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International Information for International Business

VOLUME 21, NUMBER 4 >>> APRIL 2015

U.S. Foreign Corrupt Practices Act Enforcement Developments and Trends and Selected Non-U.S. Anti-Corruption Developments

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Editor's Note: *Portions of this article are based on previous articles written by the authors, including "U.S. Foreign Corrupt Practices Act Enforcement and Anti-Corruption Trends: A 2014 Mid-Year Review," by Andrew M. Lawrence, Paul A. Solomon and B. Michelle Bosworth, available at WSLR, September 2014, page 19.*

The U.S. Securities and Exchange Commission (SEC) and the U.S. Department of Justice (DOJ) (collectively, the U.S. government) ended 2014 with record-setting fines and disgorgement related to enforcement actions brought under the U.S. Foreign Corrupt Practices Act (FCPA). The U.S. government settled seven major corporate FCPA investigations in the second half of 2014, bringing to 10 the number of corporate FCPA enforcement actions during the year. In total, the U.S. government assessed more than $1.5 billion in disgorgement and penalties against these companies.

Varying in size, scope and location of targeted conduct, these cases illustrate the trends in FCPA enforcement, including: 1) the importance of cooperation with the DOJ and the SEC in their investigations; 2) increasing coordination between U.S. regulators and anti-corruption authorities in other countries; 3) the government's increasing use of hybrid monitorships and self-auditing arrangements in FCPA settlements; and 4) the continued use by the SEC of administrative proceedings to resolve FCPA cases.

We expect that these trends will continue to shape FCPA actions this year. In fact, the importance that the government places on cooperation with investigations featured prominently in the first two FCPA settlements of 2015. In January, the SEC entered into a deferred prosecution agreement (DPA) with a company, emphasizing the quick steps taken by the company to end the alleged misconduct and cooperate with the SEC's investigation of those issues. This was only the third instance of the SEC using a DPA or a non-prosecution agreement (NPA) to resolve an FCPA matter. And in February, the SEC entered into a settlement with a company that did not include anti-bribery charges or a

civil monetary penalty, noting that the settlement reflected the company's significant cooperation with the SEC, self-reporting and timely remedial measures.

The corporate cases from 2014 illustrate that, at least in the criminal context, companies that cooperate appear to receive criminal fines that are approximately 20 percent to 30 percent below the bottom of their U.S. Sentencing Guidelines ranges.

Lessons Learned from the 2014 Corporate FCPA Settlements and the First 2015 Settlements

Corporate Cooperation

Acknowledgement for cooperation with government authorities' investigations remains a central factor in the penalty calculation and structure of FCPA resolutions. Accordingly, the majority of companies choose to cooperate with authorities — for example, eight of the 10 corporate settlements in 2014 and the only two settlements announced to date in 2015 involved reportedly prompt and genuine cooperation by the target entities.

The government has long said companies receive "credit" for cooperation in the form of lower fines and other financial penalties. However, companies and practitioners historically have had a hard time quantifying the value of such cooperation credit. The U.S. government appears to have heard the concerns of industry and the defense bar, and is providing more details regarding how it rewards cooperation in particular cases. The corporate cases from 2014 illustrate that, at least in the criminal context, companies that cooperate appear to receive criminal fines that are approximately 20 percent to 30 percent below the bottom of their U.S. Sentencing Guidelines (Guidelines) ranges. For example, Dallas Airmotive Inc.'s (Dallas Airmotive) range was $17.5 million to $35 million, but the DOJ considered a variety of factors, including Dallas Airmotive's "substantial cooperation," and settled for a $14 million criminal fine — a 20 percent reduction from the bottom of the range. The DOJ also recognized Hewlett-Packard Co. (HP) for its "extensive cooperation." HP's Polish subsidiary agreed to pay a $15,450,224 criminal penalty, which was a 20 percent reduction from the bottom of its sentencing range — $19,312,780. Meanwhile, HP's Russian subsidiary received more than 30 percent off the bottom of its sentencing range, paying a $58,772,250 criminal penalty, instead of the bottom range penalty of $87,000,000.

Conversely, the DOJ has made efforts to illustrate that failure to cooperate fully with a government investigation, including to voluntarily disclose misconduct, may result in little, if any, penalty discount under the Guidelines. The DOJ's case against Alstom S.A. (Alstom), the French power and transportation company, involved the largest FCPA criminal fine to date. In that case, Alstom's $772.29 million criminal fine was within the Guidelines range of $532.8 million to approximately $1.065 billion. In agreeing to that amount, the DOJ considered a number of factors, including: "Alstom's failure to voluntarily disclose the misconduct" and "Alstom's refusal to fully cooperate with the department's investigation for several years." The same was true for Marubeni Corp. (Marubeni), which was described as having failed to cooperate and paid an $88 million criminal fine, within the Guidelines range of $63.7 million to $127.4 million.

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However, companies desiring to receive cooperation credit must acknowledge and consider the U.S. government's strong desire to prosecute individuals responsible for corporate misconduct. As SEC Chair Mary Jo White commented: "A company, after all, can only act through its employees and if an enforcement program is to have a strong deterrent effect, it is critical that responsible individuals be charged, as high up as the evidence takes us. And we look for ways to innovate in order to further strengthen our ability to charge individuals."[1] With that in mind, the Principal Deputy Assistant Attorney General for the DOJ's Criminal Division, Marshall Miller, cautioned, "Voluntary disclosure of corporate misconduct does not constitute true cooperation, if the company avoids identifying the individuals who are criminally responsible. Even the identification of culpable individuals is not true cooperation, if the company fails to locate and provide facts and evidence at their disposal that implicate those individuals."[2]

Settlement Approval

In addition, federal judges continue to scrutinize closely settlements in criminal cases that are submitted to them for approval. For instance, on Feb. 5, 2015, U.S. District Court Judge Richard Leon rejected a proposed settlement between the DOJ and Fokker Services (Fokker) that was submitted for his approval. In this case, the DOJ and other U.S. government agencies alleged that Fokker unlawfully exported U.S. origin goods and services to Burma, Iran, and Sudan. To resolve the case, the DOJ and Fokker agreed to enter into an 18-month DPA in which Fokker would forfeit $10.5 million and pay an additional $10.5 million in a parallel civil settlement with the Commerce Department's Bureau of Industry and Security (BIS) and the Treasury Department's Office of Foreign Assets Control (OFAC). In his opinion rejecting the proposed settlement, Judge Leon referred to the government's prosecution of the case as "anemic" and said that the proposed DPA was "grossly disproportionate to the gravity of Fokker Services' conduct." Interest-

   ISSN 1357-0889

ingly, Judge Leon noted that the court would not have had a role in the matter if the DOJ had not charged Fokker with criminal conduct, *e.g.,* if the DOJ instead had entered into a NPA with the company.

Although the Fokker case did not involve FCPA charges, this and other recent cases in which federal judges have rejected proposed settlements are instructive regarding the level of scrutiny judges are increasingly applying to criminal settlements, including in the FCPA context. Whether the increased judicial scrutiny will lead the DOJ to require more stringent settlement terms in FCPA resolutions, or alternatively result in the government seeking to avoid judicial review by entering into more NPAs, is unclear at this time. However, FCPA settlements in the coming year may provide insight as to how the DOJ will react to these developments.

Global Law Enforcement Cooperation

The desire to prosecute companies and individuals that commit bribery has led to another significant trend: the growing cooperation and coordination among anti-corruption authorities throughout the world. As Assistant Attorney General Leslie Caldwell observed, "[W]e increasingly find ourselves shoulder-to-shoulder with law enforcement and regulatory authorities in other countries. Every day, more countries join in the battle against transnational bribery. And this includes not just our long-time partners, but countries in all corners of the globe."[3] The Marubeni and Alstom investigations serve as prime examples of this cross-border approach to FCPA enforcement. The DOJ press release announcing the Marubeni settlement thanked "law enforcement colleagues" in Indonesia, Switzerland and the U.K. Even more country coordination was reflected in the Alstom investigation, which brought together authorities in Cyprus, Germany, Indonesia, Italy, Saudi Arabia, Singapore, Switzerland, Taiwan and the U.K. Moreover, although this Focus article does not discuss individual enforcement actions, the growing cooperation with overseas anti-corruption authorities includes actions against individuals. In a recent press report discussing an indictment of a Pennsylvania man regarding allegations of bribery of a senior official with the European Bank for Reconstruction and Development, the FBI noted that the case presents "a great example of the FBI's ability to successfully coordinate with our international law enforcement partners to tackle corruption."[4]

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Ongoing Reporting

Moving from the investigative to the enforcement stage, the U.S. government typically includes anti-corruption compliance reporting requirements within its corporate settlements — whether in the form of independent compliance monitors or by requiring companies to self-report. However, the U.S. government has increasingly started utilizing a hybrid arrangement, typically involving a period of independent monitorship followed by a period of self-auditing and reporting. In settling with the U.S. government in December 2014, Avon Products, Inc. (Avon), a global provider of beauty products, agreed to retain an independent compliance monitor for 18 months, and then to further self-report for 18 months after the monitorship ended. While monitors provide the benefit of independence, they often are very costly for companies and thus have been criticized historically by companies and practitioners. Such criticism may be driving the U.S. government to utilize this hybrid arrangement or, in certain cases perceived to be less serious, simply require a period of self-auditing and reporting and no independent monitoring.

SEC Administrative Proceedings

Another unmistakable trend has been the SEC's continued preference for administrative proceedings. The SEC likes the administrative forum because the process and procedure generally, but not always, tilt in the SEC's favor, and federal district courts may be more inclined than SEC administrative judges to scrutinize closely the terms of a settlement. The SEC resolved six of its seven corporate FCPA cases in 2014, and one of its two cases so far in 2015, using cease-and-desist orders: Alcoa, Bio-Rad Laboratories Inc. (Bio-Rad), Bruker Corp. (Bruker), The Goodyear Tire & Rubber Co. (Goodyear), HP, Layne Christensen Co. (Layne Christensen), and Smith & Wesson Holding Corp. (Smith & Wesson). The head of the SEC's FCPA Enforcement Unit, Kara Brockmeyer, reportedly stated that the FCPA unit is "moving towards using administrative proceedings more frequently."[5]

With these trends in mind, we summarize recent corporate settlements, and then examine other key developments in FCPA enforcement: 1) the U.S. Court of Appeals for the Eleventh Circuit's interpretation of an "instrumentality" of a foreign government; 2) two FCPA Opinion Procedure Releases issued by the DOJ in 2014; and 3) interesting international enforcement developments.

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Corporate Enforcement Actions of 2014 and Early 2015

The Goodyear Tire & Rubber Co.

On Feb. 24, 2015, the SEC announced a settlement with Goodyear related to more than $3.2 million in alleged bribes paid by the company's sub-Saharan subsidiaries in connection with land tire sales in Angola and Kenya. According to the SEC, Goodyear had inadequate controls at its subsidiaries and, as a result, failed to detect or prevent the alleged bribes over a four-year period. The SEC alleged that the bribes generally were provided in the form of cash to local authorities, including city council members and police, as well as to employees of both government-owned entities and private businesses in Angola and Kenya. The SEC further alleged that the bribes then were falsely recorded in the subsidiaries' books and records as legitimate business expenditures, which then got consolidated into Goodyear's books and records. According to the SEC, Goodyear had failed to conduct sufficient due diligence in acquiring its Kenyan subsidiary, and then further failed to devise and maintain adequate FCPA compliance controls and training at its Angolan and Kenyan subsidiaries.

The SEC found that Goodyear violated the FCPA's books and records and internal control provisions. Without admitting or denying the SEC's findings, Goodyear consented to the SEC's cease-and-desist order and agreed to disgorge $14,122,525 in alleged illicit profits and to pay $2,105,540 in pre-judgment interest. As part of the settlement, Goodyear must report to the SEC for three years regarding its FCPA compliance and remedial measures. In its release announcing the settlement, the SEC stated that the settlement, which did not include a civil monetary penalty, reflected the company's self-reporting, significant cooperation with the SEC, and timely remedial measures. Goodyear's remedial measures have included: disciplining culpable employees, divesting its ownership interest in its Kenyan business in 2013, and ongoing efforts to sell its Angolan business.[6]

The PBSJ Corp.

On Jan. 22, 2015, the SEC announced a two-year DPA with The PBSJ Corp. (PBSJ), an engineering and construction firm in Florida. PBSJ no longer offers securities in the U.S. and now is known as The Atkins North America Holdings Corp. This case is the third instance of the SEC using a DPA or an NPA to resolve an FCPA matter.

The SEC alleged that PBSJ's former officer, Walid Hatoum, who also agreed to settle the SEC's charges, violated the FCPA by offering and authorizing the provision of bribes to Qatari government officials. In particular, in 2009, Hatoum allegedly offered to provide money to a company owned by a government official in exchange for assistance in obtaining two multi-million dollar contracts from the Qatari government for PBSJ — a Moroccan hotel resort development project and a Qatari light rail project. According to the SEC, the official then used an alias to provide confidential information regarding bids and pricing to assist PBSJ's subsidiary in obtaining the contracts.

The SEC further alleged that, when the bribery scheme began to unravel, Hatoum offered employment to a second official in exchange for assistance. According to the SEC, the bribery scheme came to light before the bribes could be "consummated," but PBSJ gained approximately $2.9 million in profits from working on the rail project while a replacement company was sought.

Under the DPA, PBSJ agreed to pay $3,032,875 in disgorgement and pre-judgment interest and a civil penalty of $375,000. The SEC noted PBSJ's voluntary cooperation, including self-reporting the misconduct and ensuring witnesses were available for interviews. In addition, PBSJ provided work product, such as chronologies and internal summaries, to assist the SEC in its investigation.

Alstom S.A.

On Dec. 22, 2014, Alstom agreed to pay a $772.29 million criminal fine — the largest FCPA criminal fine to date and the second-largest FCPA enforcement action to date — in order to resolve charges of corruption spanning the globe, including in the Bahamas, Egypt, Indonesia, Saudi Arabia and Taiwan. Alstom pled guilty to a two-count criminal information alleging violations of the FCPA's books and records and internal controls provisions (*see WSLR, January 2015, page 26*).

Three Alstom subsidiaries, two of which were incorporated in the U.S., also were implicated in the multinational bribery scheme. Alstom Network Schweiz AG, a Swiss subsidiary, pled guilty to one count of conspiring to violate the FCPA's anti-bribery provisions, while the two U.S. subsidiaries — Alstom Grid, Inc., and Alstom Power, Inc. — both entered into three-year DPAs with the DOJ for conspiring to violate the FCPA's anti-bribery provisions.

The DOJ's charging documents outlined conduct in which Alstom and its subsidiaries paid approximately $75 million in bribes to foreign government officials and made about $300 million in profits from various grid,

   ISSN 1357-0889

power and transportation projects with state-owned entities (SOEs). According to the DOJ, Alstom altered the company's books and records in connection with those bribes and routed payments through third-party consultants with code names such as "Mr. Geneva," "London," "Old Friend," "Mr. Paris" and "Quiet Man."

In reaching this resolution, the DOJ emphasized Alstom's alleged failure to self-report the misconduct, the company's refusal to cooperate for several years, the elaborate nature of the bribery scheme, its poor compliance and ethics program at the time, and a history of criminal misconduct that led to resolutions with other governments and the World Bank. Alstom eventually cooperated — after the DOJ filed charges against several Alstom executives. Nevertheless, the resolution clearly reflects Alstom's delayed cooperation — where other settlements have resulted in penalty amounts below the Guidelines minimum, Alstom's $772.29 million fine sits squarely within its Guidelines range. The DOJ appears to be sending the message through this case that an entity will be penalized if it does not report a corruption resolution in another jurisdiction. Notably, however, the DOJ did not require the Alstom parent entity to plead to a substantive bribery offense, which would have significant collateral effect on participation in government contracts and tenders.

The DOJ appears to be sending the message through the Alstom case that an entity will be penalized if it does not report a corruption resolution in another jurisdiction.

As long as Alstom "satisfies the monitoring requirements contained in the Negotiated Resolution Agreement between the Company and the World Bank Group" (the World Bank Resolution), Alstom only is required to self-report to the DOJ on its compliance and remediation efforts for three years. If Alstom does not satisfy the World Bank Resolution's requirements, Alstom is required, by the terms of its plea agreement with the DOJ, to retain an independent compliance monitor for a three-year period.

In addition, similar to agreements that other companies have reached with the DOJ, Alstom is required under its plea agreement to continue to review and enhance its FCPA compliance program and internal controls. As part of those enhancements within the mergers and acquisitions context, Alstom must adopt policies and procedures that require due diligence with respect to all "potential new business entities." The plea agreement further stipulates that, "where warranted, [Alstom must] conduct an FCPA-specific audit of all newly acquired or merged businesses."

Avon Products Inc.

On Dec. 17, 2014, Avon agreed to pay approximately $135 million to settle enforcement actions with the SEC, the DOJ and the U.S. Attorney's Office for the Southern District of New York, for FCPA violations (*see WSLR, January 2015, page 27*). The charges stemmed from Avon's failure to detect and prevent bribes made to foreign officials in China by its Chinese subsidiary's employees and consultants. The subsidiary, Avon Products (China) Co. Ltd. (Avon China), pled guilty to one count of conspiring to violate the FCPA's books and records provisions.

According to the SEC, from 2004 to 2008, Avon China provided approximately $8 million in bribes, in the form of cash, travel, entertainment and gifts, to obtain influence over Chinese officials with responsibility for sales regulations, as well as to prevent negative press coverage and fines. As a result of its efforts, Avon was the first company to receive a direct selling business license in China. The bribes were recorded in the company's books and records with false details or no detail at all. The SEC further alleged that Avon's management team became aware of the problem as a result of a late 2005 internal audit report. Despite the audit report, Avon failed to ensure that reforms were implemented at the subsidiary. Moreover, Avon took steps to conceal the conduct identified in the audit report by directing members of the audit team to delete the relevant discussion from the audit report and destroy any copies containing the discussion, as well as avoid using the acronym "FCPA" in any document or email.

To settle the matter with the SEC, Avon agreed to disgorge approximately $52.9 million and pay approximately $14.5 million in pre-judgment interest. Avon also entered into a three-year deferred prosecution agreement with the DOJ and agreed to pay approximately $67.6 million in fines, considerably below the approximate $84.6 million Guidelines minimum fine. The DOJ attributed this discount to the company's voluntary disclosure, thorough cooperation, agreement to continue to assist the DOJ with its ongoing investigation and extensive remedial actions, which included terminating the individuals responsible for the misconduct as well as enhancing the company's internal controls and compliance program.

As noted earlier, both the SEC and the DOJ required Avon to retain an independent compliance monitor for 18 months to conduct a thorough review of the company's compliance program. After the monitorship has concluded, Avon is required to continue to self-report to both agencies for an additional 18 months.

Bruker Corp.

On Dec. 15, 2014, Bruker, a manufacturer of life sciences and analytical tools and research systems, consented to an SEC cease-and-desist order alleging violations of the FCPA's internal controls and books and records provisions. Bruker agreed to pay approximately $2.4 million to settle the matter, of which $375,000 constituted a civil monetary penalty. In reaching the settlement, the SEC considered the company's voluntary report of the misconduct, "significant remedial acts," and cooperation in the investigation.

According to the SEC, the misconduct included employees in Bruker's Chinese offices entering into "sham 'col-

laboration agreements' " with Chinese SOEs. Pursuant to those agreements, the Chinese SOEs agreed to utilize Bruker products and provide work product regarding those products. In exchange, Bruker provided the officials with approximately $230,000 in improper payments and non-business related travel across the globe, including to the U.S. and Europe. The SEC alleged that no work product was ever provided to Bruker, and, in some cases, payments were provided directly to Chinese officials rather than to the SOEs.

Dallas Airmotive Inc.

On Dec. 10, 2014, Dallas Airmotive, a global provider of aircraft engine maintenance, repair and overhaul (MRO) services, entered into a three-year DPA with the DOJ for conspiring to violate and violating the FCPA's anti-bribery provisions. Dallas Airmotive agreed to pay a $14 million criminal penalty to resolve charges that it bribed foreign officials in Latin America in order to obtain MRO contracts. The DOJ alleged that these bribes were sometimes referred to as "commissions" or "consulting fees." As part of the agreement with the DOJ, Dallas Airmotive must continue to enhance its internal controls, report annually to the DOJ for the duration of the agreement on the company's compliance efforts, and continue to cooperate with the DOJ's ongoing investigation. In reaching this agreement, the DOJ considered Dallas Airmotive's "substantial cooperation, including conducting an internal investigation, voluntarily making U.S. and foreign employees available for interviews, and collecting, analyzing, and organizing voluminous evidence and information."

Bio-Rad Laboratories Inc.

On Nov. 3, 2014, Bio-Rad, a manufacturer of medical diagnostics and life sciences products, agreed to pay approximately $55 million to settle parallel FCPA enforcement actions with the SEC and the DOJ, including $40.7 million in disgorgement and pre-judgment interest and a $14.35 million criminal penalty. In addition to the monetary figures, Bio-Rad also agreed to enhance its internal controls and report to the SEC and the DOJ on its compliance efforts for two years.

The SEC, which issued a cease-and-desist order, alleged that Bio-Rad violated the FCPA's anti-bribery, books and records, and internal controls provisions. According to the SEC, Bio-Rad's subsidiaries paid approximately $7.5 million in bribes to foreign officials in Russia, Thailand and Vietnam, resulting in approximately $35 million in illicit profits. The bribes then were recorded in the company's books and records as legitimate business expenditures, such as advertising, commissions or training fees. The SEC and the DOJ both noted in their press releases that Bio-Rad self-reported the misconduct and cooperated extensively with their investigations.

Layne Christensen Co.

On Oct. 27, 2014, Layne Christensen, a global water construction, drilling and management company, agreed to pay more than $5 million to settle an FCPA enforcement action with the SEC, which found that Layne Christensen violated the FCPA's anti-bribery, books and records, and internal controls provisions. Without admitting or denying the SEC's findings, Layne Christensen consented to a cease-and-desist order and agreed to disgorge approximately $3.9 million, pay $858,720 in pre-judgment interest, and pay a $375,000 civil penalty. In addition, Layne Christensen is required to report to the SEC on its compliance and remediation efforts for two years. The SEC noted in its press release that Layne Christensen self-reported the misconduct and cooperated with the SEC's investigation.

The SEC alleged that, from 2005 to 2010, Layne Christensen paid bribes to foreign officials in Africa in an effort to reduce the company's tax liability, secure work permits, obtain customs clearance and bypass immigration and labor inspections. Layne Christensen often paid the bribes through its subsidiaries in Australia and Africa, and some of the bribes originated from Layne Christensen's bank accounts in the U.S. Layne Christensen allegedly paid close to $800,000 to officials in the Democratic Republic of the Congo (the DRC), the Republic of Guinea and the Republic of Mali to reduce its tax liabilities and avoid delinquent payment penalties. Layne Christensen also allegedly paid bribes to police, immigration officials, labor inspectors and border patrol agents in Burkina Faso, the DRC, Guinea and the United Republic of Tanzania, in order to obtain work permits for expatriate employees, secure border entry for employees and equipment, and avoid penalties for Layne Christensen's failure to comply with local labor and immigration laws.

Smith & Wesson Holding Corp.

On July 28, 2014, Smith & Wesson agreed to pay $2 million to settle the SEC's allegations that it had bribed foreign officials to secure sales contracts for its firearms products in Bangladesh, Indonesia, Nepal, Pakistan and Turkey (*see analysis at WSLR, October 2014, page 8*). The SEC resolved the matter through an administrative proceeding in which Smith & Wesson neither admitted nor denied the SEC's findings. The SEC ordered Smith & Wesson to disgorge $107,852, pay $21,040 in pre-judgment interest, pay an approximate $1.9 million penalty, and report to the SEC on its compliance efforts for the next two years. In reaching this settlement, the SEC considered the company's cooperation, its compliance and controls enhancements to date, and its remedial actions, which included terminating all of its international sales staff.

Hewlett-Packard Co.

On April 9, 2014, HP agreed to pay more than $108 million to settle enforcement actions with the DOJ and the SEC for an alleged bribery scheme involving its overseas subsidiaries (*see WSLR, May 2014, page 27*). The SEC issued a cease-and-desist order, charging HP with violating the FCPA's books and records and internal controls provisions. HP consented to the order and agreed to pay $34 million in disgorgement and pre-judgment interest.

In addition, three of HP's subsidiaries resolved parallel criminal charges with the DOJ and agreed to pay ap-

   ISSN 1357-0889

proximately $74.2 million combined in criminal penalties. HP's Russian subsidiary 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. HP's Polish subsidiary entered into a three-year DPA with the DOJ for allegedly bribing a foreign official in order to obtain contracts with Poland's national police agency. HP's Mexican subsidiary entered into a three-year NPA with the DOJ, in which it accepted responsibility for making improper payments to an official at Petroleos Mexicanos (Pemex), Mexico's state-owned petroleum company. The DOJ recognized HP's cooperation efforts, noting its "robust internal investigation" and its substantial remedial efforts, including enhancing the company's internal controls and disciplining culpable employees.

Marubeni Corp.

On March 19, 2014, Marubeni, a Japanese general trading company that provides services and products in a variety of industries, resolved its second FCPA enforcement action, pleading 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*). The resulting plea agreement required Marubeni to admit wrongdoing, pay an $88 million criminal fine, cooperate with the DOJ's ongoing investigation, and maintain and enhance its anti-corruption compliance program. In reaching this settlement, the DOJ considered Marubeni's lack of cooperation, the deficiency of its compliance program at the time of the offense, its failure to self-report and its failure to take remedial actions. The DOJ doubtless also considered Marubeni's January 2012 enforcement action, for which it paid $54.6 million in criminal penalties in connection with a bribery scheme in Nigeria.

Alcoa Inc.

On Jan. 9, 2014, Alcoa, Inc. (Alcoa) and its subsidiary Alcoa World Alumina LLC (Alcoa World) paid $384 million in criminal fines and disgorgement to settle FCPA charges with the SEC and the DOJ. The authorities alleged that Alcoa's subsidiaries paid more than $110 million in bribes to Bahraini officials to maintain an alumina supply contract with a state-controlled aluminum smelter. Alcoa World agreed to pay $209 million in criminal fines and $14 million in forfeiture in connection with a guilty plea to one count of violating the FCPA's anti-bribery provisions. Alcoa 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. The SEC, in a parallel investigation, ordered Alcoa to disgorge $175 million, but $14 million of that amount was satisfied by the forfeiture payment in the criminal matter.

Interpretation of 'Instrumentality' of a Foreign Government

On May 16, 2014, the U.S. Court of Appeals for the Eleventh Circuit provided the first appellate court interpretation of the meaning of "instrumentality" of a foreign government under the FCPA (the *Esquenazi* decision). 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*"[7] (*see analyses at WSLR, August 2014, page 15 and WSLR, August 2014, page 17*).

The court noted that the amount of "control" over an entity would be determined using case-specific facts. Nevertheless, the court provided a list of factors that would inform the analysis. These factors, broadly construed, centered on the entity's formal designation as well as more practical considerations, such as the degree to which the foreign government could influence the entity's hiring decisions and share in profits or losses. The second component of instrumentality, the extent to which the government "treats [entity functions] as its own," involves a separate set of factors. As outlined by the court, these factors include: "whether the entity has a monopoly over the function it exists to carry out," "whether the entity provides services to the public at large in the foreign country," "whether the government subsidizes the costs associated with the entity providing services," and "whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function."[8]

The *Esquenazi* decision is largely consistent with the DOJ's and the SEC's interpretation of an instrumentality of a foreign government.[9] It further supports the government's focus on bringing FCPA cases involving the alleged bribery of employees of state-owned or state-controlled entities. This expansive view of state instrumentalities — many of which operate in the commercial sector — reinforces the need for companies to closely examine and enhance their FCPA compliance programs to protect against potential liability under the statute.

DOJ FCPA Opinion Procedure Releases for 2014

Opinion Procedure Release No. 14-01

On March 17, 2014, the DOJ responded to an issuer's question regarding its anticipated acquisition of a minority interest in a company, where the minority shareholder is a foreign businessman who holds a senior government position in that country. In 2007, the issuer acquired a majority interest in a foreign financial services company, which was founded by the foreign businessman. Several years later, the foreign businessman was appointed to a high-level position in that country's central monetary and banking agency, making the foreign businessman a "foreign official" under the FCPA. Though the agency does not directly regulate the company, the agency has been the issuer's client for more than 20 years. The foreign official ceased his functions at the foreign company and became a passive shareholder. In ad-

dition, he recused himself from all decisions concerning the provision of business to the issuer, the foreign company or any affiliated entities of either. In early 2012, the issuer — through a subsidiary — began negotiating with the official to buy out his minority interest in the foreign company.[10]

The DOJ confirmed that it did not intend to pursue any enforcement action against the issuer with respect to the acquisition plan, reasoning that the "FCPA does not *per se* prohibit business relationships with, or payments to, foreign officials." If there is such an arrangement, however, the DOJ probes further "to determine whether there are any indicia of corrupt intent," among other potentially problematic factors.[11] The DOJ observed that the issuer's "proffered purpose" for the transaction appeared sound — it aimed "to sever the parties' existing financial relationship," which, if left in place, could be considered an ongoing conflict of interest. The DOJ also noted that the parties engaged a neutral arbiter to assess the value of the shares, which "provide[d] additional assurance that the payment reflects the fair market value of the Shares, rather than an attempt to overpay [the foreign official] for a corrupt purpose." Other considerations included: a written opinion of the sale's legality under local law and the parties' "appropriate and meaningful disclosure" of their relationship, including disclosures to the foreign government and the relevant foreign agency.[12]

Opinion Procedure Release No. 14-02

On Nov. 7, 2014, the DOJ issued its second and final Opinion Procedure Release of 2014. The request for an opinion came from a U.S. company seeking "to acquire a foreign consumer products company and its wholly owned subsidiary" (*see WSLR, December 2014, page 21*). During its pre-acquisition due diligence, the U.S. company "identified a number of likely improper payments — none of which had a discernible jurisdictional nexus to the U.S. — by the Target Company" to foreign officials. The U.S. company prepared a remediation plan, which included fully integrating the target company into its reporting and compliance structure within one year of the acquisition, and correcting the deficiencies in the target company's recordkeeping procedures that facilitated the problematic payments.[13]

The DOJ declared that it did not intend to pursue any enforcement action with respect to the pre-acquisition conduct, based on the facts presented. Although an acquiring company also may acquire successor liability for a target's pre-existing civil and criminal liabilities, including FCPA violations, "[s]uccessor liability does not . . . create liability where none existed before."[14] The DOJ noted, in this case, based on the facts presented, none of the improper payments came under U.S. jurisdiction.

International Enforcement Developments

As corruption becomes more of a global concern, the U.S. has gained some powerful allies in its anti-corruption enforcement efforts. Not only are foreign authorities assisting with U.S.-initiated investigations, but also, more recently, other jurisdictions have begun to insert themselves into the anti-corruption arena by enacting tough anti-corruption laws. These investigative and legal developments signal the need for companies to stay abreast of new laws coming into effect that may be applicable to their operations. Now more than ever, companies need to recognize that they potentially may face investigations across several jurisdictions and, as a result, should consider early on the cooperation and settlement implications of dealing with investigations in multiple jurisdictions.

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Brazil

Brazil's new anti-corruption law, the Clean Company Act (CCA), which was enacted in mid-2013 and became effective on Jan. 29, 2014, targets the bribery of foreign government officials, as well as fraud, manipulation and bribery in connection with public tenders.[15] The new law applies to corporations operating in Brazil, including their directors, officers, employees and agents. Significantly, the statute has a global reach for Brazilian companies and, as a strict liability statute, requires no proof of intent or knowledge on the part of an entity. Because Brazil does not recognize criminal liability for corporate entities, the CCA only provides for civil penalties. However, the CCA rewards companies that self-disclose potential violations and have instituted compliance programs.

Canada

On Aug. 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 (CFPOA).[16] In May 2014, the court sentenced Karigar to three years in prison, after noting his extensive cooperation and the fact that Cryptometrics was unsuccessful in securing the contract.[17] Karigar was the first individual convicted under the CFPOA since it passed in 1999, but three more individuals have been charged under the CFPOA in connection with the Cryptometrics scheme, including two U.S. nationals and one U.K. national.[18] Moreover, facing significant international pressure, the Royal Canadian Mounted Police "have established a special unit solely dedicated to investigating international bribery" and enforcing the CFPOA.[19]

On Feb. 19, 2015, the Royal Canadian Mounted Police National Division (RCMP) issued a press release informing the public that it had filed charges against SNC-Lavalin Group Inc., a Canadian-headquartered engi-

   ISSN 1357-0889

neering and construction services firm, and its division SNC-Lavalin Construction Inc. and subsidiary SNC-Lavalin International Inc. (the SNC-Lavalin entities). The charges allege, among other things, that the SNC-Lavalin entities violated the CFPOA between August 2001 and September 2011 by offering or providing improper benefits totaling at least C$47,689,868 (U.S.$38.1 million) to Libyan public officials, "to induce these officials to use their positions to influence any acts or decisions of the" Libyan government. The press release notes also that three individuals have been charged for related conduct.[20]

China

In September 2014, the Chinese government revealed itself as a major player in the international fight against corruption when it fined GlaxoSmithKline PLC (GSK), a British pharmaceutical company, to the tune of nearly U.S.$500 million for bribing Chinese doctors to use GSK products (*see WSLR, October 2014, page 29*). Similar to the U.S., China has signaled a desire to hold accountable individuals responsible for bribery. In this case, it did so by sentencing Mark Reilly, the former head of GSK's Chinese unit, and four other GSK executives to prison. These sentences have been suspended, and Reilly may face deportation to the U.K. The Chinese court considered cooperative actions taken by the individuals in reaching its decision, including the fact that Reilly returned to China "to face the investigators," and that he and the other executives confessed.[21] This decision demonstrates to companies that do business outside the U.S. the very real dangers of bribery and corruption, even if such actions have no nexus to the U.S.

Conclusions

The U.S. government rounded out 2014 with the record-setting Alstom enforcement action, a cautionary tale underscoring the importance of significant cooperation in FCPA investigations, and then began the current year with two cases showing the potential benefits to the companies that cooperate fully.

Moreover, the growing relationships between domestic and foreign authorities highlight a trend that has been developing for years: a global approach to anti-corruption investigations and enforcement. Additional evidence for this comes from recent legal and enforcement enhancements in Brazil, Canada and China.

On the home front, the SEC continues to deploy its administrative powers, an avenue that the Dodd-Frank Wall Street Reform and Consumer Protection Act amplified significantly.

NOTES

[1] Mary Jo White, Speech, U.S. Sec. & Exch. Comm'n, Three Key Pressure Points in the Current Enforcement Environment (May 19, 2014), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370541858285#.VLPKwtJOWKE.

[2] Marshall L. Miller, Speech, U.S. Dep't of Justice, Remarks by Principal Deputy Assistant Attorney General for the Criminal Division Marshall L. Miller at the Global Investigation Review Program (Sept. 17, 2014), *available at* http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller.

[3] Leslie R. Caldwell, Speech, U.S. Dep't of Justice, Assistant Attorney General Leslie R. Caldwell Speaks at American Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014), *available at* http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-conference-institute-s-31st.

[4] Press Release, Fed. Bureau of Investigation, Former Owner and President of Pennsylvania Consulting Companies Charged with Foreign Bribery (Jan. 6, 2015), *available at* http://www.fbi.gov/philadelphia/press-releases/2015/former-owner-and-president-of-pennsylvania-consulting-companies-charged-with-foreign-bribery.

[5] *See* Jean Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*, The Wall Street Journal (Oct. 21, 2014), *available at* http://www.wsj.com/articles/sec-is-steering-more-trials-to-judges-it-appoints-1413849590.

[6] Chelsey Dulaney, *Goodyear Tire to Pay $16 Million to Settle African Bribe Charges*, The Wall Street Journal (Feb. 24, 2015), available at http://www.wsj.com/articles/goodyear-tire-to-pay-16-million-to-settle-sec-charges-over-african-bribes-1424796482.

[7] *See United States v. Esquenazi*, No. 11-15331, 2014 BL 136610, at *8 (11th Cir. May 16, 2014) (emphasis added).

[8] *Id.* at *9-10.

[9] 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 20 (Nov. 14, 2012) (footnote omitted) [hereinafter *FCPA Resource Guide*], *available at* http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf (discussing how the term "instrumentality" is interpreted broadly and listing factors for consideration).

[10] *See* FCPA Opinion Procedure Release No. 14-01, at 1-2, U.S. Dep't of Justice (March 17, 2014), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2014/14-01.pdf.

[11] *Id.* at 4 (quoting and citing FCPA Opinion Procedure Release No. 10-03, at 3, U.S. Dep't of Justice (Sept. 1, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1003.pdf).

[12] *Id.* at 4-5.

[13] *See* FCPA Opinion Procedure Release No. 14-02, at 1-2, U.S. Dep't of Justice (Nov. 7, 2014), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2014/14-02.pdf.

[14] *Id.* at 3 (quoting the *FCPA Resource Guide*, *supra* note 9, at 28).

[15] 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.

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

[17] *Id.* at paras. 2, 12(a), 12(c), 36-37.

[18] 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.

[19] Mark Morrison, Paul Schabas and Tony Wong, The Canadian Bar Association, *Canada's Corruption of Foreign Public Officials Act: What You Need to Know, and Why* (2015), *available at* http://www.cba.org/CBA/PracticeLink/12-09-bc/PrintHTML.aspx?DocId=40077.

[20] Press Release, Royal Canadian Mounted Police, *RCMP Charges SNC-Lavalin* (Feb. 19, 2015), *available at* http://www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2015/0219-lavalin-eng.htm.

[21] Keith Bradsher and Chris Buckley, *China Fines GlaxoSmithKline Nearly $500 Million in Bribery Case*, The New York Times (Sept. 19, 2014), *available at* http://www.nytimes.com/2014/09/20/business/international/gsk-china-fines.html (noting that there was "no mention of any conviction for bribing government officials").

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   ISSN 1357-0889