

FCPA Digest

Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act

JANUARY 2015



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Enforcement Actions and Strategies

The 2014 FCPA enforcement year has been interesting to say the least. While the DOJ and SEC continue to prosecute individuals at a relatively steady pace, the big news concerns the government's pursuit of corporate defendants. With a surge of large corporate enforcement actions towards the end of the year, 2014 has generated the second highest corporate penalty total in history despite the fact that the total number of corporate enforcement actions has remained roughly the same as 2013. As a result, average corporate penalties continue to steadily increase, reaching their highest levels ever in 2014.

Among the highlights from 2014 are:

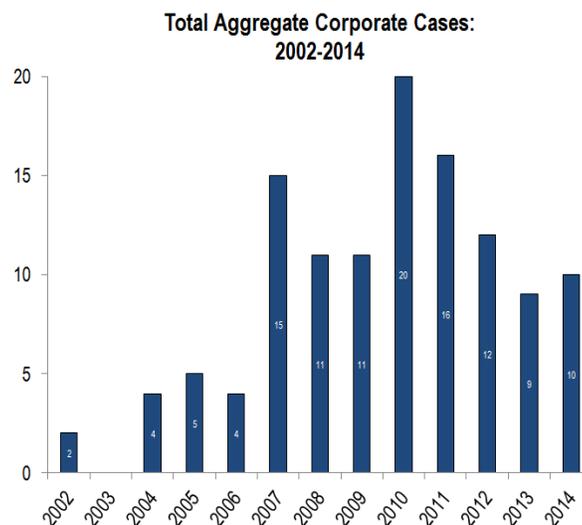
- A series of high profile enforcement actions have resulted in total corporate penalties of \$1,566 million, the second highest on record;
- Average corporate fines and penalties of \$156.6 million—by all measures the highest average in history;
- The DOJ's prosecution of Alstom resulted in the largest FCPA-related criminal fine in history of \$772 million—well over the \$450 million criminal fine in Siemens;
- The DOJ's use of plea agreements and the SEC's use of administrative proceedings has increased over the use of deferred prosecution and non-prosecution agreements;
- The Eleventh Circuit issued its opinion in *United States v. Esquenazi*, largely supporting the government's view regarding the definition of "instrumentality" under the FCPA;
- Recent paper victories by the SEC could be perceived as setbacks in the Commission's actions against individual defendants; and
- The SEC's 2014 enforcement actions reflect a number of concerning practices including the continued pursuit of a theory of strict liability against parent corporations for acts of corporate subsidiaries and an interpretation of the "obtaining or retaining business" element of FCPA that contradicts *United States v. Kay*.

Statistics

In 2014, the government brought ten enforcement actions against corporations: Alcoa, Alstom, Avon, Bio-Rad, Bruker Corporation, Dallas Airmotive, Inc. (DAI), Hewlett-Packard (HP), Layne Christensen, Marubeni, and Smith & Wesson.

As can be seen in the accompanying chart, the number of corporate enforcement actions has only slightly increased from 2013, and overall, is down from the peak in 2010. While the majority of cases from 2013 were joint enforcement actions, only four of the ten cases from 2014 involved charges by both the DOJ and SEC (*Alcoa*, *HP*, *Bio-Rad*, and *Avon*). Of the remaining six corporate enforcement actions in 2014, the DOJ and SEC each filed three stand-alone enforcement actions. The DOJ filed charges on a stand-alone basis against Alstom, DAI, and Marubeni, none of which were issuers. For its part, the SEC filed stand-alone enforcement actions against Bruker, Layne Christensen, and Smith & Wesson, noting that the DOJ officially declined to file an enforcement action against Smith & Wesson and Layne Christensen.

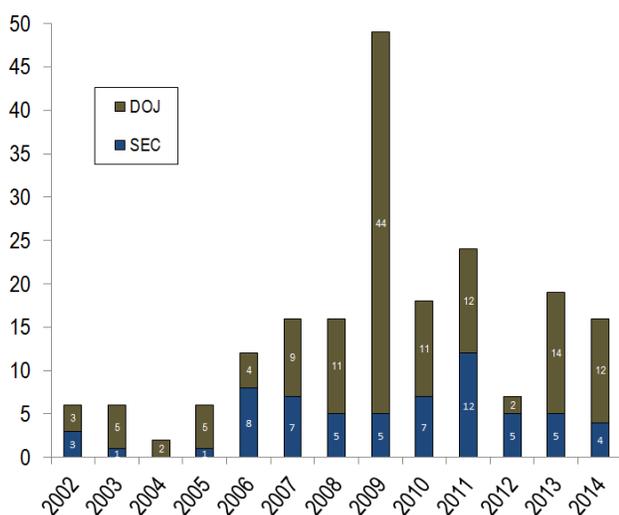
With respect to individuals, the DOJ and SEC brought FCPA-related charges against fourteen individuals (although two defendants, R.V.P. Ramachandra Rao from *United States v. Firtash* and Asem Elgawhary from *United States v. Elgawhary*, both of whom were characterized as government officials, were not



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specifically charged with violating the FCPA). While the DOJ and SEC began the year by filing FCPA-related charges against twelve different defendants, the pace of enforcement waned in the latter half of 2014, with only the SEC filing charges against two defendants in *In re Timms*. As can be seen in the accompanying graph, the total number of individual enforcement actions in 2014 is generally consistent with previous years.

Individuals Charged: 2002-2014



The enforcement actions against the individual defendants were grouped into five separate cases: *United States v. China*, *United States v. Firtash*, the Petro-Tiger Defendants (where each defendant was charged separately for his involvement in the same bribery scheme in *United States v. Hammarskjold*, *United States v. Weisman*, and *United States v. Sigelman*), *In re Timms*, and the somewhat usual case of *United States v. Elgawhary*.

The two defendants in *China*, Benito China and Joseph DeMeneses, were charged and later pleaded guilty to conspiracy to violate the FCPA (among others) in conjunction with an ongoing enforcement action involving the New York broker dealer, Direct Access Partners, which already snagged guilty pleas from four individuals in *United States v. Clarke* and *United States v. Lujan*. The SEC amended its complaint in *SEC v. Clarke* to include China and DeMeneses as defendants as the Commission continues to pursue a variety of securities fraud claims against several of the individuals it alleges were involved in the Direct Access Partners scheme.

In the cases involving the Petro-Tiger defendants, through indictments that were unsealed in early 2014, Knut Hammarskjold, Gregory Weisman, and Joseph Sigelman were each separately charged by the DOJ for allegedly bribing Colombian officials in exchange for lucrative oil services contracts. Hammarskjold and Weisman pleaded guilty to the DOJ's charges and are awaiting sentencing. The third defendant, Sigelman, the former co-CEO of Petro-Tiger Ltd., has pleaded not guilty and elected to put the enforcement agency to its burden, specifically challenging the DOJ's position that employees of state-owned enterprises are "foreign officials" for purposes of the FCPA.

In *Firtash*, the DOJ charged a group of foreign citizens (and one resident of the United States) with RICO and conspiracy to violate the FCPA for their involvement in a bribery scandal to acquire mineral licenses in India. Notably, among those charged are one of Ukraine's wealthiest citizens and a sitting member of the Indian parliament. All of the defendants except Dmitry Firtash remain fugitives. Firtash himself was arrested by Austrian authorities in Vienna on March 12, 2014 and, after posting bail of approximately \$174 million, will remain in Austria pending extradition proceedings to the United States. The U.S. government has also requested that Indian authorities arrest and extradite K.V.P. Ramachandra Rao, though few expect any developments in the near future in those proceedings.

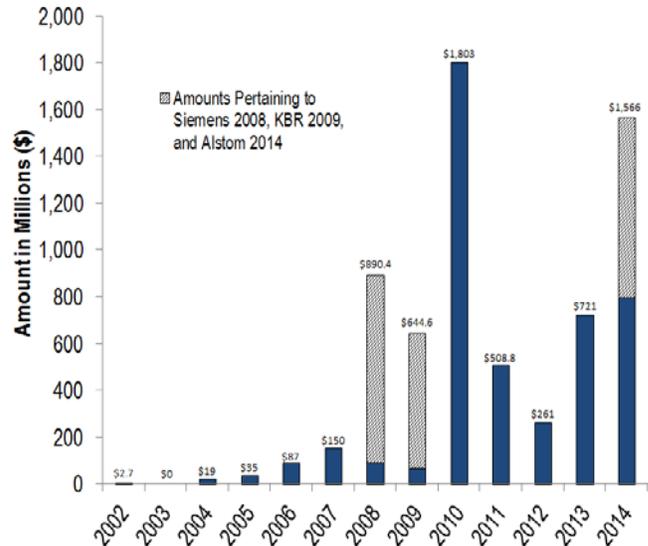
Finally, in a recent stand-alone administrative proceeding from November 2014 (*Timms*), the SEC settled FCPA-related charges against Stephen Timms and Yasser Ramahi for an alleged bribery scheme that provided Saudi officials with expensive travel and gifts in exchange for lucrative sales contracts. As part of the settlement, Stephen Timms and Yasser Ramahi agreed to pay civil penalties of \$50,000 and \$20,000, respectively. The settlement in *Timms* marks only one of a few cases where the SEC has used administrative proceedings to prosecute individual defendants for FCPA violations. As will be discussed below, this development is part of a broader trend by the SEC to almost exclusively use administrative proceedings to prosecute FCPA violations instead of filing civil charges before the U.S. courts.

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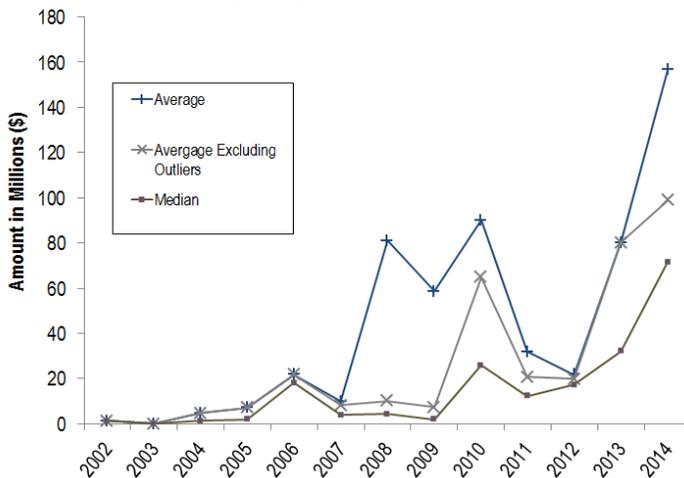
United States v. Elgawhary was announced in February 2014 and involved a kickback scheme concerning a former vice-president of a U.S. contractor. Significantly, however, Elgawhary was not charged as an employee of the U.S. company but as a government official due to his secondment to a joint venture with the state-owned and controlled Egyptian electrical company—the Egyptian Electricity Holding Company (EEHC). As a result, Elgawhary was not charged with violating the FCPA but rather with various counts of mail fraud, wire fraud, conspiracy to launder money, and tax evasion. According to the court documents in *Alstom*, Elgawhary is named as being among the foreign officials who allegedly received bribes from Alstom in exchange for valuable power project contracts. In December 2014, Elgawhary pleaded guilty to mail fraud, conspiracy to launder money, and tax evasion. According to the plea agreement, Elgawhary has agreed to forfeit \$5,258,995 in proceeds from the kickback scheme and to serve a 42-month prison sentence. The parties are currently awaiting the court’s approval of the plea agreement.

Although the number of corporate enforcement actions has remained relatively low as compared to years like 2010, the government collected \$1,566 million in financial penalties (fines, DPA/NPA penalties, disgorgement, and pre-judgment interest) from corporations in the ten enforcement actions in 2014—the second highest total on record. Led in large part by Alstom, the 2014 corporate penalty total can be divided between six relatively large enforcement actions—*Alstom* (\$772 million), *Alcoa* (\$384 million), *Avon* (\$135 million), *HP* (\$108 million), *Marubeni* (\$88 million), and *Bio-Rad* (\$55 million)—and four relatively small corporate enforcement actions—*DAI* (\$14 million), *Layne Christensen* (\$5.1 million), *Bruker* (\$2.4 million), and *Smith & Wesson* (\$2.0 million).

Total Criminal and Civil Fines Imposed on Corporations: 2002-2014



Average Corporate Penalties: 2002-2014



As a result of the relatively low number of corporate enforcement actions and high corporate penalties, by all measures, the 2014 average corporate penalties are the highest on record. While several of the 2014 corporate enforcement actions have been in the works for a number of years, the trend suggests that the agencies are focusing their resources on closing the most significant cases, marking a distinct shift from the enforcement patterns witnessed in 2011, 2010, and earlier, when the government showed a greater willingness to cast a wider net in favor of lower value cases.

Maybe more striking is that of the ten cases from 2014, the seven highest value corporate enforcement actions involved the DOJ (*Alstom*, *Alcoa*, *Avon*, *HP*, *Marubeni*, *Bio-Rad*, and *DAI*), while the three cases at the lower end of the spectrum were stand-alone SEC enforcement actions. Although *DAI* appears to be an outlier in this instance, the correlation between the DOJ and the higher corporate penalties suggests that the DOJ, maybe more so than the SEC, is focusing its resources on higher value enforcement targets while the SEC may be more willing to prosecute lower tier FCPA violations.

As mentioned above, it may be telling that in two of the three stand-alone SEC enforcement actions (*Smith & Wesson* and *Layne Christensen*), the DOJ officially declined to bring charges—although it is not possible to determine whether it did so on the basis of policy grounds or a determination that the evidence did not satisfy the higher burden of proof required for criminal prosecution. The 2013 enforcement actions did not show a similar pattern. Rather, the corporate penalties for the 2013 enforcement actions involving the DOJ (joint or stand-alone) were

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spread across the spectrum with both the highest (*Total*) and lowest (*Ralph Lauren*) value corporate enforcement actions involving the DOJ. We will have to see if this continues to be a developing pattern or is simply an anomaly restricted to 2014.

Types of Settlements

Despite the relatively few corporate enforcement actions in 2014, the DOJ and SEC have demonstrated a growing willingness to settle charges without the use of deferred prosecution agreements and non-prosecution agreements. While we doubt that the DOJ and SEC are moving towards doing away with deferred and non-prosecution agreements altogether, the 2014 cases indicate that enforcement agency practices may be evolving. This is particularly salient given recent comments by U.S. Attorney General Eric Holder and SEC Chairwoman Mary Jo White, who have hinted (sometimes not so subtly) at an increased priority in obtaining guilty pleas from corporate defendants.

In five of the seven corporate enforcement actions which have involved the DOJ (*Alstom*, *Alcoa*, *Avon*, *HP*, and *Marubeni*), the Department settled the charges through the use of corporate plea agreements (though we note that the DOJ used a combination of plea agreements, deferred prosecution agreements, and non-prosecution agreements in *Alstom*, *Avon*, and *HP*). By way of comparison, in 2013, of the seven corporate enforcement actions involving the DOJ, only two (*ADM* and *Weatherford*) were settled by plea agreements.

While the distinction between plea agreements, deferred prosecution agreements, and non-prosecution agreements may be minor in substance and consequence, the government's decision to extract a guilty plea is generally understood to be a harsher form of corporate punishment. Under a deferred or non-prosecution agreement, the corporation admits to the facts presented in the government's case, agrees to pay a specific penalty, and agrees to ongoing cooperation with the government; the sole difference from a guilty plea is the fact of the conviction. Although the collateral consequences of a guilty plea can be severe, including reputational harm, automatic debarment from government procurement, and potential effects in private civil litigation, it is clear that the government is sensitive to these issues and helps corporations avoid the worst of these by structuring the pleas with subsidiaries rather than the parent entities.

The DOJ's decision to demand guilty pleas from a corporate parent or at least a subsidiary is likely a fact-specific inquiry. That said, to the extent one can discern a prosecution strategy in these charging decisions, we suspect that the defendants' conduct during the bribery scheme or during the course of the government's investigation was a driving factor. In the case of *Alstom* and *Alcoa* (the two largest corporate penalties of 2014), the DOJ's decision to settle the charges through a plea was likely the result of the sheer scale of the bribery scheme. In *Alstom*, the DOJ accused the French power and transportation company of engaging in acts of systematic bribery for nearly a decade, paying bribes totaling approximately \$75 million and netting gains of approximately \$296 million. Similarly, in *Alcoa*, the U.S. aluminum producer engaged in a scheme to pay Bahraini officials over the course of a decade, allegedly netting the company hundreds of millions of dollars in illicit gains. In other cases, obstructionist behavior by the corporate defendant, whether a refusal to cooperate with U.S. authorities (*Alstom* and *Marubeni*) or efforts by high-level executives to cover up the scheme (*Avon*), likely weighed heavily on the DOJ's decision to demand a plea.

The latter half of 2014 makes clear that the SEC's practice of using administrative proceedings to settle FCPA enforcement actions is here to stay. Six of the seven corporate enforcement actions raised by the Commission (*Alcoa*, *HP*, *Smith & Wesson*, *Layne Christensen*, *Bio-Rad*, and *Bruker*) were settled through administrative proceedings (in *Avon* the SEC elected to file a civil complaint). Furthermore, while the SEC joined the defendants, Benito Chinea and Joseph DeMeneses, to the 2013 case of *SEC v. Clarke* currently pending in the S.D.N.Y., in *Timms*, where no previous case existed, the SEC elected to use administrative proceedings to settle the charges instead of filing a case before the U.S. courts. Previously, the SEC was only permitted to bring administrative proceedings against regulated entities such as investment advisors and broker dealers. However, following the enactment of Dodd-Frank, the SEC is now allowed to bring administrative proceedings against any entity or individual.

However, what may be the most interesting facet of the SEC's current enforcement approach is the Commission's shift in the latter half of 2014 in *Timms* to settle charges against individuals through administrative proceedings. This may come as no surprise, as the SEC has had difficulty successfully prosecuting individuals for violating the FCPA in previous years. Most recently, in early 2014, the SEC suffered a pair of setbacks in its enforcement actions against executives from Noble Corp. and Magyar Telekom (discussed in greater detail below) before the U.S. courts. Other cases, such as *SEC v. Sharef* (the SEC's case against the Siemens executives) and *SEC v. Clarke* (which is currently the subject of a pending stay), have lingered in the S.D.N.Y. for significant periods of time without resolution.

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Elements of Settlements

Monitors. *Avon* marks the only instance in 2014 where the government has required that a corporate defendant retain an independent compliance monitor. In the DOJ's three-year deferred prosecution agreement with *Avon*, the Department required the company to retain an independent compliance monitor for an 18-month period. *Avon's* case may come as no surprise as the DOJ's and SEC's allegations described relatively striking compliance failures, including an effort by company executives to cover up (or at a minimum, turn a blind eye to) *Avon* China's practice of offering government officials improper benefits and the allegations suggesting that the legal and compliance department failed in its role to ensure improper conduct was investigated and stopped.

It is also worth pointing out that the DOJ would have likely required *Alstom* to retain an independent compliance monitor but for the fact that the company was already subject to certain monitoring requirements in accordance with a Negotiated Resolution Agreement between *Alstom* and the World Bank Group. In the DOJ's plea agreement with *Alstom*, the DOJ provided that if the World Bank's Integrity Compliance Office did not certify that *Alstom* satisfied the monitoring requirements in the Negotiated Resolution Agreement, *Alstom* would be required to retain an independent compliance monitor.

As mentioned in previous *Trends & Patterns*, the government has moved towards adopting self-reporting requirements, instead of corporate monitors, which require the corporate defendant to conduct regularly scheduled internal reviews of its compliance program and to report its findings to the government. In continuation of that trend, the DOJ's settlements in *HP*, *Bio-Rad*, and *DAI* required the companies to evaluate their revised compliance programs over the course of a three-year or two-year term (*HP* – 3-years; *Bio-Rad* – 2-years; *DAI* – 3-years), and to report to the department on its findings at one-year intervals.

The DOJ's decision to require a compliance monitor in *Avon* contrasts with its decision not to implement a compliance monitor in *Bio-Rad* and *Marubeni*. In *Bio-Rad*, the DOJ alleged similar compliance failures including the failure to institute adequate internal controls and the failure of company managers to prevent the improper conduct from continuing after discovering the bribes. In *Marubeni*, the DOJ declined to require a compliance monitor despite the fact that the DOJ's charges marked the second enforcement action against *Marubeni* in two years. The fact that the allegations in *Avon* singled out high-level corporate executives while the allegations in *Bio-Rad* and *Marubeni* were restricted to relatively low level regional managers may indicate when the government believes a monitor would be the most appropriate.

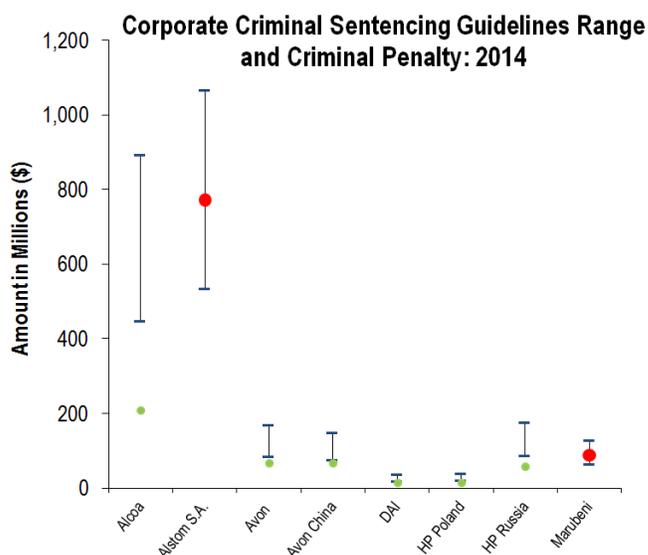
Most interesting is the fact that, despite requiring a guilty plea from a subsidiary in *Alcoa*, the Department did not require either the subsidiary or the parent to submit to any reporting requirements at all. Instead, *Alcoa's* subsidiary was subjected to four years' probation. This is not the first time that the Department has foregone reporting requirements in favor of probation, however, to many, probation is viewed as a relatively toothless requirement given the fact that the probation department has not been set up for corporate monitoring. It is possible that the DOJ was satisfied that the bribery scheme was generally limited to *Alcoa's* operations in Bahrain or that the DOJ was satisfied with *Alcoa's* cooperation and updated compliance measures. Whatever the case, it is curious that in one of the largest FCPA enforcement actions to date, neither the Department nor the SEC, which settled an administrative action with the parent directly, included reporting requirements in their settlements.

Discount. As in previous years, companies have continued to receive discounts off the applicable Sentencing Guidelines ranges as a reward for their cooperation and settlement. In the cases of *Alcoa*, *HP*, *DAI*, and *Avon*, the DOJ departed from the bottom of the applicable Sentencing Guidelines fine range by approximately 55%, 25%, 20%, and 20%, respectively. The settlement documents cited the companies' extensive internal investigations, voluntary disclosure, cooperation with the DOJ (including making witnesses available and collecting/analyzing voluminous amounts of evidence), and continued commitment to enhancing their corporate anti-corruption compliance programs. In *Bio-Rad*, although the DOJ did not detail a specific discount, the non-prosecution agreement reported that the company engaged in an extensive internal investigation, voluntarily disclosed the potential FCPA violations, cooperated with the Department over the course of its investigation, and engaged in significant remedial actions, including the closing of the company's Vietnamese office.

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As illustrated by the accompanying chart, the Department's discounts in *Alcoa*, *HP*, *DAI*, and *Avon* contrast with the plea agreements reached in *Alstom* and *Marubeni*, where the DOJ cited the numerous compliance failures by the company, including the failure to voluntarily disclose the conduct, the refusal to cooperate with the Department's investigation, and the defendants' history of prior misconduct. Where no discounts are granted, it is typical for the Department to recommend a fine at the very bottom of the Sentencing Guidelines range. However, as a result of the factors cited above, the Department recommended that both Alstom and Marubeni pay a fine in the middle of the Guidelines range. In *Alstom*, the plea agreement detailed a Sentencing Guidelines range of \$523.8 million to 1,065.6 million and settled on a criminal fine of \$772 million. In *Marubeni*, the company was sentenced to a criminal fine of \$88 million—in the middle of the Guidelines fine range of \$63.7 million to \$127.4 million.

In fact, a comparison of the plea agreements in *Alstom* and *Alcoa* may reflect the actual monetary value in cooperating with U.S. authorities during an FCPA investigation. The Sentencing Guidelines range in *Alcoa* and *Alstom* were relatively comparable. In *Alcoa*, the Sentencing Guidelines recommended a criminal fine between \$446 million and \$892 million while the Sentencing Guidelines range in *Alstom* was between \$523.8 million and 1,065.6 million. Notably while *Alcoa*, who self-reported and cooperated with U.S. authorities, received a 55% departure from the sentencing guidelines range, *Alstom*, who did not self-report and refused to cooperate with U.S. officials, received no departure from the sentencing guidelines. What this demonstrates is that *Alstom's* failure to cooperate likely cost the company hundreds of millions of dollars in criminal fines.



However, in addition to the company's cooperation in *Alcoa*, the plea agreement also indicated that the DOJ would consider how a potentially severe corporate fine could impact the financial health of the defendant. In departing from the Sentencing Guidelines range in *Alcoa*, the DOJ explained that it believed this to be the appropriate disposition on account of:

[T]he impact of a penalty within the guidelines range on the financial condition of the Defendant's majority shareholder, Alcoa, and its potential to 'substantially jeopardiz[e]' Alcoa's ability to compete . . . including but not limited to, its ability to fund its sustaining and improving capital expenditures, its ability to invest in research and development, its ability to fund its pension obligations, and its ability to maintain necessary cash reserves to fund its operations and meet its liabilities.

This marks only one of a handful of times, and certainly the most significant, that the DOJ has granted a downward departure from the Sentencing Guidelines range to avoid financial hardship. In *Nordam* from 2012, the DOJ agreed to depart from the Sentencing Guidelines range to a fine of \$2 million citing that any more would "substantially jeopardize the Company's continued viability." Likewise, in *Innospec* from 2010, the DOJ departed from a Sentencing Guidelines range of between \$203 million and \$101.5 million, ultimately deciding on a penalty of \$14.1 million (accounting for fines paid to other enforcement agencies) citing the company's inability to pay the minimum recommended fine. Thus, despite the relatively high corporate penalties seen in 2014, *Alcoa*, *NORDAM*, and *Innospec* reiterate that the Department is actively trying to avoid causing irreparable harm to businesses who are the subject of FCPA enforcement.

Forfeiture & Disgorgement. *Alcoa* raises another interesting question related to the DOJ's decision to seek forfeiture of \$14 million in its action against the aluminum producer at the same time the SEC sought the disgorgement of \$175 million. While the \$14 million forfeiture was counted towards satisfying the \$175 million ordered in the SEC's case, the fact that the Department separately sought such a remedy is somewhat unprecedented. Disgorgement and criminal forfeiture are rarely pursued by both the DOJ and SEC at the same time because both remedies typically have the same impact: to force the defendant to surrender any ill-gotten gains. While we are uncertain what motivated the DOJ to seek this remedy in addition to the disgorgement sought by the SEC, we will be on the lookout for similar practices in the future to determine if this is part of an emerging trend by the Department.

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Case Developments

United States v. Esquenazi. Among the highlights of 2014 thus far has been the Eleventh Circuit's decision in the ongoing case of *United States v. Esquenazi*. In *Esquenazi*, the Court of Appeals, in reviewing one of the many unsuccessful challenges raised by defendants to the DOJ's and SEC's expansive interpretation of "instrumentality" under the FCPA, generally upheld the enforcement agencies' application of the statute. With the Supreme Court's denial of defendants' petition for certiorari in late 2014, the 11th Circuit's decision seemingly closed this chapter of the development of the FCPA. However, as we discuss in greater detail below, the opinion raises new questions on whether certain government-controlled entities may fall outside the scope of the term "instrumentality" under the FCPA. Indeed, Joseph Sigelman, the former CEO of Petro-Tiger and defendant in *United States v. Sigelman*, has indicated that he intends to challenge the DOJ's charges against him in part by arguing that, according to *Esquenazi*, the Department has not established that he paid bribes to a "foreign official."

Noble Executives. In early July 2014, the SEC settled its lawsuit against two former executives, Mark A. Jackson and James J. Ruehlen, of the oil and drilling contractor Noble Corporation. Jackson and Ruehlen were accused of violating the books and records provisions of the FCPA for their involvement in a scheme to pay bribes to Nigerian officials in exchange for illegal import permits for drilling rigs. The suit would have marked the first time the SEC pursued FCPA related charges to trial which was scheduled to begin on July 9, 2014.

Instead, in a joint stipulation, the SEC declared victory but allowed Jackson and Ruehlen to resolve the action without paying any civil penalties or admitting to any of the allegations in the SEC's complaint. The two defendants agreed to be enjoined from aiding and abetting violations of the Exchange Act related to the maintenance of books and records and internal controls, which in practice imposes no new obligations on them, as every citizen is obligated to follow the law. By contrast, Thomas F. O'Rourke, a third defendant in the action who settled the SEC's claims in 2012, had agreed to pay \$35,000 in civil penalties. Jackson and Ruehlen's favorable settlement appears to be largely the result of *Gabelli v. SEC*, a 2013 Supreme Court decision which imposed a five-year statute of limitations on civil fraud cases from the date the fraud occurred, not when it was discovered, forcing the SEC to drop the majority of its claims against the defendants.

Siemens Executives. In the SEC's ongoing case against several Siemens executives, on February 3, 2014, Judge Shira A. Scheindlin of the S.D.N.Y. entered default judgments against Ulrich Bock and Stephan Signer, the last remaining defendants and the only ones who had refused to appear or otherwise answer the SEC's complaint. On September 19, 2012, Judge Scheindlin ordered that both Bock and Signer pay \$524,000 in civil penalties each. In addition, Bock was ordered to disgorge \$413,957. These sanctions are among the highest civil penalties ever ordered against individuals in an SEC proceeding, but given the defendants' refusal to appear in the first place, they appear largely symbolic.

Magyar Executives. In March 2014, the SEC dropped its claims that three former executives at Magyar Telekom—Elek Straub, Andras Balogh, and Tamas Morvai—bribed Montenegrin officials in 2005 in exchange for control of the Montenegrin telecommunications provider, Telekom Crne Gore A.D. Citing the complexity and scope of the investigation, the SEC opted to pursue only a second set of civil allegations involving bribes paid to Macedonian officials to block competition against Magyar. The three defendants are currently scheduled to go to trial in 2015.

Alstom Executives. On July 17, 2014, the DOJ announced that William Pomponi, a former vice president of regional sales for Alstom Power Inc., pleaded guilty to conspiracy to violate the FCPA in connection with the award of the Tarahan power project in Indonesia. Pomponi joins his two former co-defendants, Frederic Pierucci and David Rothschild, who pleaded guilty to related charges in 2013 and 2012 respectively. A fourth Alstom executive, Lawrence Hoskins, a U.K. citizen, was indicted alongside Pomponi in July 2013. However, unlike his co-defendants, Hoskins has challenged the government's case and filed a motion to dismiss the charges on July 31, 2014. In his motion to dismiss, Hoskins argued that the charges are time-barred, that the government does not retain jurisdiction, and that the government's agency theories are unsupported by the law. As of December 2014, no decision had been handed down.

Frederic Cilins. In April 2013, the French citizen, Frederic Cilins was arrested in Jacksonville, Florida on obstruction of justice charges in connection with a grand jury investigation into potential FCPA violations by the Beny Steinmetz Resources Group in Guinea. Nearly a year later, in March 2014, Cilins pleaded guilty to the charges and was sentenced on July 25, 2014 to two years in prison.

BizJet Executives. In July 2014, Bernd Kowalewski, the former CEO of the Tulsa-based aircraft services company, BizJet, pleaded guilty to violations of the FCPA after being arrested in Amsterdam in March. Kowalewski is the third of the four BizJet executives charged with FCPA

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violations to plead guilty. In November 2014, Kowalewski was sentenced to time-served and ordered to pay a \$15,000 criminal fine. The fourth BizJet executive, Jald Jensen, remains a fugitive.

Dismissal of Alba RICO Suit. On April 28, 2014, the Western District of Pennsylvania dismissed the pending suit against Victor Dahdaleh, an alleged middleman in the Alcoa bribery scheme that funneled bribes to members of the Bahraini royal family in exchange for inflated commercial contracts. In 2009, Aluminum Bahrain (Alba) sued both Alcoa and Dahdaleh, alleging that their conduct in the bribery scheme violated RICO. In 2012, Alcoa settled the suit with Alba for \$85 million but Alba's claims against Dahdaleh were stayed pending the outcome of the ongoing criminal prosecution of Dahdaleh in the U.K.

As discussed in our last *Trends & Patterns*, the SFO's prosecution of Dahdaleh collapsed in late 2013, and Dahdaleh was acquitted of the charges. Following the conclusion of the U.K. trial, Dahdaleh immediately moved to dismiss Alba's claims and compel arbitration in the U.K. Judge Ambrose of the Western District of Pennsylvania granted Dahdaleh's motion, dismissing Alba's complaint without prejudice and concluding that all of the claims in dispute were subject to a series of contracts which contained valid arbitration clauses. Because Alba retained the right to pursue its statutory remedies under RICO through arbitration and because it was unclear how the arbitrators would construe RICO when applying English law (the governing law of the contracts), Judge Ambrose reasoned that the dispute should be settled through arbitration in accordance with the relevant arbitration clauses.

Canada: CryptoMetrics. For the first time, in August 2013, Canadian officials convicted an individual for conspiring to bribe a foreign official in violation of the Corruption of Foreign Public Officials Act. In *R. v. Karigar*, Nazir Karigar, an employee of the Canadian subsidiary of CryptoMetrics (an American company that develops and provides biometric devices) was accused of offering bribes to officials at Air India and to an Indian Cabinet Member in exchange for contracts to sell facial recognition software products to Air India. In April 2014, Karigar was sentenced to three years imprisonment.

Shortly after Karigar's sentencing, the Royal Mounted Canadian Police charged three other individuals – Robert Barra, Dario Bernini, and Shailesh Govindia – with violations of the Corruption of Foreign Public Official Act in connection with the same scheme. Of note, however, is that Barra and Bernini are both U.S. citizens while Govindia is a citizen of the U.K. While the charges are relatively recent, willingness of Canadian officials to prosecute foreign citizens is a new development which we will be paying close attention to in the future.

India: Indian Railway. In March 2014, the Indian courts sentenced two Indian Railway officials to three years in prison for the receipt of bribes from private contractors in exchange for lucrative infrastructure project contracts. The recent sentences appear connected to the 2008 FCPA enforcement action against Westinghouse Air Brake Technologies Corporation ("WABTEC") where the company paid approximately \$675,000 in penalties for bribes paid to Indian Railway officials.

China: GlaxoSmithKline. Following a highly-publicized investigation, in September 2014, the Chinese courts found GSK China Investment Co., the Chinese subsidiary of the British drug manufacturer GlaxoSmithKline, guilty of bribery and fined the company nearly \$500 million. Additionally, five of the company's managers, including its former top China executive were convicted of bribery-related charges and received suspended prison sentences. While GSK's Chinese operations are still the subject of investigations by U.S. and U.K. authorities, GSK China Investment Co.'s conviction marks the largest corporate fine in China to date and the first criminal conviction of a foreign company in China.

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Perennial Statutory Issues

Jurisdiction

Although the 2014 cases have not suggested any significant changes to the DOJ's and SEC's current approach to the FCPA's jurisdiction, *Firtash* and *Alstom* present interesting examples of how enforcement agencies utilize conspiracy charges to avoid jurisdictional limitations.

In *Firtash*, the indictment charged five of the six individuals with conspiracy to violate the FCPA: Dmitry Firtash, Andras Knopp, Suren Gevorgyan, Gajendra Lal, and Periyasamy Sunderalingam. Of those individuals, the DOJ alleged that Lal was a permanent resident of the United States and therefore constituted a "domestic concern" for purposes of the FCPA's jurisdictional requirement. The indictment also alleged that, in furtherance of the conspiracy, funds had been transmitted through the United States and that the defendants, Gevorgyan and Lal, traveled to the United States, thus satisfying the territorial jurisdiction requirement of the FCPA for non-US persons. As a result, the DOJ asserted jurisdiction over all five foreign nationals for their participation in the scheme, even though they were not issuers or domestic concerns and may not have taken any action within the territorial jurisdiction of the United States.

Similarly in *Alstom*, the DOJ raised conspiracy charges against the company's Swiss subsidiary (Alstom Network Schweiz AG) despite the fact that the company met none of the jurisdictional requirements of the FCPA. To overcome the jurisdiction hurdle, the DOJ relied upon the fact that the three other members of the conspiracy (Alstom S.A., Alstom Grid, Inc., and Alstom Power, Inc.) were either "issuers" or "domestic concerns" for purposes of the FCPA.

The DOJ had previously utilized this theory when charging the Italian firm, Snamprogetti, for conspiracy to violate the FCPA in connection with the TSKJ-Nigeria joint venture. In *Snamprogetti*, the DOJ claimed jurisdiction over Snamprogetti because multiple members of the conspiracy – the other companies in the TSKJ-Nigeria joint venture – were either domestic concerns or had conducted acts in furtherance of the conspiracy in the United States. Cases such as *Firtash*, *Alstom*, and *Snamprogetti* are classic examples of how the DOJ uses the U.S. conspiracy laws to exert jurisdiction over a wide range of non-U.S. companies and individuals.

Instrumentality

As mentioned above, 2014 saw the Eleventh Circuit issue its decision in *United States v. Esquenazi*, in which the appellants, who had been convicted in the lower court, again challenged DOJ's (and by implication the SEC's) historically broad reading of the term "instrumentality" under the FCPA. To violate the FCPA, an individual or entity must make or offer anything of value to a "foreign official." According to the statute, a "foreign official" is defined as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof." The DOJ and SEC have seized upon the term "instrumentality" and argued that this can include essentially any type of state-owned/state-controlled business entity, including national oil companies, telecommunications firms, hospitals, and universities, to name a few. According to the FCPA Guide released by the DOJ and SEC in 2012, to determine whether a company is an "instrumentality" parties must consider a number of non-dispositive factors including:

- The foreign state's extent of ownership of the entity;
- The foreign state's degree of control over the entity (including whether key officers and directors of the entity are, or are appointed by, government officials);
- The foreign state's characterization of the entity and its employees;
- The circumstances surrounding the entity's creation;
- The purpose of the entity's activities;
- The entity's obligations and privileges under the foreign state's law;

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- The exclusive or controlling power vested in the entity to administer its designated functions;
- The level of financial support by the foreign state (including subsidies, special tax treatment, government-mandated fees, and loans);
- The entity's provisions of services to the jurisdictions' residents;
- Whether the governmental end or purpose sought to be achieved is expressed in the policies of the foreign government; and
- The general perception that the entity is performing official or governmental functions.

In *Esquenazi*, the defendants argued that the term "instrumentality" must be read more narrowly to only include entities that serve a core government function. The Eleventh Circuit ultimately disagreed with the defendants' approach, siding with the DOJ in concluding that any number of business entities can be an instrumentality for purposes of the FCPA and adopting a factor-based test similar to that previously enunciated by the government to assess the entities' characteristics and relationship to the foreign government.

The Eleventh Circuit's approach, however, requires a slightly different analysis than the mere laundry list of factors set out in the FCPA Guide. Instead, these factors must be evaluated to find two overarching conclusions: (1) the foreign government must control the relevant entity and (2) the entity must serve a government function. While factors associated with whether an entity served a government function were generally encompassed by the government's factors, the DOJ had never taken the position that the government function test was essential or determinative. Furthermore, prior to *Esquenazi*, the DOJ and SEC focused almost exclusively on control-based factors rather than function based characteristics. The inclusion of the additional requirement to show that the entity serves a government function may not be an enormous departure from the status quo, but it may create room in the future to argue that certain classes of state-owned commercial enterprises, such as government airlines for example, do not constitute government instrumentalities.

Indeed, it is telling that defendants have not yet conceded this issue. In *United States v. Sigelman*, the defendant and former Petro-Tiger CEO intends to challenge the DOJ's charges on the grounds that the Department cannot show that the Colombian officials cited in the charging documents were "foreign officials" as defined by the FCPA. According to the DOJ, Sigelman violated the FCPA by bribing an official at Ecopetrol—a state instrumentality of the Colombian government. Sigelman argues that under the 11th Circuit's decision in *Esquenazi*, Ecopetrol is not a government "instrumentality" because the company does not serve a "government function." According to Sigelman, any contrary interpretation would stretch the definition of the term "foreign official" so far as to render the statute unconstitutionally vague. As the case of *United States v. Sigelman* proceeds to trial, it will be interesting to watch how the DOJ addresses the issues raised by Sigelman and 11th Circuit's decision in *Esquenazi*.

Obtain or Retain Business

Following the announcement of the SEC's settlement with Layne Christensen over improper payments made to foreign officials in various African countries, we noted that the SEC's approach to the "obtaining or retaining business" test in the FCPA appeared at odds with the Fifth Circuit's 2007 opinion in *United States v. Kay*.¹ Specifically, in *Kay*, the DOJ charged two executives of American Rice, Inc. for engaging in a scheme to pay Haitian customs officials bribes in exchange for accepting false shipping documents that under-reported the amount of rice onboard ocean-going barges. The result of the false shipping documents was to reduce the amount of customs duties and sales taxes that American Rice would have otherwise been forced to pay. While the court in *Kay* dismissed the defendants' argument that the FCPA was only intended to cover bribes intended for "the award or renewal of contracts," holding instead that the payment of bribes in exchange for reduced customs duties and sales taxes, the court added that in order to violate the FCPA, the prosecution must show that the reduced customs duties and sales taxes were in turned used "to assist in obtaining or retaining business" per the language of the FCPA. In short, the court in *Kay* held that while bribes paid exchange for the reduction of duties or taxes could violate the FCPA, they were not *per se* violations of the statute, and that the Department would have to show how the benefit derived from the reduced duties and taxes were used to obtain or retain business.

¹ For further discussion of these issues, you may wish to refer to our prior client publication, available at Shearman & Sterling, [SEC Settlement with Layne Christensen Raises New Questions on the Government's Understanding of the Business Nexus Element of the FCPA](#).

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Fast forwarding to 2014 in *Layne Christensen*, the Houston-based global water management, construction, and drilling company, was forced to pay over \$5 million in sanctions despite the fact that the SEC's cease-and-desist order pleaded facts inconsistent with the Fifth Circuit's opinion in *Kay*. In its discussion of Layne Christensen's alleged violation of the FCPA's anti-bribery provisions, the SEC only alleged that the company paid bribes to foreign officials in multiple African countries "in order to, among other things, obtain favorable tax treatment, customs clearance for its equipment, and a reduction of customs duties." The SEC's cease-and-desist made no reference to how these reduced costs were used to obtain or retain business, rendering the SEC's charges facially deficient.

Layne Christensen is not, however, the first time the DOJ and SEC have brought similar FCPA charges against companies without alleging how reduced taxes and customs duties were used to obtain or retain business. In the *Panalpina* cases from 2010, a series of enforcement actions against various international oil and gas companies, the DOJ and SEC treated the exchange of bribes for reduced taxes and customs duties as *per se* violations of the FCPA. Even in the 2012 FCPA Guide the enforcement agencies make clear that "bribe payments made to secure favorable tax treatment, or to reduce or eliminate customs duties . . . satisfy the business purpose test." Whether the DOJ's and SEC's approach to the "obtaining or retaining business" element of the FCPA stems from a misinterpretation of *Kay* or is an attempt to challenge the Fifth Circuit's opinion, remains to be seen. Nevertheless, we are troubled by the lack of clarity in the DOJ's and SEC's approach as it ultimately disadvantages defendants who may otherwise be pressured to settle charges over conduct which does not necessarily constitute a crime.

Parent/Subsidiary Liability

As noted in previous *Trends & Patterns*, over the past several years the SEC has engaged in the disconcerting practice of charging parent companies with anti-bribery violations based on the corrupt payments of their subsidiaries.² In short, the SEC has adopted the position that corporate parents are subject to strict criminal liability not only for books & records violations (since it is the parent's books ultimately at issue) but also for bribery violations by their subsidiaries regardless of whether the parent had any involvement or even knowledge of the subsidiaries' illegal conduct. The SEC has subsequently continued this approach in *Alcoa* and *Bio-Rad*.

According to the charging documents, officials at two Alcoa subsidiaries arranged for various bribe payments to be made to Bahraini officials through the use of a consultant. The SEC acknowledged that there were "no findings that an officer, director or employee of Alcoa knowingly engaged in the bribe scheme" but it still charged the parent company with anti-bribery violations on the grounds that the subsidiary responsible for the bribery scheme was an agent of Alcoa at the time. The Commission's tact is curious considering that it charged Alcoa with books and records and internal controls violations as well, making anti-bribery charges seemingly unnecessary. Moreover, it is noteworthy that in the parallel criminal action, the DOJ elected to directly charge Alcoa's subsidiary with violations of the FCPA's anti-bribery provisions instead of Alcoa's corporate parent.

In *Bio-Rad*, the SEC's cease-and-desist order alleged that the corporate parent was liable for violations of the FCPA's anti-bribery provisions committed by the company's corporate subsidiary in Russia, Vietnam, and Thailand. In order to impute the alleged wrongful conduct upon the corporate parent, the SEC relied heavily upon corporate officials' willful blindness to a number of red flags arising from the alleged schemes in Russia, Vietnam, and Thailand. Nevertheless, even if certain officials from Bio-Rad's corporate parent were aware of the bribery scheme, the SEC's charges ignore the black-letter rule that in order to find a corporate parent liable for the acts of a subsidiary, it must first "pierce the corporate veil," showing that the parent operated the subsidiary as an alter ego and paid no attention to the corporate form.

It is also interesting that much like the case of *Alcoa*, the DOJ's criminal charges against Bio-Rad are notably distinct from the SEC's. Specifically, while the DOJ charged Bio-Rad's corporate parent with violating the FCPA, the Department elected to only charge the company with violations of the FCPA's book-and-records and internal controls provisions, not the anti-bribery provisions like the SEC.

The SEC's charging decisions in *Alcoa* and *Bio-Rad* are even more peculiar given the fact that the SEC took an entirely different approach in *HP*, *Bruker*, and *Avon*, where despite alleging largely analogous fact patterns, the SEC charged the parent companies in *HP*, *Bruker*, and *Avon* with violations of the FCPA's books-and-records and internal controls provisions only. Much like *Alcoa* and *Bio-Rad*, all of the relevant acts of bribery in *HP*, *Bruker*, and *Avon* were committed by the company's subsidiaries in Mexico, Poland, Russia (*HP*), and China (*Bruker* and *Avon*). The SEC's decisions in *Alcoa*, *Bio-Rad*, *HP*, *Bruker*, and *Avon* to charge parent companies involved in largely analogous fact patterns with different FCPA violations raise ongoing questions as to consistency and predictability of the SEC's approach to parent-subsidary liability.

² See also Philip Urofsky, [The Ralph Lauren FCPA Case: Are There Any Limits to Parent Corporation Liability?](#), BLOOMBERG (May 13, 2013).

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Anything of Value

To date, several Wall Street investment firms have reported being the subject of probes for their hiring practices in China. Specifically, U.S. enforcement agencies are examining whether the banks violated the FCPA by hiring the children and other relatives of well-connected Chinese politicians and clients in exchange for having business directed to the firms. Because many commercial entities in China are considered government instrumentalities, high-ranking officials and executives of these businesses are considered foreign officials under the FCPA.

While the term “anything of value” is broadly worded, should the DOJ and SEC proceed according to this theory, it would seemingly expand the FCPA beyond any precedent or the wording of the statute itself. There are numerous examples of FCPA cases where enforcement agencies have charged companies for offering the relatives of foreign officials jobs, but these jobs were always shams that served as conduits to allow the defendant to pass bribes through the relative to the foreign official (*UTStarcom*, *DaimlerChrysler*, *Siemens*, *Tyson Foods*). For example, in *Tyson Foods* the DOJ alleged that the U.S. food processing company hired the wives of Mexican foreign officials as veterinarians on Tyson Foods’ payroll knowing that the wives did not perform any services for the company. This is obviously not the same as a case where a company offers the child of a foreign official a job allegedly to influence the government official without any evidence that something of tangible value passes to the official, especially when the child may have been well-educated and qualified for the job in the first place.

This is not to say, of course, that there have never been cases in which the underlying payments were made to or through a family member or where a family member likely derived the most immediate benefit. In *Paradigm*, the DOJ alleged that the Houston-based oil and gas services provider hired the brother of a foreign official as a company driver upon the foreign official’s request. The Department explained, in its non-prosecution agreement with the company, that “[w]hile employed at Paradigm Mexico, the brother did perform some work as a driver.” That said, there were various other tangible items being directly provided to the foreign official in *Paradigm* and the language of the non-prosecution agreement does not make clear whether the brother was a legitimate employee of the company or an employee who was paid a disproportionately large salary for limited services.

In the 2004 case of *Schering-Plough*, the New Jersey pharmaceutical company made significant contributions to a charitable foundation managed by a Polish official to obtain business. Later in 2012, the SEC brought an action against Eli Lilly, an Indiana-based pharmaceutical company, for making charitable contributions to the very same charitable foundation and for the same purpose. Although the donations were never alleged to have reached the pockets of the foreign official, it is arguable (albeit barely) that the intangible benefit of knowing that his foundation received significant funding constituted “anything of value” under the FCPA. While the case could be read to suggest that intangible benefits are sufficient to constitute “anything of value,” in both *Schering-Plough* and *Eli Lilly*, the SEC only alleged that the charitable contributions violated the books and records and internal controls provisions of the FCPA. Therefore, neither case specifically reached the question of whether or not the donations violated the anti-bribery provisions of the FCPA.

In short, while there is some precedent to suggest that the offering of jobs to the relatives of foreign officials *could*, under certain circumstances, constitute “anything of value” under the FCPA, a closer examination suggests that the issue is not a foregone conclusion, particularly in the absence of evidence that any tangible benefit passed through to the government official.

Modes of Payment

Of the 2014 enforcement actions, the companies and individuals most commonly utilized some form of intermediary in order to funnel bribes to foreign officials (*Alstom*, *Alcoa*, *China*, *HP (Mexico and Russia)*, *Marubeni*, *Smith & Wesson*, *Bio-Rad*, *Firtash*, *Layne Christensen*, *DAI*, and *Petro-Tiger*). These cases typically involved individual agents or consultants with pre-existing connections to government officials. For example, in *Alcoa*, the company relied upon a “consultant” at the behest of the relevant Bahraini official and agreed to pay the consultant commissions which, in large part, were allegedly used as bribes. Likewise, in *Alstom* and *Marubeni*, the companies used various consultants with close connections to government officials with the authority to award a valuable energy services contracts. In *Firtash*, the defendants are alleged to have used a foreign official (and co-defendant) as an agent for distributing bribes to other Indian officials.

However, while the majority of these cases are examples of professional “consultants” with formal business connections to foreign officials (*Alcoa*, *HP Mexico*, *HP Russia*, *Marubeni*, *Bio-Rad*, *Smith & Wesson*), the intermediaries in *Petro-Tiger* and *China* were actually close family members. In the case of the *Petro-Tiger* defendants, the individuals allegedly used the wife of a Colombian official as a “consultant” through

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which the company executives funneled bribes. In *Chinea*, the defendants are alleged to have used the family members of their co-defendants to launder bribes through foreign bank accounts.

Additionally, in the case of *Layne Christensen*, the SEC alleged that the company used local lawyers to help funnel the relevant bribes to the foreign officials. Specifically, in connection with the bribes paid in Guinea, Layne Christensen was accused of retaining two lawyers at the suggestion of Guinean tax authorities despite the fact that the attorneys provided no legal services. According to the SEC, Layne Christensen paid the lawyers thousands of dollars which in turn were funneled to the Guinean officials. This is not the first time a corporate defendant has been accused of using lawyers to funnel bribes to foreign officials. In the 2013 SEC enforcement action *Stryker*, the SEC accused the Michigan-based medical device manufacturer of using a "Mexican Law Firm" to pay bribes to Mexican officials in exchange for lucrative sales contracts.

In the other 2014 cases, including *HP Poland*, *Timms*, *Bruker*, and *Avon* (in part) bribe payments took a more direct route. For example, in *HP Poland*, HP officials were charged with bribing the relevant Polish official with items ranging from expensive gifts and travel, to literally bags of money. Similarly, in *Timms*, *Bruker*, and *Avon* the defendants were responsible for providing government officials with extravagant travel, gifts, or direct payments, in exchange for lucrative sales contracts.

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Compliance Guidance

Gifts and Entertainment

In the summer of 2014, all eyes were on Brazil, as the South American country hosted the 2014 FIFA World Cup. Although Brazilians will likely look back on this year's tournament with disappointment having watched Germany walk away from Rio de Janeiro with the Cup, the impact of the World Cup on Brazil is not just restricted to *fútbol*. Indeed, just prior to the World Cup's opening ceremonies, the Office of Comptroller General in Brazil issued a sweeping directive barring government officials from accepting offers to attend or participate in the 2014 FIFA World Cup.³ The Brazilian Office of Comptroller Generals' directive is a reminder of the possible FCPA and Brazilian anti-corruption law violations that could stem from gifts and entertainment expenses. With the 2016 Summer Olympics in Rio de Janeiro on the horizon, gifts and entertainment will continue to control the attention of most compliance officers.

Apart from the happenings in Brazil, the 2014 corporate enforcement actions presented one interesting development in the DOJ's and SEC's approach to gifts and entertainment. In the SEC's enforcement action against Stephen Timms and Yasser Ramahi, both defendants were responsible for organizing extensive travel and offering expensive watches to Saudi Ministry of Interior officials in exchange for valuable sales contracts from FLIR Systems, an Oregon-based defense contractor that designs and manufactures thermal imaging and other sensing devices. In most FCPA cases involving entertainment, travel, and gifts, those bribes are generally seen as "icing on the cake," so to speak, and are generally accompanied by monetary payments. *Timms* is interesting because it is among the very few FCPA enforcement actions premised solely on improper gifts. *Timms* is a helpful reminder that although the government's tendency has been to treat improper travel or gifts as mere add-ons to more serious allegations of cash bribes, the DOJ and SEC are not unwilling to bring charges on the basis of gifts alone.

The DOJ's and SEC's enforcement actions against HP, Bruker, and Avon offer additional examples of the types of practices that companies should avoid. In the case of *HP Poland*, company employees bribed an official at the Polish National Police responsible for awarding IT contracts with various forms of gifts and entertainment. According to the DOJ, HP employees provided the Polish official with various HP products including HP computers, HP-branded mobile devices, an HP printer, iPods, flat screen televisions, cameras, a home theater system, and other items. While it is arguable that product samples, even those as valuable as computers and other high-tech devices in the context of an IT contract, would not violate the FCPA, certainly the number and type of devices that HP actually gave the Polish official exceeded the threshold of reasonableness.

Relatedly, HP officials also provided the Polish official's travel expenses to a technology-industry conference, which, in and of itself, would not violate the FCPA except that HP officials also paid for dinners, gifts, and sightseeing, along with a side-trip to Las Vegas mid-way through the conference which the government concluded served no legitimate business purpose. Such was also the case in *Bruker*, where the company paid for Chinese officials to take numerous leisure trips in Sweden, Norway, and Finland as part of a business conference in Sweden. Much like the case in *HP Poland*, the SEC concluded that the majority of the company's travel expenses in *Bruker* did not relate to a legitimate business purpose and that the company violated the FCPA's book-and-records provisions by failing to properly record the travel.

In *Avon*, the charges in both the DOJ and SEC enforcement actions highlight how a company can run afoul of the FCPA by failing to properly record gifts and entertainments, legitimate or not, in its books and records, while also raising questions as to when and why the government agencies choose to charge bribery in one case and books-and-records in another. Despite considerable focus in the pleadings of awareness at the U.S. parent company of conduct by its Chinese subsidiary that involved over eight million dollars in "things of value, including gifts, cash, and non-business travel, meals, and entertainment," all of which the government linked to obtaining licenses and other government actions, the various actions by the DOJ and SEC (guilty plea by Avon China, a DOJ NPA for Avon itself, and SEC civil action against Avon) charged the various entities, not with bribery, but with books and records and internal controls violations. For example, Avon China offered government officials expensive gifts from retail designers Louis Vuitton and Gucci which it misleadingly recorded as "public relations entertainment" or some derivation thereof. In other instances, Avon China paid for government officials' vacations in the United States as well as in China and improperly recorded the expenses as "business entertainment." The government also charged that Avon China incurred expenses of thousands of dollars in meals and entertainment for Chinese officials which also were recorded as "business entertainment."

³ For a further discussion of these issues, you may wish to refer to our prior client publication, available at Shearman & Sterling, [So You Want to See Messi, Neymar, Ronaldo, and Xavi: Brazil Issues Directive Barring Government Officials From Receiving World Cup Tickets \(June 2, 2014\)](#).

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Specific Compliance Failures

Several of the cases that were brought thus far in 2014 provide examples of rather startling compliance failures that clearly raised the ire of the enforcement agencies.

Failure of Corporate Managers and Executives. The enforcement actions against Avon and Bio-Rad are likely the most striking 2014 compliance failures of the year. In both cases, corporate managers and executives charged with overseeing regional and global operations detected the improper payments in question and permitted the conduct to continue. However, most concerning were allegations that high-level executives at Avon attempted to conceal the company's Chinese subsidiary's improper practices after receiving an internal audit report indicating potential FCPA violations. Specifically, after Avon's internal audit department discovered multiple examples of improper payments to government officials giving rise to potential FCPA liability, executives of Avon and Avon China requested that language referring to improper payment and FCPA liability be removed from the audit report. Furthermore, upon the discovery of the potential FCPA violations, although Avon executives, including Avon's General Counsel, directed the internal audit team to perform an expanded review, they also instructed the audit team not to create any electronic documents, not to send emails related to the follow-up review, and not to use the term "FCPA" in any written document.⁴

Failure of Legal and Compliance Departments. In light of the discovery of certain potential FCPA violations, Avon's legal and compliance departments allegedly took certain actions to try to investigate and remedy the conduct; however, according to the DOJ and SEC, none of these actions were done in earnest. For example, although Avon eventually consulted an outside law firm concerning the Avon China issues, Avon's Vice President of Legal & Government Affairs sent the law firm a short email after only two telephone conferences indicating that the company had "moved on" from the FCPA issues.

In other instances, Avon's General Counsel, its Vice President of Legal & Government Affairs, and its Regional Counsel - Asia-Pacific decided to implement certain remedial measures at Avon China, including the creation of a log which would list the government officials who Avon entertained or provided with gifts. However, the log did not require a description of the business purpose of any meeting with the government officials, and Avon China was allowed to keep the log off-premises—essentially enabling Avon China to continue to conceal the improper payments. The deficient remedial measures were made worse by the fact that Avon China never actually implemented them. According to the SEC's complaint against Avon, the Commission cited multiple instances where the company declined to implement reforms aimed at improving the company's FCPA compliance program. For example, in 2005, roughly around or after the company discovered various potential FCPA violations, Avon's internal audit department recommended providing FCPA training for the Asia-Pacific region. Despite such recommendations, the company declined to provide the FCPA trainings citing deficient budgetary resources. As a result of the inability of Avon's legal and compliance departments to take the evidence of improper payments to address the clear indications of misconduct at Avon China, the conduct continued for several years.

Purposeful Policy to Evade the FCPA. In *Alstom*, the DOJ's plea agreement highlighted the company's unwritten policy to discourage consultancy agreements that would subject Alstom to the jurisdiction of the United States. According to the plea agreement, "[t]o effectuate this policy, Alstom typically used consultants who were not based in the United States, and intentionally paid consultants in bank accounts outside the United States and in currencies other than U.S. dollars." A policy to evade, rather than comply with the FCPA, is likely to draw the harsh criticism from the government.

Failure to Detect. In the SEC's action against HP, despite corporate policies against inviting representatives of government customers to events related to the 2006 FIFA World Cup in Germany, multiple employees of HP Russia and other European subsidiaries allegedly paid tens of thousands of dollars in travel and entertainment expenses. The SEC concluded that HP's internal controls simply failed to detect and prevent the conduct.

⁴ Although the SEC in particular was critical of Avon's legal department for taking the position that "conclusions about potential violations fell within the purview of Legal, and not Internal Audit," we note that this is a common and, we believe, correct position. Internal Audit is rarely staffed with attorneys and ought not to include legal conclusions in its reports without first consulting with the legal department, precisely because an uncounseled opinion as to the application of law, particularly when incorrect, does more than create a bad record – it causes untold additional work and difficulties in subsequent investigations and negotiations with the government.

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Easily Circumvented Internal Controls. In *HP Mexico*, the company subsidiary hired a Mexican consulting company that was well connected to the Mexican national oil company and would eventually funnel bribes to Mexican officials. HP's internal controls would have placed the Mexican consultant under significant scrutiny, likely barring HP Mexico from engaging its services. To circumvent the company's internal controls, HP Mexico contracted with a pre-approved entity to simply act as a pass-through, thereby avoiding internal compliance scrutiny. Accordingly, HP Mexico would pay the pass-through entity a portion of the commissions, which the pass-through would in turn funnel to the Mexican consulting company to be used as bribes. The SEC noted that "[b]y simply injecting the [pass-through entity] in the transaction, HP Mexico sales managers were able to evade HP's policies."

Repeat Violations. The case of *Marubeni* is the second time in two years where the company has been charged with an FCPA violation, indicating a generally ineffective/non-existent anti-corruption compliance program. Although difficult to point to any one particular compliance failure, *Marubeni* may simply illustrate the difficulty certain foreign firms have had in dealing with U.S. regulators.

Refusal to Abide by Internal Controls. In the case of *Bio-Rad*, the bribery scheme involved the payment of commissions to a group of offshore companies that in turn were used to bribe Russian Ministry of Health officials. The DOJ and SEC note that there were numerous red flags about the offshore companies that suggested they could not supply the contracted-for-services but that Bio-Rad nevertheless approved the commission payments.

Both agencies highlight the fact that many of the alleged bribes were the direct result of a failure by the company to abide by internal controls. According to the DOJ, a general manager charged with the responsibility of approving the commission payments signed off on many of the payments without appropriately scrutinizing the supporting documents—assuming that the company's emerging market division conducted the appropriate due diligence. In the SEC's cease-and-desist order, the Commission described instances where a general manager from the emerging markets division instructed Bio-Rad's Russian country manager (the manager responsible for the bribery scheme) to sign and approve the commission payments on Bio-Rad's behalf, in direct contravention of company policies. The SEC also alleged that the same emerging markets general manager failed to provide translated copies of the commission agreements to Bio-Rad's finance and legal departments in further violation of company policies. Despite this, Bio-Rad's finance department continued to approve the commission payments for five years.

Excessive Discretion. Also in *Bio-Rad*, the Department explained that although the company maintained a set of corporate policies, its international offices were given autonomy to implement and maintain adequate controls. As a result of this significant autonomy, Bio-Rad Russia's country managers declined to implement any internal controls, enabling them to continue the bribery scheme. When pressed by company representatives to correct the situation, the country managers resisted and refused to implement the requested internal controls.

Failure to Provide Compliance Materials in Foreign Languages. In *Bruker*, the SEC highlighted the fact that despite maintaining relatively significant operations in China, the company failed to translate any of its training presentations on the FCPA, ethics, or compliance issues as well as its Code of Conduct and employee handbook into Mandarin. Instead, since establishing an FCPA compliance program in 2006, the company relied upon its China-based managers (the individuals responsible for organizing the bribery scheme) to ensure that employees understood anti-bribery risks posed by doing business with Chinese state-owned entities. Furthermore, the SEC pointed out that Bruker's toll-free hotline, which was intended to allow employees to report complaints anonymously, was not provided in Mandarin.

Recent Trends and Patterns in FCPA Enforcement

Unusual Developments

Consistent with past *Trends & Patterns*, we have begun to include 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.

Prosecution of Foreign Officials

It is important to remind our readers that the FCPA does not prohibit foreign officials from taking bribes. Instead, the FCPA is a supply-side statute that punishes individuals and companies for offering or giving illicit payments. However, despite this asymmetrical feature of the law, U.S. enforcement agencies have regularly relied upon other federal statutes, including the Travel Act (18 U.S.C. § 1952), RICO (18 U.S.C. §§ 1961-68), and the federal money laundering statute (18 U.S.C. § 1956) to prosecute foreign officials who have participated in FCPA-related bribery schemes. The 2014 cases of *Firtash* and *Alstom*, along with the prosecution of the former Guatemalan president, Alfonso Portillo, are all examples of how the DOJ is willing to circumvent the supply-side feature of the FCPA to prosecute foreign officials who receive bribes.

In *Firtash*, the Department alleged that the defendant, K.V.P. Ramachandra Rao, a sitting member of the Indian Parliament and possibly the highest profile foreign official to be prosecuted as part of an FCPA enforcement action to date, participated in an alleged bribery scheme along with his five other co-defendants. According to the indictment, Rao worked alongside his co-defendants to take and funnel bribes to other Indian officials in exchange for granting mineral licenses to certain designated entities. While the indictment did not charge Rao with violating the FCPA, the DOJ charged him with violations of the federal criminal statutes mentioned above.

In *Alstom*, the court documents identify a specific Egyptian official named Asem Elgawhary, the individual responsible for awarding a pair of power infrastructure projects on behalf of a joint-venture company which included the state-owned and state-controlled Egyptian electricity company—Egyptian Electrical Holding Company. Alstom officials are accused of having paid Elgawhary several millions of dollars through the use of a consultant. In February 2014, Elgawhary, a resident of Maryland, was charged and later pleaded guilty to mail fraud, conspiracy to launder money, and tax evasion.

Elgawhary's and Rao's cases mark the second and third times in less than a year that the DOJ has prosecuted a foreign official who received bribes as part of an FCPA enforcement action. The first occurred in May of 2013 when the DOJ unsealed charges against Maria de los Angeles Gonzalez de Hernandez, a senior official for the Venezuelan state economic development bank (BANDES), for her role in receiving bribes as part of enforcement action against a group of brokers employed by the financial services firm, Direct Access Partners. Gonzalez, who later pleaded guilty to the charges, was responsible for diverting business from BANDES to Direct Access Partners in exchange for kickbacks. As was the case for Rao, the DOJ charged Gonzalez with similar violations of the Travel Act and the federal money laundering statute.

It is also worth noting that, in a non-FCPA related case, 2014 also saw the former president of Guatemala, Alfonso Portillo, plead guilty and be sentenced to 70 months in prison for money laundering. In the 2013 indictment, the U.S. Attorney for the S.D.N.Y. accused Portillo of receiving approximately \$2.5 million in bribery payments from the government of Taiwan in exchange for the Guatemalan government's decision to recognize Taiwan as an independent state. The \$2.5 million dollar payment was made in five separate installments and were deposited in a bank account in Miami, Florida, and subsequently transferred through other banking institutions in France, Luxembourg, and Switzerland, among others. Much like the charges against Rao and Gonzalez, Portillo's sentencing serves as a reminder that although the FCPA does not prohibit the receipt of bribes, the government is willing to utilize other U.S. laws to prosecute government officials involved in acts of bribery.

Prosecuting Individuals for Non-FCPA Related Bribery Schemes

In February 2014, the DOJ announced charges against four current and former employees of International Adoption Guides Inc. for allegedly conspiring to defraud the United States in connection with the adoption services it offered in Ethiopia. According to the DOJ's press release, the defendants are accused of obtaining adoption decrees and U.S. visas by submitting fraudulent adoption contracts signed by orphanages that never cared for or housed the children who were purported to be adopted.

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On August 6, 2014, the DOJ announced that one of the four defendants, Alisa Bivens, pleaded guilty to the charges. In her guilty plea, Bivens also admitted that Bivens and others bribed two Ethiopian officials to obtain the fraudulent adoption contracts. One official was a teacher at a government school and the other, the head of the regional ministry of women's and children's affairs.

Presumably, all of the alleged conduct could have sustained a charge that Bivens violated the FCPA; however, the DOJ declined to do so, instead charging Bivens with fraud. The decision not to charge Bivens with an FCPA violation is curious and raises interesting questions on how the government chooses to enforce the FCPA.

Diverging Approaches by the DOJ and SEC

In the four instances in which both the DOJ and the SEC have brought enforcement actions against the same or related corporations (*Alcoa*, *HP*, *Bio-Rad*, and *Avon*), the agencies' pleadings have reflected diverging approaches in the prosecution of the FCPA. As mentioned above, in *Alcoa*, *HP*, and *Bio-Rad*, both the DOJ and SEC took different stances on how to hold a corporate parent accountable for the conduct of a subsidiary. While the DOJ has generally taken the more conservative stance—deciding only to charge a corporate parent with book-and-records and internal controls violations (*Bio-Rad*) or deciding to only charge a corporate subsidiary with violating the FCPA's anti-bribery provisions (*Alcoa* and *HP*)—the SEC has applied the language of the statute as broadly as possible, frequently charging corporate parents for violations of the FCPA's anti-bribery provisions for the acts of subsidiaries without satisfying general black-letter rules of corporate liability.

In addition to the cases above, the settlement agreements in *Avon* reveal the agencies' different perspectives on the same relevant facts. According to the DOJ's charges, *Avon*'s senior management engaged in a scheme to cover up the potential FCPA violations by instructing auditors to remove references to the improper payments from any reports and to avoid creating any electronic documents related to the potential FCPA violations. In the SEC's complaint against *Avon*, the charges focused less on the actions of *Avon*'s senior management and more on the general failures of the company's legal and compliance departments. The DOJ's and SEC's differing approaches may reflect a split in enforcement priorities, with the DOJ seeking to impress the importance of FCPA compliance on corporate executives and the SEC seeking to stress the critical role legal and compliance departments play in avoiding FCPA liability.

It is also interesting that in two of the SEC's stand-alone cases, the DOJ officially declined to bring any charges (*Smith & Wesson* and *Layne Christensen*). While the Department did not issue an explanation for its declinations, and it is not clear whether the declinations resulted from policy, jurisdictional, or evidentiary conclusions, the SEC's decision to prosecute the two companies indicates a more aggressive FCPA enforcement policy by the Commission.

Industry Sweeps: Aviation Services Industry

Over the past decade, the DOJ and SEC have announced that they would conduct a series of "industry sweeps" for potential FCPA violations. This has included inspections of the industries which include defense, finance, gaming (gambling), aviation, and films, to name a few. The 2014 enforcement act action in *DAI* highlights the numerous connections between a recent slew of cases stemming from the aviation services industry.

Beginning in 2012, the DOJ first filed charges against the Tulsa, Oklahoma-based aircraft maintenance and servicing company, BizJet, for bribes made of officials in Mexico and Panama. The allegations associated with BizJet's activities also caused its German parent company, Lufthansa Technik AG, to enter into a deferred prosecution agreement with the DOJ. Later the same year, government prosecutors announced charges against another Oklahoma-based aircraft maintenance company, Nordam Group Inc. for payments to Chinese officials. Notably, later revelations made clear that the charges against Nordam were, in part, due to the cooperation of a BizJet executive, Peter DuBois, who was charged along with three other BizJet executives (Bernd Kowalewski, Jald Jensen, and Neal Uhl) with FCPA violations associated with the same activity detailed in the DOJ's 2012 enforcement action in *BizJet*. However, one notable addition to the government's charges against the BizJet executive, Bernd Kowalewski, was that in addition to bribing officials from Mexico and Panama, the government also alleged that Kowalewski bribed officials from the Brazilian state of Roraima. Interestingly enough, the government's case against DAI centers, in large part, around a number of improper payments made to officials from the Brazilian state of Roraima. In short, the connections between the industry sweep of the aviation industry highlights how interconnected the DOJ's and SEC's investigations can be.

Recent Trends and Patterns in FCPA Enforcement

U.S. Government Financing

In *Alstom*, the company was involved in a series of power projects in Egypt which were funded, in part, by the United States Agency for International Development (USAID). To ensure that the project contractors were compliant with U.S. regulations, including the FCPA, USAID required that Alstom submit regular certifications that would disclose if Alstom was using any third-party vendors or consultants, state whether Alstom was paying commissions in connections with the projects, and certify that no unlawful payments were being made. According to the DOJ, Alstom regularly submitted false certifications to USAID knowing that the company repeatedly used consultants as part of the Egyptian power projects and knowing that improper benefits were being made to Egyptian government officials. Although U.S. government financing played a minor role in the case and was arguably unnecessary to state the government's charges against Alstom, the DOJ made a specific point to highlight the fact that the corporate defendants attempted to use U.S. taxpayer backed financing to further the alleged bribery schemes. The decision to include these allegations in *Alstom* is telling of a particular sensitivity felt by the enforcement agencies.

Sealed Indictments

The 2014 FCPA enforcement actions against individual defendants highlighted the DOJ's increasing use of sealed indictments. Indeed, in *Chinea*, *Hammarskjold*, *Weisman*, *Sigelman*, and *Firtash*, the DOJ filed the indictments under seal apparently to prevent the defendants from evading arrest. In the case of *Hammarskjold*, the defendant was arrested at Newark Liberty Airport on November 20, 2013 while the defendant in *Sigelman* was arrested in the Philippines on January 3, 2014. The indictments in *Hammarskjold* and *Sigelman* were both filed on November 8, 2013 and unsealed on January 6, 2014. Similarly, the indictment in *Firtash* was filed on June 20, 2013 and unsealed on April 2, 2014 after Dmitry Firtash was arrested in Vienna, Austria on March 12, 2014.

Given the very detailed description of the conduct of certain executives in a number of the corporate cases brought in 2014, it is entirely possible that additional sealed indictments are lurking in the courts' files, particularly with respect to foreign nationals, with the government alert to any opportunity to obtain custody of those executives.

Whistleblower Confidentiality Statements

The enactment of Dodd-Frank created a mechanism for allowing whistleblowers to report fraud, including FCPA violations, to the SEC without retaliation. However, over the course of a recent federal lawsuit, media sources have reported that certain companies have begun requiring employees to sign confidentiality agreements that restrict their ability to disclose reports of fraud to anyone, including federal investigators. The SEC has since launched an investigation into the use of these confidentiality agreements, throwing the future viability of these practices into question.

Freedom of Information Act Lawsuit Over Compliance Monitor Reports

In July 2013, a Freedom of Information Act request was filed by Marjorie Valbrun, an investigative journalist from the non-profit news website "100 Reporters," seeking records related to Siemens' plea agreements, the government's sentencing memorandum, and the reports issued by Siemens' compliance monitor. In response, the DOJ denied Valbrun's request on the grounds that the disclosure would interfere with an ongoing investigation into Siemens.

After exhausting her administrative appeals, Valbrun filed a lawsuit on July 24, 2014 before the U.S. District Court of the District of Columbia seeking an order to instruct the Department to disclose its records on the Siemens FCPA investigation, prosecution, and compliance program. On October 20, 2014, following the filing of the DOJ's answer to the complaint, attorneys for Siemens filed a motion to intervene in support of the government.

While the outcome of the case remains uncertain, the possibility that such investigative materials and compliance reports could be made public through a FOIA request could fundamentally change the way companies and the government manage FCPA (and other criminal or civil charges) enforcement actions. Indeed, among the fundamental reasons companies like Siemens elect to settle FCPA charges with the government through plea agreements, deferred prosecution agreements, and non-prosecution agreements is that these settlement devices allow companies to avoid the risk of disclosing potentially embarrassing conduct before the U.S. courts. If FOIA requests for such documents are granted, it seems that the one of the fundamental precepts of the current approach could be undermined.

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Multi-Jurisdictional Investigations and Prosecutions

While cooperation with foreign authorities has always played a role in FCPA enforcement and investigations (e.g., *Siemens*), the 2014 cases have illustrated the extent to which U.S. authorities are working alongside their foreign counterparts to prosecute companies and individuals for acts of bribery. In *HP Russia*, U.S. authorities only entered the fray after German investigators discovered the alleged bribery scheme in 2012. Since that time, the proceedings in Germany have continued, although the ultimate outcome and even the merits of the charges against certain individuals remain uncertain. Indeed, when deciding whether to award the company a discount, the plea agreement reached with HP Russia specifically took into consideration amounts that the company would pay to German authorities. Likewise, *Alcoa* and *Alstom* included a multi-jurisdictional component as the SFO cooperated extensively with the DOJ and SEC during the course of the U.S. government's investigations. In *Alstom* and *Marubeni*, U.K. and Swiss authorities arrested multiple individuals involved in the same Indonesian bribery scheme as alleged in the U.S. charges. It is also worth pointing out that (as discussed below) the FCPA investigation into Beny Steinmetz Resources Group and the subsequent 2013 arrest of Frederic Cilins has generated evidence that was used by Guinean authorities in deciding to revoke BSGR's mining licenses in the country.

As foreign authorities, including the SFO, German prosecutor's office, Royal Canadian Mounted Police, and China's Administration of Industry and Commerce and Public Security Bureau, increasingly begin to investigate and prosecute companies for bribery, we expect the current trend of anti-corruption enforcement to continue. Based upon the increasing activity of foreign regulators, we anticipate seeing a greater number of DOJ and SEC investigations stemming from investigations/charges abroad. In fact, an investigation by Chinese enforcement agencies into the practices of foreign pharmaceutical companies has already spurred inquiries by the SFO.

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Private Litigation

Consistent with past years, 2014 saw a number of derivative and securities lawsuits stemming from disclosures over FCPA investigations and enforcement actions. However, among the most notable private litigation cases from 2014 arise out of the ongoing FCPA investigation into Beny Steinmetz Resources Group (“BSGR”) and its mining operations in Guinea.

On April 30, 2014, the British-Australian metals and resource extraction company, Rio Tinto plc, filed a complaint in the S.D.N.Y. against Vale, S.A. and BSGR, along with multiple corporate executives and Guinean government officials. According to the complaint, Vale and BSGR violated RICO and defrauded Rio Tinto by engaging in a scheme to steal a valuable mining concession that Rio Tinto had been developing in the Simandou region of Guinea.

Rio Tinto accused Vale of stealing proprietary information through the course of negotiations over the sale of mining rights in Guinea. With the relevant information in hand, including information on where the most valuable mineral deposits were located, Vale allegedly partnered with BSGR to execute a scheme to have Guinea withdraw Rio Tinto’s mining concession and have it reissued in Vale’s and BSGR’s favor. For its part, Rio Tinto alleges that BSGR had very little mineral extraction experience of the kind needed to develop the Simandou concessions, but added value to the venture by bribing Guinean authorities. Much of the evidence used by Rio Tinto in its complaint stems from information acquired by an ongoing investigation into BSGR and disclosed during the arrests and prosecution of the BSGR employee, Frederic Cilins.

Interestingly, Rio Tinto’s action against Vale and BSGR is not the only litigation stemming from the BSGR-FCPA investigation and the arrest of Cilins. Indeed, just before Rio Tinto filed its complaint in April 2014, the government of Guinea, relying in large part on the information acquired by U.S. authorities, announced that it would revoke Vale’s and BSGR’s mining rights in Guinea after concluding that the mining licenses had been acquired through bribery. As a result, BSGR has filed a request for arbitration against Guinea before the International Centre for Settlement of Investment Disputes claiming that Guinea expropriated BSGR’s property in violation of domestic and international laws.

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Enforcement in the United Kingdom

Update

The year 2014 has seen a rise in investigations into alleged bribery and corruption, illustrating an increasing focus on such issues and the broad scope and jurisdictional reach that the Bribery Act is intended to have. Over the past year, the SFO has begun to announce, with increasing frequency, investigations into or proceedings against various multi-national corporations for alleged bribery and corruption offences. In December 2013, the SFO launched a criminal investigation into allegations of bribery and corruption in China and Indonesia at Rolls-Royce, and in May 2014 the SFO launched a criminal investigation into GlaxoSmithKline PLC. It has also been reported that the SFO is considering whether to launch an investigation into FIFA relating to alleged bribery in the World Cup bidding process.

The SFO also brought proceedings in September 2014 against Alstom Network UK Ltd, a U.K. subsidiary of French energy and rail infrastructure giant Alstom S.A., after five years of investigation. Alstom is charged with allegedly offering and giving bribes to win transport project contracts in India, Poland, and Tunisia between 2000-2006. As the alleged offences occurred before the Bribery Act entered into force, the charges are under the Prevention of Corruption Act 1906, although any sentence would be imposed in accordance with the new sentencing guidelines (discussed below).

Four individuals were sentenced in August 2014 in the long-running Innospec investigation. While the offences were charged under the Prevention of Corruption Act 1906, the sentences were the first to be determined under the new sentencing guidelines (discussed below). The sentences ranged from a 16-month suspended sentence to four years' imprisonment (subsequently reduced to three years on appeal), and reflect the seriousness with which corporate crime is taken by the courts. The joint head of the SFO, Ben Morgan, stressed that a key takeaway from the sentencing is that the defendant who pleaded guilty and co-operated with the investigation received a suspended sentence.

This year also saw the SFO obtain the first corporate-related convictions under the Bribery Act (although no charges were brought against the corporate entity itself under section 7 of the Bribery Act). Three men were convicted for their participation in a £23 million sustainable energy scam, following the SFO's investigations into Sustainable Growth Group and its subsidiary companies Sustainable AgroEnergy plc and Sustainable Wealth Investments Ltd. The individuals involved were sentenced in accordance with the new sentencing guidelines (each receiving custodial sentences).

Most recently, on December 22, 2014, Smith and Ouzman Ltd and two of its employees were convicted of offences under the Prevention of Corruption Act 1906 following an SFO investigation into corrupt payments made to public officials for business contracts in Kenya and Mauritania. This is a notable development as it is the SFO's first conviction after trial of a corporation for offences involving bribery of foreign public officials.

However, this wave of activity has occurred against a backdrop of some turmoil, including judicial review proceedings that were brought by BSG Resources (a diamond mining company) against the Home Office and the SFO in relation to their assistance in a request from the Republic of Guinea in respect of a purported criminal investigation into BSG Resources and others. This has all led to some criticism of the SFO, resulting in the Home Secretary, Theresa May, calling yet again for the SFO to be merged into the National Crime Agency (this suggestion was previously raised in 2011).

Deferred Prosecution Agreements

Deferred Prosecution Agreements are now available to prosecutors in the United Kingdom, with effect from February 24, 2014. As in the United States, DPAs are agreements entered into between a prosecutor and a company where the prosecutor has agreed to bring but not immediately proceed with a criminal charge against the company, subject to successful compliance by the company with agreed terms and conditions as set out in the DPA. However, the U.K. DPA process, as set out in schedule 17 of the Crime and Courts Act 2013, is more restrictive than its U.S. equivalent (for example, U.K. DPAs are only applicable to organizations, whereas in the U.S. they are also available in relation to individuals).

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Most notably, the U.K. regime requires far greater judicial oversight of the entire DPA process. Prior to becoming effective, U.K. prosecutors must first submit the DPA to the Crown Court for a declaration that the terms of the agreement are “in the interests of justice” and “fair, reasonable, and proportionate.” The extent to which the U.K. courts will use this authority to overturn or second-guess DPAs remains to be seen; the court’s explicit authority, however, is in stark contrast to the approach taken in the United States, where the Second Circuit only recently concluded that a district court’s decision to overturn a similar settlement was an abuse of discretion. Although judges such as Judge John Gleeson of the Eastern District of New York in *United States v. HSBC Bank USA* have asserted their authority to oversee the implementation of DPAs in the United States as part of the courts’ “supervisory powers,” the Second Circuit’s recent opinion reiterates the limited role of the U.S. judiciary in the DPA settlement process.

The final version of the U.K. joint code of practice on DPAs was published on February 14, 2014 by the Director of Public Prosecutions and the Director of the Serious Fraud Office. The joint code of practice has (among other things) given guidance on some of the potential terms and conditions that may form part of a DPA. One of those terms could be the appointment of a monitor to assess and monitor an organization’s internal controls, advise on necessary improvements to its compliance program, and report any specified misconduct to the prosecutor. For these purposes, the monitor will have complete access to all relevant aspects of the organization’s business. However, the appointment of a monitor will depend on the factual circumstances of each case and must be fair, reasonable, and proportionate.

DPAs are therefore a new alternative in the United Kingdom to criminal prosecution or civil enforcement (such as civil recovery orders under the Proceeds of Crime Act 2002). It is not clear, however, how effective or regularly used they will be in practice. David Green, the Director of the SFO, has said that “[p]rosecution remains the preferred option for corporate criminality,” and that DPAs are not “a mechanism for a corporate offender to buy itself out of trouble.” Moreover, there remains some uncertainty as to the practical implementation and future use of DPAs, not least given the required amount of judicial involvement in the approval of DPAs under the relevant legislation. It remains to be seen to what extent organizations and prosecutors will be prepared to agree to the terms of a DPA, and whether the courts will then approve those terms. However, the SFO has confirmed that “[e]ntering into the agreement will be a fully transparent public event and the process will be approved and supervised by a judge”.

U.K. Sentencing Guidelines

The United Kingdom’s new sentencing guidelines to be used by judges for offenses relating to fraud, bribery and money laundering (including offenses under the Bribery Act) came into force on October 1, 2014. These guidelines encompass both the sentencing of individuals and corporate offenders, and set out a variety of factors which will be considered by a court in determining the appropriate sentence, including by reference to the culpability and harm involved and any aggravating or mitigating features. The court must follow those guidelines in all cases where it is sentencing offenders for these types of offenses unless it is satisfied that it would be contrary to the interests of justice to do so. It is likely that the guidelines will also be considered when DPAs are being considered and negotiated.

Transparency International Guidance on Countering Small Bribes

Transparency International has recently published guidance for companies entitled “Countering Small Bribes”. The guidance aims to “help companies to address the significant challenge of countering small bribes, including facilitation payments”. This reflects a common reality faced by many companies with operations outside of the United States and United Kingdom—that dealing with the risk of such bribes is one of the most challenging issues in countering bribery, as such improper payments are often difficult to detect and eliminate.

Under section 7 of the Bribery Act, a company can face liability for these types of small bribes paid overseas or in the United Kingdom by its employees or related third parties. However, a company has a defense if it has in place “adequate procedures” designed to prevent persons associated with it from committing bribery. The TI guidance is therefore designed to help companies protect themselves by setting out “Ten Principles for Countering Small Bribes”, as follows:

- There is a supporting culture of integrity;
- The company commits to eliminating small bribes;
- Risk assessment is the basis for designing the strategy and program to eliminate small bribes;

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- The company implements a program to counter small bribes;
- Communication and training are provided to employees;
- Attention is given to countering third-party risks;
- The internal accounting controls are designed specifically to counter small bribes;
- Appropriate actions are taken if small bribes are detected;
- The company monitors the effectiveness of its program to counter small bribes; and
- The company acts strategically to influence the corruption environment in which it operates.

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Conclusion

Although 2014 may reflect a general downward trend in the number of corporate enforcement actions from the peak in 2010, this year's enforcement activity is noteworthy for other reasons. The remarkably high total and average corporate penalties indicate that the FCPA remains a high priority among enforcement agencies. If we are to read anything from the 2014 statistics, it is that the DOJ and SEC are taking a more measured approach to FCPA enforcement, electing to bring charges against only the biggest FCPA violators. That said, despite the government's more pragmatic tact, several of the 2014 cases suggest that the DOJ and SEC continue to utilize practices that, at least arguably, fall outside the scope of the statute.

The government's settlement devices, particularly the SEC's use of the administrative proceedings, also reflect an emerging trend. For both the DOJ and SEC, obtaining the most impactful prosecutions are a high priority. It appears that the DOJ believes that it can achieve this goal by the increasing use of plea agreements and higher corporate penalties. For the SEC, which has experimented with various settlement devices over the years, it seems that the administrative proceedings process has proven to be an efficient and practical way for the Commission to secure successful prosecutions.

Moving forward, it seems that while the 11th Circuit's decision in *Esquenazi* has been the most high profile judicial opinion on the FCPA in recent years, with several defendants such as *Sigelman (Petro-Tiger)* and *Hoskins (Alstom)* challenging the DOJ's charges, it is not improbable that the courts may be asked to decide additional questions on the FCPA in the future. The opportunity for the courts become more involved with defining the scope of the FCPA should come as welcome news to many. We will continue to look out for these developments and more in 2015.

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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