

Client Alert

May 8, 2015

Top Ten International Anti-Corruption Developments for April 2015

By the MoFo FCPA and Global Anti-Corruption Team

- 1. Criminal Division AAG Promises Increased Transparency in Corporate Charging Decisions.** In an April 17, 2015 [speech](#) at New York University Law School's Program on Corporate Compliance and Enforcement, Leslie Caldwell, Assistant Attorney General of DOJ's Criminal Division, which oversees the Fraud Section's FCPA Unit, promised to increase transparency in the Division's charging decisions in corporate prosecutions. Caldwell pledged to provide "even more detailed [written] explanations" of the key factors that led to a particular guilty plea, non-prosecution agreement (NPA), or deferred prosecution agreement (DPA), and to "look[] for ways to better inform the community about cases in which we decline to prosecute." Echoing the *FCPA Resource Guide's* hallmarks of effective compliance programs, Caldwell set forth several "hallmarks of all good internal investigations," including the identification of wrongdoers, the complete and timely provision to the Division of all available facts relating to the misconduct, and an independent, appropriately tailored, and well-designed investigation aimed at uncovering the facts. While Caldwell noted that the Division expects internal investigations to be thorough, she stated that the Division "does not expect companies to aimlessly boil the ocean" by conducting overly broad and needlessly expensive investigations. Caldwell also stated that, although the Division "does not dictate" how a company conducts an internal investigation, it will provide "guideposts" and make clear to the company its areas of interest, while contemporaneously "pressure test[ing]" the company's investigation. Also of note, Caldwell stated that the Division "will not hesitate to tear up a DPA or NPA and file criminal charges" if a company breaches its agreement. Caldwell's remarks, which bring together in one statement many of the Division's practices and expectations, should be a useful guide for inside and outside counsel in determining how to react to potential corporate wrongdoing.
- 2. KBR Resolves With SEC for "Pre-taliation."** On April 1, 2015, the SEC [announced](#) its first enforcement action against a company for using confidentiality agreements that had the potential to "stifle" the whistleblowing process. According to the SEC, engineering and construction firm KBR, Inc., required witnesses in certain internal investigations to sign confidentiality agreements that warned of possible discipline, including termination, if they discussed the subject matter of the interview with outside parties without the company's prior approval. If taken literally, such an agreement could penalize witnesses for reporting misconduct to the SEC and other government agencies in certain circumstances. KBR agreed to pay a \$130,000 penalty to settle the SEC's charges, and the company amended its confidentiality agreement to make it clear that employees are free to report legal violations to the SEC without prior company approval. In the SEC's [order](#) instituting the settlement, the agency stated that it did not find any instances in which KBR actually prevented one of its employees from communicating with the SEC about a legal violation. Nonetheless, the SEC said that KBR's pre-notification requirement had a

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potential chilling effect on whistleblowers' willingness to report violations. The KBR action will likely impact how other companies draft their confidentiality agreements — indeed, the SEC has already warned that companies should amend agreements “that in word or effect stop their employees from reporting potential violations to the SEC.”

- 3. Mounting Challenges to SEC's Use of Administrative Proceedings.** Following the passage of the Dodd-Frank Act, which enhanced the SEC's ability to charge defendants in its own in-house court, the SEC has increasingly used administrative proceedings, including in resolving corporate FCPA cases. However, this trend has been met with criticism from several quarters, including a growing number of legal challenges brought by individuals charged in administrative proceedings. On April 13, 2015, the D.C. Circuit heard oral argument raising constitutional challenges to the SEC's use of administrative proceedings.¹ Two days later, a district judge in Manhattan ruled that federal courts have jurisdiction to hear constitutional challenges to administrative proceedings.² The judge held, however, that the plaintiff was “unlikely to succeed on the merits” of her claim that SEC administrative law judges enjoy unconstitutional tenure protections.³ Even to the extent that individual litigants are unsuccessful in their challenges to administrative proceedings, the mounting criticism of their use could provoke a congressional response that would, in turn, significantly affect the way that the SEC pursues FCPA resolutions.
- 4. Private Actions Stemming From the Wal-Mart FCPA Allegations Face Challenges.** Although the FCPA itself does not create a private right of action, private securities actions frequently follow public allegations of FCPA violations. With sometimes mixed results, Wal-Mart, its Mexican subsidiary (commonly known as Walmex), and certain of their officers and directors have moved to dismiss several such lawsuits brought in the wake of the April 2012 *New York Times* [report](#) alleging that, in 2005–2006, Wal-Mart's U.S. headquarters covered up Walmex's bribery of Mexican officials. On March 31, 2015, U.S. District Court Judge Susan O. Hickey dismissed a shareholder derivative suit filed against Wal-Mart Stores, Inc. (WMSI), and several of its directors in the Western District of Arkansas.⁴ Judge Hickey found that the plaintiffs had failed to allege a particularized basis to infer that a majority of the board had actual or constructive knowledge of the alleged misconduct or had acted improperly with scienter and, therefore, that they could not excuse their failure to make a demand on the board before bringing suit themselves. In contrast, in September 2014, Judge Hickey refused to dismiss a securities fraud action against WMSI and one of its executives.⁵ In that case, the plaintiffs alleged that WMSI's December 2011 disclosure of an ongoing FCPA internal investigation was materially misleading as to when the defendants first learned of, and began investigating, the suspected corruption in Mexico. Judge Hickey ruled that the plaintiffs had sufficiently alleged scienter and materiality. On April 6, 2015, WMSI, Walmex, and Walmex's board

¹ *Jarkesy et al. v. SEC*, No. 14-cv-5196 (D.C. Cir. Apr. 13, 2015).

² *Duka v. SEC*, No. 1:15-cv-00357, at 15 (S.D.N.Y. Apr. 15, 2015), ECF No. 33.

³ *Id.* at 3.

⁴ *In re Wal-Mart Stores, Inc. S'holder Derivative Litig.*, No. 4:12-cv-4041, at 19 (W.D. Ark. Mar. 31, 2015), ECF No. 137.

⁵ *City of Pontiac Gen. Emps.' Ret. Sys. v. Wal-Mart Stores, Inc.*, No. 12-CV-5162, at 7 (W.D. Ark. Sept. 26, 2014), ECF No. 146.

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chairman moved to dismiss⁶ another securities fraud action, this one filed in the Southern District of New York, alleging that WMSI's December 2011 disclosure and Walmex's repeated failure to inform its shareholders about the suspected corruption negatively impacted Walmex's share price.⁷ The court has not yet ruled on this latest motion.

- 5. U.S. Asks Sweden to Freeze \$30 Million Linked to Uzbek Bribery Investigation.** In April, it was revealed that, on March 20, 2015, U.S. officials asked Sweden to freeze more than \$30 million in assets linked to an investigation into possible bribery and money laundering involving Uzbek officials. According to a [DOJ letter](#) to the Swedish government, U.S. investigations have revealed that three European telecommunications companies — VimpelCom, MTS, and TeliaSonera — “paid bribes to Uzbek officials to obtain mobile telecommunications business in Uzbekistan” and laundered funds through shell companies and accounts around the world, including accounts held in Sweden. The DOJ letter seeks the restraint of \$30.4 million held in a Swedish bank account by a beneficiary identified as Takilant Limited. The DOJ's request is the latest development in a [multinational corruption investigation](#) centered on Gulnara Karimova, the daughter of Uzbek President Islam Karimov. Karimova [allegedly](#) received more than \$1 billion worth of payments and ownership shares from companies including TeliaSonera, VimpelCom, and MTS in exchange for access to Uzbekistan's telecommunications market.
- 6. SFO Brings Additional Charges in Alstom Investigation.** On April 16, 2015, the UK Serious Fraud Office (SFO) [announced](#) additional charges in its long-standing Alstom investigation. The SFO charged Alstom Network UK Ltd. and Michael John Anderson, a former business development director of Alstom Transport SA, with violating the Prevention of Corruption Act 1906 and conspiracy to corrupt under the Criminal Law Act 1997, for allegedly corrupt activities committed between 2006 and 2007 in connection with a project to supply trains to the Budapest, Hungary metro. This round of charges, which the SFO called “phase three” of its ongoing investigation, follows charges brought by the SFO in July 2014 against Alstom Network UK Ltd. and two employees for conduct occurring in India, Poland, and Tunisia, and in December 2014 against Alstom Power Ltd. and two employees for conduct occurring in Lithuania. Various Alstom entities and individuals have also been [charged](#) in Switzerland, Italy, and the United States.
- 7. Greece Reportedly Brings Charges in Connection With Daimler AG Bribery Case.** In 2010, Daimler AG and several of its subsidiaries reached [resolutions](#) with the DOJ and SEC involving allegations of improper payments to foreign officials in 22 countries, including Greece. Prompted by this resolution, Greek authorities have [reportedly](#) been investigating Daimler since 2012. On April 27, 2015, Greek prosecutors announced charges against seven people for their role in an alleged kickback scheme involving military vehicle contracts. According to [reports](#), investigators suspect that senior Daimler executives gave Greek officials kickbacks worth at least €2 million (\$2.3 million) to secure military vehicle contracts worth more than €100 million (\$113.6 million). Daimler allegedly used offshore bank accounts and third parties to execute the scheme, and the U.S. reportedly helped Greek officials track down the

⁶ Motion to Dismiss, *Fogel v. Vega*, No. 1:13-cv-02282 (S.D.N.Y. Apr. 6, 2015), ECF No. 46.

⁷ First Amendment Complaint, *Fogel v. Vega*, No. 1:13-cv-02282 (S.D.N.Y. Dec. 8, 2014), ECF No. 29.

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illegal payments. Prosecutors have not disclosed the names of the Daimler executives and Greek officials who were charged, but the alleged bribes occurred during the tenure of Greek Defense Minister Akis Tsahatzopoulos — who was convicted of unrelated money-laundering charges in 2013—and his successor Yiannos Papantoniou.

8. Chinese Anti-Corruption Campaign Heats Up.

- **Former Head of Chinese State-Owned Oil Company Prosecuted.** On April 13, 2015, China prosecuted Jiang Jiemen, the former chairman of the China National Petroleum Corporation, for allegedly accepting millions of dollars in bribes and engaging in other corrupt activities while working at that state-owned enterprise. Jiang reportedly pleaded guilty to taking bribes, accumulating unexplained wealth, and abusing his powers as a state company employee. Jiang's prosecution appears to be part of a wider anti-corruption campaign aimed at the country's largest state-owned enterprises. The campaign seems to be gathering momentum, as Chinese authorities recently announced that the Assets Supervision and Administration Commission has appointed seven audit companies, including a U.S. Big Four accounting firm, to investigate the offshore holdings of the major state-owned enterprises. Although it does not appear that the bribe-payers have been publicly identified in the Jiang case, China's ongoing campaign to root out corruption in state-owned enterprises could have widespread implications, especially if Chinese and foreign authorities begin cooperating in connection with these investigations.
- **China Releases List of Top 100 Economic Crime Fugitives.** In an attempt to repatriate corruption suspects, the Chinese government released an online list of its 100 most-wanted economic fugitives, many of whom are officials accused of taking bribes. This was the latest phase of operation "Sky Net" and is believed to be designed to put pressure on the U.S. and other countries that are preferred destinations for Chinese fugitives and their assets to do more to assist China in its anti-corruption campaign.

- ## 9. New Brazilian Corruption Probe "Operation Zealots."
- With "Operation Car Wash," an investigation into alleged bribery and kickbacks at Petrobras, showing no signs of slowing down, the existence of another significant corruption investigation in Brazil — "Operation Zealots" — was revealed in April. According to reports, Brazilian prosecutors, along with the finance ministry and internal revenue service, are investigating an alleged scheme to bribe Brazilian tax authorities in exchange for reduced liabilities in corporate tax disputes. Estimates of the lost taxes range from \$1.8 billion to \$6 billion, with tax officials allegedly receiving from 1–10 percent of those amounts. Although Operation Zealots, unlike Operation Car Wash, does not appear to be taking aim at top Brazilian officials, some believe that major corporations are among the 74 as-yet-unnamed companies under investigation. Because bribes paid to reduce taxes can sometimes form the basis for an FCPA prosecution, Operation Zealots, like Operation Car Wash, could lead to related U.S. enforcement actions.

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10. U.S.-Based Defense Contractor Resolves FCPA Investigation With SEC. On April 8, 2015, the Securities and Exchange Commission announced that it had entered into a cease-and-desist order with FLIR Systems, Inc., a U.S.-based defense contractor. Without admitting or denying the allegations, the company agreed to pay just over \$9.5 million in disgorgement, penalties, and prejudgment interest and to self-report on its FCPA compliance efforts for two years. According to the SEC, two of the company's employees, who resolved with the SEC in November 2014, caused the company to pay for, and improperly book, lavish gifts and travel for Saudi officials. The SEC expressly noted that the company self-reported the conduct, cooperated with the SEC's investigation, and undertook "significant remedial efforts." Although DOJ made no public statements regarding its declination, which the company announced in its own press release, this might be indicative of AAG Caldwell's recent remarks that the public should expect more declinations in corporate investigations, as well as of her comments extolling the importance of self-reporting, cooperation, and remediation in securing a more favorable outcome.

For more information, please contact:

Washington, D.C.

Charles E. Duross
cduross@mofo.com

New York

Carl H. Loewenson, Jr.
cloewenson@mofo.com

San Francisco

Paul T. Friedman
pfriedman@mofo.com

London

Paul T. Friedman
pfriedman@mofo.com

Denver

Randall J. Fons
rfons@mofo.com

James M. Koukios
jkoukios@mofo.com

Ruti Smithline
rsmithline@mofo.com

Stacey M. Sprenkel
ssprenkel@mofo.com

Kevin Roberts
kroberts@mofo.com

Nicole K. Serfoss
nserfoss@mofo.com

Demme Doufekias
ddoufekias@mofo.com

Amanda Aikman
aaikman@mofo.com

Hong Kong

Timothy W. Blakely
tblakely@mofo.com

Tokyo

James E. Hough
jhough@mofo.com

Berlin

Thomas Keul
tkeul@mofo.com

Singapore

Daniel P. Levison
dlevison@mofo.com

Beijing

Sherry Xiaowei Yin
syin@mofo.com

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