

Client Alert

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Marubeni Gets Hit Again for FCPA Violations *DOJ Says the Company Did Not Voluntarily Disclose the Conduct and Refused to Cooperate*

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In a courtroom in New Haven, Connecticut, on March 19, 2014, Marubeni Corporation (Marubeni), a storied Japanese trading company headquartered in Tokyo, pleaded guilty to an eight-count criminal information charging Marubeni with one count of conspiring to violate the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA) and seven counts of violating the FCPA.¹ The FCPA violations arise from a bribery scheme involving Indonesian officials and a contract to build a major power plant in Indonesia. The criminal fine was \$88 million, which was \$25 million above the typical low end of the U.S. Sentencing Guideline range applied in many of these cases.²

Marubeni has now become one of less than a handful of companies in history to be charged with FCPA violations on more than one occasion.³ Indeed, Marubeni entered into a Deferred Prosecution Agreement (DPA) with the Department of Justice (DOJ) in January 2012 to resolve an investigation into Marubeni's involvement with the Bonny Island bribery scandal in Nigeria, which included a monetary penalty of \$54.6 million.⁴ Moreover, and in some ways more importantly, Marubeni became one of the rare parent corporations to enter a guilty plea for violating the FCPA's anti-bribery provisions, which carries with it the greater possibility of significant collateral consequences such as suspension and debarment.⁵

¹ Dep't of Justice, Press Release, "Marubeni Corporation Agrees to Plead Guilty to Foreign Bribery Charges and to Pay an \$88 Million Fine" (Mar. 19, 2014), available at <http://www.justice.gov/opa/pr/2014/March/14-crm-290.html>; Criminal Information, *United States v. Marubeni Corp.*, No. 14-cr-052 (D. Conn. Mar. 19, 2014) (hereinafter "Crim. Inform.").

² Plea Agreement ¶¶ 16-17, *United States v. Marubeni Corp.*, No. 14-cr-052 (D. Conn. Mar. 19, 2014), ECF No. 5.

³ See, e.g., Deferred Prosecution Agreement, *United States v. ABB Ltd.*, No. 10-cr-665 (S.D. Tex. Sept. 29, 2010), ECF No. 10-1, available at <http://www.justice.gov/criminal/fraud/fcpa/cases/abb/09-29-10abbjordan-dpa.pdf>; *United States v. Vetco Gray Controls, Inc.*, et al., No. 07-cr-004 (S.D. Tex. Jan. 5, 2007), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/vetco-controls.html>; *United States v. ABB Vetco Gray, Inc.*, No. 04-cr-279 (S.D. Tex. June 22, 2004), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/abbvetcogray-inc.html>.

⁴ Deferred Prosecution Agreement, *United States v. Marubeni Corp.*, No. 12-cr-022 (S.D. Tex. Jan. 17, 2012), ECF No. 3 (prosecution deferred for two-year period and \$54.6 million penalty paid by Marubeni). At the time, the DOJ announced that a four-company joint venture called TSKJ "paid approximately \$132 million to a Gibraltar corporation controlled by [a third-party agent] and \$51 million to Marubeni during the course of the bribery scheme and intended for these payments to be used, in part, for bribes to Nigerian government officials" to secure \$6 billion in contracts to construct liquefied natural gas facilities on Bonny Island, Nigeria. Dep't of Justice, Press Release, "Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$54.6 Million Criminal Penalty," available at <http://www.justice.gov/opa/pr/2012/January/12-crm-060.html>. Combined, there were \$1.7 billion in total penalties and forfeiture orders imposed. *Id.*

⁵ See, e.g., *United States v. Bridgestone Corp.*, No. 11-cr-651 (S.D. Tex. Sept. 15, 2011), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/bridgestone/10-05-11bridgestone-plea.pdf>; *United States v. Innospec Inc.*, No. 10-cr-061 (D.D.C. Mar. 17, 2010); *United States v. Control Components, Inc.*, No. 09-cr-00162 (C.D. Cal. Jul. 22, 2009), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/control-inc/07-24-09cci-plea-agree.pdf>; *United States v. Kellogg Brown & Root LLC*, No. 09-cr-071 (S.D. Tex. Feb. 6, 2009), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/kelloggb/02-11-09kbr-plea-agree.pdf>. But see *United States v. Siemens Aktiengesellschaft*, No. 08-cr-367 (D.D.C. Dec. 12, 2008) (guilty plea to FCPA's accounting provisions), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-15-08siemensakt-plea.pdf>.

Client Alert

DOJ SENDS A MESSAGE

The DOJ's press release sought to explain why Marubeni was forced both (1) to plead guilty and (2) to pay such an enhanced fine when other companies have not had to do so:

The plea agreement cites 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 as some of the factors considered by the department in reaching an appropriate resolution.⁶

Underscoring this point, acting Assistant Attorney General Mythili Raman announced, "The company refused to play by the rules, then refused to cooperate with the government's investigation. Now Marubeni faces the consequences for its crooked business practices in Indonesia."⁷

An examination of the facts underlying the charges, the jurisdictional basis for the charges, and the status of the broader investigation, highlights the important lessons to be learned from this case, and helps explain the message the DOJ is sending through Marubeni's guilty plea and fine.

MARUBENI

Marubeni is a Japanese company with more than 100 years of history to its name. Today it has more than 24,000 employees, and operates in more than 70 countries.⁸ It is involved in a broad range of business sectors, including importing and exporting, transactions in the Japanese market related to food products, textiles, chemicals, and metals and mineral resources, among others. Marubeni is also involved in power projects and infrastructure, plants and industrial machinery, and real estate development.

THE FACTS UNDERLYING THE CHARGES

The Tarahan Project

According to the court documents, in 2002, Marubeni was working with Alstom, S.A., a French company in the business of providing power generation and transportation-related services around the world, including in Indonesia.⁹ Marubeni and Alstom, and certain Alstom subsidiaries, including a power company in Connecticut, were pursuing a contract to build a major power plant in Indonesia.¹⁰ The project, known as the Tarahan Project, "was a project to provide power-related services to the citizens of Indonesia that was bid and contracted through Indonesia's state-owned and state-controlled electricity company, Perusahaan Listrik Negara (PLN), valued at roughly \$118 million."¹¹ During the scheme, Marubeni and Alstom retained two consultants whose "primary purpose was not to provide legitimate consulting services to Marubeni, [Alstom], and [Alstom's] subsidiaries but was instead to pay bribes to Indonesian officials who had the ability to influence the award of the Tarahan Project

⁶ *Supra note 1.*

⁷ *Id.*

⁸ *Crim. Inform.* ¶ 2.

⁹ *Id.* ¶ 5. While Alstom is not named specifically in the criminal information, it has been widely reported that "Parent Company" in prior related charging instruments (which is the identical description for "Power Company" in the instant charges against Marubeni) is, in fact, referring to Alstom, S.A. See, e.g., Edvard Pettersson, *Alstom Executives Charged in U.S. with FCPA Crimes*, Bloomberg News, Apr. 16, 2013, available at <http://www.bloomberg.com/news/2013-04-16/alstom-executives-charged-in-u-s-with-fcpa-crimes.html>.

¹⁰ *Crim. Inform.* ¶ 5.

¹¹ *Id.* ¶ 4.

Client Alert

contract.”¹² Two PLN officials are mentioned in the charging documents, along with another official identified as a “Member of Parliament in Indonesia [who] had influence over the award of contracts by PLN, including on the Tarahan Project.”¹³

The Details of the Alleged Conspiracy

According to the DOJ, the conspiracy began in 2002.¹⁴ The criminal information details meetings and email exchanges evidencing the conspiracy, including;

- A meeting between employees of both Marubeni and an Alstom subsidiary about the Tarahan Project in Connecticut during the summer of 2002.¹⁵
- Email exchanges in August 2002 between Alstom employees referring to the two PLN officials and Member of Parliament, including, for example, an email stating, “[W]e are working with [Official 2] and [Official 3] in PLN on our ‘competition’, nevertheless, we would need a stronger push now.”¹⁶
- An email exchange in which an Alstom employee emailed a Marubeni employee mentioning “the arrangement with [Official 1].”¹⁷

Consultants A and B

In late 2002, Marubeni and Alstom retained Consultant A, “agreeing to pay Consultant A three percent of the Tarahan Project contract value as a commission.”¹⁸ In a December 2002 email exchange, Alstom employees critique Consultant A’s value and conclude, “[b]asically, his function is more or less similar to [a] cashier which I feel we pay too much.”¹⁹ A little more than a month later, a Marubeni employee emailed an Alstom employee, stating: “We would like to ask [Consultant A] to force PLN to issue below clarification for further discount.”²⁰

Apparently, by the end of summer 2003, problems between Consultant A and the PLN officials were starting to surface. According to the criminal information, Consultant A had a meeting with an Alstom employee in which the consultant indicated that “members of the PLN evaluation committee were unhappy with the amount of money they were receiving and that Consultant A needed to pay additional money to members of the evaluation committee.”²¹

In mid-September 2003, an email was sent by a Marubeni employee to Alstom employees complaining that things were not under control at all and that there was no evidence that Marubeni and Alstom were in an advantageous position.²² Concerns were then immediately raised within Alstom, and days later an email was exchanged among Alstom employees in which one employee observed that the PLN officials were “concern[ed] whether they can

¹² *Id.* ¶ 6.

¹³ *Id.* ¶¶ 19-21.

¹⁴ *Id.* ¶ 23.

¹⁵ *Id.* ¶ 35.

¹⁶ *Id.* ¶ 37.

¹⁷ *Id.* ¶ 38.

¹⁸ *Id.* ¶ 43.

¹⁹ *Id.* ¶ 44.

²⁰ *Id.* ¶ 47.

²¹ *Id.* ¶ 49.

²² *Id.* ¶ 51.

Client Alert

count on the agent or not in regards to [the] 'rewards' issue.²³ The employee said that the PLN officials were concerned about getting paid once the contract was won, or whether Consultant A would “only give them pocket money and disappear.”²⁴

Not long after, in late September or early October 2003, Marubeni and Alstom employees met with Consultant A in Indonesia, where Consultant A was told: “(i) they were going to retain another consultant to pay bribes to officials at PLN in connection with the Tarahan Project; (ii) Consultant A needed to pay bribes only to Official 1; and (iii) Consultant A’s commission, therefore, would be cut from three percent of the total value of the contract to one percent.”²⁵

Shortly thereafter, Consultant B was retained by Marubeni for a success fee of 2% of the contract price. The court documents reference a later email discussion about Consultant B, and Consultant B’s concerns about having to front the payments to the PLN officials without being repaid for years: “You would understand why he is worr[ie]d, he is willing to pre-finance his scope, fulfilling his commitment up-front (prior he get paid) to get the right ‘influence’, but certainly not waiting 2 or 3 years to get paid while most of his scope completed in the beginning.”²⁶ After a series of exchanges between Marubeni and Alstom employees, the payment schedule for Consultant B was set.²⁷

Marubeni Wins the Project

According to the court documents, Marubeni and Alstom were later awarded the Tarahan Project in 2005, and the charging document provides a long list of payments that were then made from Alstom’s and Marubeni’s bank accounts in New York to Consultant A’s bank account in Maryland for the purposes of paying bribes to Official 1.²⁸ It appears that the final payment to Consultant A was long delayed, and it was not until October 2009 that the final wire payment was made from Alstom’s New York bank account to Consultant A’s Maryland bank account.²⁹ Payments were likewise detailed from Alstom’s bank account in New York to Consultant B’s bank account in Singapore via Switzerland.³⁰

JURISDICTIONAL BASIS

The criminal information charging Marubeni cites Title 15, United States Code, Section 78dd-3, sometimes referred to as “territorial jurisdiction,” as the jurisdictional basis for the charges against Marubeni.³¹ Generally, this provision permits the United States to charge, among other things, foreign companies that are not publicly traded in the United States when they take acts in furtherance of a foreign bribery scheme “while in the territory of the United States.”³² The information states:

²³ *Id.* ¶ 54 (emphasis in original).

²⁴ *Id.*

²⁵ *Id.* ¶ 58.

²⁶ *Id.* ¶ 68.

²⁷ *Id.* ¶¶ 69-80.

²⁸ *Id.* ¶¶ 82, 85-88, 93-95.

²⁹ *Id.* ¶ 88.

³⁰ *Id.* ¶ 89-92.

³¹ *Id.* ¶ 10.

³² 15 U.S.C. § 78dd-3(a) (“It shall be unlawful for any person other than an issuer that is subject to section 30A of the Securities Exchange Act of 1934 or a domestic concern (as defined in section 104 of this Act), or for any officer, director, employee, or agent of such person or any

Client Alert

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, [Alstom], and [Alstom's] subsidiaries. In addition, MARUBENI, through its employees and agents, attended meetings in Windsor, Connecticut, in connection with the Tarahan Project.

Count 1 of the information alleges that Marubeni conspired with numerous others to violate the FCPA. The government highlighted the use of conspiracy jurisdiction to expand the reach of FCPA in *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, and this case demonstrates their willingness to continue using that approach.³³ Beyond the conspiracy count, the information charges seven substantive counts of violating Section 78dd-3 of the FCPA, citing wire transfers by Marubeni and Alstom through U.S. bank accounts.

THE BROADER INVESTIGATION AND POSSIBLE NEXT STEPS

The Tarahan Project bribery investigation has been simmering for years and it now appears to be picking up speed.

- First, on November 2, 2012, David Rothschild, 67, a former vice president of regional sales at an Alstom subsidiary, Alstom Power, in Connecticut, pleaded guilty to conspiring to violate the FCPA's anti-bribery provisions, that is, both Title 15, United States Code, Sections 78dd-2(a) and 78dd-3(a).³⁴ That guilty plea was initially under seal.
- On November 27, 2012, the Department secured an indictment charging Frederic Pierucci, 45, who was at that time an executive at Alstom and had previously held executive-level positions at Alstom Power, charging Pierucci with FCPA violations and money laundering.³⁵ That indictment, however, remained under seal until he was arrested at JFK International Airport on April 14, 2013.
- About two weeks later, on April 30, 2013, the indictment against Pierucci was superseded to add yet another defendant, William Pomponi, 65, another former Alstom Power executive.³⁶
- Then, three months later, on July 30, 2013, the Department announced that Pierucci had pleaded guilty to conspiring to violate the FCPA and violating the FCPA.³⁷ At the same time, the Department announced that

stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to . . . any foreign official" to influence the official, induce the official to violate a lawful duty, or secure an improper advantage "in order to assist [the company] in obtaining or retaining business for or with, or directing business to, any person.").

³³ Dep't of Justice and Sec. & Exch. Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 34 (Nov. 14, 2012) ("Individuals and companies, including foreign nationals and companies, may also be liable for conspiring to violate the FCPA – i.e., for agreeing to commit an FCPA violation – even if they are not, or could not be, independently charged with a substantive FCPA violation. For instance, a foreign, non-issuer company could be convicted of conspiring with a domestic concern to violate the FCPA. Under certain circumstances, it could also be held liable for the domestic concern's substantive FCPA violations under *Pinkerton v. United States*, which imposes liability on a defendant for reasonably foreseeable crimes committed by a co-conspirator in furtherance of a conspiracy that the defendant joined. . . . For example, if a foreign company or individual conspires to violate the FCPA with someone who commits an overt act within the United States, the United States can prosecute the foreign company or individual for the conspiracy."), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

³⁴ Dep't of Justice, Press Release, "Foreign Bribery Charges Unsealed Against Current and Former Executives of French Power Company" (Apr. 16, 2013), available at <http://www.justice.gov/opa/pr/2013/April/13-crm-434.html>.

³⁵ Id.

³⁶ Dep't of Justice, Press Release, "Former Executive of French Power Company Subsidiary Charged in Connection with Foreign Bribery Scheme" (May 1, 2013), available at <http://www.justice.gov/opa/pr/2013/May/13-crm-496.html>.

³⁷ Dep't of Justice, Press Release, "Former Senior Executive of French Power Company Charged in Connection with Foreign Bribery Scheme" (July 30, 2013), available at <http://www.justice.gov/opa/pr/2013/July/13-crm-862.html>.

Client Alert

the indictment had been superseded a second time, this time adding yet another former Alstom employee, Lawrence Hoskins, 62, and charging him with FCPA and money laundering violations.³⁸

At this juncture, then, two defendants have pleaded guilty (Rothschild and Pierucci), Pomponi awaits trial in mid-June 2014,³⁹ and Hoskins appears to be a fugitive. With Marubeni's guilty plea on March 19, 2014, it leaves Alstom⁴⁰ as the last remaining corporation that appears to have been involved in the Tarahan Project, and it also raises the question whether any other individuals will be charged.

PRIOR DEFERRED PROSECUTION AGREEMENT

One of the intriguing aspects of this case is that the current Marubeni case is the *second* case. Indeed, until less than a month ago, Marubeni labored under a Deferred Prosecution Agreement (DPA) for its involvement in a bribery scheme in Nigeria. On January 17, 2012, in the Southern District of Texas, Marubeni entered into a DPA and agreed to pay \$54.6 million to resolve allegations that it was involved in one of the largest FCPA bribery scandals in history concerning the construction of liquefied natural gas facilities on Bonny Island in Nigeria.⁴¹ On February 24, 2014, the DOJ moved to dismiss the pending charges, stating:

Pursuant to the DPA, if Marubeni complied with its obligations under the DPA, the United States would not continue the criminal prosecution against Marubeni and would dismiss with prejudice the criminal information. DPA ¶13. Given that Marubeni has paid a \$54.6 million penalty and improved its compliance system, the United States believes that dismissal with prejudice is appropriate under the circumstances and pursuant to the agreement of the United States and Marubeni contained in the DPA.⁴²

Neither the impending guilty plea by Marubeni to FCPA violations nor the \$88 million criminal fine was mentioned in the DOJ's motion. Two days later, the district court granted the motion and dismissed with prejudice the charges against Marubeni.⁴³

At first blush, it appears that Marubeni must have breached the DPA with its involvement in the Indonesian bribery scheme. But a closer look reveals that not to be the case. The DPA with Marubeni involving the Nigeria bribery scheme was entered into on January 17, 2012, more than two years after the last payment alleged in the Indonesian bribery scheme, which was October 5, 2009. In other words, Marubeni's conduct in the Indonesian bribery scheme pre-dated the entry of the DPA by more than two years. As a result, Marubeni did not, in fact, "commit[] any felony under United States law subsequent to signing" the DPA, and therefore, it was not in breach of its obligations under the DPA as a result of the Indonesian bribery conduct.⁴⁴ This appears to explain the DOJ's

³⁸ Id.

³⁹ Order at 2, *United States v. Pomponi*, No. 12-cr-238 (D. Conn. Nov. 21, 2013), ECF No. 83 (setting "trial to commence on June 16, 2014").

⁴⁰ Alstom has had two recent corruption-related resolutions. See, e.g., World Bank Group, Press Release, "Enforcing Accountability: World Bank Debars Alstom Hydro France, Alstom Network Schweiz AG, and their Affiliates" (Feb. 22, 2012) (announcing debarment of two Alstom entities and the payment of \$9.5 million in restitution for misconduct involving a World Bank-financed project in Zambia), available at http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:23123315~pagePK:64257043~piPK:437376~theSitePK:4607_00.html; Alstom Fined \$42 mln in Swiss Bribery Probe, Reuters, Nov. 22, 2011 (Swiss authorities fined Alstom \$42 million for misconduct in Latvia, Malaysia, and Tunisia), available at <http://www.reuters.com/article/2011/11/22/alstom-idUSL5E7MM1ZD20111122>. There has also been recent press about a corruption investigation by the Serious Fraud Office in the United Kingdom. See Suzi Ring, Alstom Said to Face U.K. Bribery Charges After Five-Year Probe, Bloomberg News, Feb. 19, 2014, available at <http://www.bloomberg.com/news/2014-02-19/alstom-said-to-face-u-k-bribery-charges-after-five-year-probe.html>. But to date, none of the resolutions or stories have involved Indonesia.

⁴¹ *Supra* note 4.

⁴² Mot. to Dismiss Criminal Information ¶¶ 5, 6, *United States v. Marubeni*, No. 12-cr-022 (S.D. Tex. Feb. 24, 2014), ECF No. 7.

⁴³ Order, *United States v. Marubeni*, No. 12-cr-022 (S.D. Tex. Feb. 26, 2014), ECF No. 8.

⁴⁴ *Supra* note 4, ¶ 14.

Client Alert

silence on this issue in its motion to dismiss the pending DPA.

This, however, is not the end of the inquiry. *The DOJ explicitly mentioned Marubeni's "refusal to cooperate with the Department when given the opportunity to do so" as an important factor in requiring the guilty plea and imposing a fine much higher than it otherwise would have been.*⁴⁵ This begs the question: Why was Marubeni's refusal to cooperate with the DOJ simply not considered a breach of the DPA? It is true that the DPA does contain cooperation language, and Marubeni apparently refused to cooperate. The answer, however, appears to be that the subject matter of the required cooperation in the DPA was limited in scope. In the DPA, it states that "Marubeni shall cooperate with the Department's investigation of the scheme described in Attachment A," and Attachment A described the Nigerian bribery scheme, not the Indonesian one.⁴⁶ *As a result, Marubeni's apparent refusal to cooperate with the DOJ's investigation into the Indonesian bribery scheme was not, in fact, a breach of its obligations to cooperate in the DPA, which was limited to conduct involving Nigeria.* It will be interesting to see whether the DOJ modifies the cooperation language in its DPA template going forward to address this circumstance, or whether other policy considerations will continue to limit the subject matter of cooperation.

In the end, then, Marubeni's involvement in the Indonesian bribery scheme does not appear to have, in fact, breached the pending deferred prosecution agreement. Even if it was not a breach of the DPA, as a practical matter, it does raise issues about the wisdom of Marubeni's apparent strategy of "refus[ing] to cooperate with the Department when given the opportunity to do so" when it was operating under a DPA.

TAKEAWAYS

The Marubeni case should serve as a wake-up call to companies and executives alike. First, it provides a stark reminder of the breadth of U.S. jurisdiction under the FCPA, and it underscores the reach of the FCPA over non-U.S. companies that are not even traded on a U.S. exchange. Over its history, particularly recently, U.S. enforcement authorities have increasingly used the FCPA's broad jurisdiction to charge companies with little nexus to the United States.

Indeed, this broad jurisdictional application has previously caught other Japanese companies in its net, specifically JGC Corporation⁴⁷ and Bridgestone,⁴⁸ as well as Marubeni once before. Besides Marubeni, both JGC and Bridgestone were Japanese companies that did not trade on a U.S. exchange, yet in both instances the DOJ charged them with conspiring to violate the FCPA. In the JGC case, the DOJ charged that JGC conspired with others, including a U.S. company and a U.S. citizen, who were domestic concerns under Section 78dd-2. Similarly, in the Bridgestone case, the government charged that Bridgestone, through its employees in Japan, conspired with "persons" within the meaning of Section 78dd-3(a), which included foreign nationals working for one of Bridgestone's U.S. subsidiaries. For Japanese companies, particularly those that are not publicly traded in the United States, the latest case against Marubeni should be an unpleasant reminder that FCPA jurisdiction is extremely broad and that U.S. enforcement authorities have demonstrated a resolve to use it to hold even non-publicly traded Japanese companies accountable under the FCPA.

⁴⁵ *Supra* note 2, ¶ 17.

⁴⁶ *Supra* note 4, ¶ 5.

⁴⁷ *United States v. JGC Corp.*, No. 11-cr-260 (S.D. Tex. Apr. 6, 2011), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-info.pdf>.

⁴⁸ *United States v. Bridgestone Corp.*, No. 11-cr-651 (S.D. Tex. Sept. 15, 2011), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/bridgestone/09-15-11bridgestone-information.pdf>.

Client Alert

Second, the Marubeni case is a reminder to companies that there may be severe consequences for companies that do not make voluntary disclosures and refuse to cooperate with investigations, particularly here, where the company had already run afoul of the law in a separate bribery scheme. Indeed, by forcing Marubeni to plead guilty at the parent level to the FCPA's anti-bribery provisions,⁴⁹ with the attendant suspension and debarment risk, the DOJ was once again sending a signal that companies that do voluntarily disclose and cooperate, such as in the case of Morgan Stanley,⁵⁰ will be rewarded, while those that choose not to do so will face harsher results. In this case, those harsh results included a penalty that was \$25 million higher than it likely otherwise would have been.

It remains to be seen whether the Marubeni case will have the desired impact of encouraging more companies to voluntarily disclose FCPA violations and cooperate with the government during an FCPA investigation.

While the aggressive FCPA enforcement environment will remain a reality, it should not stop good businesses from pursuing rewarding opportunities even in the most challenging markets. Instead, companies need to understand their risk profiles, design and implement compliance programs to mitigate risk, conduct appropriate, risk-based due diligence on third parties and cross-border business transactions, and address and remediate issues as they arise.

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Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.

⁴⁹ Incidentally, pleading to the accounting provisions was not an option for Marubeni, which is not publicly traded in the United States and was thus not subject to the accounting provisions of the FCPA.

⁵⁰ Dep't of Justice, Press Release, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012) (announcing declination of Morgan Stanley), available at <http://www.justice.gov/opa/pr/2012/April/12-crm-534.html>.