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SENTENCING

A Mayer Brown attorney examines FCPA-related cases in which defendants have been sentenced. Using empirical sentencing data, the author looks at how courts sentenced cooperating defendants, pleading non-cooperators, and defendants who contested their guilt at trial.

Executives, Sentencings, and the Foreign Corrupt Practices Act

By Kelly B. Kramer

The Department of Justice has long stressed its intent to prosecute individuals for violations of the Foreign Corrupt Practices Act. Recently, however, the DOJ has issued policies—such as the Yates Memorandum and the Fraud Section's new corporate cooperation policies—that are intended to focus prosecutors' attention on the conduct of individual executives. With these new policies in place, it is fair to suggest that individual executives may face greater FCPA peril today than ever before.

Executives who find themselves caught up in FCPA investigations must eventually decide whether to fight the potential charges or to cooperate with law enforcement. There is no easy answer to this question; every case is different and the cooperation decision turns on the unique facts and circumstances of any given case. That said, there are now enough resolved FCPA cases against individuals for defense counsel to provide their clients with data-driven predictions about what might happen if they elect to cooperate, to plead guilty without cooperating, or to put the government to its burden of proof.

In writing this article, we examined every FCPA-related case in which individuals have been sentenced since the start of 2010. We sought to understand what the empirical sentencing data tells us about how courts sentenced cooperating defendants, pleading non-cooperators, or defendants who contested their guilt at trial.

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Cooperating FCPA Defendants

The first and largest group of FCPA defendants is comprised of cooperating defendants. The empirical data suggests that cooperating defendants have a substantial opportunity to avoid jail time altogether or, failing that, to reduce—often dramatically—their prison exposure.

Since the start of 2010, trial courts have sentenced (or re-sentenced) 36 defendants for FCPA-related offenses in cases in which the government filed a motion for a reduced sentence under either Section 5K1.1 of the Guidelines or Rule 35 of the Federal Rules of Crimi-

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nal Procedure. (For purposes of this analysis, we excluded one defendant who was sentenced under the pre-2002 Guidelines, which generated a much lower offense level than current law.) On average, these defendants faced a post-acceptance Guidelines offense level of 30, which results in, on average, a recommended, pre-departure prison sentence of eight to 10 years.

Given that this group of defendants earned downward departure motions, one would expect that they would have received below-Guideline sentences. That is precisely what the data reflects. In fact, every one of the cooperating defendants received a below-Guidelines sentence.

Overall, the median prison sentence for this group of cooperating defendants was 10 months and the mean was 11.25 months. This represents a discount of roughly 90 percent from the low end of the pre-cooperation Guideline range. Fourteen of the cooperating defendants (39 percent) avoided prison entirely or spent only days in prison incident to their arrest. More than half of the cooperating defendants—22 of the 36 defendants (61 percent)—received prison sentences of less than one year after considering good time credit. Moreover, most of the 14 defendants who were sentenced to prison terms of more than one year nonetheless benefitted substantially from cooperating, as they otherwise would have faced Guideline sentences ranging from 84 months to life.

Interestingly, the data also reflects that cooperating defendants have done substantially better with courts than they have with the DOJ. While the DOJ does not always make public sentencing recommendations, we identified specific DOJ sentencing requests in 24 of the 36 cases we reviewed. In 79 percent of those cases, the courts imposed more lenient sentences than requested by DOJ. In another 17 percent of the cases, the courts imposed sentences that were in line with the DOJ's recommendations but only because the DOJ reduced its recommendations based on the results of related sentencings. Indeed, we found only one case—the prosecution against Richard Bistrong, who pled guilty to a multi-object conspiracy involving over $4 million in payments and violations of the FCPA and export control laws—in which a court imposed a longer prison sentence than the government requested. (The court imposed an 18-month prison sentence despite the DOJ's recommendation of probation.)

The data suggests an emerging judicial consensus in sentencing cooperating FCPA defendants. In these cases, courts have not hesitated to require cooperating defendants to pay restitution or to forfeit ill-gotten monetary gains, but, when it comes to prison time, the courts have imposed relatively light sentences. Indeed, the courts often reward early and effective cooperators with no jail time at all—even when the DOJ seeks prison time.

Pleading, Non-Cooperating Defendants

The second group of FCPA defendants are those who were sentenced following an FCPA plea without the benefit of a downward departure motion. It is difficult to draw conclusions about this group of defendants because the data is limited, and there is significant variation in the results of the resolved cases. Still, the data reveal some useful information.

Since the start of 2010, the courts have sentenced 16 defendants who pled guilty to FCPA offenses but who did not receive cooperation credit from the DOJ. (Of these, five pled guilty to conduct that occurred before November 2002. Because they were sentenced under a much more forgiving Guideline regime, we have excluded them from this analysis.) On average, the pleading, non-cooperating defendants faced a post-acceptance Guidelines offense level of 30, which implies, on average, a recommended prison sentence of eight to ten years. (Here again, a defendant's Guideline offense level was not publicly available in several instances, so for those we have estimated the actual Guidelines range based on the offense conduct or the announced sentencing ranges.)

Because none of these defendants earned cooperation credit, one would expect to see a number of Guideline sentences. But that is not what the data reflects: *Only one of the defendants in this group received a Guideline sentence*. Every other defendant received substantially less time than the Guidelines advisory range.

This trend is perhaps best illustrated at the aggregate level. Despite a Guideline range of eight to 10 years, on average, the mean sentence imposed on members of this group was 33.8 months, and the median was 37 months. Accordingly, this group received sentences that were about 53 percent less, on average, than the Guideline's low-end recommendation. This may suggest that courts are skeptical about the usefulness of the Guidelines in FCPA cases.

The data also suggest that the courts may view these cases differently than the DOJ. In every one of these cases, the courts imposed a more lenient sentence than DOJ requested. In three such cases, the courts imposed dramatically lighter sentences than DOJ had sought, as follows:

■ **Nam Nguyen and An Quoc Nguyen**: In 2010, Nam and An Quoc Nguyen pled guilty to a decade-long bribery scheme centered in Vietnam. The government contended that the business they operated conducted no legitimate business. The DOJ asked the court to impose a 168-month prison sentence on Nam Nguyen and to sentence An Quoc Nguyen to 87 months. Both of these sentences would have been at the low end of the applicable Guideline range, but the court sentenced Nam and An Quoc Nguyen to 16 and 9 months, respectively. Both sentences reflected a roughly 90 percent discount from the low end of the Guidelines.

■ **Garth Peterson**: In 2012, Garth Peterson pled guilty to conspiring to circumvent Morgan Stanley's internal controls in violation of the FCPA. As part of the plea, he acknowledged paying a Chinese government official more than $2.8 million. The DOJ's sentencing memorandum took Peterson to task for minimizing his culpability and distorting the facts around the offense. Despite DOJ's requested sentence of 51 months, the court imposed a sentence of just nine months.

Although the other cases did not involve such dramatic departures, the results suggest that courts have more sympathy for individual FCPA defendants than does the DOJ. For example, Jorge Granados, Benito Chinea, and Joseph Demeneses all pled to one-count informations. By doing so, they each capped their exposure at 60 months (even though the advisory Guidelines range would have resulted in sentences of 11 to 21 years). At sentencing, noting this ''benefit,'' the DOJ requested 60-month prison sentences for each man. How-

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ever, the courts varied below the Guidelines to impose a 46-month sentence on Granados and 48-month sentences on Chinea and Demeneses.

There is one outlier in this group. Charles Jumet received, by far, the harshest sentence (87 months). It appears, however, that he received such a harsh sentence because he sought to obstruct the government's investigation. Indeed, the sentencing court noted that its view of the case would have been ''totally different'' had Jumet not obstructed the investigation. This seems to be borne out by the 37-month sentence that was imposed on Jumet's co-defendant, who did not engage in any obstructive acts.

FCPA Defendants Who Went to Trial

Any individual involved in an FCPA investigation reasonably wonders what might happen if they were to put the government to its burden of proof at trial. That is an especially difficult question to answer in the FCPA context because there is a dearth of data. Very few FCPA cases have proceeded to trial and fewer still have resulted in convictions. The small sample size and the varied results in the tried cases make it impossible to draw any firm conclusions from the sentencing data.

The Haiti Teleco enforcement action stands out as the DOJ's most successful enforcement action. In that action, the DOJ successfully prosecuted Joel Esquenazi and Carlos Rodriguez for paying bribes to officials at Haiti Telco and, in a separate trial, it convicted Jean Rene Duperval, a Haitian government official, of laundering the proceeds of the FCPA offense. The sentencing judge imposed significant (albeit below Guideline) prison sentences ranging from seven to 15 years. The Eleventh Circuit then affirmed the convictions despite a serious challenge to whether Haiti Telco was, in fact and law, an ''instrumentality'' of the Haitian government.

At the same time, the results in DOJ's other enforcement actions suggest that it is not easy to bring FCPA cases against individuals to trial. This should not be surprising. Because FCPA cases revolve around a defendant's dealings with foreign officials, the relevant evidence and witnesses often will be located overseas. FCPA investigations often take years to complete, and it can be difficult for the DOJ to secure witnesses and documents. Much ink has been spilled chronicling the government's failures in FCPA trials, but it is instructive to consider the various ways in which these prosecutions have gone awry:

- **Petro Tiger**: In 2015, a government cooperator offered false testimony in a trial against Petro Tiger founder Joseph Sigelman. After the district court asked the witness whether he had ''hallucinated'' on the stand, the DOJ reached a plea agreement that capped Sigelman's exposure at one year in prison. The district court refused to impose any prison time at all but instead sentenced Sigelman to probation and imposed a criminal fine.

- **Africa Sting Case**: In January 2010, the government announced that it had charged 22 executives following a long-running undercover operation. As part of the sting, FBI agents approached targets to participate in a purported scheme to pay a $1.5 million bribe to an African defense minister in return for a $15 million contract. But in February 2012, after failing to secure a conviction in two different trials, the government abandoned all further prosecutions and even withdrew charges against three individuals who originally had pled guilty.

- **ABB**: In 2012, a district court dismissed the government's FCPA case against former ABB executive Joseph O'Shea at the close of the government's evidence. From the bench, the judge criticized the government's failure to bring forward evidence or witnesses to prove the critical details necessary to establish an offense and complained that the principal cooperating witness knew ''almost nothing'' about O'Shea's role in the alleged crimes.

- **Lindsey Manufacturing**: In May 2011, a jury convicted Lindsey Manufacturing and two executives on FCPA charges. Post-trial, however, the district court threw out the convictions upon finding that the prosecutors had engaged in a pattern of misconduct. The government initially sought to salvage the convictions on appeal, but it abandoned that effort in March 2012.

- **Bangkok Film Festival**: In 2009, after a high-profile trial, the government convicted Gerald and Patricia Green on FCPA and tax charges arising out of a bribery scheme involving Thailand's annual film festival. The government initially sought 20-year sentences, which prompted the district court to request several rounds of briefing. Eventually, the government reduced its request to 10 years, but the district court had a radically different view of the case; it sentenced the Greens to six months in prison plus six months of home confinement.

It is difficult to see any common cause for the results in these prosecutions. In Petro Tiger and ABB, the DOJ relied on cooperators that proved to be insufficiently knowledgeable or credible in the eyes of the court. In Lindsey Manufacturing and the Africa Sting Case, the courts found that the government overreached. And the Bangkok Film Festival appears to be a case in which the district court saw the facts radically differently than did the DOJ.

Conclusion

For individual executives, deciding whether to plead guilty or to proceed to trial in an FCPA investigation is momentous. The data suggests that executives who decide to cooperate early in an investigation receive, on average, little-to-no prison time—notwithstanding their significant exposure under the Guidelines. Moreover, even defendants who cooperate late (or who do not cooperate at all) have tended to receive below-Guideline sentences, perhaps reflecting at least some judicial hostility to the harsh Guideline regime.

Executives who refuse to cooperate face more uncertainty. The DOJ does not publish statistics about declinations involving potential individual prosecutions, so it is difficult to know how often it closes investigations without seeking charges against individuals. While it is clear that the government faces unusual obstacles when bringing these cases, it has also achieved a handful of notable trial successes that culminated in lengthy—even extraordinary—prison sentences.