

# Takeaways From First Anti-Terrorism Act Prosecution Of A Co.

By **Amy Jeffress, Daniel Bernstein and Volodymyr Ponomarov** (January 30, 2023)

On Oct. 18, 2022, the U.S. Department of Justice announced<sup>[1]</sup> its first-ever prosecution of a corporation for material support to terrorism under Title 18 of the U.S. Code, Section 2339B of the Anti-Terrorism Act.

Lafarge SA, a French cement company, and its Syrian subsidiary, Lafarge Cement Syria SA, pled guilty to one count of conspiracy to provide material support to one or more foreign terrorist organizations — namely, ISIS and the al-Nusra front, or ANF — in connection with business operations in Syria. Lafarge agreed to pay a hefty \$778 million in fines and forfeitures.

As Deputy Attorney General Lisa Monaco explained, the Lafarge case is "a vivid reminder of how corporate crime can intersect with national security."<sup>[2]</sup>

Indeed, the case shows the array of tools available to the U.S. to combat corporate crime, including the long arm of U.S. jurisdiction, which extends to foreign companies operating overseas, even when those companies are subject to enforcement actions in their home countries. The case also highlights the importance of due diligence in corporate acquisitions.

## Background

From August 2013 to October 2014, Lafarge paid armed terrorist groups what company executives likened to taxes, but were in fact bribes.<sup>[3]</sup> Specifically, the plea agreement notes, in exchange for the payments:

ISIS permitted access to raw materials sourced from territory under its control so that the Jalabiyeh Cement Plant could continue to produce cement, and further allowed [Lafarge] employees, suppliers and customer-distributors to safely pass through ISIS and ANF checkpoints on the roads leading to the Jalabiyeh Cement Plant. ISIS also agreed to impose costs on, and in some cases block the importation of, competing cement from Turkey.<sup>[4]</sup>

While most of the relevant conduct took place overseas, one of the payments was made through a New York intermediary bank. Lafarge also attempted to conceal the scheme through falsified records and the use of personal email addresses serviced by U.S.-based providers.

In July 2015, Lafarge was acquired by one of its competitors, Swiss cement maker Holcim Ltd. During preacquisition due diligence, Lafarge executives apparently did not disclose its dealings with ISIS and ANF.

Although Holcim "did not conduct post-acquisition due diligence of the Defendants' operations in Syria," it did investigate the conduct when it later came to light.<sup>[5]</sup> Notably, Lafarge did not voluntarily disclose the conduct to government authorities, nor did it fully



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cooperate with the DOJ's investigation.

On Oct. 18, 2022, following the unsealing of the case in the U.S. District Court for the Eastern District of New York, Lafarge pleaded guilty to conspiring to provide material support to ISIS and ANF in violation of Section 2339B of the ATA.

Section 2339B authorizes criminal penalties for any person who "knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so." [6] The ATA defines "material support" as the provision of any property or service, including financial services, lodging, training, expert advice or assistance and transportation. [7]

As a result of the plea deal, Lafarge agreed to forfeit more than \$687 million — reflecting the value of assets derived from the criminal enterprise — and pay a criminal fine exceeding \$90 million. Lafarge also agreed to cooperate with ongoing investigations.

## **Takeaways**

### ***Precedent-Setting Corporate Prosecution Under the ATA***

Until now, the U.S. government has used the ATA to bring charges for material support to terrorism against individuals. While Lafarge is the first company prosecuted under the "material support" provision of the ATA, it likely is not the last.

As Monaco noted:

[These] charges and guilty pleas should make clear: when companies and their executives engage in conduct that threatens our national security — in this case by fueling violent terrorist organizations — the Department will respond with resolve. [8]

It is also notable that the DOJ charged Lafarge under the ATA, not under International Emergency Economic Powers Act and the sanctions regulations promulgated under it, which the DOJ has used in other corporate prosecutions.

In 2007, for example, Chiquita Brands International Inc., a multinational corporation incorporated in New Jersey, pled guilty to one count of engaging in transactions with a specially designated global terrorist, based on what DOJ officials described as protection payments to a Colombian paramilitary organization called Autodefensas Unidas de Colombia. [9]

Foreign financial institutions have also faced prosecution under the IEEPA: For example, in 2014, Paris-based BNP Paribas SA pled guilty to a conspiracy to violate the IEEPA by processing transactions through the U.S. financial system on behalf of sanctioned entities in Cuba, Iran and Sudan, and agreed to pay \$8.9 billion in criminal penalties. [10]

### ***The Long Arm of U.S. Law***

The Lafarge case shows how the DOJ's enforcement of anti-terrorism laws can extend well beyond U.S.-based companies or conduct — here, to a French company, its Syrian subsidiary and their dealings with foreign terrorist organizations in Syria.

According to plea documents, the participating Lafarge executives were located in France, Syria, Egypt, Jordan, Lebanon, Turkey and the United Arab Emirates, and the offense did

not involve any U.S.-based persons.

It appears that U.S. jurisdiction was based on a single wire transfer made by Lafarge from its operating account in Paris through a U.S. intermediary bank, and on Lafarge's use of U.S. email accounts.

Although a stronger nexus with the U.S. may be required to exercise jurisdiction in other contexts, U.S. courts have found extraterritorial application of criminal anti-terrorism statutes, including Section 2339B, over "non-citizens acting entirely abroad" to be consistent with due process when "the aim of that activity is to cause harm inside the United States or to U.S. citizens or interests,"[11] as articulated by the U.S. Court of Appeals for the Second Circuit in its 2011 U.S. v. Al Kassar decision.

The term U.S. interests may be interpreted broadly. Foreign companies operating in countries of national security interest to the U.S. need to be aware of the reach of U.S. law and take steps to protect their business from the risks in these countries.

These companies must also be aware of how the use of U.S. financial systems and communications infrastructure, even from abroad, can establish a basis for jurisdiction.

### ***Enforcement Actions in Multiple Jurisdictions***

Lafarge has faced prosecution in other countries, too. Earlier in 2022, the Paris Court of Appeal allowed[12] French authorities to bring similar charges against Lafarge in France. This case demonstrates how law enforcement authorities in multiple countries are working together on corporate criminal investigations; here, the DOJ thanked French, Moroccan and Lebanese authorities for their cooperation.

Companies may need to navigate overlapping investigations in multiple jurisdictions and think about how to handle the investigations in a coordinated fashion, such as by pursuing global settlements that minimize the risk of duplicative penalties.

This trend of international cooperation is likely to continue. As Monaco noted in June 2022:

[T]he months and years ahead will see the department's sanctions teams work hand-in-glove with civil and law enforcement agencies across the world. The multilateralization of our sanctions work follows the same trajectory as our [Foreign Corrupt Practices Act] history, which grew from a largely unilateral effort by the United States to a worldwide movement to combat international corruption.[13]

### ***The Need for Due Diligence in Corporate Acquisitions***

The Lafarge prosecution is a cautionary tale about the need for acquiring companies to conduct adequate due diligence and to consider whether to report preacquisition activity to the authorities.

Holcim apparently acquired Lafarge without knowing about the illicit payments it had made.

In the words of DOJ, the Lafarge case

sends the clear message to all companies, but especially those operating in high-risk environments, to invest in robust compliance programs, pay vigilant attention to

national security compliance risks, and conduct careful due diligence in mergers and acquisitions.

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[1] DOJ, "Lafarge Pleads Guilty to Conspiring to Provide Material Support to Foreign Terrorist Organizations," (Oct. 18, 2022), available at: <https://www.justice.gov/opa/pr/lafarge-pleads-guilty-conspiring-provide-material-support-foreign-terrorist-organizations>.

[2] Id.

[3] See generally *United States v. Lafarge S.A. and Lafarge Cement Syria S.A.*, 22-CR-444 (E.D.N.Y. 2022), Dkt. No. 10 (plea agreement) and Dkt. No. 10-1 (statement of facts).

[4] Dkt. No. 10 (plea agreement), ¶15.

[5] Id.

[6] 18 U.S.C. § 2339B.

[7] 18 U.S.C. § 2339A(b)(1).

[8] DOJ, "Lafarge Pleads Guilty to Conspiring to Provide Material Support to Foreign Terrorist Organizations," (Oct. 18, 2022), available at: <https://www.justice.gov/opa/pr/lafarge-pleads-guilty-conspiring-provide-material-support-foreign-terrorist-organizations>. See also <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-announcing-guilty-plea-lafarge>.

[9] DOJ, "Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization And Agrees to Pay \$25 Million Fine," (Mar. 19, 2007), available at: [https://www.justice.gov/archive/opa/pr/2007/March/07\\_nsd\\_161.html](https://www.justice.gov/archive/opa/pr/2007/March/07_nsd_161.html).

[10] See *United States v. BNPP*, No. 1:14-cr-00460-LGS (S.D.N.Y. July 9, 2014).

[11] *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011). See also *United States v. Peterson*, 812 F.2d 486, 494 (9th Cir. 1987) ("Protective jurisdiction is proper if the activity threatens the security or government functions of the United States.").

[12] Reuters, "Lafarge loses latest appeal over crimes against humanity charges," (May 18,

2022), available at: <https://www.reuters.com/world/paris-appeals-court-upholds-charges-complicity-crimes-against-humanity-against-2022-05-18/>.

[13] DOJ, "Deputy Attorney General Lisa O. Monaco Delivers Keynote Remarks at 2022 GIR Live: Women in Investigations," (June 16, 2022), available at: <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-keynote-remarks-2022-gir-live-women>.