SHEARMAN & STERLING LLP

FCPA Digest

Cases and Review Releases Relating to Bribes to Foreign Officials
under the Foreign Corrupt Practices Act of 1977

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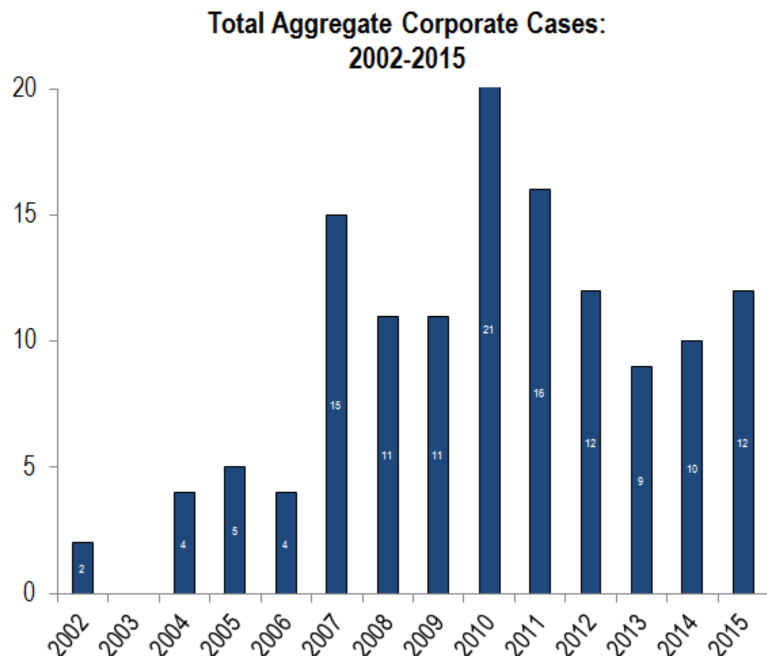
Recent Trends and Patterns in FCPA Enforcement

Enforcement Actions and Strategies

Following a busy 2014, the DOJ and SEC took a step back in 2015 to refocus and reprioritize their efforts. While the SEC pursued ten low-value corporate enforcement actions, the DOJ took a backseat with only two—indicating a greater interest in pursuing individual enforcement actions and apparently conserving its resources to focus on a set of large ongoing investigations.

Among the highlights from 2015 were:

- Twelve corporate enforcement actions with total sanctions of $143.1 million reflect a slowdown in enforcement activity by the DOJ and SEC;
- The twelve corporate enforcement actions have resulted in total average corporate penalties of $11.9 million—significantly lower than previous years;
- The DOJ's trial difficulties in the prosecution of former PetroTiger CEO Joseph Sigelman and the failed extradition of Dmytro Firtash reflect the government's ongoing obstacles to successfully prosecuting individuals;
- The DOJ's decision to publicly decline to prosecute PetroTiger for FCPA violations, while noteworthy, may be of limited significance for large companies;
- The SEC breaks new ground in its enforcement action against The Bank of New York Mellon, concluding that the provision of prestigious internships to the family members of foreign officials is sufficient to trigger FCPA liability;
- The announcement of the Yates Memo, although not a substantive change to DOJ policy nor to the historical expectations of the DOJ Fraud Section and the SEC Division of Enforcement, nevertheless puts increasing pressure on prosecutors to demand information on culpable individuals and then to either bring a prosecution or justify not doing so;
- The U.K. Serious Fraud Office entered into its first ever DPA with Standard Bank Plc over the bank's violations of section 7 of the U.K. Bribery Act;
- Personnel changes at the DOJ raise an interesting new dynamic, but the FCPA will continue to be a priority.



Statistics

In 2015, the DOJ and SEC initiated twelve corporate enforcement actions: *PBSJ*, *Goodyear*, *FLIR*, *BHP Billiton*, *IAP*, *Louis Berger International*, *Mead Johnson Nutrition*, *The Bank of New York Mellon* ("*BNYM*"), *Hitachi*, *Hyperdynamics*, *Standard Bank*,[1] and *Bristol-Myers*.

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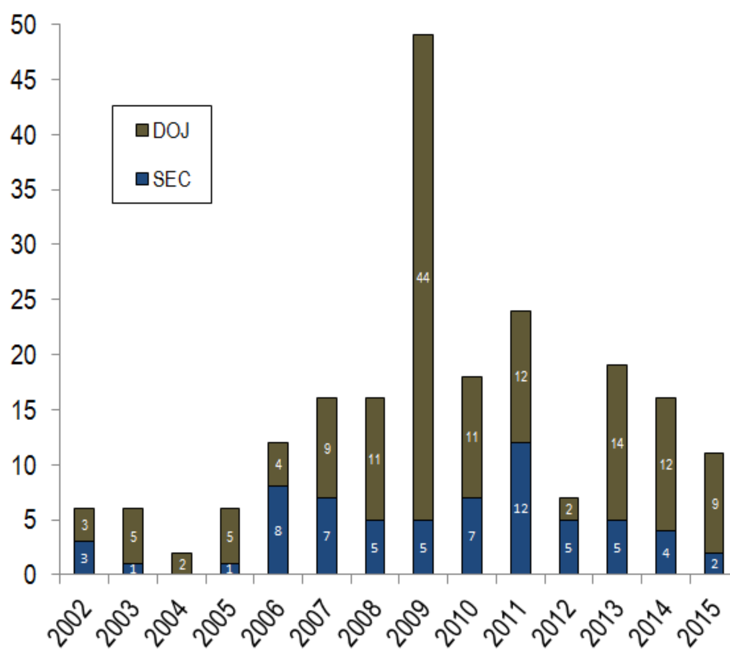
[1] While *Standard Bank* is not an FCPA enforcement action *per se*, we have included *Standard Bank* in our FCPA statistics given the company's admissions of bribery in its deferred prosecution agreement with the U.K. SFO. We also note that *Standard Bank* is another example of how the SEC is able to prosecute claims of bribery against non-regulated entities.

Recent Trends and Patterns in FCPA Enforcement

Of the two enforcement agencies, the SEC has been, by far and away, the more active—responsible for ten of the twelve enforcement actions this year: *PBSJ*, *Goodyear*, *FLIR*, *BHP Billiton*, *Mead Johnson Nutrition*, *BNYM*, *Hitachi*, *Hyperdynamics*, *Standard Bank*, and *Bristol-Myers*. For its part, the DOJ remained relatively silent on the corporate front for most of the year, only announcing its settlement with IAP Worldwide Services, Inc. and Louis Berger International within the span of approximately a month in mid-2015 (though, as discussed below, the DOJ has been slightly more active in pursuing individuals). Notably, none of the twelve corporate enforcement actions have been joint enforcement actions by both the DOJ and SEC. All in all, when looking at the gross number of enforcement actions in 2015, the DOJ's and SEC's enforcement of the FCPA remains on par with past years. However, as described further below, the same cannot be said for the corporate penalties associated with these actions.



For FCPA enforcement against individuals, the DOJ and SEC have pursued FCPA charges against ten individuals in seven different enforcement actions: *United States v. Harder*; *In re Hatoum*; *United States v. Rama*; *United States v. McClung*; *United States v. Hirsch*; *United States v. Garcia*; *In re Garcia*; *United States v. Condrey*; *United States v. Mikerin*; and *United States v. Rincon*.[2] In addition, of course, both agencies have continued to devote resources to litigating or resolving charges against individuals brought in previous years. In total, as we discuss below, while this is slightly below the number of individual enforcement actions seen in past years, we do not believe 2015 reflects a future trend in FCPA enforcement against individual defendants. We discuss each of the 2015 enforcement actions below.

In January 2015, the DOJ wasted no time after the New Year and announced it would charge the former owner and president of Chestnut Consulting Group, Dmitrij Harder, with multiple criminal offenses including violations of the FCPA, Travel Act, and the federal money laundering statute. The DOJ's case involves allegations that Harder facilitated a scheme to bribe an official at the European Development and Reconstruction Bank to secure financing for a client. Harder pleaded not guilty and his trial is currently scheduled for May of 2016.

The cases of *Hatoum*, *Rama*, *McClung*, and *Hirsch* all stem from parallel enforcement actions against their former employers. While the DOJ and SEC have commonly brought FCPA-related charges against both companies and their employees in the past, with this year's announcement of the Yates Memo indicating an increased focus on pursuing individuals (discussed below), we have to believe that the pattern of joint corporate-individual enforcement actions will continue to increase. In *Hatoum*, the defendant entered into an administrative settlement with the SEC, agreeing to pay $50,000 in civil penalties after allegedly bribing a Qatari official in exchange for providing Hatoum's employer, PBSJ, confidential tender information. In *Rama*, the defendant agreed to plead guilty to conspiracy to violate the FCPA by bribing a Kuwaiti official in exchange for securing a valuable security contract on behalf of IAP. Rama was sentenced on October 9, 2015 to 120 days in prison followed by a two-year period of supervised release. In *McClung* and *Hirsch*, the DOJ brought charges against two former executives of the New Jersey construction and engineering firm, Louis Berger International, for bribing officials in Vietnam, India, and Indonesia. Sentencing for both McClung and Hirsch is scheduled for February 2016.

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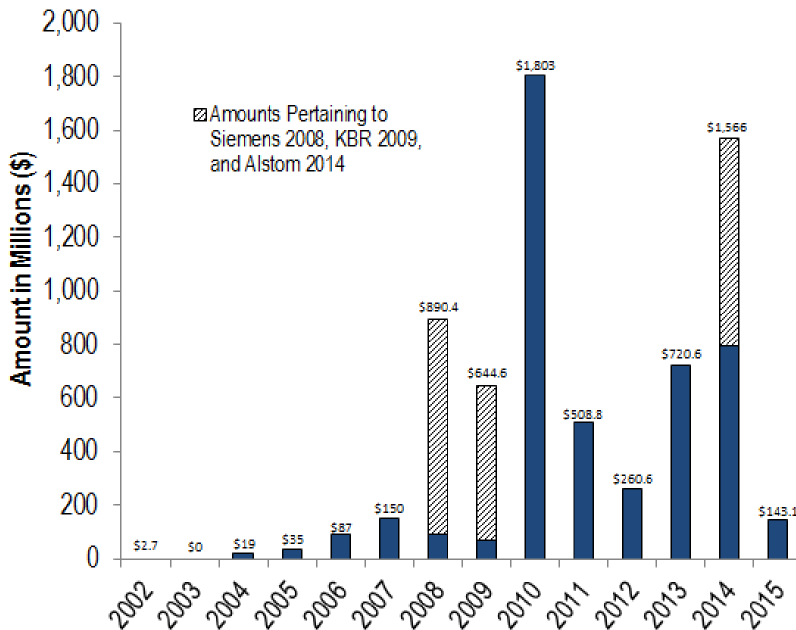
[2] Although the defendant in *Mikerin* was not charged with an FCPA violation, he was treated as a "foreign official" in the related FCPA enforcement action, *Condrey*. We have therefore included *Mikerin* in our list for 2015. In addition, we have grouped *McClung* and *Hirsch* as well as *Mikerin* and *Condrey* as single enforcement actions because the cases arise out of a similar set of facts.

Recent Trends and Patterns in FCPA Enforcement

In *Garcia*, both the DOJ and SEC filed charges against Vicente Garcia, a former executive of the German software solutions provider, SAP SE, for allegedly bribing Panamanian officials in exchange for lucrative software contracts. *Garcia* marks one of only a handful of cases where both the DOJ and SEC decided to charge a single individual for violating the FCPA. Garcia settled the SEC's case through an administrative proceeding in which he agreed to pay a $92,395 sanction. In the DOJ's criminal action against him, Garcia pleaded guilty to one count of conspiracy to violate the FCPA and was sentenced to 22 months in prison on December 16, 2015.

In the related cases, *United States v. Condrey* and *United States v. Mikerin*, the DOJ charged the owner and executive of an unnamed transportation company (Condrey) with conspiracy to violate the FCPA after he allegedly bribed a director and president of two nuclear service providers owned by the Russian government (Mikerin).[3] Condrey pleaded guilty to the charge and is awaiting sentencing. Mikerin, the foreign official, was charged with and pleaded guilty to one count of conspiracy to commit money laundering. Mikerin was sentenced to 48 months in prison on December 15, 2015—marking yet another example of how the DOJ has pursued criminal charges against foreign officials even where such officials are not subject to liability under the FCPA.

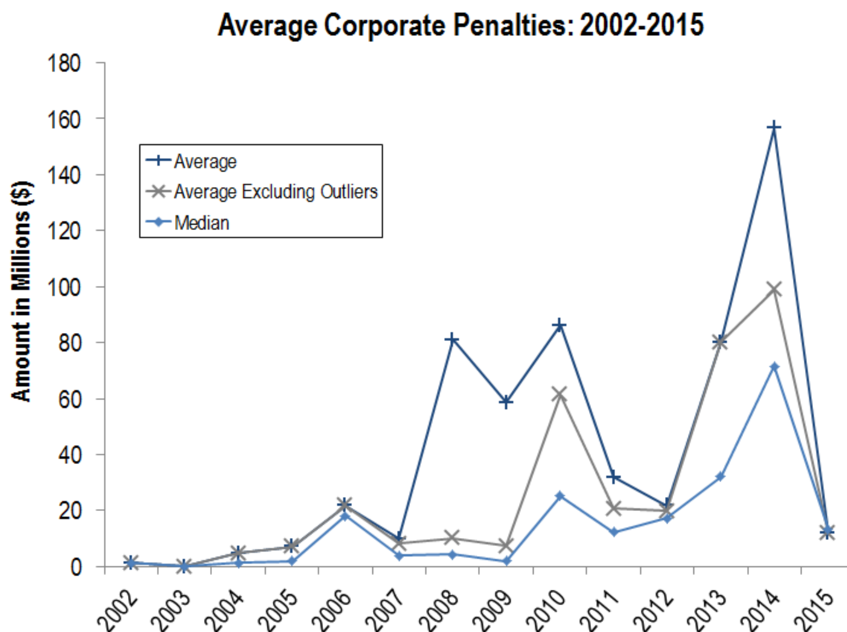


Finally, and most recently, in the case of *United States v. Rincon*, the DOJ charged two individuals (Roberto Enrique Rincon Fernandez and Abraham Jose Shiera Bastidas) with FCPA related offenses in connection with the award of various project contracts from the Venezuelan stated-owned oil and natural gas producer, Petróleos de Venezuela S.A. ("PDVSA") Specifically, Rincon and Shiera are accused of bribing PDVSA officials in exchange for essentially rigging the company's competitive bidding process in their favor. Rincon pleaded not guilty to the charges. As of December 31, 2015, Shiera had yet to enter a plea.

As alluded to above, although the number of corporate enforcement actions appears consistent with previous years, total corporate penalties have dropped to $143.1 million—the lowest total sanctions since 2006. All the more striking is that the downturn in criminal penalties follows a near record-breaking year in 2014. Similarly, when compared to previous years, the average corporate penalty in 2015 of $11.9 million is the lowest since 2007. This decrease is largely the result of the SEC's decision to bring several low-value FCPA enforcement actions, the smallest of which was $75,000 in *Hyperdynamics.* Even excluding the statistical outliers (such as *Hyperdynamics*) the average corporate sanction for 2015 is $11.8 million and remains among the lowest average corporate sanctions in recent history.

[3] A third individual, Boris Rubizhevsky, was charged with one count of conspiracy to commit money laundering in connection with the allegations surrounding Mikerin. Because Rubizhevsky was not charged with violating the FCPA and because the alleged scheme was unrelated to that of Condrey, we have elected not to include *United States v. Rubizhevsky* in the 2016 FCPA Digest.

Recent Trends and Patterns in FCPA Enforcement



The most plausible explanation for the downward shift in corporate sanctions is the large number of ongoing FCPA investigations currently overseen by the DOJ and SEC. Large scale investigations, such as those involving Wal-Mart and Petrobras, might temporarily shift enforcement resources and priorities away from resolving major enforcement actions—leaving only a few relatively straightforward cases to be settled. Indeed, in contrast to the major FCPA cases of 2014 where the bribery allegations spanned several decades, countries, and often involved tens of millions of dollars in improper payments, the 2015 cases are not of the same complexity, scale, and severity (though we acknowledge that *Louis Berger International*, a case involving bribery allegations spanning four different countries, is somewhat of an outlier). Additionally, changes in leadership at the DOJ, with the appointment of Andrew Weissmann as Chief of the Department's Fraud Section in January 2015 and later Loretta Lynch to Attorney General in April 2015 as well as a large turnover of Fraud Section attorneys into private practice in the first half of the year, may have momentarily stalled FCPA enforcement.

On the individual enforcement side, while the total number of individual enforcement actions is slightly down since 2014, the difference is not evidence of a material change. FCPA enforcement actions against individuals have been less consistent from year to year, largely because such prosecutions generally depend on the facts surrounding ongoing corporate investigations and enforcement actions. For the same reasons discussed above, we suspect that the lower number of individual enforcement actions is due to a large number of ongoing investigations and transitions in leadership at the DOJ. In addition, the DOJ has been preparing for a number of trials against individuals involving FCPA charges including *Sigelman*, *Hoskins*, and *Harder*—not to mention extradition proceedings against Dymtro Firtash in Austria—all of which inevitably result in a drain on prosecutorial resources. If anything, the Yates Memo would seem to suggest that we will witness an increasing number of individual enforcement actions in the future.

It is, however, noteworthy that the DOJ's and SEC's prioritization of individual prosecutions comes as enforcement agencies continue to struggle while pursuing FCPA charges against individual defendants. Setbacks in *United States v. Sigelman* and *United States v. Firtash* (discussed in greater detail below) may cause the Department to rethink its strategy. Indeed, while the DOJ has had some success extracting plea agreements, when put to its burden of proof the DOJ (and the SEC for that matter) has experienced difficulty in securing convictions and judgments. Given these struggles, it is possible that future individual defendants may be emboldened to test their chances against the government in court, potentially requiring the DOJ to devote even more resources to trying these individuals. While the DOJ and SEC have made it a clear priority to prosecute individuals for violations of the FCPA, the risk-reward calculations that prosecutors must consider before bringing charges could be altered going forward.

Overall, notwithstanding the 2015 FCPA statistics, we doubt that the decreased amount of enforcement activity in 2015 is evidence of long-term trend. DOJ and SEC officials have made clear that the FCPA will remain a priority for both agencies and we see no reason to question those officials' sincerity.

Recent Trends and Patterns in FCPA Enforcement

Types of Settlements

As the more active enforcement agency of 2015, the SEC has continued its trend of using administrative proceedings to resolve FCPA enforcement actions in *Hatoum*, *Goodyear*, *FLIR*, *BHP Billiton*, *Mead Johnson Nutrition*, *Garcia*, *BNYM*, *Hyperdynamics*, *Standard Bank*, and *Bristol-Myers*. Continued scrutiny of pre-trial settlements by U.S. federal court judges, including Judge Leon's scathing rejection of the government's DPA in *United States v. Fokker*, combined with the Commission's difficulties in resolving its claims against individuals (*e.g.*, the former officers and employees of Direct Access Partners, *Rhuelan* and *Jackson*), likely gives the SEC little appetite to try their hand at other forms of pre-trial settlement. Although there have been a series of constitutional challenges to the SEC's administrative proceedings mechanism over the course of 2015, to date, several courts of appeals, including the D.C. Circuit (*Jarkesy v. SEC*) and the Seventh Circuit (*Bebo v. SEC*), have vindicated the SEC's practices—paving the way for the SEC's continued use of administrative proceedings.

However, while the majority of the SEC's FCPA enforcement actions have been resolved using administrative proceedings, both *PBSJ* and *Hitachi* stand as outliers. In *PBSJ*, the SEC resolved its claims against the company through a DPA—representing only the second time the SEC has used a DPA to settle an FCPA enforcement action (the first being the 2011 case of *Tenaris*). In *Hitachi*, the SEC resolved its case against the Japanese conglomerate through a consent decree after filing its complaint in the District of Columbia. The use of these two settlement mechanisms appears to have been somewhat out of necessity. Both PBSJ (now controlled by the U.K. engineering firm WS Atkins plc) and Hitachi were no longer issuers at the time their respective settlements were reached, and although Dodd-Frank grants the SEC the authority to use administrative proceedings against non-issuers, the SEC can only seek civil penalties, not injunctive relief as part of an administrative proceeding. In each case, specific circumstances may have motivated the SEC to seek future leverage over the companies: in *PBSJ*, the DPA focused on cooperation with potential ongoing investigations, an obligation which is specifically extended to PBSJ's acquirer, a foreign non-issuer; while in *Hitachi*, the SEC specifically noted that although the company had de-registered in 2012, it might re-enter the U.S. markets in the future. Moreover, as a general rule, no agency, including the SEC, likes to be deprived of jurisdiction, and even if the companies would no longer be subject to SEC enforcement for future violations of the FCPA (as they would no longer be covered under section 30A of the 1934 Act (15 U.S.C. § 78dd-1), the terms of the PBSJ DPA and the Hitachi injunction give the SEC leverage to punish such violations under alternative grounds.

The DOJ's two corporate enforcement actions in 2015 against IAP and Louis Berger International were settled through an NPA and DPA respectively. When explaining the basis for offering IAP and Louis Berger International an NPA and DPA, respectively, the DOJ cited a number of common factors seen in other settlement agreements in the past including: (1) offering significant cooperation including, conducting extensive internal investigations, making U.S. and foreign employees available for interviews, and collecting large amounts of documentation for review by the DOJ; (2) engaging in remediation, including disciplining culpable officers and employees, enhancing third-party due diligence, and instituting heightened reviews of proposals and other transactional documents; (3) enhancing their current compliance programs; and (4) agreeing to continue to cooperate with the government on any other ongoing investigations. In the DOJ's DPA with Louis Berger International, the DOJ noted two additional factors not listed in the *IAP* NPA but commonly seen in other pre-trial settlement documents—that the company had self-reported the violation and the "nature and scope of the offense conduct." While none of these considerations break new ground, it is peculiar that the government agreed to enter into an NPA with IAP (a slightly less severe form of pre-trial settlement) despite the fact that the company did not appear to self-report the violation—a factor (as discussed below) that the government repeatedly cites as being among the most critical for purposes of receiving credit during an investigation. It therefore appears the DOJ placed greater weight on the "nature and scope" factor in distinguishing between these two companies for settlement purposes. Specifically, Louis Berger International's FCPA violations—spanning four different countries—were enough to cause the DOJ to offer a DPA to Louis Berger International, while the relatively limited scope of the alleged bribery in *IAP* was sufficient to warrant an NPA in the DOJ's eyes—notwithstanding the company's failure to self-report.

Another interesting development in the DOJ's settlement decisions has been the series of recent declinations by the Department. Most significant among these has been the DOJ's public declination of the British Virgin Island oil and gas company, PetroTiger Ltd. The DOJ's declination of PetroTiger marks only the second time the government has publicly announced its decision not to prosecute a company for FCPA violations (the first being Morgan Stanley in 2012 after the bank's former employee, Garth Peterson, pleaded guilty to violating the FCPA). We discuss the implications of the PetroTiger declination further below.

Recent Trends and Patterns in FCPA Enforcement

DOJ declinations of FCPA enforcement actions against numerous other companies also suggest that the Department may be more willing to not pursue an enforcement action where other agencies (including the SEC or foreign regulatory agencies) have already initiated or resolved charges against the company. Most recently, the DOJ has issued declinations in *Eli Lilly*, *Goodyear*, *Smith & Wesson*, *Layne Christensen*, *BHP Billiton*, *Mead Johnson Nutrition*, *Hyperdynamics*, and *Bristol-Myers* while the SEC brought enforcement actions against the companies.

The DOJ, of course, has not provided an explanation for not proceeding against a company where the SEC had done so. We would like to think that the DOJ had concluded that additional charges provided limited benefit when the SEC had already forced the company to disgorge. We note however, in the cases of *Eli Lilly, Goodyear*, *Mead Johnson Nutrition*, *Hyperdynamics*, and *Bristol-Myers*, the DOJ's declination decision might also be explained by a possible lack of jurisdiction. Specifically, in each of the cases above, where all of the illicit conduct was committed by subsidiaries of the parent company, the DOJ may have concluded it was too difficult to prove that the subsidiaries' conduct should be imputed on the corporate parent—bearing in mind that the DOJ has a higher burden of proof to sustain criminal FCPA charges against a company. [4] With the SEC's decision to bring an enforcement action coupled with its own jurisdictional limitations, the DOJ could have concluded that additional criminal charges may not be justified.

Regardless of its reasoning, the DOJ has followed a similar pattern when foreign regulatory agencies have initiated and concluded enforcement actions against a particular company. For example, in November 2014, the Dutch oil and gas services company, SBM Offshore, reached an agreement to pay Dutch authorities $240 million to settle allegations that it bribed government officials in Angola, Brazil, and Equatorial Guinea. On the very same day, the DOJ announced that it would drop its investigation of the company. Most recently, on November 30, 2015, the U.K. Serious Fraud Office announced that a U.K. court approved its first DPA with Standard Bank for violations of the U.K. Bribery Act resulting from payments related to a securities offering for the Government of Tanzania. On the very same day, the SEC announced that it too had settled a case against Standard Bank for failing to disclose the same payments in private placement offering documents provided to U.S. investors in violation of U.S. securities laws (although not the FCPA, as Standard Bank is not an "issuer" for purposes of FCPA jurisdiction). In light of the SFO's and SEC's actions, the DOJ declined to bring charges.

This trend should come as welcome news for multinational companies as it indicates that the DOJ is aware of the need to avoid regulatory pile-ons. As Assistant Attorney General Leslie Caldwell recently stated in an interview: "We work hard to coordinate with other countries and, to the extent that a particular situation is really more in the interests of another country—the conduct occurred there and people are located there, it didn't really affect the United States except in a tangential way—we're willing to defer to foreign countries."

Elements of Settlements

SEC Guidance. As mentioned above, the SEC's enforcement action in *PBSJ* is only the second time that the Commission has used a DPA to settle charges against a company. The SEC's DPA in *Tenaris* is largely the same both in substance and form, however, there a few changes. Specifically, in the section "Undertakings," which details the various items that the company must agree to comply with going forward, the SEC's DPA included two additional terms that did not previously exist in the *Tenaris* DPA. These two additional terms state:

> h. to maintain and enforce comprehensive procedures designed to address and prevent violations of the federal securities laws, including but not limited to compliance with the FCPA and other applicable anticorruption laws on or before January 22, 2016; and
>
> i. to identify and implement improved internal controls by, as necessary, adopting new or modifying existing internal controls, policies, and procedures designed to ensure the making and keeping of books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the Respondent on or before January 22, 2016.

[4] *See also* Philip Urofsky, *The Ralph Lauren FCPA Case: Are There Any Limits to Parent Corporation Liability?*, BLOOMBERG (May 13, 2013).

Recent Trends and Patterns in FCPA Enforcement

Although these provisions are common in FCPA settlements, they have special significance in the *PBSJ* settlement, as PBSJ, although still based in the U.S. and thus subject to the FCPA's anti-bribery provisions as a domestic concern, is no longer subject to the FCPA's books and records provisions. Thus, by including these provisions, the SEC maintains the ability indirectly to punish the company for future violations of those provisions by declaring a breach of the DPA. Further, the DPA imposes certain cooperation obligations on PBSJ's new owner, the U.K.-based WS Atkins company; although these cooperation obligations do not include the compliance provisions, the overall impact of the agreement is to force the new owners to ensure that PBSJ has sufficient controls and compliance procedures in place.

The *PBSJ* DPA departs from the *Tenaris* template in one other significant aspect. We previously noted, with respect to the *Tenaris* DPA, the incongruity of the SEC's application of the traditional rule that criminal fines and civil penalties are not tax deductible to disgorgement, characterizing the contractual prohibition as a hidden additional penalty that the SEC could not have imposed in a judicially-approved settlement.[5] Significantly, the *PBSJ* DPA appears to distinguish between the civil monetary penalty (or its equivalent in a non-judicial settlement) and disgorgement, requiring only that the company "refrain from seeking or accepting a U.S. federal or state tax credit or detection for any civil monetary penalty paid pursuant to this Agreement." Given that the civil penalty accounted for only $375,000 of the total amount of $3,407,875 required to be paid under the DPA, this is a significant distinction.

Discounts. In May 2015, Alstom S.A. posted a €719 million loss as a result of the company's $772 million settlement with the DOJ in December 2014. DOJ officials have stated on multiple occasions that Alstom's record-breaking settlement was due in large part to the company's unwillingness to cooperate with the Department's investigation. As discussed in previous *Trends & Patterns*,[6] while the DOJ has been willing to grant a company a substantial discount from the recommended penalty under the Sentencing Guidelines because of financial hardship (*see, e.g., Alcoa* (2014) and *NORDAM* (2012)), Alstom's loss shows that no amount of financial hardship will help to mitigate against a large corporate sanction if a company is unwilling to cooperate with the Department. While the specter of Arthur Andersen has loomed large over the DOJ after the Department's prosecution of the accounting giant ultimately led to the firm's implosion, Alstom's €719 million loss shows that the DOJ's fear of instigating another company's collapse may be waning.

Monitors. The DOJ's DPA with Louis Berger International required the company to engage a compliance monitor for a three-year period. The terms of the requirement in the *Louis Berger International* DPA mirror those of other recent DPAs which imposed a compliance monitor (*e.g.*, *Avon*). While compliance monitors have become somewhat less common in recent years, the DOJ's enforcement action against Louis Berger International indicates that the Department continues to believe that monitors can still serve as a useful tool to ensure a company adequately remedies its past mistakes, particularly in cases with conduct that spans time and space and where the Department may harbor concerns as to the sustainability of any remedial steps implemented in advance of the settlement.

Reporting Requirements. For its part, the SEC has generally chosen to impose self-reporting requirements in some, but not all, of its 2015 FCPA enforcement actions. Specifically, in *Goodyear*, *FLIR*, *BHP Billiton*, and *Bristol-Myers*, the SEC required the companies to report to the Commission at regular nine or twelve-month intervals for a term of two to three years on the general status of the companies' compliance efforts. The SEC did not impose reporting requirements as part of its other 2015 enforcement actions: *PBSJ*, *Mead Johnson Nutrition*, *BNYM*, *Hitach*i, and *Hyperdynamics*. The SEC has provided no specific reason for why it decided to impose self-reporting requirements on certain companies but not others.

Case Developments

Direct Access Partners. Beginning in 2013, a series of executives and employees of the broker-dealer Direct Access Partners were charged with FCPA violations in connection with a bribery scheme involving an official at the Venezuelan development bank, Banco Desarrollo Económico y Social de Venezuela (BANDES). In 2014, two more individuals were charged with violating the FCPA in

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[5] For our critique of the *Tenaris* DPA, please see Shearman & Sterling, *A New Tool and a Twist? The SEC's first Deferred Prosecution Agreement and a Novel Punitive Measure* (May 24, 2011).

[6] For a further discussion of these issues, you may wish to refer to our prior client publication, available at Shearman & Sterling, *FCPA Digest, Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act* (July 21, 2014).

connection with the scheme. After entering into plea agreements with the government in 2013 and 2014, several of the defendants were finally sentenced over the course of 2015.

First, on March 27, 2015, both Benito Chinea and Joseph DeMeneses, the former CEO and Managing Director, respectively, of Direct Access Partners, were sentenced to four years in prison after pleading guilty to one count of conspiracy to violate the FCPA and the Travel Act. Chinea was also ordered to forfeit $3.6 million while DeMenes was ordered to forfeit $2.7 million.

On December 4 and 8, 2015, Ernesto Lujan and Tomas Clarke Bethancourt were each sentenced to two years in prison after pleading guilty to multiple criminal offenses including conspiracy to violate the FCPA and the Travel Act and to commit money laundering, as well as violations of the substantive offenses. Lujan and Clarke were also ordered to forfeit $18.5 million and $5.8 million, respectively. Subsequently, on December 15, 2015, Jose Alejandro Hurtado was sentenced to three years in prison and ordered to forfeit $11.9 million after pleading guilty to the same offenses as Lujan and Clarke.

United States v. Elgawhary. On March 23, 2015, the former vice president of Bechtel Corporation and general manager of a joint venture operated by Bechtel and an Egyptian utility company, Asem Elgawhary, was sentenced to 42 months in prison for accepting kickbacks totaling $5.2 million in exchange for lucrative power contracts. Elgawhary was among the "foreign officials" who allegedly received bribes from Alstom S.A.

United States v. Firtash. On April 30, 2015, an Austrian Court rejected the DOJ's request to extradite the Ukrainian energy magnate, Dmtryo Firtash, to the United States to be prosecuted for alleged violations of the FCPA. In issuing his ruling, Austrian Judge Christoph Bauer characterized the evidence that the DOJ offered as incomplete and concluded that the extradition request was "politically motivated." As a result, all defendants in *Firtash*, Dymtro Firtash, Andras Knopp, Suren Gevorgyan, Gajendra Lal, Periyasamy Sunderalingam, and K.V.P. Ramachandra Rao, currently remain at large. We have previously questioned the utility of charging, with great fanfare and press releases, foreign nationals over whom the government is unlikely to obtain jurisdiction (or, even worse, obtain jurisdiction through happenstance years down the road when the evidence is stale and witnesses' recollection faded). With a large number of FCPA cases remaining untried because foreign nationals have chosen not to avail themselves of the hospitality of the U.S. government, the Austrian court's decision underscores the difficulty the DOJ and SEC have experienced while pursuing charges against foreign citizens who reside outside of the United States.

United States v. Sharef, et al. In the DOJ's ongoing criminal case against eight former executives of Siemens stemming from charges related to the company's 2008 settlement, Andres Truppel, the former chief financial officer, pleaded guilty to one count of conspiracy to violate the FCPA and admitted to engaging in a decade-long scheme to pay tens of millions of dollars in bribes to Argentine government officials in connection with a national identity card contract worth approximately $1 billion. According to the court docket, none of the other seven former Siemens executives have appeared in the case.

United States v. Dupreval. On February 9, 2015, the U.S. Court of Appeals for the Eleventh Circuit affirmed the conviction and nine-year sentence of Jean Rene Dupreval on multiple counts of conspiracy and money laundering as part of the *Haiti Teleco* FCPA enforcement action from 2009. Dupreval was the first foreign official to be convicted at trial for money laundering as a result of an ongoing FCPA enforcement action. His appeal was based upon the argument that he was not a "foreign official" and therefore could not be guilty of money laundering because the payments he received did not result from a violation of the FCPA. In rejecting his appeal, the Eleventh Circuit upheld its earlier decision from *United States v. Esquenazi* from 2014, where it concluded that Haiti Teleco qualified as a government "instrumentality." Accordingly, the court concluded that Dupreval, as Assistant Director General and Director of International Affairs of Haiti Teleco, was in fact, a "foreign official" under the FCPA and thus, having engaged in transactions involving the proceeds of FCPA bribery, committed money laundering.

PetroTiger: United States v. Hammarskjold; United States v. Weisman. On September 10, 2015, Knut Hammarskjold and Gregory Weisman, the former Co-CEO and General Counsel of PetroTiger Ltd., respectively, were sentenced after each pleaded guilty to one count of conspiracy to violate the FCPA and the wire fraud statute. Hammarskjold was sentenced to time served and placed on supervised release for two years. Hammarskjold was also ordered to pay a $15,000 criminal fine and restitution of $106,592.93. Weisman was placed on probation for a two-year term and ordered to pay a criminal fine of $30,000.

Recent Trends and Patterns in FCPA Enforcement

PetroTiger: United States v. Joseph Sigelman. On June 15, 2015, Joseph Sigelman, the former Co-CEO of PetroTiger Ltd., pleaded guilty to one count of conspiracy to violate the FCPA. There is some debate in the FCPA community as to whether this was nevertheless a setback for the DOJ. Prosecutors can point to the fact that Sigelman did, in fact, plead guilty to a felony and admitted to having been part of a bribery conspiracy, thus, together with the other pleas noted above, validating the legitimacy of the DOJ's investigation and prosecution. On the other hand, the conspiracy plea, and the subsequent lenient sentence, came only after the government was forced to offer Sigelman a favorable plea deal following the collapse of its case at trial.

During the cross examination of PetroTiger's former general counsel and the government's star witness, Gregory Weisman, counsel for the defense caused Weisman to confess on the stand that he had given false testimony during the government's direct examination. Shortly after Weisman's admission, the trial judge ordered a recess of the trial for several days. During the recess period, Sigelman agreed to plead guilty to conspiracy and the government agreed to move to dismiss the remaining charges. At sentencing, Sigelman was fined $100,000, ordered to pay $239,015 in restitution, and required to serve a one-year term of probation.

That Sigelman was able to avoid jail time altogether is a reminder of the difficulties the DOJ has had in securing convictions for FCPA violations at trial. *Sigelman* was the first FCPA prosecution to go to trial since the Africa Sting case in 2012, where the DOJ saw its case collapse after the government's key witness's credibility was successfully impeached and the *O'Shea* case in which the court acquitted the defendant at the close of the government's case, citing insufficient evidence of the alleged unlawful conduct. Only the year prior, in 2011, were the convictions of Keith Lindsey and Steve Lee overturned as a result of numerous findings of prosecutorial misconduct.

For its part, the SEC has experienced similar difficulties in prosecuting individual defendants. Just last year, during its lawsuit against the former executives of Noble Corporation, Mark Jackson and James Ruehlen, the SEC was forced to drop its case in exchange for a favorable stipulation with the defendants. Similarly, in its case against three former executives of Magyar Telekom—Elek Straub, Andras Balogh, and Tamas Morvai—the SEC, while stating it was merely "simplifying" its case in advance of trial, was forced to drop a large number of its claims citing the complexity and scope of the investigation. What remains of the case is currently the subject of competing summary judgment motions and as of December 2015 no trial date has been set.

Taken together, along with the DOJ's difficulties in *Firtash*, the inability of the DOJ and SEC to regularly secure convictions of FCPA violations when put to their burden is likely to embolden more defendants to test the government's charges against them. If the prosecution of individuals is truly a priority of the DOJ and SEC, the greater number of defendants who elect to go to trial will likely result in a greater drain on the government's resources. On the other hand, an increase in the number of individual prosecutions going to trial may be welcome news for those seeking greater judicial guidance on the scope of the FCPA. With the trial of Lawrence Hoskins and Dmitrij Harder set for 2016, we will have to see whether the DOJ can rally from the setbacks it has suffered over the past year.

PetroTiger Ltd. As mentioned above, the DOJ's recent public declination of PetroTiger marks only the second time the Department has publicly announced a declination decision. Key among the reasons the DOJ offered a declination appears to be the company's willingness to implicate top ranking officials in the scheme. However, while the PetroTiger declination is noteworthy, it is important not to overstate the significance of the DOJ's announcement. PetroTiger's willingness to identify key executives in the alleged bribery scheme appears to have influenced the Department's declination decision but is not the only factor at play.

In point of fact, PetroTiger is but one of several small, privately held companies whose officers were prosecuted for FCPA violations but not the company itself. Take for example the case of *Harder*, where the former owner and president of Chestnut Consulting Group Co. was charged with conspiracy to violate the FCPA but Chestnut Consulting Group Co. itself has yet to be charged with related violations. Similar scenarios have most recently played out with respect to DF Group in *United States v. Firtash* and Direct Access Partners in *United States v. Clarke, United States v. Lujan*, and *United States v. Chinea.*

This pattern may simply be evidence of the fact that it is easier for small companies to implicate senior officials because there are fewer layers of management to insulate those executives from the day-to-day administration of a company. Furthermore, it may often be the case that small companies, such as PetroTiger, do not have the financial assets needed to pay a substantial FCPA sanction.

Overall, PetroTiger is not a paradigm shift in FCPA enforcement practices. Certainly, taking the appropriate remedial steps to identify

those responsible for violating the FCPA will undoubtedly help a company's cause (as indicated by the Yates Memo), but companies should not expect that doing so will operate as a *get-out-of-jail-free* card.

United States v. Siriwan, et al. In 2009, a grand jury from the Central District of California indicted Juthamas Siriwan, the former governor of the Tourism Authority of Thailand, and her daughter, Jittisopa Siriwan, for allegedly receiving bribes in exchange for awarding a Hollywood producer, Gerald Green, and his wife, Patricia Green, the rights to run the Bangkok Film Festival. The presiding judge, the Honorable George Wu, questioned the DOJ's decision to charge the Siriwans and stated that he may dismiss the suit if Thai prosecutors filed charges against them. Approximately six years later, in August 2015, reports surfaced that Thai prosecutors formally filed charges against the Siriwans for taking bribes in connection with awarding state contracts. The Thai prosecution has led to speculation whether the U.S. charges against the Siriwans will be dismissed.

Declinations. According to company filings, over the course of 2015 the DOJ and SEC have declined to bring enforcement actions against a number of companies including: Goodyear Tire & Rubber Co. (DOJ); Eli Lilly & Co. (DOJ); Hyperdynamics Corporation (DOJ); 21st Century Fox (DOJ); News Corp. (DOJ); PetroTiger Ltd. (DOJ); Mead Johnson Nutrition Company (DOJ); BHP Billiton (DOJ); Affinia Group Inc. (DOJ); Cobalt International Energy Company (SEC); Net 1 UEPS Technologies (SEC); Gold Fields Ltd. (SEC); NCR Corp. (SEC); Brookfield Asset Management Inc. (SEC); Xylem Inc. (SEC); NCR Corp. (SEC).

Biomet Inc. In March 2012, the orthopedic device maker, Biomet Inc., settled FCPA charges with the DOJ and SEC for $22.7 million as part of a DPA. According to the DOJ and SEC, Biomet was responsible for bribing doctors in Argentina, Brazil, and China from 2000 to 2008. The Biomet DPA was set to expire on March 26, 2015, but following the voluntary disclosure from the company of the possibility of additional bribes in Brazil and Mexico pre-dating the 2012 DPA, the DOJ extended the agreement for an additional year.

Lockheed Martin Corp. On May 29, 2015, U.S. Federal Judge Amit P. Mehta granted an unopposed motion to modify the terms of a 1975 consent order between Lockheed Martin and the SEC stemming from allegations that Lockheed Martin had concealed corrupt payments to foreign government officials in the early 1970s. The settlement agreement previously required Lockheed Martin to file a Form 8-K with the SEC at least ten days in advance of the date when a scheduled change to its statements or policies and procedures was set to take place. Lockheed, without opposition from the SEC, successfully argued that subsequent changes in the securities laws obviated this requirement. The SEC's allegations against Lockheed Martin in the early 1970s served, in part, as the impetus behind the enactment of the FCPA in 1977.

Oil For Food Scandal. On June 18, 2009, a French court acquitted fourteen companies for paying bribes in exchange for lucrative contracts as part of the U.N. Oil-For-Food Program. Among the companies were Renault Trucks, Schnieder Electric, and Legrand. The U.N. Oil-For-Food Program required the sales proceeds of Iraqi oil to be deposited in a U.N. bank account to be used for humanitarian aid. The Oil-For-Food Program scandal began when the Iraqi regime of Saddam Hussein began requiring companies to pay kickbacks in exchange for the oil sales.

According to the French court, the prosecution had offered no evidence of bribery because no individuals benefited from the alleged graft, and the former Iraqi regime (for which the U.N. Oil-For-Food Program was set up) was not victimized by the scheme. The French court's decision aligns with the approach taken in the United States. Although the Justice Department has brought a number of cases against U.S. and foreign companies resulting from the Oil-For-Food scandal, none allege bribery in connection with the Oil-For-Food program itself (although some cases involved additional FCPA charges related to different bribery schemes, *see, e.g.*, *Innospec*) and those cases are largely predicated on theories of fraud against the U.N. or books-and-records violations by issuers.

Perennial Statutory Issues

Instrumentality

The DOJ's 2015 prosecution of Daren Condrey in *United States v. Condrey* raises some questions as to whether government prosecutors are remaining faithful to the government instrumentality test set out in the Eleventh Circuit's 2014 decision in *United States v. Esquenazi*. For purposes of enforcing the FCPA, the DOJ and SEC heavily rely on the theory that government owned and operated

entities fall within the definition of the term government "instrumentality" and therefore any employee of those entities constitutes a "foreign official" according to the language of the statute. In summary, under *Esquenazi*, the Eleventh Circuit held that the government bore the burden of proving two conditions to establish that a particular entity should be considered an "instrumentality" under the FCPA: (i) the foreign government must control the relevant entity; and (ii) the entity must serve a government function. The Eleventh Circuit's decision in *Esquenazi* largely vindicated the DOJ's and SEC's broad interpretation of the term. However, the "government function" element represented a slight deviation from the DOJ's and SEC's former practice, which had focused almost exclusively on government ownership and control.

In *Condrey*, the defendant was charged with, and ultimately pleaded guilty to, conspiracy to violate the FCPA after he allegedly bribed a Director and President of a nuclear supply and servicing company known as JSC Techsnabexport ("Tenex") and its U.S. subsidiary, Tenam Corporation. Both Tenex and Tenam were indirectly owned by the Russian government. As a result, the DOJ claimed that Tenex and Tenam were "instrumentalities" and that, therefore, the Director/President was a "foreign official." Thus, in the stipulated statement of facts attached to Condrey's plea agreement, the government, in summary fashion states:

> TENEX supplied uranium and uranium enrichment services to nuclear power companies throughout the world on behalf of the government of the Russian Federation. TENEX was indirectly owned and controlled by, and performed functions of, the government of the Russian Federation, and thus was an "agency" and "instrumentality" of a foreign government, as those terms are used in the FCPA, Title 15, United States Code, 78dd-2(h)(2).
>
> TENEX established a wholly-owned subsidiary company located in the United States in or about October 2010, Tenam Corporation ("TENAM"). TENAM was TENEX's official representative in the United States. Tenam was indirectly owned and controlled by, and performed functions of, the government of the Russian Federation, and thus was an "agency" and "instrumentality" of a foreign government, as those terms are used in the FCPA, Title 15, United States Code, 78dd-2(h)(2).

The statement that both Tenex and Tenam were "indirectly owned and controlled by, and performed functions of, the government of the Russian Federation" appears to be a direct nod to *Esquenazi*. However, upon a review of the facts, the question is whether, if tested in court, Tenex and Tenam could satisfy the instrumentality test. While there seems to be little doubt that Tenam and Tenex were owned by the Russian government (in a parallel action against the foreign official, Vadim Mikerin, the DOJ disclosed additional details over the Russian government's ownership of the companies), both Tenex and Tenam appear to serve primarily commercial roles as nuclear service providers and it is therefore debatable whether they served a government function.

According to *Esquenazi*, the following non-exclusive factors are relevant to whether an entity serves a government function: (i) whether the entity has a monopoly over the function it exists to carry out; (ii) whether the government subsidizes the costs associated with the entity providing services; (iii) whether the entity provides services to the public at large in the foreign country; and (iv) whether the public and government of that foreign country generally perceive the entity to be performing a government function. Applying these factors to Tenex and Tenam leaves a much less clear picture than the stipulated facts suggest.

First, Tenex and Tenam are but two companies within a much larger group of competing nuclear service providers—indicating that the two companies do not hold a monopoly over their industry (especially not within the United States where the bribes took place). Second, whether the Russian government subsidizes the companies is not entirely clear, but because it seems that the Russian government indirectly owns Tenex and Tenam, it would not be surprising if the companies received some degree of government support. Third, Tenex and Tenam arguably do not serve the public at large of the foreign government because the two companies maintain operations outside Russia, and operate for what appear to be primarily commercial purposes. Fourth and for similar reasons, because the companies, arguably, appear to be serving a commercial role, whether the Russian government and public generally believe Tenex and Tenam serve a government function is debatable. While we note the analysis above is far from perfect, it highlights how the *Esquenazi* court sought to carve out certain entities from the definition of "instrumentality," and how the government's summary analysis of the facts may be subject to challenge going forward.

Recent Trends and Patterns in FCPA Enforcement

Foreign Officials – Public International Organization

The 2015 enforcement action in *United States v. Harder* is a reminder that officials of public international organizations, although not affiliated with any one specific government, may fall within the definition of "foreign official" under the FCPA. The language of the statute clearly states:

> (1)(A) The term "foreign official" means any officer or employee of . . . a public international organization, or any person acting in an official capacity . . . for or on behalf of any public international organization.
>
> (B) For purposes of subparagraph (A), the term "public international organization" means—
>
> (i) an organization that is designated by Executive Order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or
>
> (ii) 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. (emphasis added).

In *Harder*, the former owner and president of Chestnut Consulting Group was charged with conspiracy to violate the FCPA as a result of an alleged scheme to pay approximately $3.5 million in illicit funds to an official at the European Bank for Reconstruction and Development. Although headquartered in London, the EBRD is owned by over 60 sovereign nations and most importantly was designated a "public international organization" on June 18, 1991 by Executive Order 12766. *Harder* is a reminder that companies that conduct business with multinational development organizations, such as the EBRD, the World Bank Group, International Monetary Fund, and other international financial institutions (IFIs), or projects funded by such IFIs, may be subject to the same FCPA compliance risks they face when conducting business with sovereign governments.

Relatedly, the DOJ's recent announcement of a 47-count indictment against various officials at the international government body of the sport of soccer, FIFA, presents the opposite side of the coin. FIFA, unlike the EBRD, has not been designated a "public international organization" and therefore its officials are not "foreign officials" per se by virtue of their relationship to FIFA. Many have pointed out that this is among the primary reasons that the DOJ's indictment did not charge the defendants in FIFA with FCPA violations. While these commentators are in large part correct—FIFA is not a "public international organization," and therefore its officials do not automatically constitute "foreign officials" sufficient to generate FCPA liability upon receiving or being offered an illicit payment[7]— companies should not assume that they will be free from FCPA risk for conducting business with international sporting bodies simply because they have not been designated a "public international organization" by the President of the United States.

What is important for companies to consider when assessing FCPA risks in situations similar to that of FIFA, is what relationship a particular official has to other national entities. As we have pointed out elsewhere,[8] many FIFA officials were appointed to their positions by virtue of their relationship with national soccer associations. Because many of these national soccer associations receive funding from government coffers and exert monopolistic control over large scale sporting events in that country, it is plausible under the "instrumentality" test defined by *Esquenazi* that these organizations could fall within the meaning of a government "instrumentality." Moreover, with the scrutiny that FIFA is currently facing, it would seem plausible for governments to begin to assert even more control over its national athletic associations, only further raising the likelihood that those organizations would constitute an "instrumentality" under the FCPA.

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[7] The same analysis governed the government's charging decisions in the 2002 Salt Lake City Olympics case involving payments to International Olympic Committee members.

[8] For a further discussion of these issues, you may wish to refer to our prior client publication, available at Shearman & Sterling, *FIFA and BHP Billiton: The Unique FCPA Challenges Present In International Sports* (June 15, 2015).

Recent Trends and Patterns in FCPA Enforcement

Foreign Political Parties

The FCPA is most commonly discussed in the context of its prohibition against offering or making illicit payments to a "foreign official." Less commonly discussed is that the FCPA separately prohibits individuals and companies from offering or making illicit payments to "*any foreign political party*" irrespective of whether a specific individual is offered or receives the payment. The SEC's enforcement action against Hitachi highlights this often ignored component of the FCPA.

In *Hitachi*, the SEC accused the Japanese conglomerate of unlawfully passing funds to a joint venture partner that operated as a front company for the African National Congress, South Africa's ruling party. Although, likely due to jurisdictional issues, the SEC charged Hitachi only under the FCPA's books-and-records provisions and not its anti-bribery provision, the SEC's complaint made clear that the Commission's action was predicated on unlawful payments to a political party: Hitachi's "books and records did not reflect that the [funds were], in fact, an amount due for payment to a foreign political party in exchange for its political influence in assisting Hitachi land two government contracts." Thus, *Hitachi* is a reminder that companies should be cognizant of the possible FCPA risks when doing business with foreign political parties as a whole, not simply individual foreign officials.

Anything of Value

Since 2013, several Wall Street investment firms have reported investigations by the DOJ and SEC over allegations that the firms hired the children of well-connected government officials and clients to win business. In the first enforcement action arising out of the so called "Princeling Investigations," *BNYM* breaks new ground.

In most FCPA cases where a family member of a foreign official was hired by the defendant corporation (*e.g.*, *UTStarcom*, *DaimlerChrysler*, *Siemens*, and *Tyson Foods*), the family member was used as a conduit to funnel monetary payments to the foreign official. In other cases, such as *Schering-Plough* and *Eli Lilly*, while no tangible benefit was conveyed to the foreign official, the companies were charged with violating the FCPA after making charitable donations to a foundation managed by the official to obtain business. Significantly, the companies in *Schering-Plough* and *Eli Lilly* were only charged with violating the books-and-records and internal controls provisions of the FCPA, leaving the question open as to whether an intangible benefit, such as a charitable donation or the knowledge that a child was hired by a Wall Street bank, could actually violate the FCPA's anti-bribery provisions. According to the SEC, its enforcement action against BNYM answers the question in the affirmative.

In *BNYM*, the bank was accused of violating the FCPA's anti-bribery provision after it provided a series of internships to the family members of a pair of officials at a Middle-Eastern sovereign wealth fund to maintain its current relationship with the fund and secure future business. Under the SEC's theory, the indirect benefit of providing a family member a prestigious internship was sufficient to satisfy the "anything of value" element of the FCPA. In our view, this theory is problematic and flies in the face of the statute's clear and unambiguous language, that to violate the statute a person must conduct an "act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money [or] the giving of anything of value *to* any foreign official." Given the novelty of the SEC's theory, we have to ask whether, if tested in court, the SEC's reading of the statute is a step too far. Indeed, despite the broad scope of the term "anything of value," the statute clearly requires that "anything of value" be offered, promised, paid, or given *to* the foreign official. It is unlikely that Congress ever intended for the FCPA to be applied to benefits offered to third parties that were not passed on to the foreign official and simply made the official "feel good" about the company providing the benefit. As many commentators have already pointed out, the practice of securing jobs and employment through family connections (whether rightly or wrongly) exists in nearly every industry in the United States and around the world.

In some ways, this may be a case of bad alleged facts making bad law. The SEC appears to justify its case against BNYM by alleging that the internships were shams and that the family members who received the positions were not qualified and performed poorly. While these details may have atmospheric value, the legitimacy of the position and qualifications of the family member are irrelevant to question of whether a foreign official was offered or received "anything of value." Under the SEC's theory, even if the internships were entirely legitimate and the family members were well qualified, the subjective benefit received by a foreign official would technically be sufficient to trigger FCPA liability. Indeed, this specific issue may be presented in the other "princeling" investigations, many of which appear to involve real jobs and real internships given to qualified and highly educated scions of senior Chinese officials, forcing the SEC and the

DOJ to decide just how far they are willing to stretch the language of the statute to reach conduct potentially intended to influence officials but which does not involve conveying a tangible benefit, directly or indirectly, to the official.

In the end, whether offering the family member of a foreign official a job leads to an FCPA violation may be more of a question of how the DOJ and SEC choose to enforce the law rather than what the statute actually says. It is fairly uncontroversial to hold that providing a scholarship to a foreign official's child is conveying a benefit to the official—on the basis that otherwise the official would have had to pay tuition out of his own pocket. A similar theory supports application of the statute to providing "no show" jobs to officials' family members and dependents. The *BYNM* case raises the issue of whether the same rule ought to apply to providing internships and jobs to allegedly unqualified and underperforming relatives, but, if so, the government's allegations would appear to omit several critical facts, *e.g.*, whether the job recipients were otherwise dependent upon the official, whether they were known to be unqualified before being employed (or only performed unsatisfactorily after being hired), whether the internal discussions at the company anticipated that the job recipients would be unqualified, would be held to different standards, and would not be expected to work, etc.

Moreover, the government's approach is bad policy. For better or worse, some of the most educated and most qualified potential hires in many countries are the children of government officials—individuals who benefited from their parents' privileges and had the opportunity to attend prestigious schools, learn foreign languages, etc. If the government infers an intent to apply corrupt influence from the potential hire's relationship to government officials, it is likely to chill hiring of such individuals, resulting in a completely unnecessary disadvantage to U.S. and other companies covered by the FCPA.

Jurisdiction

According to the FCPA Guide published by the DOJ and the SEC staff, individuals or companies can be found guilty of conspiracy to violate the FCPA "even if they are not, or could not be, independently charged with a substantive FCPA violation." This application of U.S. criminal law allows the DOJ and SEC effectively to enforce the FCPA against individuals or companies that are not (i) issuers or (ii) domestic concerns or, (iii) did not take actions in furtherance of a corrupt payment within the United States (*i.e.*, the three jurisdictional bases of the FCPA). By way of an example, the FCPA Guide states: "For instance, a foreign, non-issuer company could be convicted of conspiring with a domestic concern to violate the FCPA." This theory was used to prosecute the three non-U.S. companies in the TSKJ consortium, by alleging that each of them had conspired with KBR to bribe Nigerian officials. In those actions, although the DOJ and SEC hinted at a more expansive view of territorial jurisdiction over non-U.S. companies, the facts carefully articulated conspiratorial meetings in the United States.

In the ongoing proceedings leading up to the government's prosecution of the former Alstom official, Lawrence Hoskins, Judge Janet Bond Arterton (D. Conn.) recently threw the DOJ's and FCPA Guide's theories on the government's authority to charge an individual with conspiracy to violate the FCPA into question. In its charging documents, the DOJ alleged *inter alia* that Hoskins was guilty of conspiring to violate the FCPA because he acted in concert with a U.S. subsidiary of Alstom to pay bribes to officials in Indonesia. Upon reviewing Hoskins' motion to dismiss, Judge Arterton concluded that for the DOJ to make its case for conspiracy, the DOJ would have to show that the defendant met one of the three jurisdictional bases of the FCPA. According to Judge Arterton, "[t]he clearest indication of legislative intent is the text and structure of the FCPA, which carefully delineates the classes of people subject to liability and excludes nonresident foreign nationals where they are not agents of a domestic concern or did not take actions in furtherance of a corrupt payment within the territory of the United States." In so ruling, Judge Arterton has provided valuable guidance on how both the government and defendants should understand the application of conspiracy jurisdiction to the FCPA.

Modes of Payment

The 2015 FCPA enforcement actions have generally exhibited schemes similar to those seen in the past. As with most alleged bribery schemes, the issues concerning the modes of payment are (i) how the defendant acquired the funds to be used as bribes and (ii) how the defendant funneled those bribes to a foreign official.

Fictitious Receipts/Invoices/Contracts. Goodyear and *Bristol-Myers* provide examples of how companies and their employees are able to secure funds used for bribes through the submission of falsified reimbursement forms or receipts. Beginning with *Goodyear*, the SEC

cited two methods by which Goodyear's subsidiaries acquired the funds to pay the alleged bribes. In the case of Goodyear's Kenyan subsidiary, managers and directors are alleged to have approved phony payments for promotional products and instructed the finance department to write-out checks in cash. After the checks were cashed, the money was allegedly used as bribes to foreign officials. In the case of Goodyear's Angolan subsidiary, a former manager falsely marked-up the cost of the subsidiary's tires by adding phony custom and clearance costs to the invoices. When the tires were sold, the mark-ups were used to bribe officials through direct payments and wire transfers. Similarly, in *Bristol-Myers*, company employees were accused of falsifying reimbursement claims to acquire funds used to pay rebates, provide entertainment, and fund gift cards for foreign officials.

Kickbacks. In *PBSJ/Hatoum* and *IAP/Rama*, the funds used for the alleged improper payments were derived from the profits generated by the project contracts obtained through bribery. For example, in *PBSJ/Hatoum*, the defendants used a large percentage of the profits from two construction projects to bribe a senior Qatari official. The funds were subsequently transferred through a local subcontractor that was controlled by the foreign official. Similarly, in *IAP/Rama*, the defendants allegedly used approximately 50% of the profits from a service contract to bribe Kuwaiti foreign officials. The payments were made through a relatively sophisticated kickback scheme whereby funds were transferred through several entities.

Family Members. The use of family members to funnel and conceal bribe payments continued to be a common mode of payment in the 2015 enforcement actions. As mentioned above, in *PBSJ/Hatoum*, the defendants funneled the alleged bribe payments to the foreign official through a local subcontractor. In a further attempt to conceal the alleged bribes, Hatoum allegedly arranged for PBSJ to open a joint bank account with the local subcontractor to which the foreign official's wife had access. Similarly, in *Rincon*, the DOJ accused the defendants of wiring funds to bank accounts controlled by the relatives of the foreign officials as a means of funneling the illicit payments to the foreign officials without detection. Lastly, in *Harder*, the defendant is alleged to have funneled bribes to the foreign official by wiring the funds to a bank account controlled by the foreign official's sister.

Gifts and Travel. In *FLIR* and *BHP Billiton*, the companies were liable for violating the FCPA as a result of improper gift giving. While FLIR's conduct was the result of purposeful acts of a pair of employees who offered foreign officials extravagant travel and gifts, the violations in *BHP Billiton* were the result of a hospitality program that the company failed to appropriately monitor and detect whether foreign officials (with the ability to influence BHP Billiton business) were being offered travel and entertainment during the 2008 Summer Olympics in Beijing. While *FLIR* indicates that the government is willing to initiate enforcement actions against companies purely on the basis of improper gift giving, *BHP Billiton* exhibits that the failure to appropriately monitor hospitality programs can unwittingly lead to FCPA liability.

Product Discounts. Both *Garcia* and *Mead Johnson Nutrition* exhibited how defendants were able to use product discounts, offered to third-party partners or distributors, to generate funds used to pay bribes. Specifically, according to the SEC's cease-and-desist order against Garcia, Garcia was able to generate the funds allegedly used to bribe Panamanian officials by securing a high discount on the sales price of SAP software for a local partner who in turn would resell the software to the Panamanian government at the normal price. Because the profit margins from the sale of SAP software to the Panamanian government were so high, portions of the profits were used as a bribe.

Similarly, in *Mead Johnson Nutrition*, the company's Chinese subsidiary sold its products to local distributors at a discounted price. The local distributors used the additional profit margins, allegedly at the company's direction, to provide employees of government owned hospitals cash and other benefits in exchange for recommending Mead Johnson Nutrition's products.

Foundations. The SEC's enforcement action against Louis Berger International provides an example of how a company allegedly used a charitable organization to funnel bribe payments to foreign officials. Although the allegations contained in *Louis Berger International* are many, in Vietnam, Louis Berger International officials allegedly disguised bribe money as "donations," which were paid to a local non-government organization that Louis Berger International engaged as its local sponsor to secure labor and operation support.

Success Fees/Commitment Fees/Agency Fees. A number of the 2015 FCPA enforcement actions, including *Harder*, *Louis Berger International*, and *Hitachi*, illustrated examples of how companies attempted to mask bribe payments by referring to them as "success fees," "commitment fees," "agency fees," etc. As the DOJ highlighted in its DPA with Louis Berger International, the company allegedly

paid "commitment fees" and "counterpart per diems" in Indonesia in connection with contracts with the government. After the company began its internal investigation, an internal email directing scrutiny at the alleged wrongdoers stated that a "[c]ommittment fee is the misnomer for bribe money." In *Harder*, the DOJ claims that a portion of the bribes were derived from "success fees" that Harder and his company, Chestnut Group, received in exchange for securing financing from the EBRD on behalf of his clients. In *Hitachi*, the company allegedly entered into a side agreement with its joint venture partner—an entity controlled by the ruling party in South Africa—where Hitachi would pay the joint venture partner a "success fee" in the event Hitachi was able to secure a contract award with the assistance of the partner (and by inference the political party).

Compliance Guidance

Yates Memo

On September 9, 2015, the DOJ released, under the signature of Deputy Attorney General Sally Yates, a memo that expounded on its position *vis a vis* cooperation credit for corporations. Although viewed by some as a change to the DOJ's policy, the Yates Memo is more in the nature of emphasizing the Department's long-standing expectations that its prosecutors should pursue *both* corporate and individual wrongdoers and that corporations purporting to cooperate may not protect, and indeed must disclose, the identity of wrongdoing executives, employees, and individuals (sometimes referred to as "throwing under the bus" or "diming out"). In short, the Yates Memo outlined six steps that prosecutors would be expected to follow when investigating and pursuing charges against corporations. Each of these steps was aimed at the Department's overarching goal of increasing the number of prosecutions and convictions of individuals for corporate wrongdoing. Key among the steps was the requirement that prosecutors only give corporations credit for cooperating with a DOJ investigation if the corporation provides "all relevant facts relating to individuals responsible for the misconduct." While there has been a significant amount of commentary on the Yates Memo already (which we won't rehash here), there are a few takeaways that we thought important to highlight.

First, the Yates Memo is not a sea change; it simply documents what has for a long time been relatively common practice at the DOJ. If anything, this year's collection of FCPA enforcement actions, where the DOJ (and SEC) have brought charges against both the company and employees on multiple occasions, is only further evidence that the Yates Memo memorializes a practice that was already well understood at the Fraud Section and in many U.S. Attorneys Offices. What the Yates Memo will change, however, is the timing of certain stages of a corporation's cooperation and the government's parallel investigations. Where prosecutors may have in the past allowed corporations to proceed at a relatively leisurely pace, comforted by the corporation having executed an agreement tolling the statute of limitations, they will now be required to state, at the charging stage, whether there are any individuals who should or could have been charged, when those individuals will be charged, and if those charges are not forthcoming, why not. This obviously puts pressure on the prosecutors to demand more fulsome information earlier on in the process concerning the individuals who were, or might be, culpable.

Second, the most common issue raised by the Yates Memo is whether the requirement that companies turn over the names of those individuals responsible for the wrongdoing will make it more difficult for companies to investigate the misconduct and cooperate with the DOJ. Won't the Yates Memo cause employees to engage their own personal attorneys at an earlier stage in the investigation, thereby inhibiting the company's access to the facts and raising investigation costs? What if a company, after conducting a good-faith investigation, simply cannot identify the wrongdoers?

While these are possible scenarios, we anticipate that they will be few and far between and won't dramatically impact the way current corporate investigations are managed, at least with respect to investigations of U.S. companies. For example, if an employee is savvy enough to engage counsel, we suspect that the employee would have done so with or without knowledge of the Yates Memo. However, for non-U.S. companies, particularly those located in jurisdictions with more rigid protections of personal data and employee rights, the knowledge that a company's investigation may result in his or her identity being given to the U.S. government and potentially result in a criminal prosecution may well create obstacles that will have to be carefully navigated.

Third, although there may be prosecutors who are content to allow companies to bring cases to them and not do more, most prosecutors are already considering whether to prosecute individuals and will view any effort to protect individuals as evidence of obstruction and lack of cooperation. On the other hand, the lack of a flood of FCPA individual prosecutions is reflective of the difficulty of these cases—of

finding credible witnesses, identifying admissible documentary evidence, and obtaining cooperation from foreign governments—difficulties well demonstrated by some of the trial setbacks suffered by the DOJ over the past several years. The Yates Memo acknowledges this difficulty generally and carefully makes it clear that the DOJ is not expecting prosecutors to bring weak cases simply for the sake of bringing of cases—indeed, to do so *would* be a change in policy and contrary to the *Principles of Federal Prosecution*. Thus, although we do expect to see prosecutors demanding that cooperating corporations provide more information concerning individuals and earlier in the process than before, we do not expect the Yates Memo will necessarily result in a substantial increase in the quantity of individual prosecutions.

Finally, a potentially unforeseen upside to the Yates Memo is that the government's more outlandish prosecutorial theories will now be more likely tested in court rather than acceded to in negotiations. The plain fact is that the ultimate consequence for corporations is financial, while individuals face a real chance of jail time and are thus more likely to take the government to trial. Given the DOJ's and SEC's difficulties in pursuing charges against individuals, as mentioned above, we anticipate that more individual defendants will be emboldened to put the Department to its burden and take their cases to trial, particularly senior executives with access to directors and officers insurance who can fund an aggressive defense. Accordingly, we expect that the DOJ's and SEC's interpretation and application of the FCPA will be tested by the U.S. courts, removing the DOJ's and SEC's ability to act as the sole interpreters of the FCPA and providing some clarity in areas now subject to prosecutorial discretion.

Overall, while companies are well advised to take note of the Yates Memo and should make concerted efforts to identify any wrongdoers, it is important not to overreact. Companies need to make good-faith efforts to investigate the conduct and report their findings to the DOJ and SEC—as has always been the case.

Corporate Sponsorships and Global Sport

As we have discussed elsewhere,[9] the DOJ's recent charges against officials at FIFA (although not an FCPA enforcement action) along with *BHP Billiton*, indicate the FCPA risks companies may face when assessing how to acquire and utilize corporate sponsorships for major sporting events.

In *FIFA*, the DOJ's charges revolve around how a group of sports marketing agencies allegedly paid bribes to FIFA officials to acquire valuable marketing rights from FIFA and then resold those rights to various media outlets, beverage companies, and apparel manufacturers. In some instances, the DOJ claims that the sports marketing agencies acted on behalf of companies to directly negotiate the terms of a sponsorship agreement with FIFA. The DOJ and SEC have made clear that the use of an intermediary to pay bribes for foreign officials will not shield a company from liability in the event the company should be aware of a "high probability" that improper payments will be made. Thus, companies engaging intermediaries to secure sponsorships or other marketing rights on their behalf have been warned. Proper third-party due diligence is key to detecting red flags and determining whether a third-party intermediary, like a sports marketing agency, places the company at risk of violating the FCPA. As the DOJ's allegations involving corruption at FIFA continue to play out in the news, companies who rely upon corporate sponsorships of major sporting events to promote their goods and services must be increasingly vigilant in overseeing how those sponsorships are acquired.

The case of *BHP Billiton* exhibits a different type of FCPA risk posed by corporate sponsorships. While *FIFA* highlights the need for companies to scrutinize how corporate sponsorships are acquired, *BHP Billiton* underscores that companies must ensure that it implements proper oversight over how those corporate sponsorships are utilized to generate business to avoid running afoul of the FCPA. In *BHP Billiton*, the British-Australian mining company became an official sponsor of the 2008 Summer Olympic Games in Beijing, China after agreeing to provide the raw materials for the Olympic medals and financial support. The sponsorship granted BHP Billiton priority status to event tickets and luxury accommodations. To make use of its sponsorship, BHP Billiton developed a hospitality program that would allow employees to extend invitations to individuals who could advance the business interests of the company. However, BHP Billiton failed to properly oversee the program, causing several employees to extend invitations to foreign officials with the

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[9] For a further discussion of these issues, you may wish to refer to our prior client publication, available at Shearman & Sterling, *FIFA and BHP Billiton: The Unique FCPA Challenges Present In International Sports* (June 15, 2015).

ability to influence ongoing BHP Billiton business interests. The SEC concluded that BHP Billiton's failure to properly administer its hospitality program violated the FCPA. Accordingly, even after a company acquires a corporate sponsorship, it must ensure that it implements appropriate policies and procedures to ensure that the benefits of the sponsorship are not utilized in a manner that will risk generating FCPA liability.

BHP Billiton reflects many of the same issues the SEC highlighted in its 2014 case against HP where the Commission accused several of HP's European subsidiaries of violating the FCPA by providing government officials with tens of thousands of dollars' worth of travel and entertainment benefits in connection with the 2006 World Cup in Germany. According to the SEC's cease-and-desist order, HP's subsidiaries were able to provide these benefits in spite of a clear directive by the company not to invite foreign officials. The company's failure to detect and prevent this conduct *inter alia* resulted in a $58.8 million fine.

Overall, cases such as *FIFA*, *BHP Billiton*, and *HP* (not to mention the corruption allegations involving the 2002 Winter Olympics in Salt Lake City) continue to demonstrate that global sport is all too often a beacon for corrupt conduct. When engaging in business connected to a high-profile sporting event such as the World Cup or the Olympic Games, companies must ensure that they have adequate internal controls to monitor the conduct of their employees and to safeguard against any unwitting violations of the FCPA.

Self-Reporting

Among the key themes promoted by government officials over the course of 2015 is the necessity of self-reporting and how it impacts the government's decision to charge a company for violating the FCPA. In May 2015, DOJ Fraud Section Chief Andrew Weissmann provided the following comments:

> [W]hat does one get for voluntarily self-disclosing a crime? Why not just wait to see whether law enforcement—whether here in the U.S. or overseas—discovers the wrongdoing? Having been outside counsel, I am aware that that question gets asked, and is not always answered in the way we in the government want it to be, why disclose? Why not stay mum and see if it gets discovered and then if necessary cooperate to mitigate the damage. . . .
>
> <u>The carrots</u>: you have seen and will increasingly see what you get for voluntary self-disclosure in terms of each decision that we have to make—form of disposition, fine, and monitor. There will be a meaningful gap between those companies that voluntary [*sic*] self-disclose and those who don't, and seek to fully cooperate only once caught. Although the latter will still get some credit, it will rarely be commensurate in type or degree to the benefits accorded to those who voluntarily self-disclose, who will greatly increase the odds of a declination, no monitor or a significantly reduced fine . . .
>
> <u>That is the carrot. There is a stick as well</u>. The stick is that if a company does not voluntarily self-disclose you cannot expect to make it up with then cooperating—that is no longer going to cut it. And in this day and age don't bank on not getting caught.

A similar sentiment has been made by SEC officials such as Andrew Ceresney, Director of the SEC's Division of Enforcement who stated in a recent speech: "companies are gambling if they fail to self-report FCPA misconduct." The U.K. SFO echoed these statements noting that, while there may be a range of outcomes stemming from a violation of the U.K. Bribery Act, it is "overwhelmingly in [a company's] best interests to engage with [the SFO] early and to do so fully, honestly and with integrity." Indeed, among the most critical factors to affect the SFO's decision to offer Standard Bank a DPA and the U.K. court's decision to approve the agreement, was the company's decision to self-report the conduct.

As Weissmann and Ceresney (as well as the U.K. authorities) make clear, the DOJ and SEC will continue to treat a company's decision to voluntarily disclose misconduct as a key factor when deciding whether and how to resolve an enforcement action against a company. However, as mentioned above, the DOJ's charging decision in *IAP*, made only a few weeks after Weismann's comments above, may muddy the waters over the benefits of self-disclosure, as it does not appear that the company self-reported the violations to the DOJ. While it is possible that IAP could have received a declination or lower monetary penalty if it had voluntarily disclosed the bribery scheme,

the DOJ's failure to explain this element of its charging decision in *IAP* still leaves some lingering questions for the FCPA bar.

By contrast, the SEC's enforcement action against *BHP Billiton* sent a clearer message. BHP Billiton did not appear to self-report, and as a result received a $25 million civil penalty (the highest single corporate sanction in 2015). The severity of the $25 million civil penalty is all the more striking given the fact that BHP Billiton did not appear to profit from the alleged wrongful conduct.

Multi-Jurisdictional Investigations and Information Sharing

Multi-jurisdiction investigations and prosecutions are here to stay and, as a result, companies may be venturing into uncharted territory. According to a study performed by Trace International, non-U.S. enforcement actions have more than doubled in recent years. Agencies in the U.K., Canada, Brazil, China, Germany, and Australia, to name a few, all appear to be pursuing bribery related charges both domestically and abroad. As a result of the uptick in anti-bribery enforcement activity around the world, the DOJ and SEC have highlighted a growing willingness to exchange information between foreign governments.

With the increasing amount of information sharing, companies may feel less inclined to voluntarily disclose misconduct to the DOJ and SEC if doing so would risk a regulatory pile-on. While the DOJ has exhibited a nuanced approach to overly penalizing companies for anti-bribery violations (see the above discussion of the DOJ's recent declinations), there is an open question as to how other foreign agencies, with their own enforcement priorities and limited experience in resolving corporate prosecutions, will manage the increased information sharing.

That said, the recent cooperation between the U.K. SFO, SEC, and DOJ over the SFO's most recent DPA with Standard Bank for violations of the U.K. Bribery Act is reason to be optimistic. As explained in Lord Justice Levenson's approved judgment of the SFO's DPA, the SFO consulted with the DOJ to confirm that the financial sanction in the SFO's DPA would have been comparable to the sanction U.S. authorities would have imposed had the matter been dealt with in the United States. In light of the SFO's DPA, the SEC imposed a $4.2 million penalty against the Bank without seeking any additional penalties, which it claimed would have been appropriate but for the SFO's action. For its part, the DOJ declined to bring any charges against the bank.

Notwithstanding the companies' legitimate fears, although caution is certainly warranted, general counsels should not automatically reject offering cooperation out of fear that the company will be prosecuted by multiple enforcement agencies for the very same conduct. While we have yet to see how enforcement agencies will manage overlapping anti-bribery violations, there is hope that enforcement agencies will coordinate to limit over-penalizing companies.

Specific Compliance Failures

Some of the FCPA compliance actions in 2015 provide notable examples of what companies should try to avoid.

Lack of Oversight. As mentioned above, the case of *BHP Billiton* is a classic example of how a company's failure to adequately oversee its hospitality programs can unwittingly expose the company to FCPA liability. In *BHP Billiton*, the company established a hospitality program through which employees at the company could invite "key stakeholders" across Asia and Africa to the 2008 Olympics in Beijing. However, BHP Billiton failed to ensure that the appropriate polices and procedure were put in place to prevent invitations from being sent to foreign officials with the ability to influence BHP Billiton's business interests. Key to the company's oversight failures were the: (i) failure to establish an independent oversight board that would review all potential invitations (in particular, placing business managers in the position of reconciling competing business and compliance interests); (ii) failure to ensure that the appropriate forms were filled out completely and accurately; (iii) failure to provide training on how to complete the forms and how business managers should evaluate the invitations; (iv) failure to institute a procedure for updating the invitations if the status of a particular invitee changed such that the individual (if a foreign official) was able to affect BHP Billiton business interests; and (v) the failure to implement any method for determining whether invitees, who also happened to be foreign officials, were party to ongoing negotiations involving BHP Billiton.

Failure to Detect Red Flags. In *PBSJ*, the SEC listed a series of red flags which it claims, if detected, would have led the company to uncover the bribery scheme at an earlier point in time. The red flags include: (i) PBSJ Int'l was known to have been receiving confidential

sealed bid information; (ii) the individual responsible for the bribery scheme, Waleed Hatoum, informed multiple PBSJ and PBSJ Int'l employees that he was receiving information from a "good friend" and "top executive" of the government ministry responsible for awarding the contract; (iii) an officer of PBSJ Int'l learned of the connections between the foreign official and a local partner used as a subcontractor by PBSJ Int'l (the local subcontractor was allegedly used to funnel bribes to the foreign official); and (iv) a PBSJ employee was aware that certain "agency fees" made to the local partner were disguised within the initial costs of a project bid.

Failure to Remedy Known Misconduct. *Bristol-Myers* and *Hitachi* are each examples of cases where companies were aware of the wrongful conduct but failed to take action or were willfully blind. In *Bristol-Myers*, the SEC stated that it was an "open secret'' that employees frequently provided Chinese healthcare officials at state-owned hospitals with various benefits, such as cash, gifts, entertainment, etc., in exchange for recommending the company's products. Notwithstanding the "serious allegations of potentially widespread bribery practices, [the company] did not investigate these claims." In *Hitachi*, the alleged bribery scheme centered on a joint venture between Hitachi and an entity called Chancellor House Holdings (Pty) Ltd., a front company for the African National Congress—South Africa's ruling party. In short, Hitachi agreed to pay certain funds and profits from any successful energy project tenders to Chancellor in exchange for Chancellor's willingness to use its political connections to steer business to Hitachi. Hitachi continued with the arrangement even after the South African press publicly reported that the African National Congress's Secretary General admitted that Chancellor was used as a front company. That Hitachi's leaders and compliance officials allegedly did not take action after such an admission was viewed by the SEC as indicative of a lack of internal controls.

Failure to Trace Funds. In *Hyperdynamics*, the company was found liable for FCPA books-and-records as well as internal controls violations after it was unable to trace how $130,000 in funds was used. Specifically, the SEC alleged that Hyperdynamic's Guinean subsidiary paid $130,000 for public relations and lobbying services to two entities—BerMia Service SRL and Africa Business Service. Later, Hyperdynamics discovered that a local employee controlled BerMia and was the sole signatory of Africa Business Service. After discovering the conduct, Hyperdynamics could not determine how BerMia or Africa Business Service used the funds and whether Hyperdynamics received anything in return. The SEC faulted Hyperdynamics because there was no evidence to suggest the funds were used towards public relations or lobbying services. *Hyperdynamics* is a reminder that even the most granular of details could give rise to FCPA liability and that accurately documenting and recording a company's expenses is among the first lines of defense.

Unusual Developments

In our most recent *Trends & Patterns*, we have included brief summaries of trends not easily categorized under a single theme. Generally speaking, these developments mark a continuing pattern or shift in FCPA or foreign anti-bribery law enforcement practices.

Changes at the DOJ Reflect a New Dynamic in FCPA Enforcement

On January 9, 2015, the DOJ announced that it would appoint Andrew Weissmann, a former U.S. Assistant Attorney and former head of the Enron Task Force, to serve as the Chief of the DOJ's Fraud Section. Weissmann's appointment is interesting because he was among the principal authors of the U.S. Chamber of Commerce's 2010 white paper "Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act," which criticized current FCPA enforcement practices of the DOJ and SEC and called for an amendment to the statute by adding a compliance defense.

A few months later, on April 23, 2015, former U.S. Attorney for the Eastern District of New York, Loretta Lynch, was appointed as Attorney General of the United States. As U.S. Attorney for the E.D.N.Y., Lynch oversaw multiple high profile FCPA investigations including *Garth Peterson/Morgan Stanley*, *Comverse*, and *Ralph Lauren*. Most recently, Lynch, acting as Attorney General, announced the indictment of multiple officials at FIFA, an investigation that she was responsible for managing during her tenure in the E.D.N.Y.

Weismann's previous criticisms of the FCPA during his time in private practice coupled with Lynch's pro-FCPA enforcement stance have led some to question whether conflicts could arise at the DOJ. In fact, during Lynch's Senate confirmation hearing, Senator Ted Cruz of Texas specifically questioned Lynch on Weissmann's comments in his white paper for the U.S. Chamber of Commerce. When asked whether she agreed with Weissmann, Lynch replied, "I do not support the proposed changes," adding later on:

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> Several of them would be a significant departure from general principles of corporate criminal law, effectively creating unique exceptions for FCPA cases that are unwarranted, are contrary to Congress's intent in enacting the FCPA, and would impose often insurmountable obstacles to effective enforcement of the FCPA.

While even we find this new dynamic at the DOJ intriguing, we doubt that any substantial changes in current FCPA enforcement policy will be made. For example, the *Washington Post* recently reported that a policy had been circulated internally that would have provided for immunity for companies that self-reported FCPA violations, albeit with some conditions. Although this policy apparently advanced through several stages at the DOJ, it was eventually tabled due to objections from prosecutors within the Department.

Increased Enforcement Resources

If there was ever any question that FCPA enforcement has become a government priority, the additional resources that the DOJ and FBI have added to enhance FCPA enforcement should dispel all doubts.

First, on March 30, 2015, the FBI announced that it established, in conjunction with the DOJ, three separate "international corruption squads" housed in the FBI's field offices in New York City, Los Angeles, and Washington D.C. The result is that the FBI has more than tripled the number of agents dedicated to investigating overseas bribery to more than thirty from approximately ten (and from even less ten years ago).

Second, on July 30, 2015, the DOJ confirmed that it would hire a compliance expert to assist the Department to assess whether companies have implemented good-faith and effective compliance programs, and whether, as a result, the company should be the subject of an FCPA enforcement action. Later, in September 2015, it was reported that Hui Chen, former head of compliance at Standard Chartered Bank and assistant general counsel at Pfizer, had been appointed to the position. Chen has only recently taken up her position; the focus of attention will be whether the appointment of a single compliance expert at the DOJ will allow for flexibility in the design of customized compliance programs by companies.

Third, in a speech by Assistant Attorney General Leslie Caldwell on November 17, 2015, the DOJ announced that it intended to add ten new prosecutors to the Fraud Section's FCPA unit—doing so would increase the size of the unit by 50 percent.

These new resources mean that the Department remains committed to FCPA enforcement, and that companies should continue to remain vigilant in ensuring that acts of corruption and bribery are not committed by their directors, officers, and employees.

SEC Admissions

In the wake of much-publicized criticism by federal district court judges such as Judge Jed Rakoff (S.D.N.Y.), the SEC announced in 2013, with great fanfare, that similar to the DOJ's practice it would demand that companies settling with the SEC would be required, under certain circumstances, to admit culpable facts rather than settle on a "neither admit nor deny" basis. However, as a matter of practice, at least in FCPA cases, companies have only been required to admit to those facts already admitted in parallel DOJ proceedings. In 2015, we saw a slight twist on the SEC's admissions practices, when the SEC required Standard Bank to admit to the same facts it admitted in the SFO DPA. Of the other nine cases brought by the SEC this year, none of the companies were required to admit to culpable facts.

The SEC's decision to require Standard Bank to admit to wrongdoing in its enforcement action against the company should not be interpreted as a sign that the Commission may require a greater number of admissions in the future. Instead, it is simply an example of the SEC's ongoing admissions practices. Thus, notwithstanding the announcement that the SEC would require more companies to admit to culpable acts, the SEC has continued to make achieving settlements a priority over requiring admissions and we see no reason to believe this practice will change going forward.

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Petrobras

Few within the FCPA field have not heard of the current corruption scandal and investigation encircling Petrobras, the Brazilian semi-state-owned energy company. Given the size and scale of the Petrobras scandal, we would be remiss not to mention it here.

As a brief summary, in October 2014, Brazilian authorities arrested a former Petrobras director in connection with an ongoing money laundering investigation. The investigation led to the discovery of numerous irregularities between the director and Petrobras, leading to a formal investigation into the company that has come to be known as "Operation Carwash," which reportedly revealed a massive bribery scheme. According to press reports, Petrobras executives allegedly inflated construction and engineering contracts and funneled any excess profits (originating from a series of gas stations) to various politicians and Petrobras executives.

Since the announcement of the investigation in October 2014, the scandal has ballooned, implicating prominent politicians (including current and former heads of state) and business executives with reports alleging that over a billion dollars in kickbacks have been distributed through the scheme. The scandal has attracted the attention of numerous foreign enforcement agencies including the SEC and DOJ, leading to investigations into the operations of several other prominent global engineering firms with business operations in Brazil. The repercussions of the scandal have been so great that many argue that it has, in part, been responsible for the current downturn in the Brazilian economy. With the 2016 Summer Olympic Games in Rio de Janeiro on the horizon, expect to hear more about the scandal in the future.

Undercover Cooperating Defendants

Among the key pieces of evidence in the *Sigelman* trial was a wire recording of the defendant, Joseph Sigelman, by his former business accomplice and cooperating witness for the government, Gregory Weisman. Weisman, the former general counsel for PetroTiger, agreed to plead guilty to one count of conspiracy to violate the FCPA in exchange for serving as a cooperating witness against Sigelman.

The wire recording in *Sigelman* marks the third time since 2013 that the government has publically indicated it used wire recordings from cooperating witnesses to procure evidence as part of an ongoing FCPA investigation. In the 2013 *BizJet* case, the DOJ revealed it used Peter DuBois, the former vice president of BizJet, as an undercover informant as part of his plea agreement. DuBois was said to have engaged in recorded conversations with former BizJet executives and "other subjects of the government's ongoing investigations." Also in 2013, the DOJ instituted charges against the French citizen, Frederic Cilins, for obstruction of justice in an ongoing FCPA investigation after Cilins was recorded trying to bribe a cooperating witness into destroying key documents.

Wiretaps and undercover agents have now become commonplace in white-collar investigations. Indeed, in his September 2014 speech, the then Principal Deputy Assistant Attorney General of the DOJ's Criminal Division, Marshall Miller, made clear that the Department was committed to the use of "proactive investigative tools" which included "wiretaps, body wires [and] physical surveillance." With the increase in investigatory resources at the FBI, it seems likely that the use of undercover cooperating witnesses will continue to proliferate among FCPA investigations in the future.

Industry Alerts: Healthcare and Financial Services

The 2015 enforcement actions have placed the spotlight on two particular industries: healthcare and financial services.

The 2015 enforcement actions against Mead Johnson Nutrition and Bristol-Myers mark yet another instance that the DOJ or SEC have accused the healthcare industry of FCPA violations (though *Mead Johnson Nutrition* and *Bristol-Myers* were both solely SEC enforcement actions). Indeed, since the 2002 enforcement action against the California-based radiopharmaceutical products and service provider, Syncor International Corporation, there have been more than a dozen different actions against healthcare companies for FCPA violations. Most commonly, the cases have been centered in China, including *Mead Johnson Nutrition* and *Bristol-Myers*, where employees of state-owned hospitals have received cash, gifts, and travel in exchange for recommending certain company products. With several ongoing investigations by the DOJ and SEC into the healthcare sector, expect to see yet more healthcare cases in the near future.

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Similarly, 2015 may mark the turning point for the financial services industry with the SEC's enforcement action against BNYM. The DOJ and SEC have long claimed that the financial industry would be the subject of increasing scrutiny, but to date the sector as a whole has remained largely unscathed (the major exceptions being *BNYM* and the ongoing prosecutions against the several officers, directors, and employees of the broker-dealer, Direct Access Partners). As the Director of the SEC's Enforcement Division, Andrew Ceresney, has indicated in past statements, with several ongoing investigations into the activities of multiple Wall Street firms, *BNYM* may be the first of many FCPA enforcement actions against the financial services industry.

Attorney-Client Privilege for Internal Investigations

The U.S. engineering and construction firm, Kellogg Brown & Root LLC, has been the subject of an ongoing *qui tam* action by a former employee who claims the company violated the False Claims Act by allegedly defrauding the U.S. government through inflated costs and accepting kickbacks while administering military contracts in wartime Iraq. Barko (the former KBR employee) sought discovery of documents generated as part of the company's internal investigation into the False Claims allegations. KBR refused to produce the documents, claiming that they were subject to attorney-client privilege while Barko claimed that the documents were unprivileged business records. In 2014, the lower court judge sided with Barko after it concluded that the primary purpose of the documents was not to obtain legal advice and therefore were not subject to the attorney-client privilege. On appeal, the Court of Appeals for the District of Columbia Circuit disagreed, holding that the documents were privileged according to Supreme Court precedent.

On remand to the district court, Barko argued, and the lower court agreed, that KBR waived the privilege by allowing an in-house attorney to review the documents from the internal investigation before his deposition and referring to the outcome of the investigation in a motion for summary judgment. KBR immediately appealed the decision and once again the D.C. Circuit overturned the lower court's ruling in August 2015. According to the Court of Appeals, KBR could not have waived privilege by allowing an in-house attorney to review documents generated by an internal investigation because "[a]llowing privilege and protection to be so easily defeated would defy 'reason and experience,' Fed. R. Evid. 501, and 'potentially upend certain settled understandings and practices' about the protections for such investigations." Further, the Court of Appeals found that the company did not waive the privilege by referring to the outcome of the investigation in a summary judgment motion because it considered the reference a recitation of the facts, not an argument in favor of KBR based on the contents of the privileged documents.

The upshot of the Court of Appeals' decision is that the attorney-client privilege will continue to protect documents generated over the course of an internal investigation from discovery. In doing so, companies will not feel constrained from performing comprehensive investigations into possible wrongdoing for fear that the documents generated could subject the company to civil liability in the future.

Divestment

Over the last several years, we have noticed that several companies who were the subject of FCPA enforcement actions or ongoing investigations into possible FCPA violations have begun to divest certain assets and operations in high-risk jurisdictions. In *Bio-Rad* from 2014, the SEC's cease-and-desist order noted that the company closed its operations in Vietnam after discovering the alleged bribe payments. Similarly, following the 2014 enforcement action against Layne Christensen, the company announced that it was shuttering business in Africa. In *Goodyear*, as part of the company's remedial efforts, the SEC credited the company for its decision to divest its ownership interests in its subsidiaries in Kenya and Angola where the bribery allegations originated. General Cable, Cobalt, and Key Energy, all the subject of ongoing investigations into possible FCPA violations, have decided to divest their business units in Africa, South America, and the Middle East citing the increased anti-bribery risks. The divestment decisions appear to be efforts by the companies to convince either the DOJ or SEC to refrain from bringing a possible FCPA enforcement action. If the cost of an FCPA enforcement action outweighs the potential loss of revenues from a business unit in a high risk jurisdiction (after considering the difficulties a company may face in implementing an effective compliance program for the unit), then a company may be inclined to abandon those operations. While these decisions are company specific and influenced by a wide variety of factors, we have to wonder whether by offering companies the option of divesting a business unit in exchange for a less severe penalty, the DOJ and SEC are actually furthering the goals of the FCPA—*i.e.*, giving companies reason to improve their anti-corruption efforts, not incentives to close down businesses.

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Private Litigation

Consistent with past years, 2015 saw a number of derivative and securities lawsuits stemming from disclosures over FCPA investigations and enforcement actions. However, a few noteworthy cases highlight a pair of ongoing civil litigation trends. These include developments associated with (1) a trio of civil forfeiture actions brought by the United States against assets allegedly related to corrupt payments and (2) a pair of FCPA related private employment lawsuits arising under the whistleblower protections contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act. We discuss these developments below.

First, 2015 saw the initiation or closure of three notable forfeiture cases arising out of allegedly corrupt payments from business operations in Uzbekistan, Chad, and Kazakhstan. On June 6, 2015, the U.S. government filed an *in rem* action seeking the forfeiture of $300 million in assets, allegedly traceable to corrupt payments and money laundering in violation of the FCPA and other federal laws, held in an account at the Bank of New York Mellon. The complaint alleges that these assets were derived from bribes paid to a relative of the President of Uzbekistan. According to press reports, the forfeiture action is related to an ongoing investigation by the DOJ and SEC into the global telecommunications companies, Vimpelcom Ltd., Mobile TeleSystems PJSC, and TeliaSonera AB, and is part of a broader effort by U.S. authorities to seize approximately $1 billion in assets associated with the corruption probes.

On June 29, 2015, the U.S. government filed a forfeiture action against approximately £22 million, alleging that the property was paid by Griffiths Energy International Inc. to Chad's ambassador to the United States and Canada in exchange for the award of oil development rights. The action is connected to Griffiths Energy's 2013 guilty plea to violations of the Canadian Corruption of Foreign Public Officials Act after the company admitted to paying the Chadian official approximately $2 million in bribes. Shortly after the June 29 filing, the DOJ, with the assistance of the U.K. Serious Fraud Office, was able to freeze approximately $6.8 million in assets, located in an account at the Royal Bank of Scotland, that were allegedly connected to the bribe payments described in the DOJ's forfeiture complaint.

On December 9, 2015, the U.S. government filed a motion to dismiss a civil forfeiture action against approximately $84 million plus interest held in a Swiss bank account in the name of the Kazakhstan treasury. The funds were allegedly derived from bribe payments made to Kazakh government officials in exchange for oil transactions and were the subject of the DOJ's 2003 FCPA enforcement action against James Giffen and his company, The Mercator Corporation. In 2007, following the DOJ's prosecution of Giffen, the Department filed the forfeiture action against the illicit assets and, at the same time, entered into a settlement agreement with the Kazakh government, which authorized the Kazakh government to release the funds to an independent non-government organization supporting social services programs in the country. The motion to dismiss followed the final payment made under a settlement agreement.

As described above, these civil forfeiture cases have occurred in connection with ongoing anti-bribery efforts both in the United States and abroad. Although the FCPA may impose certain limitations on the DOJ's ability to enforce the statute (*e.g.*, that the FCPA does not prohibit the receipt of bribes), these recent forfeiture actions highlight the tools U.S. authorities can utilize to further the FCPA's overarching goals.

Second, in another interesting development, 2015 has seen several compliance professionals invoke the Dodd-Frank whistleblower protection provisions in their private lawsuits for wrongful termination. On May 27, 2015, former general counsel to Bio-Rad Laboratories filed a complaint alleging violations of these protections in connection with his termination. He alleges that the company fired him after he undertook an internal investigation of the company's business practices in China following the company's 2014 resolution with the SEC of alleged FCPA violations in Russia, Thailand, and Vietnam. The plaintiff claims that he was terminated when he refused to suppress his findings after an investigation by outside counsel reportedly failed to uncover any wrongdoing.

On July 28, 2015, a former employee of Teva Pharmaceuticals filed a complaint alleging that she was wrongfully terminated after filing Sarbanes-Oxley Act deficiency reports and meeting with attorneys from the FBI and DOJ to discuss problems over alleged FCPA violations by the company. The lawsuit comes after Teva disclosed, in a February 2015 SEC filing, that in the course of an internal investigation, the company discovered certain business practices in Russia, Eastern Europe, and Latin America which "likely constitute violations of the FCPA and/or local law."

While these individual employment lawsuits are in their early stages, they serve as examples of how the Dodd-Frank whistleblower

protections are impacting FCPA enforcement. With the DOJ's and SEC's continued emphasis on promoting the FCPA enforcement, and the need for greater cooperation from companies while conducting internal investigations, we expect to see more FCPA related whistleblower actions in the future.

Enforcement in the United Kingdom

In 2015, five years after the enactment of the comprehensive reform of the U.K.'s anti-corruption statutes in the Bribery Act 2010, the SFO has started to bring enforcement actions under the new legislation. Most significantly, three of those actions involved the corporate offense of failing to prevent bribery by associated persons. However, as none of these actions were ultimately contested—and one resulted in the U.K.'s first ever deferred prosecution agreement, the viability and contours of the compliance defense have not been fully clarified or articulated by either the SFO or the court. The U.K. also continues to examine ways of strengthening its anti-corruption tools, with both government and private sector proposals.

SFO Update – First U.K. DPA Approved

Whereas the first half of 2015 saw something of a lull in new announcements by the SFO of investigations into corporations for alleged bribery and corruption, there were a number of developments in the second half of the year. Most significantly, on November 30, 2015, the English Court approved the first deferred prosecution agreement in the U.K. between the SFO and Standard Bank. This DPA is also significant as the indictment filed by the SFO was the first occasion on which a prosecutor had filed an indictment alleging failure to prevent bribery contrary to section 7 of the Bribery Act.

The Standard Bank offense came to the SFO's attention in April 2013 and related to a $6 million payment in March 2013 by a former sister company of Standard Bank to a local partner in Tanzania, which the SFO alleged was intended to induce members of the Government of Tanzania to show favor to Standard Bank. The matter was referred to the Serious Organised Crime Agency (and subsequently the SFO) by Standard Bank's solicitors. Standard Bank also instructed its solicitors to begin an investigation and to disclose their findings to the SFO, and the report was sent to the SFO in July 2014. The SFO then conducted its own interviews and subsequently decided to enter into negotiations around a DPA.

The terms of the DPA provide that Standard Bank will pay to HM Treasury a total of $25.2 million (consisting of a financial penalty of $16.8 and $8.4 million disgorgement of profits) and to pay the Government of Tanzania a further $7 million in compensation. Standard Bank will also pay the SFO's reasonable costs of £330,000 in relation to the investigation and subsequent resolution of the DPA. A separate penalty of $4.2 million was agreed between Standard Bank and the SEC in respect of related conduct. Standard Bank will be subject to an independent review of its existing anti-bribery and corruption controls, policies, and procedures regarding compliance with the Bribery Act 2010 and other applicable anti-corruption laws and will be required to implement recommendations of the independent reviewer.

Unlike the U.S. courts, the English courts have a high level of involvement in the DPA process. Court approval is required twice and the court must examine the proposed DPA in detail. In the Standard Bank case, the court concluded that the DPA was in the interests of justice and its terms were fair, reasonable, and proportionate. As a result of the DPA, the charge against Standard Bank has been suspended for three years. Standard Bank also agreed to a statement of facts, which will not be contested in any future proceedings. After that time, assuming Standard Bank complies with the terms of the DPA, the SFO will discontinue the proceedings.

It is likely that further DPAs will be announced over the coming year and David Green, the Director of the SFO, has stated that the Standard Bank DPA will serve as a template for future agreements. Green has, however, cautioned that "significant cooperation from the company will be required to convince the overseeing judge that the agreement is fair and just." For example, he pointed out that the SFO would not advocate for a DPA unless a company has shown the maximum amount of cooperation (including, potentially, waiving privilege over certain documents). Similarly, Ben Morgan, the SFO's joint head of bribery and corruption, made it clear that a prerequisite of a DPA is that the company concerned should make early and full disclosure to the SFO. In the Standard Bank case, the SFO was complimentary of Standard Bank's conduct in bringing the offense to the SFO's attention so promptly.

Recent Trends and Patterns in FCPA Enforcement

Certain anti-corruption groups (Transparency International, Corruption Watch, and Global Witness), however, have written to the SFO and argued that DPAs should not replace prosecutions as the normal method of resolving investigations and that they should only be offered in limited circumstances where there is a very strong public interest in favor of their use. The groups point out that the U.K. is starting to enter into DPAs at a time when their use has become increasingly controversial in the U.S., and the U.K. must therefore avoid the more controversial elements of the U.S. procedure. The groups list certain considerations that they believe should be taken into account when the SFO enters into negotiations with companies in relation to a DPA, including a full admission of wrongdoing by the company as a prerequisite of a DPA and that the sanctions imposed must have significant deterrent value.

The Standard Bank DPA contrasts with the subsequent case of Sweett Group PLC, which became the second company charged with an offense under section 7 of the Bribery Act in relation to conduct in the Middle East. Sweett Group has subsequently pleaded guilty to that offense and will be sentenced on February 12, 2016. Meanwhile, in Scotland the authorities agreed to a civil settlement in September 2015 with Brand-Rex Limited for alleged offenses under section 7 of the Bribery Act 2010.

In other developments, the SFO has been fined £180,000 for a data protection leak which resulted in confidential documents being sent to the wrong witnesses as part of its investigation into allegedly corrupt arms deals between BAE Systems and Saudi Arabia. Separately, in December 2014, the SFO obtained its first conviction after trial of a corporation for offenses involving bribery of foreign public officials. Subsequently, in February 2015, an English Court sentenced one director of Smith and Ouzman Ltd to three years imprisonment and imposed a suspended prison sentence on the Chairman of the company. Finally, further charges have been brought in relation to the SFO's ongoing investigation into Alstom Network UK Ltd; the trial of the company is due to take place in May 2016.

The U.K.'s Anti-Corruption Plan

In late 2014, the U.K. government published an Anti-Corruption Plan which is designed to set out the government's anti-corruption actions and priorities over the near term and contains 66 action points that the U.K. government intends to undertake. The Plan explains that the government's strategic response to corruption in the U.K. will adopt the following four components: prosecuting and disrupting people engaged in corruption; preventing people from engaging in corruption; increasing protection against corruption; and reducing the impact of corruption where it takes place.

The Plan makes a number of specific proposals and strategies that are intended to be developed by the government. For example, it proposes that a new central bribery and corruption unit be created within the National Crime Agency, indicates that the U.K. government will recruit specialists into enforcement agencies to support corruption investigations, and puts forward plans for an increase in the powers of enforcement agencies to investigate financial crime. The Plan also indicates that the U.K. government will examine the merits of a new offense of "failure to prevent economic crime," which would be similar to the corporate offense under section 7 of the Bribery Act 2010 but wider in scope—for example, it would cover fraud and money laundering, not simply a failure to prevent bribery (which is covered by section 7 of the Bribery Act).

Transparency International: Proposal to Introduce Unexplained Wealth Orders in the U.K. to Assist with Corrupt Asset Recovery

Transparency International has published a discussion paper on a proposal for the introduction of Unexplained Wealth Orders ("UWOs") and other potential new approaches to assist with the recovery of proceeds of corruption in the U.K. UWOs would be intended to increase the effectiveness of suspicious activity reports ("SARs") in the U.K., which are issued by certain designated individuals whenever they suspect that a person is engaged in money laundering. TI notes that while around 14,000 SARs were issued last year to request consent to proceed with a certain transaction, action was taken in relation to just seven transactions.

TI proposes that law enforcement agencies would have the power to issue a UWO to individuals linked to suspicious U.K. assets or transactions, who would be required to explain legitimate and legal sources of wealth. If the suspect fails to respond to the UWO, or provides an inadequate response, civil recovery processes could then be used in relation to that asset. The UWO process would also lengthen the investigation period available to the authorities following a SAR, which would be suspended pending the return of the UWO.

Recent Trends and Patterns in FCPA Enforcement

As with some other recent U.K. statutes such as the Bribery Act, TI suggests that UWOs should apply extraterritorially wherever there is a sufficient connection to the U.K. (which may consist of unlawful activity in the U.K., assets located in the U.K. at a relevant time, a British citizen, resident or person domiciled in the U.K. being involved, or a company linked to the case being incorporated in the U.K.).

The U.K. government's new "Anti-corruption Champion" (Sir Eric Pickles) has indicated his support for UWOs, and it is possible that plans to implement UWOs will be publicized before the U.K.'s planned Anti-Corruption summit in 2016.

Conclusion

Following a busy 2014, the pace and size of DOJ and SEC FCPA enforcement actions have slowed. With a series of relatively low-value enforcement actions by both the DOJ and SEC, 2015 has been a year for the enforcement agencies to regroup and recalibrate their enforcement policies and practices. With the announcement of the Yates Memo, we expect to see the DOJ (and likely the SEC) pursuing a greater number of individual enforcement actions. Whether the enforcement agencies will continue to be put to their burden and continue to struggle at securing convictions remains to be seen. With the trials of Lawrence Hoskins and Dmitrij Harder slated for 2016, we look forward to seeing whether the issues presented will allow the U.S. courts to render clarity to the law.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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