

From: "Marrero Mendez, Lianis (CRM)" <Lianis.Marrero.Mendez@usdoj.gov>

To: Undisclosed recipients,;

Subject: [WARNING: UNSCANNABLE EXTRACTION FAILED][EXTERNAL EMAIL] - FCPA Daily Digest

Date: Wed, 08 Dec 2021 22:51:10 +0000

Importance: Normal

FCPA DAILY DIGEST

Sixth Circuit hears Mexican healthcare agency's high stakes bribery appeal

(<https://globalinvestigationsreview.com/just-anti-corruption/sixth-circuit-hears-mexican-healthcare-agencys-high-stakes-bribery-appeal>)

Key Factors For Challenging DOJ 'Taint Team' Procedure

(<https://www.law360.com/articles/1445667/key-factors-for-challenging-doj-taint-team-procedure>)

Justice Department Told Deutsche Bank Lender May Have Violated

Criminal Settlement (<https://www.wsj.com/articles/justice-department-told-deutsche-bank-lender-may-have-violated-criminal-settlement-11638993595>)

Former Malaysian PM Najib Razak fails in bid to overturn conviction in first 1MDB trial

(<https://content.mlex.com/#/content/1343083>)

World Bank debars waste management company and managing director for fraud

(<https://fcpublog.com/2021/12/08/world-bank-debars-waste-management-company-and-managing-director-for-fraud/>)

Sixth Circuit hears Mexican healthcare agency's high stakes bribery appeal

By Clara Hudson

In a hearing before the US Court of Appeals for the Sixth Circuit, the Instituto Del Seguro Social (IMSS) said a lower court was wrong to decide that Mexico would be a better venue for its FCPA-related lawsuit against Stryker.

IMSS, which provides healthcare services, previously asked the sixth and seventh circuit courts earlier this year to consider whether it can pursue US damages claims stemming from Foreign Corrupt Practices Act violations by medical device businesses Stryker and Zimmer Biomet.

At the 8 December hearing before the Sixth Circuit, IMSS's counsel said that, if the lower court's decision concerning Stryker isn't overturned, then the Mexican government agency's lawsuits against others including Zimmer Biomet will also be shut down. "If we lose this appeal, I think they're all going to fall," said Mark Maney, a lawyer for the Mexican government agency.

IMSS's cases against the companies are based on conduct resolved in foreign bribery settlements with US authorities. Stryker and Zimmer Biomet both agreed to pay fines to resolve allegations that they bribed Mexican officials as part of their FCPA resolutions entered into several years ago.

IMSS said the district court erred in its decision because it failed to properly consider the United Nations Convention against Corruption, which requires member countries to allow their courts to order corrupt companies and individuals to pay damages to harmed member states. Both the US and Mexico are members of the convention.

Along with Stryker and Zimmer Biomet, the Mexican agency has pursued three other healthcare companies: Olympus Latin America, Fresenius and Teva Pharmaceuticals. The latter three complaints were filed last year. The case against Olympus is pending, while the Fresenius case has been moved to state court. IMSS has taken its lawsuit against Teva to the Eleventh Circuit after struggling to serve the company.

At the December hearing, the Sixth Circuit judges were keen to clarify whether the lawsuit would be better off if brought in the US rather than Mexico. A judge asked if there were any procedural disadvantages to do with discovery or obtaining evidence that could make the US a better venue for the lawsuit.

IMSS responded that there is no discovery in a Mexican court. "You have to bring your documents with you – and if you want to call a witness, you have to name your witness. So if we don't know what executives at Stryker did it, we couldn't even ask them to be brought," Maney said.

Maney continued: "The bottom line is Stryker doesn't want to go to Mexico because there will be a lot more evidence of its wrong conduct, it wants to go to Mexico because there will be a lot less."

At the Seventh Circuit hearing in October, Maney made a similar argument about why Zimmer Biomet might be reluctant for the case to be brought in the US. "The reason we want to be here is the reason they don't want to be here," he said, adding that "we would be much more hamstrung in Mexico."

Maney then alluded to the fact that Stryker produced documents for the US government for its FCPA resolution. "And by the way, [the company] collected all their documents in response to the DOJ and got a reduction in their fine for having collected all their documents, so they're available here," he said.

Stryker's counsel responded that it's a case for a Mexican court because the conduct, which took place in that country, is a matter of Mexican, not US, law.

Counsel to IMSS
Maney & Gonzalez-Felix

Partner Mark Maney in Houston

Matthew John Valcourt in Miami

Counsel to Stryker
Miller Johnson

Partners Andrew Portinga and David Gass in Grand Rapids, and associate Laci Resendiz

Key Factors For Challenging DOJ 'Taint Team' Procedure

By Kara Brockmeyer, Andrew Levine and Douglas Zolkind

When the U.S. Department of Justice executes a search warrant in a white collar investigation, it often uses a "taint team" or "filter team" – a group of prosecutors and agents separate from the team handling the case – to screen for privileged material.

This longstanding practice has come under intense scrutiny in recent years, and courts increasingly have limited the DOJ's ability to rely on taint teams. The U.S. Court of Appeals for the Eleventh Circuit ruling on Aug. 30 in *U.S. v. Korf* is the latest significant development.

That opinion and other recent precedent reveal certain key factors that drive whether, in any given case, the DOJ's taint team procedures may be successfully challenged. Counsel must scrutinize, for example, whether the procedures involve the putative privilege holder or the court in making or approving privilege determinations.

The composition of the taint team is an important factor, such as whether it includes prosecutors from the same office handling the investigation as well as any nonlawyers. Counsel must consider also the applicable jurisdiction – given different rules in different circuits – along with the nature of the search and anticipated volume of potentially privileged material.

In short, the DOJ's taint team procedures vary from case to case depending on the circumstances. Whatever the context, defense counsel must be vigilant in assessing, at the earliest possible juncture, the procedures the DOJ plans to use and evaluating them in light of recent precedent. To safeguard the attorney-client privilege, any challenge must be brought as close in time to the search as possible, before potentially privileged material has been disclosed to the prosecution team.

Background

DOJ policy has long contemplated the use of taint teams in circumstances in which difficult privilege issues are likely to arise.[1]

Pursuant to the Justice Manual, the requirements are fairly minimal: The taint team must include only lawyers and agents not on the prosecution team; the team must not disclose material to the prosecution team until instructed by the attorney in charge of the taint team; and the DOJ must generally apprise the court of the procedures the DOJ intends to use to protect the privilege.[2]

Notably, the Justice Manual does not require any judicial involvement in making or approving privilege determinations. Nor does DOJ policy call for obtaining any input from the putative privilege holder.

Defense counsel and certain courts have objected strenuously to the use of taint teams over the years. They have argued, among other things, that prosecutors are naturally inclined to take a highly restrictive view of the attorney-client privilege and thus, in any situation in

which the privilege is less than abundantly clear, a taint team is likely to deem the privilege inapplicable.

Critics also argue that prosecutors and agents — even if not members of the prosecution team — have a bias toward wanting to see an investigation and prosecution succeed. This arguably incentivizes not withholding documents that could provide valuable evidence of guilt.

Another criticism stresses the lack of any formal wall separating prosecutors on a taint team from prosecutors handling the underlying investigation — even though they often work in the same office and may be members of the same team on other cases.

The resulting risk is that, intentionally or not, privileged material may leak from the taint team to the prosecution team. Indeed, in the 2006 decision *In Re: Grand Jury Subpoenas*, the U.S. Court of Appeals for the Sixth Circuit memorably noted the "obvious flaw" that "the government's fox is left in charge of the appellants' henhouse, and may err by neglect or malice, as well as by honest differences of opinion."^[3]

These criticisms culminated in a 2019 decision from the U.S. Court of Appeals for the Fourth Circuit that significantly changed the landscape.

Judicial Restrictions on Taint Teams

In *U.S. v. Seal*,^[4] the Fourth Circuit sharply curtailed the DOJ's ability to rely on taint teams. The government had executed a search warrant at a law firm's office in connection with a criminal investigation into a partner at the firm, seizing a massive quantity of potentially privileged material.

The DOJ set up a taint team and used a protocol that allowed the taint team to forward documents it deemed to be nonprivileged directly to the prosecution team.^[5]

The Fourth Circuit found that this feature — i.e., the taint team's ability to decide that certain documents were nonprivileged, without any involvement by the defense or the court — was unlawful. According to the court, this aspect of the protocol improperly "assign[ed] judicial functions to the executive branch" because "a court simply cannot delegate its responsibility to decide privilege issues to another government branch."^[6]

This problem was "compound[ed]" by the fact that the taint team included federal agents and paralegals, who were not lawyers.^[7]

The Fourth Circuit's decision gained widespread attention and fueled calls for the DOJ to reform its taint team procedures.

In 2020, the DOJ created the Special Matters Unit, or SMU, within the Fraud Section. The department announced that the SMU would, among other things, "conduct[] filter reviews to ensure that prosecutors are not exposed to potentially privileged material."^[8] It is not yet apparent how, if at all, the SMU is changing the DOJ's approach to privilege reviews.

Moreover, although the SMU appears to have been created in response to the Fourth Circuit's decision, it is not clear that the existence of any DOJ taint team is compatible with the Fourth Circuit's reasoning. After all, if "decid[ing] privilege issues" is an exclusively judicial prerogative, then what role is there for a DOJ taint team?

Some courts have expressly declined to follow the Fourth Circuit. For instance, a judge in the U.S. District Court for the Southern District of New York remarked in the September *U.S. v. Avenatti* decision:

To the extent that the Fourth Circuit's decision ... can be read to categorically prohibit the use of filter teams to conduct privilege reviews in the first instance of lawfully seized materials, the Court declines to follow it.^[9]

The judge noted that courts in the U.S. Court of Appeals for the Second Circuit "have long blessed such procedures" and stated that taint teams "adequately balance the law enforcement (and public) interest in obtaining evidence of crimes with respect for privileged communications."^[10] Another judge in this district took the same view in the May decision *In re: Search Warrants Executed on Apr. 28, 2021*.^[11]

Even in districts in which the DOJ remains free to use taint teams, the department sometimes affirmatively requests that the court appoint a special master to handle the privilege review.^[12] In these typically more high-profile or complex cases, the DOJ or the court may contend that the involvement of a neutral third party in the privilege review process helps to "ensure the 'perception of fairness.'" ^[13]

In sum, there is a significant lack of uniformity in the DOJ's current approach to privilege reviews. But a recent Eleventh Circuit decision may lead to greater consistency.

The Eleventh Circuit's Recent Decision

In *U.S. v. Korf*,^[14] the Eleventh Circuit upheld the DOJ's use of a taint team to conduct a privilege review of materials seized from a suite of offices in connection with an international money laundering investigation.

The protocol allowed for the privilege holders to conduct an initial review of all seized items and provide a privilege log to the prosecutors, but allowed the DOJ's taint team to review the underlying communications in deciding whether to challenge any privilege designations. Crucially, the protocol provided for a court or special master to rule on any disputes before the materials were shared with the prosecution team.^[15]

In a significant victory for the DOJ, the Eleventh Circuit rejected the argument that "government agents should never ... review documents that are designated by their possessors as ... privileged until after a court has ruled on the privilege assertion." [16]

The court distinguished the Fourth Circuit's decision on two grounds: First, the circumstances of the search were different, as the instant case did not involve a claim that "the majority of seized materials were both privileged and irrelevant to the subject of the investigation." [17]

And second, because the privilege holders were involved in the process and could obtain judicial review before any disclosure to the prosecution team, the protocol "did not assign judicial functions to the executive branch." [18]

Although the Eleventh Circuit ruled in the government's favor, the procedures that it upheld included far more safeguards — and gave both the court and the privilege holders a much greater role — than the DOJ has historically used and continues to use in many jurisdictions.

Most significantly, the protocol enabled the privilege holders to review the documents in the first instance, to designate documents as privileged, and to obtain judicial review before any such documents were disclosed to the prosecution team.

Of course, the Eleventh Circuit did not say that such measures are required in every case, and a significant open question is what procedures must be included at a bare minimum.

A particularly difficult question is what procedures are appropriate when the government executes a search warrant covertly — for example, by searching a target's Gmail or iCloud account. In those cases, the privilege holder cannot be involved in the process unless the target is notified of the search, which could risk compromising the investigation.

In this area, courts will continue struggling to balance the legitimate interests of law enforcement with the critical need to safeguard the attorney-client privilege.

Key Factors to Consider

It is common in white collar investigations for law enforcement to execute search warrants on email and other online accounts, cellphones, computers and physical premises, often collecting enormous quantities of potentially privileged material. In evaluating whether and how to challenge the DOJ's taint team procedures, key factors include whether:

The protocol enables the putative privilege holder to play a role in the process and assert privilege over particular documents;

The protocol requires a court or special master to approve the taint team's privilege determinations before the material is disclosed to the prosecution team;

The searched premises, accounts or devices were used by lawyers or are otherwise likely to contain large volumes of privileged material;

There is a basis to believe that a large portion of the seized material is unrelated to the subject matter of the investigation;

The taint team is composed of prosecutors from the same office conducting the underlying investigation;

The taint team includes nonlawyers like agents or paralegals;

The protocol was adopted ex parte or following an adversarial process; and

The search was executed covertly, and if so, whether there was a sufficient justification for not notifying the target.

Finally, counsel must also consider carefully the applicable jurisdiction. For example, the rule in the Fourth Circuit presently appears more restrictive than the rule in the Eleventh Circuit, which in turn appears more restrictive than in the Southern District of New York. [19]

It remains to be seen how other circuits will rule on this issue and whether the U.S. Supreme Court will weigh in. It also remains to be seen what further policies or procedures the SMU or the DOJ as a whole will adopt.

One thing is clear: The landscape is changing rapidly, and counsel have a better opportunity than ever before to avoid the government making privilege calls unilaterally without judicial review.

This requires acting quickly — as soon as possible following a search — to identify the DOJ's taint team procedures, evaluate them in light of the factors described above, engage in a dialogue with the prosecutors, and bring a challenge in court if necessary.

Justice Department Told Deutsche Bank Lender May Have Violated Criminal Settlement

By Dave Michaels and Patricia Kowsmann

The Justice Department has informed Deutsche Bank AG DB +0.82% that the German lender may have violated a criminal settlement when it failed to tell prosecutors about an internal complaint in its asset-management arm's sustainable investing business, according to people familiar with the matter.

The complaint alleged that the asset manager, DWS Group, overstated how much it used environmental, social and governance criteria, known by the industry acronym ESG, to manage its assets. U.S. authorities learned of the issue in an August Wall Street Journal article, rather than from the bank, which had ongoing disclosure and compliance obligations under the earlier criminal settlement, according to people familiar with the matter.

That earlier criminal settlement was struck in January and related to Deutsche Bank's involvement in overseas corruption and market-manipulation. Deutsche Bank agreed to pay \$130 million and entered into a deferred-prosecution agreement, which allows companies to avoid being indicted in exchange for staying out of trouble for a period of several years and flagging any potential problems as soon as the bank finds out about them.

If U.S. authorities pursue Deutsche Bank for a breach of the agreement, the bank could lose its earlier deal and, in the worst case, face indictment and prosecution, according to the agreement.

Authorities also could decide against taking the bank to court, and instead ask it to pay an additional fine and make other changes, such as hiring an outside monitor to dig into the bank's business and review its compliance efforts.

A final decision has yet to be made, the people familiar with the matter said.

According to the January settlement, prosecutors are supposed to give written notice before launching a prosecution, and the bank is allowed to provide its own feedback on how it dealt with the alleged violation.

A Deutsche Bank spokesman declined to comment.

A Justice Department spokesman didn't immediately respond to a request for comment. Justice officials have said in recent months that they plan to call out companies for breaches of deferred-prosecution agreements, which allow companies to avoid a guilty plea but require them to admit wrongdoing. Some critics argue the leniency deals are used too often, particularly when the government doesn't bring charges against employees who committed the misdeeds.

"You are going to see, in the days and weeks to come, a desire and a focus on making sure companies are living up to those commitments, and when they don't, there will be consequences," Deputy Attorney General Lisa Monaco said at the Journal's CEO Council event this week, without naming individual companies.

Any Justice Department move would be a costly setback for a bank that has been trying to improve its relationship with U.S. regulators and show investors it is a reformed institution following years of legal troubles.

For years Deutsche Bank was considered one of the world's most troubled banks. In the U.S. it paid hefty fines over money-laundering and mortgage-securities scandals. Also hanging over Deutsche Bank was its longtime role as lender to former President Donald Trump, which put the bank in the middle of political fights and congressional investigations.

Last year, the New York Department of Financial Services fined Deutsche Bank \$150 million over its dealings with convicted sex offender Jeffrey Epstein and other lapses. Deutsche Bank said at the time it had learned from its mistakes in the case.

The problems in its asset-management arm emerged earlier this year. DWS's former head of sustainability, Desiree Fixler, sent an email outlining her concerns about the company's ESG claims to two executives of Deutsche Bank in March, according to a copy of the email seen by the Journal.

While DWS is a separately listed company in Germany with its own management, Deutsche Bank owns most of it, consolidates DWS's figures in its results and calls it a core business for the bank. DWS's chairman, Karl von Rohr, sits on the management board of Deutsche Bank.

Ms. Fixler's email, reviewed by the Journal, went to Mr. von Rohr and Jörg Eigendorf, Deutsche Bank's global head of communications and sustainability. She wrote at the time that she believed she was being fired by DWS for raising concerns about several issues she had found at the firm, including that DWS overstated its sustainable-investing efforts.

A Deutsche Bank spokesman said Messrs. von Rohr and Eigendorf declined to comment.

ESG investments are a booming business for asset managers like DWS. Trying to meet demand from investors, some firms have rushed to classify investment strategies as ESG-friendly. U.S. regulators have warned money managers against pitching misleading ESG products.

In August, the Journal reported that DWS overstated how much it used sustainable investing criteria to manage its assets, according to Ms. Fixler and documents. DWS has denied it overstated its ESG capabilities, saying its process is transparent to investors.

Later in August, the Journal reported prosecutors and the Securities and Exchange Commission were investigating DWS's claims related to its ESG business, citing people familiar with the matter.

The Justice Department earlier this year informed two companies—Swedish telecom-equipment manufacturer Ericsson AB and British bank NatWest Group PLC—that they had breached the terms of earlier deferred and nonprosecution agreements, respectively. Ericsson said it would continue to cooperate with the department. NatWest said that it was engaged in discussions with the U.S. authorities and that it believed it shouldn't be prosecuted over its earlier conduct.

Former Malaysian PM Najib Razak fails in bid to overturn conviction in first 1MDB trial

By Jet Damazo Santos

Former Malaysian Prime Minister Najib Razak has lost his first bid to overturn his July 2020 conviction over the corruption scandal at 1Malaysia Development Berhad, or 1MDB, but immediately sought to take the case up to the top court.

Former Malaysian Prime Minister Najib Razak has lost his first bid to overturn his July 2020 conviction over the corruption scandal at 1Malaysia Development Berhad, or 1MDB, but immediately sought to take the case up to the top court.

In a closely watched decision, the country's Court of Appeal upheld his conviction for seven charges related to 42 million ringgit (about \$9.9 million) that ended up in his personal AmBank accounts from SRC International, a former unit of 1MDB. His 12-year sentence and 210 million ringgit (\$49.8 million) fine were also upheld.

"There is no error in the judgement of the High Court," Justice Abdul Karim Abdul Jalil said, according to local media reports.

Najib was found guilty of abusing his power when he used his position as prime minister and finance minister to approve two 2 billion ringgit loans in 2011 and 2012 from Retirement Fund Inc, or KWAP — which manages the pension scheme for government employees — for SRC.

He was also convicted of three counts of criminal breach of trust and three counts of money laundering of funds of SRC, which the judges said was clearly directed and controlled by him as a "shadow director".

Justice Abdul Karim, reading an excerpt from the 200-page unanimous decision in English, dismissed Najib's defense that what he did was for "national interest" and instead called the former prime minister's actions "a national embarrassment".

"He dishonestly misappropriated the [SRC] money. We find no reason to disagree with the High Court," the judge said.

As soon as the verdict was read, Najib's lawyers immediately applied for a stay of execution and said a notice of appeal to the Federal Court will be filed today.

The seven charges are part of a total of 42 criminal charges against Najib over the five separate trials tied to the 1MDB case. Two are ongoing, and two have yet to start.

Last month, Najib scored a small victory when the high court ordered the government to immediately return assets seized from him and his family, after ruling that the prosecution had failed to prove their connection to the 1MDB corruption scandal (see here).

World Bank debar waste management company and managing director for fraud

By Harry Cassin

The World Bank debarred an Indian waste management and environmental services company Wednesday for one year and eight months for a fraudulent practice connected to a project in India.

Ramky Enviro Engineers Limited (REEL), and its managing director, M. Goutham Reddy, are ineligible to participate in projects and operations financed by the World Bank Group during the 20-month debarment.

According to the World Bank, REEL and Reddy failed to disclose a subcontractor when bidding for a contract. REEL also failed to obtain prior approval before subcontracting works under the contract and misrepresented the existence of this subcontracting arrangement. This constitutes a fraudulent practice under the World Bank's Procurement Guidelines.

The \$65 million World Bank-funded project was designed to strengthen the capacity of selected state pollution control agencies in the remediation of polluted sites and support the development of a framework to establish a national program in Indian for the remediation of polluted sites.

As part of the settlement, REEL and Reddy did not contest responsibility for the underlying sanctionable practices and agreed to meet specified corporate compliance conditions as a condition for release from debarment, the World Bank said.

According to the World Bank, the settlement agreement provides a reduced period of debarment for the company's cooperation, voluntary restraint, and voluntary remedial actions, including revisions to REEL's integrity compliance program.

REEL also agreed to develop and implement an integrity compliance program reflecting the principles set out in the World Bank Group Integrity Compliance Guidelines and to continue cooperating with the World Bank Group Integrity Vice Presidency.

The debarment qualifies for cross-debarment by the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, and the African Development Bank.

A list of all World Bank debarred entities and individuals is here.

FCPA Fun fact: There's a library in Ankara, Turkey, that's filled with discarded books trash collectors rescued from landfills.

Lianis Marrero Mendez

Paralegal | Contractor

Fraud Section, Criminal Division

U.S. Department of Justice

1400 New York Ave, NW | Washington, D.C. 20005

lianis.marrero.mendez@usdoj.gov

Office: (202) 514.5650

Cell: (202) 230.6206