

Client Alert

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Top Ten International Anti-Corruption Developments for March 2015

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. Here is our March 2015 Top Ten list:

1. **Senior DOJ White Collar Prosecutor James Koukios Joins Morrison & Foerster.** James Koukios, who served in the Fraud Section of the Criminal Division at the U.S. Department of Justice (DOJ), most recently as Senior Deputy Chief, has joined MoFo's Washington, D.C. office as a partner in the Securities Litigation, Enforcement & White Collar Criminal Defense Practice Group. Read the press release [here](#). Mr. Koukios is the second high-ranking DOJ prosecutor to join MoFo in the past year, following the 2014 arrival of former Fraud Section Deputy Chief Charles Duross, who served as head of the DOJ's Foreign Corrupt Practices Act (FCPA) Unit. In his most recent position, Mr. Koukios oversaw the FCPA, Health Care Fraud, and Securities and Financial Fraud Units. With the addition of Mr. Koukios, who previously served as an Assistant Chief in the FCPA Unit and tried two of the most significant FCPA-related cases in the past decade, MoFo is the only law firm in the world with two former FCPA Unit managers. Indeed, Mr. Koukios' arrival comes just two months after Amanda Aikman, another former FCPA Unit prosecutor, joined MoFo's New York office as a senior associate. Besides handling a variety of significant cases, Ms. Aikman played a central role in the initial drafting of the DOJ's and SEC's *FCPA Resource Guide*.

Mr. Koukios began his career as a federal prosecutor in Miami, where he investigated and prosecuted a wide variety of cases during his four and a half years. Mr. Koukios was named one of the Miami U.S. Attorney's Office's top prosecutors in 2008. He was then recruited to join the Fraud Section at Main Justice in Washington, D.C. There, he rose to be Assistant Chief of the FCPA Unit and then Senior Deputy Chief of the Fraud Section, the third-ranking official of the 100-attorney section. During his tenure at DOJ, Mr. Koukios worked with domestic and foreign law enforcement authorities around the globe. He tried nearly two dozen jury cases, serving as a lead trial attorney in two landmark FCPA-related enforcement trials: *Esquenazi* and *Duperval*. In addition to his service at DOJ, Mr. Koukios served as Special Counsel to the FBI Director, advising the Bureau's leadership on criminal enforcement policy, congressional testimony, and interagency issues.

2. **Former Senior Executives of Broker-Dealer Receive Four-Year Sentences for FCPA Violations.** On March 27, 2015, Benito Chinaea, the former chief executive officer of broker-dealer Direct Access Partners, and Joseph DeMeneses, the former managing director, were each [sentenced](#) to four years in

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prison after pleading guilty to conspiracy to violate the Foreign Corrupt Practices Act and the Travel Act. The matter involved a scheme to bribe a senior official in Venezuela's state economic development bank in exchange for trading business that resulted in more than \$60 million in commissions. Chinae and DeMeneses were ordered to forfeit \$3.6 million and \$2.7 million, respectively, which represented their earnings from the bribes. Assistant Attorney General Leslie R. Caldwell of the Criminal Division of the Department of Justice (DOJ) said that the prison sentences demonstrated that the DOJ "will hold individuals accountable for violations of the FCPA and will pursue executives no matter where they are on the corporate ladder." The four-year prison sentences are substantial terms of imprisonment for FCPA violations, particularly given that both executives pleaded guilty. The Direct Access Partners matter as a whole also highlights DOJ's continued FCPA focus on the financial sector.

- 3. DOJ Extends Biomet DPA for One Year Following Company's Self-Reporting.** On March 13, 2015, DOJ extended the terms of Biomet, Inc.'s three-year deferred prosecution agreement for an additional year. DOJ also extended the appointment of the independent compliance monitor that Biomet was required to retain under the DPA. In March 2012, Biomet paid \$22.7 million to settle FCPA-related offenses (including \$17.3 million to the DOJ, and \$5.5 million in disgorgement and prejudgment interest to SEC), and DOJ agreed to defer prosecution of the company for possible violations for a period of three years. In April 2014, Biomet disclosed certain improprieties related to its operations in Brazil and Mexico to its independent compliance monitor, DOJ, and SEC. Both SEC and DOJ are investigating these improprieties. The three-year DPA was set to expire on March 26, 2015. In Biomet's Form 8-K disclosing the extension of the DPA, the company reported that the DOJ "could, among other things, revoke the DPA or prosecute Biomet and/or the involved employees and executives."

In June of 2014, the DOJ likewise extended the three-year DPA of Alcatel-Lucent S.A., requiring Alcatel-Lucent to provide its independent compliance monitor additional time to confirm the company's improvements to its compliance systems.¹ The question raised by these—and other DPA extensions—is whether the DOJ is getting tougher in post-resolution supervision. If so, it heightens the potential risk of even greater burdens in post-resolution monitorships.

4. FOIA as a Means to Access Foreign Bribery Investigatory Records.

- **Plaintiff's Firm Pushes for FOIA Disclosure of SEC's Documents in Wal-Mart FCPA Investigation.** In a March 2015 filing, a plaintiff's firm argued that the SEC had not even reviewed the records subject to the Freedom of Information Act (FOIA) request and that SEC could not assert a 7(A) exemption without having completed such a review.² The SEC has stated it plans to move for summary judgment on the applicability of FOIA exemption 7(A). The original action by the plaintiff's firm was filed in November 2014, when SEC refused to release documents pertaining to alleged

¹ United States' Motion to Dismiss Criminal Information, *United States v. Alcatel-Lucent, S.A.*, No. 10-cr-20907, at 2 (S.D. Fla. Jan. 30, 2015), ECF No. 82 (explaining that in June 2014, Alcatel, the government, and the monitor agreed to extend the monitorship until December 31, 2014, "to effectively complete the compliance enhancements required under the DPA").

² Plaintiff's Supplement to Proposed Initial Case Management Order, *Robbins Geller Rudman & Dowd v. U.S. Sec. & Exch. Comm'n*, No. 14-cv-02197 (M.D. Tenn. Mar. 9, 2015), ECF No. 26.

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bribery and FCPA violations connected to Wal-Mart's Mexico operations. The plaintiff's firm—which is representing Wal-Mart shareholders in a separate lawsuit—had previously filed a FOIA request with the SEC. The SEC denied the FOIA request under exemption 7(A), which allows the SEC to withhold documents based on potential interference with an ongoing investigation. The case remains one to watch, as any ruling impacting the SEC's reliance on exemption 7(A) in the matter could have much broader implications for companies subject to SEC investigations.

- **Reporters Seek Monitorship Records in the Siemens Case Through FOIA Request.** On March 30, 2015, the U.S. District Court for the District of Columbia granted DOJ's request for additional time to locate and review records arising from the *Siemens* monitorship that followed its December 2008 guilty plea to FCPA violations.³ The FOIA request was made by 100Reporters LLC. Siemens AG and Dr. Theo Waigel, who served as the independent compliance monitor, were permitted to intervene in the matter and raise objections with DOJ. The court extended the deadline for DOJ's response to June 1, 2015.

These FOIA-related developments highlight the need for companies and their counsel to be very circumspect in materials provided to the government, as well as to monitors, and to raise timely objections to the content of any monitorship reports, as there appears to be an increasing likelihood that those reports may well be made public.

5. **Federal Judge Dismisses Avon Shareholder Lawsuit for Lack of Subject Matter Jurisdiction.** On March 16, 2015, a federal judge in the Southern District of New York dismissed a shareholder suit against Avon Products, Inc.⁴ The shareholder suit alleged that the former CEO of Avon and others breached their fiduciary duties to Avon, wasted corporate assets, and were unjustly enriched by causing or permitting Avon to violate the FCPA. In dismissing the action, the judge rejected the argument that the claims raised a substantial federal issue just because Avon's compliance with the FCPA would be a critical issue in the litigation. In addition, the court explained that "exercising subject matter jurisdiction over Plaintiff's state law claims would be tantamount to recognizing a private right of action under the FCPA. Such an approach would 'open the floodgates' to federal court litigation of private disputes raising issues under the FCPA, an outcome directly contrary to Congress's apparent intent."⁵ The court emphasized that Congress intended that FCPA litigation proceed through SEC and DOJ enforcement actions and not through a private suit.
6. **Current and Former Ecopetrol Employees Charged with Accepting Bribes in Colombia.** Colombian authorities arrested six current and former employees of the state-run oil company Ecopetrol SA and charged them with accepting bribes totaling \$800,000 from PetroTiger Ltd., an oil services firm. In May 2014, U.S. authorities charged former PetroTiger Chief Executive Officer Joseph Sigelman with bribing

³ See Minute Entry Granting Consent Motion to Modify Scheduling Order, *100Reporters LLC v. U.S. Dep't of Justice*, No. 14-cv-01264 (D.D.C. Mar. 30, 2015).

⁴ *Pritika v. Moore*, No. 13-CV-08369, 2015 WL 1190157 (S.D.N.Y. Mar. 16, 2015).

⁵ *Id.* at *6.

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David Duran—one of the six Ecopetrol employees arrested. While DOJ cannot charge foreign officials for soliciting or accepting bribes under the FCPA,⁶ this case underscores U.S. enforcement agencies' increased efforts to assist foreign authorities in investigating and prosecuting corrupt foreign officials, such as was done in the recent Alstom/Marubeni case with Indonesia's anti-corruption enforcement agency.

7. IBM, Revenue Quebec Employees Arrested in Connection with Canada Anti-Corruption Sweep.

On March 11, 2015, fifty officers of Quebec's anti-corruption squad raided homes and arrested seven people, including Revenue Quebec employees and officials with IBM and its local partner, Informatique EBR Inc. Authorities allege that two Revenue Quebec employees provided IBM and EBR employees with privileged information to allow them to obtain a government IT contract worth \$24 million. All of those arrested (including three IBM employees) were charged with fraud, breach of trust, and conspiracy. IBM has two prior FCPA enforcement actions (in 2000 and 2011), and it disclosed in 2013 that there was a separate DOJ investigation of possible FCPA violations in Poland, Argentina, Bangladesh, and Ukraine. This latest enforcement activity reinforces Canada's increasing anti-corruption efforts.

8. China Accelerating Draft of Anti-Corruption Law. China's top legislator, Zhang Dejiang, has said that the country is speeding up efforts to draft national anti-corruption legislation. This follows an October 2014 decision adopted by the Communist Party of China Central Committee stating that anti-corruption legislation should be introduced so that "officials dare not, cannot and do not want to be corrupt." Potential new legislation includes revisions to the Law on Administrative Supervision, and harsher penalties on criminals convicted of embezzlement and bribery. The effort to speed up anti-corruption legislation comes as China's sweeping anti-corruption crackdown of government officials and company executives continues to widen.

9. U.S. Assists Korean Authorities in Recovering \$28.7 Million in Corruption Proceeds of Former President of Republic of Korea. On March 4, 2015, DOJ announced it had reached a settlement of its civil forfeiture case against \$1.2 million in assets traceable to corruption proceeds of the former president of the Republic of Korea, Chun Doo Hwan, and that it had assisted the government of the Republic of Korea in recovering an additional \$27.5 million. AAG Caldwell called the fight against corruption a "global imperative that demands a coordinated global response." The FBI similarly stressed its cooperation with foreign partners "to identify those engaged in foreign corruption and to recover their ill-gotten gains."

10. SEC FCPA Unit Targets Small and Medium-Sized Companies Entering International Market. During the annual *SEC Speaks* Conference, Kara Brockmeyer, Chief of the FCPA Unit of the Securities and Exchange Commission (SEC), reported a significant uptick in the number of FCPA cases brought since the start of the October fiscal year. While the SEC's FCPA Unit remains focused on the hot spots of China, Russia, and Africa, Ms. Brockmeyer indicated that the Middle East and Southeast Asia had seen an increase in bribery schemes. Most notably, however, Ms. Brockmeyer stated that the Unit is going to

⁶ *United States v. Castle*, 925 F.2d 831, 831-32 (5th Cir. 1991) ("We hold that foreign officials may not be prosecuted under 18 U.S.C. § 371 for conspiring to violate the FCPA.").

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focus on small and medium-sized companies that enter international markets for the first time. Read more about the SEC's conference in our [client alert](#). Similarly, on March 12, 2015, at the Georgetown University Law Center's Annual Corporate Counsel Institute, Ms. Brockmeyer warned companies against expanding their business internationally (either for the first time or to a greater extent) without considering the risks, developing a plan to manage different cultures and expectations regarding bribery, and implementing appropriate controls over new foreign subsidiaries.⁷ Put simply, the SEC is now looking at industries that may not have been paying sufficient attention to FCPA risks in the past, focusing on internal controls, books and records, and policies and procedures of companies heading into new territories.

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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.

⁷ Kara Brockmeyer, Remarks at the Georgetown University Law Center's Annual Corporate Counsel Institute (Mar. 12, 2015).