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U.S. Foreign Corrupt Practices Act Enforcement and Anti-Corruption Trends: A 2014 Mid-Year Review

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The U.S. Securities and Exchange Commission ("SEC") and the U.S. Department of Justice ("DOJ") have continued their active enforcement of the U.S. Foreign Corrupt Practices Act ("FCPA") with four significant corporate settlements in the first half of this year and the filing of several cases against individuals for alleged FCPA violations. With public reports of more than 100 ongoing FCPA investigations by the U.S. government, the second half of 2014 is likely to bring additional, significant FCPA enforcement actions.

This Focus article examines significant developments in FCPA and anti-corruption enforcement in the first half of this year, including: 1) highlights from recent noteworthy FCPA enforcement actions brought against corporations and individuals; 2) a summary of a recent federal appellate court's interpretation of "instrumentality" of a foreign government under the FCPA; and 3) an update on recent international enforcement efforts and trends, including the entry into force of Brazil's new anti-corruption law and the first prison sentence handed down under Canada's Corruption of Foreign Public Officials Act.

Corporate Enforcement Actions

There were only four corporate settlements alleging FCPA violations during the first six months of 2014. Yet, from those four enforcement actions, the DOJ and the SEC collected more than $582 million in fines, penalties and disgorgement. In those settlements, the DOJ and the SEC alleged misconduct in multiple countries, including Poland, Russia, Mexico, Indonesia, Pakistan and Bahrain, spanning the technology, energy, firearms and extractive industries — some of the usual suspects in terms of targeted countries and industries.

These corporate settlements reveal several distinct trends: 1) the importance of cooperation with the DOJ and the SEC in their investigations; 2) increasing cooperation between U.S. regulators and anti-corruption authorities in other countries; and 3) the SEC's continued use of administrative proceedings to resolve FCPA cases. These trends have been in place for several years, and we expect them to continue through the rest of 2014 and beyond.

As in the corporate enforcement actions, the penalties imposed against individuals reveal the enforcement agencies' disdain for defendants who refuse to cooperate.

Smith & Wesson Holding Corp.

On July 28, 2014, Smith & Wesson Holding Corp. ("Smith & Wesson") agreed to pay $2 million to settle the SEC's allegations that it had made or authorized representatives to make improper payments, including in the form of gifts, to foreign officials in order to obtain contracts for the sales of firearms products in Pakistan, Indonesia, Turkey, Nepal, and Bangladesh. The SEC resolved the matter through an administrative proceeding in which Smith & Wesson neither admitted nor denied the SEC's findings.[1] The SEC ordered Smith & Wesson to disgorge $107,852, pay $21,040 in pre-judgment interest and pay a $1.906 million penalty. For the next two years, Smith & Wesson also "must report to the SEC on its FCPA compliance efforts."[2]

Earlier this year, Smith & Wesson stated in its annual report that the DOJ had declined to pursue FCPA charges against it and had acknowledged Smith & Wesson's "thorough cooperation."[3] The SEC noted also that, in agreeing to its settlement with the company, it "considered Smith & Wesson's cooperation with the investigation," as well as several remedial actions, including terminating all of its international sales staff, aborting pending sales transactions that had been tainted by the alleged improper conduct, and improving its compliance processes and internal controls.[4]

Hewlett-Packard Co.

On April 9, 2014, Hewlett-Packard Co. ("HP") agreed to pay more than $108 million to settle enforcement actions by the DOJ and the SEC (*see WSLR, May 2014, page 27*). From approximately 2000 to 2010, HP's subsidiaries allegedly used intermediaries to bribe foreign government officials in order to obtain profitable technology contracts.[5] The SEC's cease-and-desist order charged HP with violating the FCPA's internal controls and books and records provisions. HP consented to the order and agreed to disgorge $29 million and pay an additional $5 million in pre-judgment interest.[6]

Three of HP's subsidiaries resolved parallel criminal charges with the DOJ and agreed to pay approximately $74.2 million combined in criminal penalties. ZAO Hewlett-Packard A.O. pled guilty to conspiring to violate and violating the FCPA's anti-bribery, internal controls and books and records provisions for its role in bribing Russian government officials to obtain a technology contract with the national prosecutor's office.[7] Hewlett-Packard Polska, Sp. zo.o. entered into a deferred prosecution agreement with the DOJ for its alleged participation in bribing an official to obtain contracts with Poland's national police agency.[8] Hewlett-Packard Mexico, S. de R.L. de C.V. ("HP Mexico") and the DOJ entered into a non-prosecution agreement in which HP Mexico agreed to accept responsibility for improper payments made to an official at Petroleos Mexicanos ("Pemex"), Mexico's state-owned petroleum company.[9] The DOJ credited HP for its "extensive cooperation," including "conducting a robust internal investigation," and its substantial remedial efforts, including enhancing the company's controls and disciplining culpable employees.[10]

Marubeni Corp.

On March 19, 2014, Marubeni Corp. ("Marubeni"), a Japanese general trading company involved in the provision of services and products across various sectors, pled guilty to one count of conspiring to violate the FCPA's anti-bribery provisions and seven counts of violating the FCPA's anti-bribery provisions (*see WSLR, April 2014, page 34*). According to the DOJ, Marubeni used third-party consultants to funnel and conceal bribes being paid over a seven-year period to high-ranking Indonesian government officials, including a member of the Indonesian Parliament, to obtain a $118 million power-services contract. The plea agreement required Marubeni to admit its criminal conduct, pay an $88 million criminal fine, cooperate with the DOJ's ongoing investigation and enhance and maintain a worldwide anti-corruption compliance program.[11] The U.S. District Court for the District of Connecticut accepted the fine amount in sentencing.[12]

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In resolving the action, the DOJ considered the following factors: "Marubeni's decision not to cooperate with the department's investigation when given the opportunity to do so, its lack of an effective compliance and ethics program at the time of the offense, its failure to properly remediate and the lack of its voluntary disclosure of the conduct."[13]

Marubeni is a Japanese company with headquarters in Tokyo. Marubeni's stock is not traded on a U.S. stock exchange. However, the DOJ charged Marubeni with conspiracy to violate and violations of the FCPA's anti-bribery provisions under 15 U.S.C. § 78dd-3.[14] This section permits application of the FCPA's anti-bribery provisions "to foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in *any* act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States."[15] The Criminal Information in the Marubeni case stated:

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> MARUBENI, through its employees, made payments to Consultant A's bank account in Maryland, knowing that a portion of the payments to Consultant A was intended for Indonesian officials in exchange for their influence and assistance in awarding the Tarahan Project contract to MARUBENI, Power Company, and Power Company's subsidiaries. In addition, MARUBENI, through its employees and agents, attended meetings in Windsor, Connecticut, in connection with the Tarahan Project. Thus, MARUBENI was a "person," as that term is used in the FCPA, Title 15, United States Code, Section 78dd-3(f)(1).[16]

This was the second FCPA enforcement action for Marubeni, which in January 2012 entered into a deferred prosecution agreement with the DOJ and agreed to pay a $54.6 million criminal penalty for its alleged involvement in a scheme to bribe Nigerian officials to obtain contracts to build liquefied natural gas facilities on Bonny Island. As part of that settlement, Marubeni agreed to retain a corporate compliance monitor for two years.[17]

Alcoa, Inc.

On January 9, 2014, Alcoa, Inc. ("Alcoa") and its subsidiary Alcoa World Alumina LLC ("Alcoa World") settled charges with the SEC and the DOJ that Alcoa's subsidiaries paid more than $110 million in bribes to Bahraini officials to maintain an alumina supply contract with Aluminium Bahrain, B.S.C. ("Alba"), a large aluminum smelter controlled by the Bahraini government.[18] The SEC ordered Alcoa to disgorge $175 million, although the SEC noted that $14 million of that amount was satisfied by the forfeiture payment in the criminal matter.[19] In a parallel criminal matter, Alcoa World agreed to pay a $209 million criminal fine and $14 million in forfeiture, and Alcoa World pled guilty to one count of violating the FCPA's anti-bribery provisions.[20] The company also must implement and maintain an enhanced compliance program. In determining the criminal penalty, the DOJ considered Alcoa's "substantial cooperation" and proactive efforts to internally investigate and remedy the improper payments, as well as the potential impact of the penalty on Alcoa's current financial position.[21]

Lessons Learned from Corporate Settlements

The DOJ and the SEC continue to stress the importance of companies' cooperation with government investigations, and this was a theme in each of the four actions filed in the first half of this year. The question of whether companies receive appropriate credit for cooperation with U.S. government investigations has been the subject of debate for years, in particular whether a company's cooperation results in a measurable reduction of the penalties sought by the government in an FCPA settlement.

A comparison of the four corporate settlements in the first half of 2014 appears to reflect some benefits from voluntary reporting, proactive investigations and implementation of effective internal controls. Three entities — Smith & Wesson, HP and Alcoa — cooperated with the government investigations, and the government stated publicly that it gave those companies credit for that cooperation in their settlements. Conversely, the DOJ stated that it considered Marubeni's lack of cooperation in reaching a settlement with that company. Although the total fine against Marubeni was lower than the fines imposed in the other actions, both HP and Alcoa were assessed fines that were significantly discounted from the low end of the sentencing guidelines. Marubeni also entered into a guilty plea, whereas neither HP's nor Alcoa's parent entity was required to enter any dispositions. Moreover, at the end of 2013, the SEC was quick to point out that another foreign issuer, Weatherford International Ltd. ("Weatherford"), had failed to cooperate during the early stages of the government investigation, and that conduct was a factor in assessing a $1.875 million penalty against Weatherford[22] (*see WSLR, December 2013, page 10*).

Indeed, Jeff Knox, Chief of the Fraud Section of the DOJ's Criminal Division, recently directed practitioners and companies to review the press releases and filings from the recent corporate settlements, stating that, "in the case of Marubeni[,] there was zero cooperation whatsoever. The company did basically no work. Provided no assistance to us."[23] Knox further highlighted that HP and Alcoa both cooperated by conducting internal investigations and disclosing their findings, and he noted that both companies "received significant credit for that."[24] Moreover, in public statements, the SEC acknowledged Smith & Wesson's cooperation and remedial activities, and the DOJ acknowledged that HP and Alcoa voluntarily made their employees available for interviews, provided relevant documents to the DOJ and undertook anti-corruption remedial efforts.[25]

The FCPA settlements this year also reflect continued cooperation among the U.S. government and investigatory and enforcement agencies in other countries. Knox recently commented that he cannot "over emphasize [sic] and overstate how much international cooperation and attention to anti-corruption has just exploded in the last several years."[26] He added that, in the three cases filed in the first half of this year, significant effort was expended not just by domestic enforcement partners, but "most importantly [by] our law enforcement partners overseas."[27] He explained that the U.K. Serious Fraud Office ("SFO"), the Swiss Attorney General's Office and the Indonesian anti-corruption authorities provided significant assistance in the Marubeni matter. With respect to HP, the DOJ relied upon the German Public Prosecutor's Office, the Polish Anti-Corruption Bureau and authorities in Mexico, the U.K., Lithuania and other European nations. In prosecuting Alcoa, the DOJ relied upon the Swiss Attorney General's Office, the Bailiwick of Guernsey's Financial Intelligence Service, the U.K. SFO and the Australian Federal Police.[28] As a result, companies facing FCPA investigations by U.S. authorities should expect that the DOJ and the SEC may obtain information and investigative assistance from regulators in other countries, and that those non-U.S. regulators may conduct their own investigations in certain instances.

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Furthermore, the Smith & Wesson, HP and Alcoa settlements reflect a continued trend of the SEC resolving FCPA cases through the use of administrative proceedings. In recent speeches, Kara Brockmeyer, Chief of the SEC's FCPA Unit, has stated that the SEC expects to resolve more FCPA cases through administrative proceedings, rather than in federal court actions. This new approach was made possible by the Dodd-Frank Wall Street Reform and Consumer Protection Act, which expanded the SEC's authority to obtain penalties in administrative proceedings. Although an administrative cease-and-desist order carries less stigma than a civil injunction, the SEC can avoid judicial scrutiny of the terms of a settlement by proceeding administratively, rather than seeking issuance of an injunction by a federal court. The SEC may find the administrative route preferable, given that federal judges have increasingly scrutinized the terms of SEC settlements in recent years.

Individual Enforcement Actions

The U.S. government has indicated for some time that it intends to increase its pursuit of charges against individuals.[29] For instance, in November 2013, Andrew Ceresney, the Co-Director of the SEC's Division of Enforcement, stated:

> Another area of focus, and recent progress, has been our efforts to bring FCPA cases against individuals. To better root out corruption, we have ramped up our pursuit not just of companies, but of the individuals responsible for the corporate malfeasance. A core principle of any strong enforcement program is to pursue culpable individuals wherever possible. *After all, companies can only act through their people.*[30]

Therefore, it is no surprise that 2014 already has seen approximately a dozen enforcement actions against individuals. As in the corporate enforcement actions, the penalties imposed against individuals reveal the enforcement agencies' disdain for defendants who refuse to cooperate. Indeed, at the SEC's recommendation, a district court judge ordered two uncooperative defendants to pay the largest civil penalties ever assessed against individuals for FCPA violations.[31]

Two enforcement actions against individuals in the first half of 2014 are of particular note:

SEC v. Sharef, et al.

On February 3, 2014, the U.S. District Court for the Southern District of New York entered a default judgment against Ulrich Bock and Stephan Signer, former executives at Germany's Siemens AG ("Siemens"), for FCPA violations (*see WSLR, March 2014, page 26*). According to the SEC, the executives were involved in Siemens' decade-long bribery scheme, in which improper payments were made to senior government officials in Argentina to obtain a $1 billion contract to manufacture identity cards for Argentine citizens. Bock and Signer elected not to respond to the SEC's complaint and, as a result, they are paying a hefty price. Each was ordered to pay a $524,000 civil penalty, representing the largest civil penalties ever imposed on individuals for FCPA violations. In addition, Bock was ordered to disgorge an additional $316,452 and pay $97,505 in pre-judgment interest. Meanwhile, Andres Truppel, the former CFO of Siemens Argentina, was able to settle with the SEC for an $80,000 civil penalty without admitting or denying the SEC's allegations.[32]

Companies need to recognize that they potentially may face investigations across several jurisdictions and, as a result, consider early in an investigation the cooperation and settlement implications of dealing with enforcement investigations in multiple jurisdictions.

SEC v. Ruehlen, et al.

On July 3, 2014, the U.S. District Court for the Southern District of Texas entered a final judgment in *SEC v. Mark A. Jackson and James J. Ruehlen*, Civil Action No. 4:12-cv-00563 (S.D. Tex. filed February 24, 2012). The entry marked the conclusion of over two years of litigation — with trial just one week away — against Jackson, former CEO of Noble Corp. ("Noble"), and Ruehlen, former Director and Division Manager of Noble's subsidiary in Nigeria.[33] Jackson's and Ruehlen's efforts in litigating the matter against the SEC resulted in what are perceived as more favorable settlement terms than those entered by another executive who settled the SEC's charges at the time the SEC filed its complaint against Jackson and Ruehlen.

In November 2010, Noble, an offshore drilling contractor, settled with the DOJ and the SEC regarding allegations that it had made improper payments to Nigerian customs officials. As part of that settlement, Noble agreed to pay more than $8 million in criminal penalties, disgorgement and pre-judgment interest.[34]

Approximately 15 months after Noble's settlement, the SEC charged Jackson and Ruehlen with violating the FCPA by approving payments to customs officials through a customs agent retained by Noble's Nigerian subsidiary. According to the SEC, the improper payments were made in exchange for customs officials processing "false paperwork purporting to show the export and re-import of oil rigs, when in fact the rigs never moved." At the same time, the SEC charged Thomas F.

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O'Rourke, former Noble controller and head of internal audit, with violating the FCPA for his role in allegedly approving the improper payments and allowing the payments to be booked as legitimate transactions. O'Rourke settled the SEC's charges without admitting or denying the allegations, paying a $35,000 fine and consenting to an order prohibiting him from future FCPA violations.[35]

Jackson and Ruehlen chose to fight the SEC's charges. In December 2012, the district court dismissed without prejudice several charges, holding that the five-year statute of limitations applied to the SEC's claims and allowing the SEC leave to amend its complaint.[36] The district court later denied Jackson and Ruehlen's motions for summary judgment, and the parties were preparing for trial when they reached a settlement.[37] The settlement resulted in no monetary sanctions. Without admitting or denying the allegations, Jackson and Ruehlen consented to the entry of a final judgment enjoining them from certain future FCPA violations.[38]

New Interpretation of 'Instrumentality' of a Foreign Government

On May 16, 2014, the U.S. Court of Appeals for the Eleventh Circuit affirmed the FCPA convictions of Joel Esquenazi and Carlos Rodriguez.[39] In doing so, the court provided the first appellate court interpretation of the meaning of "instrumentality" of a foreign government under the FCPA — an interpretation that is consistent with the one espoused by the DOJ and the SEC.[40] The court concluded that "[a]n 'instrumentality' under section 78dd-2(h)(2)(A) of the FCPA is an entity *controlled* by the government of a foreign country that performs *a function the controlling government treats as its own*"[41] (*see analyses at WSLR, August 2014, page 15 and WSLR, August 2014, page 17*).

In analyzing the element of government "control" over an entity, the Eleventh Circuit made clear that the analysis will be driven by case-specific facts. Among the factors to consider, the court noted the following:

- "the foreign government's formal designation of that entity;"
- "whether the government has a majority interest in the entity;"
- "the government's ability to hire and fire the entity's principals;"
- "the extent to which the entity's profits, if any, go directly into the governmental fisc, and, by the same token, the extent to which the government funds the entity if it fails to break even; and"
- "the length of time these indicia have existed."[42]

In considering whether an entity performs a function the government "treats as its own," the court listed the following factors for consideration:

- "whether the entity has a monopoly over the function it exists to carry out;"
- "whether the government subsidizes the costs associated with the entity providing services;"
- "whether the entity provides services to the public at large in the foreign country; and"
- "whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function."[43]

Although this decision represents just one court's opinion on the factors to assess in determining whether an entity should be deemed an instrumentality of a foreign government,[44] the Eleventh Circuit's decision is largely consistent with the broad view articulated by the DOJ and the SEC in their 2012 jointly published resource guide to the FCPA[45] (*see WSLR, December 2012, page 10*). Furthermore, the decision supports the U.S. government's continued focus on bringing FCPA cases involving the alleged bribery of employees of state-owned or state-controlled entities. Given the breadth of the DOJ's and the SEC's view of state instrumentalities, and the continued operation of such entities in the commercial sector, this decision is a significant confirmation of entities and individuals caught within the FCPA.

Accordingly, the Eleventh Circuit's decision reinforces the need for companies to closely examine their FCPA-related policies and procedures to protect against potential liability under the statute. From a compliance perspective, it may be impractical to attempt to distinguish entities that may or may not be instrumentalities associated with formal organs of government. To make such distinctions will necessarily involve fact-intensive diligence, and companies will need to document conclusions that entities with significant governmental involvement are not "instrumentalities," and their employees therefore are not "foreign officials."

International Enforcement Developments

The U.S. government's increased cooperation and joint investigations with foreign countries have been trends in anti-corruption enforcement for several years now. While the United States has actively pursued FCPA cases for quite some time, other countries are increasing their activity in the anti-corruption enforcement arena. As such, companies now need to stay abreast of new laws coming into effect that may be applicable to their operations. In addition, companies need to recognize that they potentially may face investigations across several jurisdictions and, as a result, consider early in an investigation the cooperation and settlement implications of dealing with enforcement investigations in multiple jurisdictions.

Brazil

On August 1, 2013, Brazil enacted a new anti-corruption law, called the Clean Company Act. This new law, which went into effect on January 29, 2014,[46] specifically prohibits bribery of foreign government officials and prohibits fraud, manipulation and bribery in connection with public tenders. The Clean Company Act applies to corporate entities that operate in Brazil, including an entity's directors, officers, employees and agents. If an

entity is determined to be a Brazilian company, the act applies to that entity's business operations around the world. The Clean Company Act is a strict liability statute and does not require proof of intent or knowledge on the part of an entity. As Brazil does not recognize criminal liability for corporate entities, the Clean Company Act provides for civil money penalties against corporations rather than criminal liability. The Clean Company Act provides more lenient treatment for companies that have instituted compliance programs. Companies also may receive cooperation credit for voluntary disclosure of corruption issues.

It is expected that the DOJ and the SEC will continue their aggressive pursuit of charges against individuals for alleged FCPA violations.

Canada

On August 15, 2013, the Ontario Superior Court in Ottawa convicted Nazir Karigar, an agent of Cryptometrics Canada, Inc. ("Cryptometrics"), of offering bribes to Indian officials in violation of Canada's Corruption of Foreign Public Officials Act.[47] Karigar was the first individual convicted under the Corruption of Foreign Public Officials Act. On May 23, 2014, the Ontario Superior Court in Ottawa sentenced Karigar to three years in prison for his role in a conspiracy to bribe an Indian Cabinet Minister and Air India officials in order to secure a multi-million-dollar supply contract for facial recognition software.[48] Cryptometrics ultimately did not secure the contract, which the court considered to be a "mitigating factor."[49] In addition, the judge credited Karigar for his "high level of co-operation" and his "extensive admissions concerning the documentary evidence," which saved the court a "great deal of trial time."[50]

On June 4, 2014, the Royal Canadian Mounted Police announced that three more individuals had been charged under the Corruption of Foreign Public Officials Act in the Cryptometrics matter. Two of the individuals are U.S. nationals who formerly served as executives of Cryptometrics — former CEO Robert Barra and former COO Dario Berini. The third individual is a U.K. national, Shailesh Govindia, who was an agent of Cryptometrics. Canada has issued warrants for these three individuals.[51]

Conclusions

Although only four corporate FCPA settlements were entered through the first half of 2014, robust enforcement activity against companies and individuals is expected during the second half of the year — with 2014 likely surpassing 2013 in terms of amounts assessed against companies. As has been the case in the settlements filed during the first six month of this year, a company's cooperation with the government investigations likely will continue to be a factor considered by the DOJ and the SEC in negotiating FCPA settlements.

In addition, it is expected that the DOJ and the SEC will continue their aggressive pursuit of charges against individuals for alleged FCPA violations. Moreover, we expect enforcement authorities outside the U.S. to continue to cooperate with and support U.S. government investigations while also adding resources to their own enforcement efforts.

NOTES

[1] *See* Cease-and-Desist Order, Smith & Wesson Holding Corporation, Exchange Act Release No. 72678 (July 28, 2014), *available at* http://www.sec.gov/litigation/admin/2014/34-72678.pdf; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Smith & Wesson With FCPA Violations (July 28, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542384677#.U9bG6tJOWHE.

[2] Press Release, *supra* note 1.

[3] *See* Smith & Wesson Holding Corp., Annual Report (10-K) (June 19, 2014), p. F-31, n. 19, *available at* http://ir.smith-wesson.com/phoenix.zhtml?c=90977&p=irol-sec.

[4] Press Release, *supra* note 1.

[5] *See* Cease-and-Desist Order ¶ 1, Hewlett-Packard Co., Exchange Act Release No. 71916 (April 9, 2014), *available at* http://www.sec.gov/litigation/admin/2014/34-71916.pdf; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Hewlett-Packard With FCPA Violations (April 9, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541453075#.U6i2g9JOVOo.

[6] Press Release, *supra* note 5 (noting that approximately $2.53 million disgorged went to the Internal Revenue Service ("IRS") as part of a forfeiture in the criminal matter).

[7] *See* Plea Agreement, *United States v. ZAO Hewlett-Packard A.O.*, No. 14-cr-00201 (N.D. Cal. April 9, 2014), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/hewlett-packard-zao/hp-russia-plea-agreement.pdf.

[8] *See* Deferred Prosecution Agreement, *United States v. Hewlett-Packard Polska, Sp. zo.o.*, No. 14-cr-00202 (N.D. Cal. April 9, 2014), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/hewlett-packard-polska/hp-poland-dpa.pdf.

[9] *See* Non-Prosecution Agreement, Hewlett-Packard Mexico, S. de R.L. de C.V. (April 9, 2014), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/hewlett-packard-mexico/hp-mexico-npa.pdf.

[10] Press Release, U.S. Dep't of Justice, Hewlett-Packard Russia Agrees to Plead Guilty to Foreign Bribery (April 9, 2014), *available at* http://www.justice.gov/opa/pr/2014/April/14-crm-358.html.

[11] Plea Agreement ¶¶ 1, 8, 11, 17(a), Exhibit 2, *United States v. Marubeni Corp.*, No 3:14-cr-00052-JBA (D. Conn. March 19, 2014), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/marubeni-corp/marubeni-corp-plea-agreement.pdf.

[12] Press Release, U.S. Dep't of Justice, Marubeni Corporation Sentenced for Foreign Bribery Violations (May 15, 2014), *available at* http://www.justice.gov/opa/pr/2014/May/14-crm-418.html.

[13] *See* Press Release, U.S. Dep't of Justice, Marubeni Corporation Agrees to Plead Guilty to Foreign Bribery Charges and to Pay an $88 Million Fine (March 19, 2014), *available at* http://www.justice.gov/opa/pr/2014/March/14-crm-290.html.

[14] Plea Agreement, *supra* note 11, ¶ 1 (citing 18 U.S.C. § 371 for the one conspiracy count).

[15] U.S. Dep't of Justice and U.S. Sec. & Exch. Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 11 (November 14, 2012) (footnote omitted) [hereinafter *FCPA Resource Guide*], *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

[16] Information ¶ 10, *United States v. Marubeni Corp.*, No 3:14-cr-00052-JBA (D. Conn. March 19, 2014), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/marubeni-corp/marubeni-corp-information.pdf.

[17] Press Release, U.S. Dep't of Justice, Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $54.6 Million Criminal Penalty (January 17, 2012), *available at* http://www.justice.gov/opa/pr/2012/January/12-crm-060.html.

[18] Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Alcoa With FCPA Violations (January 9, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/

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1370540596936#.U6RA1NJOVEY; Press Release, U.S. Dep't of Justice, Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay $223 Million in Fines and Forfeiture (January 9, 2014), *available at* http://www.justice.gov/opa/pr/2014/January/14-crm-019.html.

[19] Cease-and-Desist Order at 11, Alcoa Inc., Exchange Act Release No. 71261 (January 9, 2014), *available at* http://www.sec.gov/litigation/admin/2014/34-71261.pdf.

[20] Press Release, U.S. Dep't of Justice, *supra* note 18.

[21] Plea Agreement ¶ 35(a), *United States v. Alcoa World Alumina LLC*, No. 2:14-cr-00007-DWA (W.D. Pa. January 9, 2014), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/alcoa-world-alumina/01-09-2014plea-agreement.pdf; *see also* Press Release, Dep't of Justice, *supra* note 18 (listing "Alcoa's current financial condition" as a factor considered in determining the size of the criminal penalty).

[22] Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Weatherford International With FCPA Violations (November 26, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540415694#.U7v7-9JOXAU.

[23] Press Release, Main Justice, Complete Transcript: Fraud Section Chief Jeff Knox's Remarks on the FCPA at Wall Street Journal Conference (June 25, 2014), *available at* http://www.mainjustice.com/justanticorruption/2014/06/25/complete-transcript-fraud-section-chief-jeff-knoxs-remarks-on-the-fcpa-at-wall-street-journal-conference/.

[24] *Id.*

[25] *See* Press Release, *supra* note 1; Press Release, *supra* note 10; Press Release, U.S. Dep't of Justice, *supra* note 18.

[26] Press Release, *supra* note 23.

[27] *Id.*

[28] *Id.*

[29] On March 20, 2014, while speaking at the Global Anti-Corruption Compliance Congress, Acting Assistant Attorney General Mythili Raman reiterated this message, referring to the "upward trend in the prosecution of individuals," and further stated, "We have been successful in our efforts to prosecute individuals in part because we are using all of the law enforcement techniques that are at our disposal." U.S. Dep't of Justice, Acting Assistant Attorney General Mythili Raman Speaks at the Global Anti-corruption Compliance Congress (March 20, 2014), *available at* http://www.justice.gov/criminal/pr/speeches/2014/crm-speech-140320.html.

[30] U.S. Sec. & Exch. Comm'n, Andrew Ceresney, Keynote Address at the International Conference on the Foreign Corrupt Practices Act (November 19, 2013) (emphasis added), *available at* https://www.sec.gov/News/Speech/Detail/Speech/1370540392284#.U7MECxYk_1o.

[31] *See* Supplemental Memorandum in Support of Plaintiff's Motion for Default Judgment & Remedies as to Defendants Bock & Signer at 1, *SEC v. Sharef*, No. 1:11-cv-09073-SAS (S.D.N.Y. February 3, 2014) (requesting the imposition of $524,000 in civil penalties against each defendant); Litigation Release No. 22923, U.S. Sec. & Exch. Comm'n, SEC Concludes Its Case Against Former Siemens Executives Charged with Bribery in Argentina, Obtaining Judgments over $1.8 Million (February 10, 2014), *available at* http://www.sec.gov/litigation/litreleases/2014/lr22923.htm (stating that each of the two defendants was ordered to pay "the highest penalty assessed against individuals in an FCPA case").

[32] Litigation Release, *supra* note 31.

[33] *See* Litigation Release No. 23038, U.S. Sec. & Exch. Comm'n, SEC Settles Pending Civil Action Against Noble Executives Mark A. Jackson and James J. Ruehlen (July 7, 2014), *available at* http://www.sec.gov/litigation/litreleases/2014/lr23038.htm.

[34] *See* Litigation Release No. 21728, U.S. Sec. & Exch. Comm'n, SEC Charges Noble with FCPA Violations (November 4, 2010), *available at* http://www.sec.gov/litigation/litreleases/2010/lr21728.htm; Press Release, U.S. Dep't of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties (November 4, 2010), *available at* http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html.

[35] *See* Press Release No. 2012-32, U.S. Sec. & Exch. Comm'n, SEC Charges Three Oil Services Executives With Bribing Customs Officials in Nigeria (February 24, 2012), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171487432#.U8UjTBC2GSo.

[36] *See* Memorandum and Order at 48-61, *SEC v. Jackson*, 4:12-cv-00563 (S.D. Tex. December 11, 2012) (stating that 28 U.S.C. § 2462 provides the governing five-year statute of limitations, recognizing that the parties executed a tolling agreement and denying the motions as to claims seeking injunctive relief but granting those seeking monetary relief, except those against Ruehlen alleging violations occurring after February 24, 2007).

[37] *See* Docket, *SEC v. Jackson*, 4:12-cv-00563 (S.D. Tex.) (motions for summary judgment denied May 30, 2014).

[38] Litigation Release, *supra* note 33; Final Consent Judgment as to Defendant Mark A. Jackson at 1, *SEC v. Jackson*, 4:12-cv-00563 (S.D. Tex. July 3, 2014); Final Consent Judgment as to Defendant James J. Ruehlen at 1, *SEC v. Jackson*, 4:12-cv-00563 (S.D. Tex. July 3, 2014).

[39] *United States v. Esquenazi*, No. 11-15331, 2014 BL 136610, at *1 (11th Cir. May 16, 2014).

[40] *See FCPA Resource Guide*, *supra* note 15, at 20 (discussing how the term "instrumentality" is interpreted broadly and listing factors for consideration).

[41] *Esquenazi*, 2014 BL 136610, at *8.

[42] *Id.* at *9.

[43] *Id.* at *10.

[44] Indeed, other courts have provided factors to consider in determining whether an entity is an "instrumentality" under the FCPA. In *United States v. Aguilar*, Judge A. Howard Matz provided "a non-exclusive list" of "characteristics of government agencies and departments" that may indicate an entity is an instrumentality of a foreign government, including: 1) "[t]he entity provides a service to the citizens — indeed, in many cases to all the inhabitants — of the jurisdiction"; 2) "[t]he key officers and directors of the entity are, or are appointed by, government officials"; 3) "[t]he entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties"; 4) "[t]he entity is vested with and exercises exclusive or controlling power to administer its designated functions"; and 5) "[t]he entity is widely perceived and understood to be performing official (*i.e.*, governmental) functions." *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011) (order denying motion to dismiss).

Similarly, in *United States v. Carson*, Judge James V. Selna provided factors to consider when determining whether an entity qualifies as a government instrumentality, including: 1) "[t]he foreign state's characterization of the entity and its employees"; 2) "[t]he foreign state's degree of control over the entity"; 3) "[t]he purpose of the entity's activities"; 4) "[t]he entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions"; 5) "[t]he circumstances surrounding the entity's creation"; and 6) "[t]he foreign state's extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans)." *United States v. Carson*, No. SACR 09-00077-JVS, 2011 U.S. Dist. LEXIS 88853, at *11-12 (C.D. Cal. May 18, 2011) (order denying motion to dismiss).

[45] *See FCPA Resource Guide*, *supra* note 15, at 20.

[46] Lei No. 12.846, de 1 de Agosto de 2013, *Diário Oficial da União* [D.O.U.] de 02.08.2013 (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2013/Lei/L12846.htm.

[47] *R. v. Karigar*, [2014] O.N.S.C. 3093, para. 1-2 (Can. Ont. Sup. Ct. J.), *available at* http://www.canlii.org/en/on/onsc/doc/2014/2014onsc3093/2014onsc3093.pdf.

[48] *Id.* at para. 2, 36-37.

[49] *Id.* at para. 12(c).

[50] *Id.* at para. 12(a).

[51] Press Release, Royal Canadian Mounted Police, RCMP Charge Individuals with Foreign Corruption (June 4, 2014), *available at* http://www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2014/0604-corruption-eng.htm.

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