[2] *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014).

"facilitating or expediting payment" made "to expedite or to secure the performance of a routine governmental action."[3] But in rejecting Duperval's argument, the Eleventh Circuit found that actions taken by high-ranking officials like Duperval, who administer multi-million dollar international contracts, are not "routine" and therefore do not fit within this narrow exception. Rather, the opinion notes that the exception is appropriate only for "grease" payments made to government employees performing low-level, routine government actions.

III. What's Next for Anti-Corruption Enforcement?

This month's *Duperval* ruling affirms the DOJ's use of the MLCA to complement the FCPA in aggressively prosecuting international bribery cases. Expect the DOJ to continue bringing cases against both the payers and recipients of foreign bribes, turning what otherwise could have been hard-to-prove corruption cases into sprawling conspiracies deserving increased resources from federal authorities, as well as potentially parallel matters with foreign regulators. The DOJ can also use money laundering charges, and the very real possibility of conviction, to convince foreign officials and others to cooperate in prosecuting U.S. companies and their executives for FCPA violations. After *Duperval*, money laundering charges may be further considered as a critical piece of complex and contentious FCPA prosecutions and a new risk to those subject to FCPA enforcement.

Further, the Eleventh Circuit clarified that courts will strictly construe the FCPA's facilitation payments exception. Companies should carefully review existing policies and practices related to facilitation payments, and reevaluate the treatment of any such payments made by employees, partners, agents, and others acting on the company's behalf.

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[3] 15 U.S.C.§ 78dd–2(b).