Client Alert

February 16, 2016

Top Ten International Anti-Corruption Developments for January 2016

By the MoFo FCPA and Global Anti-Corruption Team

In order to provide an overview for busy in-house counsel and compliance professionals, we summarize below some of the most important international anti-corruption developments in the past month, with links to primary resources. For our first installment of 2016, we ask: Which countries fared the best and worst in Transparency International's annual Corruption Perceptions Index? Which OECD member country was the latest to issue guidance on effective compliance programs? What penalties did individuals and companies convicted of anti-bribery offenses in the United States, Brazil, and the UK receive? The answers to these questions and more are here in our January 2016 Top Ten list:

1. **Transparency International Releases Annual Corruption Perceptions Index.** On January 27, 2016, Transparency International (TI) released its annual Corruption Perceptions Index (CPI). The CPI, which measures the perceived levels of public sector corruption in 168 countries, provides one of the major data-points used by compliance officers, outside counsel, and enforcement officials in assessing the anti-corruption risk of doing business in particular countries. Denmark came out on top as being perceived as the least corrupt country, while North Korea and Somalia tied for last place. Brazil saw one of the largest falls in rankings (from 69 to 76), likely because of revelations that have surfaced during the ongoing investigation into corruption related to state-oil company Petroleo Brasiliero SA (Petrobras). According to TI, more countries improved their scores in 2015 than experienced a decrease. However, two-thirds of all countries still scored below 50—the mid-point between "perceived to be highly corrupt" (0) and "perceived to be very clean" (100). TI considers scores below 50 to indicate that a country has a "serious corruption problem."

2. **U.S. Supreme Court Rejects Haitian Official's Bid to Overturn FCPA-Related Money Laundering Conviction.** In March 2012, Jean Rene Duperval, a former director of international relations for Haiti's state-owned and state-controlled phone company, Haiti Teleco, was convicted by a South Florida jury of laundering bribe payments he received from two Miami-based telecommunications companies. Duperval was later sentenced to nine years' imprisonment. On January 11, 2016, the U.S. Supreme Court denied Duperval's petition for certiorari,[1] letting stand a February 2015 Eleventh Circuit opinion[2] that addressed two important FCPA issues: (1) whether and under what circumstances a state-owned enterprise can be considered an "instrumentality" under the FCPA and (2) the scope of the FCPA's "routine governmental action" (or "facilitating payment") exception. (See our client alert for more analysis of the Eleventh

[1] *Duperval v. United States*, No. 15-7117, 136 S. Ct. 859 (Jan. 11, 2016) (denying petition for writ of certiorari).

[2] *United States v. Duperval*, 777 F.3d 1324 (11th Cir. 2015).

Circuit's decision.) Duperval was one of three former Haitian officials charged and convicted of money laundering in the Haiti Teleco investigation, which also resulted in the longest term of imprisonment ever imposed for an FCPA violation. Prosecutions of foreign officials in FCPA cases have been relatively rare—officials cannot themselves be charged with FCPA violations for accepting bribes—but DOJ has signaled recently that it intends to increase this practice (such as in the recent Mikerin prosecution), perhaps in an effort to address the "demand" side of foreign bribery.

3. **Venezuelan Official Sentenced for Accepting and Laundering Kickbacks from New York Broker-Dealer.** On January 15, 2016, Maria Gonzalez, a former official of the state-owned and state-controlled Banco de Desarrollo Económico y Social de Venezuela (BANDES), was sentenced to time served—approximately 17 months' imprisonment—by Southern District of New York Judge Denise L. Cote for receiving bribes from a New-York based broker-dealer.[3] Last month, we noted that five former officers and employees of the broker-dealer, Direct Access Partners (DAP), had been sentenced to terms of imprisonment of two to four years in connection with a scheme to pay kickbacks to Gonzalez in exchange for her directing lucrative bond-trading business from BANDES to DAP. In November 2013, Gonzalez pleaded guilty to money laundering and commercial bribery offenses related to the kickback scheme. She was the last of the six charged defendants to be sentenced.

4. **First Guilty Plea in United Nations Bribery Case.** In mid-January 2016, the CEO and the Finance Director of a New York-based non-profit organization both pleaded guilty to bribing John Ashe, a former United Nations General Assembly President. Sheri Yan and Heidi Hong Piao were charged in October 2015 as part of a larger group of defendants that included Ashe. According to the complaint, Yan and Piao arranged for over $800,000 of payments to Ashe in exchange for official favors by Ashe and other Antiguan officials for various Chinese businessmen, three of whom were described anonymously in the complaint. Piao pleaded guilty to conspiracy, bribery, money laundering, and failure to report foreign financial accounts and agreed to cooperate with law enforcement in the ongoing investigation. Yan pleaded guilty to one count of bribery. In court, Yan stated that she and others had paid Ashe "with the intent of influencing [him] in his official capacity" to promote business ventures from which they intended to profit. As we noted in our October 2015 Top Ten, Piao and Yan were charged with bribing and conspiring to bribe an official of an organization receiving federal funds rather than with violating the FCPA, even though Ashe would technically be considered a "foreign official" under that statute.

5. **Qualcomm Receives DOJ Declination.** On January 27, 2016, U.S. global semiconductor company Qualcomm Inc. disclosed in its Form 10-Q that DOJ had notified the company in late 2015 that it had terminated its FCPA investigation into the company and would not pursue charges. Qualcomm's investigation by U.S. authorities commenced in 2009 after a whistleblower made allegations to the company's Audit Committee and to the SEC. In September 2010, the SEC notified the company of a formal order of investigation. In January 2012, Qualcomm learned that DOJ was conducting a parallel FCPA investigation. Qualcomm conducted its own internal investigation and uncovered that special hiring consideration, gifts, and other benefits had been given to individuals associated with Chinese state-

[3] *See* Judgment, *United States v. Gonzalez*, No. 13-cr-901 (Jan. 19, 2016), ECF No. 66.

owned entities. Excluding compensation, Qualcomm estimated that the benefits given totaled less than $250,000. Qualcomm reported its findings to DOJ and SEC and undertook a remediation effort to enhance its FCPA compliance program. Despite the DOJ declination, it appears that the investigation by the SEC, which issued a Wells notice in March 2014, is still ongoing.

6. **Monitor Report to Be Unsealed.** Last month, we noted a motion pending before Eastern District of New York Judge John Gleeson to unseal a monitor's report issued in connection with a deferred prosecution agreement (DPA) filed in his court. On January 28, 2016, Judge Gleeson ordered that portions of the report be made public.[4] After finding that the report was a "judicial record" to which the public had a First Amendment right of access, Judge Gleeson found that most of the potential policy concerns raised by the government could be alleviated by targeted redactions. Judge Gleeson credited the government's argument that disclosure of certain portions of the report would negatively affect the monitor's relationship with foreign regulators and ruled that these portions would remain sealed in their entireties. Judge Gleeson's order has the potential to chill both the government's and future companies' willingness to enter into publicly-filed DPAs, over concerns that public disclosure of monitor reports and self-reports will expose competitive information and potentially reveal material damaging to a company's reputation. As a result, Judge Gleeson's ruling may well make companies less forthcoming with monitors because of these risks. Because DPAs have often been used to resolve corporate FCPA matters, this has the potential to affect FCPA enforcement and negotiations between companies and the government.

7. **U.S. Supreme Court Agrees to Hear Former Virginia Governor's Appeal.** On January 15, 2016, the U.S. Supreme Court granted former Virginia governor Robert F. McDonnell's petition for certiorari in connection with his 2014 conviction in the Eastern District of Virginia on corruption charges.[5] McDonnell was accused of intervening with state officials on behalf of a Virginia businessman for help in promoting a health supplement his company was producing in exchange for approximately $177,000 in loans, vacations, and luxury goods. McDonnell was sentenced to two years' imprisonment, and his conviction and sentence were upheld by the Fourth Circuit in July 2015.[6] Because one of the domestic corruption statutes under which McDonnell was convicted—the federal bribery statute—is in many ways the domestic analog to the FCPA, the Supreme Court's decision on whether prosecutors sufficiently proved that McDonnell took an "official act" in exchange for the benefits he received could affect the way that the *quid pro quo* element of the FCPA is analyzed in the future.

8. **Petrobras-related Charges Resolved in Brazil with No Admission of Guilt.** Last month, we reported that Brazilian prosecutors had charged a dozen individuals with various offenses related to allegations that Netherlands-based SBM Offshore NV paid at least $46 million in bribes to former executives of Petroleo Brasiliero SA (Petrobras) in order to secure contracts for floating oil production, storage, and offloading ships. Among those charged in "Operation Black Blood" were SBM's CEO and a current Board member who formerly served as the company's chief governance and compliance officer. At the time,

[4] *United States v. HSBC Bank USA, N.A. and HSBC Holdings plc*, No. 12-cr-763 (E.D.N.Y. Jan. 28, 2016), ECF No. 52.

[5] *McDonnell v. United States*, No. 15-474, 2016 WL 205948, at *1 (Jan. 15, 2016) (granting petition for certiorari).

[6] *United States v. McDonnell*, 792 F.3d 478 (4th Cir. 2015).

SBM publicly supported both men and stated that they would continue in their current capacities with the company. On January 22, 2016, the CEO and current Board member agreed to resolve the charges by paying a fine of approximately $60,000. Notably, the settlement, which is subject to confirmation by the presiding judge, required no admission of guilt. In a January 25, 2016 statement, SBM stated that this type of settlement "is common for misdemeanors of the kind alleged," reiterated its belief that the accusations were meritless, and stated that the settlements were a "pragmatic opportunity to expeditiously resolve this matter," avoid costly legal proceedings, and prevent a proceeding that could detract focus from SBM's business. The company agreed to pay the fines on behalf of both individuals.

9. **Spain Publishes Guidelines on Effective Compliance Programs.** In July 2015, Spain revised its 1995 Criminal Code, providing that business entities, including state-owned enterprises, are subject to criminal liability for corruption offenses and establishing an affirmative compliance defense. On January 22, 2016, Spain's Public Prosecutor announced that it had issued a comprehensive set of Guidelines implementing these revisions. The Guidelines provide commentary on the prosecution of business entities, establish criteria for the evaluation of compliance programs in connection with the compliance defense, and elaborate on other matters relevant to criminal prosecution of business entities. The Guidelines' nine criteria for evaluating compliance programs are consistent with guidelines set out by other OECD member countries, such as the "Hallmarks of Effective Compliance Programs" set out in *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, and include an admonition against "paper" programs, an exhortation to set the proper tone from the top, and a focus on prevention, detection, and remediation.

10. **Enforcement Under the UK's Prevention of Corruption Act 1906 (POCA) Remains Robust.**

    - **UK Printing Company Fined for Foreign Corruption in Violation of POCA.** On January 8, 2016, the UK Serious Fraud Office (SFO) announced that UK-based printing company Smith & Ouzman was ordered to pay a total of £2.2 million (consisting of a £1.3 million fine and £880,000 in forfeiture) by the Southwark Crown Court in London in connection with bribes paid to public officials in Kenya and Mauritania to win business contracts. Smith & Ouzman made news when, in December 2014, it became the first company ever convicted under POCA. The company's chairman and sales and marketing manager were also convicted at that time. Charges against a company under POCA are generally regarded as being more difficult to prove than charges under the UK's newer foreign bribery law, the Bribery Act 2010. Under POCA, for a company to be charged, it must be shown that those responsible had the "directing will and mind" of the company, which in the case of family-run business Smith & Ouzman may have been less difficult to establish than with a large organization. The threshold is much lower under section 7 of the Bribery Act 2010, which is a strict liability offense prohibiting failure to prevent bribery.

    - **Court of Appeal Rules in SFO's Favor in POCA Appeal.** On January 15, 2016, the Court of Appeal of England and Wales ruled in the SFO's favor in deciding that bribery of a foreign principal or foreign agent has been illegal under UK law since 1906. The case related to the SFO's prosecution of an anonymized UK subsidiary of a multinational conglomerate operating in the power and transport sectors. The SFO alleged that bribes were paid from an English bank

account to principals or agents of three foreign organizations in India, Poland, and Tunisia using sham consulting agreements. The respondents were charged with offenses under section 1 of POCA, which provides, "If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal," that person shall be guilty of a misdemeanor offense and subject to imprisonment and/or a fine. The 1906 Act was amended by the Anti-Terrorism, Crime and Security Act 2001, which expressly provides that bribery of a foreign principal or foreign agent is illegal, but much of the alleged misconduct pre-dated February 2002, when the 2001 Act came into force. The Court of Appeal held that the terms "agent" and "principal" in the 1906 Act should be construed broadly, explaining that, "if Parliament had intended to exclude foreign principals from the scope of the 1906 Act, it would have done so." Although the ruling only impacts pre-2002 acts of bribery, its potential impact is broad because there is no limitation period with respect to corruption offenses in the United Kingdom.

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