Foreign Corrupt Practices Act 2015 Update

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Dear Clients and Friends:

Despite a decline in enforcement actions by the Securities Exchange Commission ("SEC") and the Department of Justice ("DOJ"), the first half of 2015 has continued to highlight the relevance and ever-evolving effects of the Foreign Corrupt Practices Act ("FCPA"). Notable in the first half of 2015 was the SEC's willingness to look beyond the foreign official bribery provision of the FCPA, as it instituted actions for inadequate internal controls and violations of the FCPA's books and records provisions against companies including Polycom, BHP Billiton, and Goodyear Tire & Rubber Company ("Goodyear"). In May, the DOJ demonstrated its willingness to go beyond the FCPA's provisions to tackle foreign corruption. The Fédération Internationale de Football Association ("FIFA") conspiracy resulted in the DOJ indictment of at least 14 individuals so far for racketeering, wire fraud, and money laundering. As the controversy continues to unravel, it demonstrates the concerted efforts of U.S. and foreign law enforcement authorities. Although the FIFA investigation has not yet resulted in FCPA actions, it provides insight into the DOJ's willingness to use all available criminal statutes in its crusade against foreign corruption or bribery.

The common theme that has resonated throughout the first half of 2015 is the value placed on cooperation with government investigations. Though the focus on cooperation is not new—the November 2012 joint DOJ and SEC Resource Guide to the FCPA provided insight and guidance on this matter—the various settlements, declinations, and SEC and DOJ remarks during the first half of 2015 have indicated that it is a valuable tool in ensuring a greater potential for settlement and reduced penalties.

The SEC's first enforcement action of the year, in January 2015, against PBSJ Corporation ("PBSJ"), resulted in a deferred prosecution agreement with a modest monetary penalty of $375,000. Though PBSJ was criticized for its failure to identify the bribery early, the SEC emphasized PBSJ's immediate steps to remedy the situation, its voluntary disclosure, and its substantial cooperation with the investigation. Similarly, in the SEC's February 2015 enforcement action against Goodyear, Goodyear accepted an administrative cease-and-desist order with no monetary penalty. Again, the SEC noted that its decision was guided by Goodyear's willingness to cooperate with the investigation. The DOJ, in June 2015, made only its second public FCPA declination in the act's history. PetroTiger's "voluntary disclosure, cooperation, and remediation" were important factors leading to the DOJ's ultimate decision not to prosecute the company. The DOJ issued its first public declination in 2012 and similarly cited Morgan Stanley's voluntary disclosure and cooperation as among the factors prompting its decision not to prosecute. Although this public declination is only the second public announcement for the DOJ, six companies have publicly reported that the DOJ has concluded its investigations and declined to prosecute. Hyperdynamics Corporation ("Hyperdynamics"), in its announcement of the DOJ's declination, noted that the DOJ had referenced the company's cooperation as an important factor.

While cooperation with investigations has relieved companies of liability, it is important to note that cooperation is not without costs. Many companies, spending years cooperating with government investigations while simultaneously conducting internal investigations and remediation efforts, find themselves burdened by substantial costs and fees, and cooperation does not immediately result in a declination or modest penalty. In May 2015, BHP Billiton agreed to an administrative cease-and-desist order with the SEC. Despite the company's substantial efforts toward cooperation and remediation, the SEC still imposed a $25 million penalty.

The SEC and DOJ have spoken extensively regarding the importance of cooperation during the first half of 2015. On March 3, 2015, Andrew J. Ceresney, SEC director of enforcement, addressed the CBI Pharmaceutical Compliance Congress in Washington, D.C. His speech noted the SEC's efforts to ensure enhancements to the cooperation program, in the hope that an improved program would encourage companies to report suspected misconduct promptly. Ceresney emphasized that meaningful cooperation has resulted in reduced charges and penalties and even non-prosecution or deferred prosecution agreements. On May 13, 2015, Ceresney delivered remarks at the University of Texas School of Law's Government Enforcement Institute. These remarks focused on the SEC cooperation program's five-year anniversary. Ceresney noted four factors considered when evaluating a company's cooperation: (i) self-policing, (ii) self-reporting, (iii) remediation, and (iv) cooperation. Ceresney again stated that the rewards of cooperation could range from the "'extraordinary' step of declining an enforcement action, to narrowing charges, limiting sanctions, or including mitigating or similar language in charging documents."

Assistant Attorney General Leslie R. Caldwell of the DOJ also delivered cooperation-focused speeches during the first half of 2015. Caldwell's April 17, 2015, remarks at New York University Law School's Corporate Compliance and Enforcement Program addressed the benefits of transparency for the DOJ and for companies. Transparency allows companies to be fully aware of the potential benefits of cooperation, and to be aware of the types of consequences they would face for not cooperating with investigations. Caldwell emphasized the importance of shaping corporate culture and the DOJ's efforts to "transparently communicate its expectations and the consequences of corporate misconduct" to ensure the deterrence of future wrongdoing.

Caldwell's May 12, 2015, remarks at the New York City Bar Association's Fourth Annual White Collar Crime Institute further illustrated the benefits of complete cooperation, while also citing cases where failure to cooperate has resulted in severe penalties in and out of the FCPA space—Alstom's $772 million penalty, the largest in FCPA history, and BNP Paribas's $8.9 billion penalty, the largest financial penalty in a criminal case, though not FCPA-related. Caldwell recognized that investigations have been costly for companies and stated that the DOJ would not instruct companies on how to investigate, but underscored the importance of due diligence, full

and complete cooperation in the delivery of information, a willingness to disclose individual misconduct, and timeliness. Caldwell remarked that the DOJ does not expect companies to go overboard in their investigative efforts, but stressed the importance of thoughtful and reasonable efforts at cooperation. But on July 30, 2015, the chief of the DOJ Criminal Division's Fraud Section announced that the DOJ will be hiring a former prosecutor to serve as a full-time expert in compliance programs to ensure that corporate compliance programs are more than "mere window dressing."

Included below are summaries of the major enforcement actions, settlements, prosecutions, and declinations from the first half of 2015. We are pleased to offer this update and look forward to answering any questions or concerns you have about these significant developments in FCPA enforcement, compliance, and defense.

BRIC Spotlight Section

Introduction

Companies and individuals doing business in the emerging BRIC markets must consider the risk that their business could come under scrutiny under both foreign anti-corruption laws and the FCPA. A number of developments have occurred in Brazil, Russia, India, and China since we substantively covered the legal framework and corruption outlook in our previous FCPA midyear and year-end updates.

For example, in March 2015, President Dilma Rousseff of Brazil enacted the long-awaited implementation of Brazil's anti-corruption law, the Clean Companies Act.

In Russia, enforcement of Article 13.3 of the anti-corruption law, which sets forth compliance program requirements, continues to be monitored, as new laws implementing criminal fines against companies are being proposed.

In India, corruption continues to be at the fore of public debate, with Prime Minister Narendra Modi's economic reforms being closely watched and a number of important corruption laws pending in Parliament.

Finally, President Xi Jinping's aggressive crackdown on corruption among government officials continues in China amid talk of new anti-corruption laws.

We'll discuss these developments more fully below. Companies doing business in or seeking to do business in developing countries should be aware of the legal framework in the relevant country and should consider creating or reviewing their compliance programs considering the unique operations and associated risks of their companies, taking into account the realities of doing business in the BRIC markets.

Spotlight: BRAZIL

Brazil continues its increasing trend to combat corruption in the midst of new scandals. Principally, Brazilian authorities are conducting an extensive probe into state-owned oil company Petrobras, which may become the world's largest corruption investigation.

Brazilian authorities filed the first known criminal complaint against eight Embraer S.A. employees for bribing officials in the Dominican Republic in connection with a contract for attack planes.

On March 18, 2015, Brazilian president Dilma Vana Rousseff issued Decree No. 8,420, enacting the long-awaited regulations of Brazil's Anti-Corruption Law, or "Lei Anticorrupção." The regulations supplement an already existing anti-corruption law, commonly referred to as the Clean Companies Act.

(CCA) Economic Outlook and Current Enforcements/ Investigations

Brazil was to be the next economic growth story as the largest country in South America and the seventh-largest economy in the world. Yet the Brazilian economy disappointed in 2014 and 2015 with 0.1 GDP growth, an increasing inflation rate, and a falling currency. While a boom for commodities propelled Brazil's economy, now the prices for many of Brazil's key exports, such as oil, have fallen due to declining demand from China, Brazil's biggest trade partner. According to the World Bank, Brazil's Doing Business rank increased from 123 in 2014 to 120 in 2015, yet the ability to start a business dropped from 160 to 167.[1]

Since late 2014, Brazilian federal prosecutors have been investigating allegations concerning Brazil's state oil company, Petróleo Brasileiro S.A., culminating in hundreds of corruption charges against executives and politicians.[2] The Petrobras corruption case involving Brazilian oil and politicians has engulfed the economy in pessimism, especially as dozens of politicians, including some in Rousseff's own party, are accused of accepting millions in payments. In fact, Petrobras may become the world's largest corruption investigation. As part of this unrest, both Brazil's stock index (Bovespa) and Petrobras's market value have plummeted since September, and two of Brazil's largest banks revised their 2015 forecast for Brazil's GDP to negative numbers. In addition to the Brazilian investigation, both the SEC and the DOJ opened investigations into Petrobras in late 2014.[3]

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1 *Doing Business 2015: Going Beyond Efficiency,* WORLD BANK GROUP (12th ed. 2015), http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB15-Chapters/DB15-Report-Overview.pdf.

2 *After Brazil's Boom, Bust?*, COUNCIL ON FOREIGN RELATIONS (Apr. 3, 2015), http://www.cfr.org/brazil/after-brazils-boom-bust/p36393.

3 *Petrobras Corruption Scandal Draws Attention of U.S. Investigators,* THE WALL STREET JOURNAL (Nov. 12, 2014), http://www.wsj.com/articles/petrobras-corruption-scandal-draws-attention-of-u-s-investigators-1415834871.

While Brazil appears as the seventh major inbound destination of foreign direct investment globally, Petrobras was the main reason behind Brazil's influx of foreign direct investment over the past few years. It's believed that a reduction in investment by Petrobras will ultimately lead to a decline in economic output. Foreign investors should remain cognizant of Brazil's poor growth and amplified anti-corruption enforcement.

Beyond Petrobras, there are a number of other anti-corruption developments in Brazil.

In September 2014, Brazil filed a criminal action against eight Embraer S.A. employees, including two executives, for an alleged $3.5 million bribe to an official in the Dominican Republic in return for a $92 million contract for attack planes to be provided to Brazil's armed forces.[4] Embraer S.A. is a Brazilian aerospace conglomerate that is one of Brazil's highest-profile companies and the world's third-largest commercial aircraft manufacturer. As a criminal case, this falls under the Brazilian Criminal Code Article 337-B rather than the CCA (which imposes civil and administrative penalties). Interestingly, Brazilian federal prosecutors filed the action with help from the U.S. Department of Justice and the U.S. Securities and Exchange Commission. In fact, the DOJ and the SEC had been investigating Embraer's sales practices since 2010.

According to its May 19, 2015, filing with the SEC, Embraer entered into discussions with the DOJ "for a possible resolution of the allegations of non-compliance with the U.S. Foreign Corrupt Practices Act."[5] In that filing, the company stated that a resolution of the investigation would result in fines and other sanctions by the DOJ.

Federal prosecutors are also investigating allegations that Brazilian tax authorities solicited bribes from major companies in exchange for reducing their liabilities in corporate tax disputes. The tax bribery investigation, dubbed Operation Zealots, focused on 74 companies and 24 individuals. There are no formal charges or names publicly released to share at this time.

Review of the Clean Companies Act

The Clean Companies Act,[6] which imposes civil and administrative penalties for bribery, has been in force since January 2014. The CCA prohibits corrupt payments to both foreign and domestic officials and applies only to companies registered or operating in Brazil. Unlike the FCPA, the CCA prohibits facilitation payments, which means payments made in small denominations to officials to expedite routine government actions. Notably, the CCA does not punish the recipient of the bribe or commercial bribery among private parties. The CCA applies a strict liability standard and does not include any explicit defenses.

Lead-Up to Decree No. 8,420

On January 29, 2014, Brazil's CCA took effect after months of social protests about widespread corruption in former President Lula's administration. While the CCA provided the Office of the Comptroller General with authority to investigate and prosecute acts against the federal government and foreign administrations, it lacked regulations that would provide details about how they'll enforce the CCA. Prominent among the issues that needed further regulating were the minimum requirements for compliance programs.

In the months following the passage of the CCA, the Brazilian Supreme Court convicted and imprisoned 12 defendants for corruption as part of the "mensalão" trial, and began the "Operacão Lava Jato" enforcement action, which involves the Petrobras corruption scheme and is referred to as "the largest known corruption scheme in Brazil's modern history."[7] After the Petrobras corruption scandal and an increasing number of nationwide protests against the federal government, Brazil passed Decree No. 8,420 on March 18, 2014.

4 *Brazil Files Bribery Charges in Embraer Aircraft Sale to Dominican Republic,* THE WALL STREET JOURNAL (Sept. 23, 2014), http://www.wsj.com/articles/brazil-files-bribery-charges-in-embraer-aircraft-sale-to-dominican-republic-1411502236.

5 Embraer S.A., Form 6-K, Report of Foreign Private Issuer (May 19, 2015).

6 Lei Anticorrupção, No. 12.846, http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12846.htm.

7 *Brazil: Petrobras Case Had $800M in Kickbacks Found So Far,* NEW YORK TIMES (Jan. 29, 2015), http://www.nytimes.com/aponline/2015/01/29/world/americas/ap-lt-brazil-petrobras.html?_r=0

Overview of Decree 8,420

The Decree[8] supplements aspects of the CCA that weren't fully developed previously. It addresses four main aspects, including (i) compliance programs, (ii) administrative proceedings, (iii) sanctions, (iv) and leniency agreements.

The most notable aspect of the Decree is its emphasis on the implementation of effective compliance programs.[9] The compliance program is evaluated according to 16 factors set forth in the Decree, including the commitment of senior management to support the program; a code of ethics and standards of conduct that is applied to employees, as well as to suppliers and agents where necessary; periodic reanalysis of risks, records, and internal controls; and the independence of the monitoring department. Importantly, the Decree indicates that the effectiveness of a company's compliance program will be considered in investigations of CCA violations.

The Decree establishes that violations of the CCA shall be investigated and decided by means of an administrative liability proceeding, the Processo Administrativo e Responsabilização ("PAR"). Regarding leniency agreements, the CCA authorized regulators to enter into those agreements with companies accused of misconduct to potentially mitigate penalties and sanctions through self-disclosure and full cooperation with government investigations and proceedings. Unlike the FCPA, the CCA and the Decree establish the rules of leniency agreements.

The Decree also details the criteria for imposing the sanctions for companies found liable by the PAR. Possible sanctions include fines and debarment, if the violation involves government bidding and procurement. The amount of any fine is based on a percentage of an entity's gross revenues from the prior fiscal year and on an assessment of certain aggravating and mitigating factors. The fine may also be based on the value of the benefit obtained or sought through misconduct. While the CCA establishes that companies would be liable for fines between 0.1 and 20 percent of the violator's annual gross revenue, the Decree clarifies the minimum and maximum limits of any such fine.

Corruption Outlook and Key Considerations

The Decree is only one of a series of anti-bribery measures expected to be implemented in Brazil to address the perceived problem of corruption. Specifically, the Decree notes that the comptroller-general of the union will issue additional regulations and guidelines relating to the governance and assessment of compliance programs.[10] Companies should take the new decree as both a guide for change and a trigger for timely action.

If a compliance program already exists, the entity would be well advised to review and update it to ensure that it is in line with the Decree's evaluation parameters. In addition, a company should review and update its compliance program with regard to third parties, and should confirm that the company's reporting channels are open and disseminated to third parties and not only to employees.

Spotlight: RUSSIA

Corruption continues to be a major issue facing companies that seek to do business in Russia, as corruption among government officials remains a concern. Transparency International has ranked Russia as 136 out of 175 in the 2014 Corruption Perceptions Index, and a U.S. Department of State "2014 Investment Climate Statement" on Russia notes the widespread corruption in connection with construction for the 2014 Winter Olympic Games in Sochi.[11] While the Prosecutor General's Office opened criminal cases and imposed administrative penalties in connection with the Games, the report stated that it was likely that high-ranking officials were not the subjects of these investigations. Moreover, President Vladimir Putin has recently amended the Criminal Code to lower the fines for bribery.

A number of other anti-corruption developments have occurred of which companies doing business in Russia should be aware. In particular, Article 13.3 of the

8 Decreto No 8.420, de 18 de Março de 2015, available at https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/decreto/d8420.htm. English version available with registration by Merrill Brink International, http://www.merrillbrink.com/translation-of-Brazil-decree-Clean-Company-Act-04062015.htm.

9 Decree 8,240, at Article 42.

10 Decree 8,240 at Article 52.

11 *2014 Investment Climate Statement – Russia,* U.S. Department of State (June 2014), http://www.state.gov/e/eb/rls/othr/ics/2014/227933.htm.

Russian anti-corruption law contains the requirement for companies to implement a compliance program, and another law is proposed to amend the Criminal Code to expose companies to criminal liability. These developments occurred in the broader context of the National Plan to Counter Corruption for 2014-2015, as ordered by President Putin in July 2014, which requires authorities to amend their anti-corruption plans.[12]

Current Anti-Corruption Framework

On January 10, 2009, Russia enacted its anti-corruption law, Russia Federal Law 273-FZ, "On Countering Corruption."[13] Federal Law 273 broadly sanctions both individuals and companies that engage in illegal conduct. The law resembles the FCPA and the UK Anti-Bribery Act, at times reaching even further (for example, Federal Law 273 does not provide for an "adequate procedures" defense). The law is not limited to Russian entities and fully impacts foreign companies doing business in Russia.

Federal Law 273 is amended by Article 13.3, "The Obligation of Organizations to Undertake Anti-Corruption Measures."[14] On January 1, 2013, Article 13.3 came into effect. Importantly, this law requires all "organizations" to implement a compliance framework. The law sets forth six guidelines for a compliance program:

- Designate departments and officers to be responsible for prevention of bribery;
- Develop and implement procedures to ensure ethical business conduct;
- Cooperate with law enforcement agencies;
- Adopt a code of ethics and professional conduct for all employees;
- Install a means for identifying, preventing, and resolving conflicts of interest; and
- Prevent creation and use of forged documents.

Whether Russian authorities will aggressively enforce the law, and whether and to what extent they will use the law to target what they consider to be undesirable individuals or companies, is yet to be seen. Recently, the Prosecution Service of the Russian Federation has pursued actions against companies for failing to implement a compliance program. Courts have issued judgments ordering these companies to create programs, requiring the company to implement changes at times within one month.[15]

While the requirements of Article 13.3 appear to be substantially similar to guidelines for compliance programs under the FCPA, corporations would be well-advised to review and expand their programs based upon the elements set forth above.

Regarding penalization, Russia's current legal framework proscribes both giving and accepting a bribe. The penalty structure is tiered, and the specific fine depends on the amount of the underlying bribe and the conduct at issue. Individuals may be held liable under civil and criminal laws, but legal entities are not currently subject to criminal liability. Legal entities are subject to civil fines from three to 100 times the bribe amount, with the minimum penalty set at one million rubles, under Article 19.28 of the Code of Administrative Violations. If the bribe exceeds 20 million rubles, the minimum fine is set at 100 million rubles.

In March 2015, President Vladimir Putin signed an amendment to the Russian Criminal Code reducing fines for bribery.[16] Giving a bribe now can result in a penalty ranging from five to 90 times the bribe amount (down from a range of 15 to 90) and the possibility of incarceration for two to 12 years, with maximum sentences imposed if the bribe exceeds one million rubles. Unlike the FCPA, which does not proscribe accepting a bribe, Russian law imposes stiffer penalties for accepting a bribe than for offering a bribe. Accepting a bribe can result in a penalty ranging from 10 to 100 times the bribe amount (down from a range of 15 to 100) and the possibility of incarceration for three to 15 years,

12 Putin Endorses National Anti-Corruption Plan for 2014-2015, TASS (Apr. 11, 2014), http://tass.ru/en/russia/727473.

13 English version of Federal Law 273-FZ is available at http://archive.kremlin.ru/eng/text/docs/2008/12/222114.shtml.

14 *Russia: Courts Are Ordering Companies to Adopt Compliance Programs,* FCPA BLOG (Feb. 18, 2015).

15 *See Nizhny Norgorod,* Case 2-147712014 (Moscow District, June 17, 2014); *Russia: Courts Are Ordering Companies to Adopt Compliance Programs*, FCPA BLOG (Feb. 18, 2015).

16 *Russia Reduces Penalties for Graft,* FCPA BLOG (Mar. 16, 2015), http://www.fcpablog.com/blog/2015/3/16/russia-reduces-penalties-for-graft.html.

with maximum sentences imposed if the bribe exceeds one million rubles. For bribes that exceed 25,000 rubles, the penalty is 10 times the amount of the bribe.

Proposed Amendments to the Anti-Corruption Framework

An important potential change to Russia's anti-corruption laws for companies currently doing business in, or looking to do business in, Russia is the proposed extension of criminal liability to legal entities.[17] Under the current framework, legal entities may be held liable under the civil administrative law. The Duma, the lower house of the legislature, is considering an amendment that would impose criminal liability on legal entities for a number of crimes, including bribery, terrorism, and failure to comply with a court judgment. That law would bring Russian laws into accord with international treaties and the United Nations Conventions against Corruption, which Russia ratified in 2006. For bribery violations, the law would provide for fines of up to 30 million rubles (around $590,000), and other penalties including revocation of business licenses.

Furthermore, the Duma is considering an amendment to the anti-corruption framework to add whistleblower protections.[18] The law, as drafted, would allow public officials to receive remuneration of up to 15 percent of the damages to the state budget as alleged (but capped at 3 million rubles).

Spotlight: INDIA

The legal framework, political developments, and grassroots support for corruption reform in India were recently covered in our FCPA 2014 Year-End Update. During the first half of 2015, Prime Minister Narendra Modi's economic reforms remained closely watched, following his landslide election in June 2014 on a platform of good governance and economic reform. Another political party running on an anti-corruption platform, the Aam Aadmi Party ("AAP"), caught the world's attention in 2015 by winning the vast majority of seats in the Delhi state election and defeating Prime Minister Modi's Bharatiya Janata Party ("BJP"). However, the AAP's staying power has yet to be determined, as shortly after the elections, the AAP became embroiled in allegations of corruption.

Recently, the BJP has also become subject to corruption allegations relating to senior party members providing assistance to Lalit Modi, a businessman under investigation for financial irregularities.[19] These allegations have surfaced prior to the monsoon session of Parliament, which started on July 21, 2015, and has disrupted Parliament and Prime Minister Modi's ability to push through certain laws.

Several key anti-corruption laws are still pending in Parliament, including the Prevention of Corruption (Amendment) Bill, 2013 ("PCA Amendment"); the Whistleblower Protection Act of 2015; and amendments to the Lokpal and Lokayukta Act, 2013, which created an independent ombudsman at the union and state levels to investigate and prosecute bribery and corruption allegations against public servants.

Anti-Corruption Developments

The Prevention of Corruption (Amendment) Bill, 2013, which was introduced to the Rajya Sabha on August 19, 2013,[20] is currently pending in Parliament. In April 2015, the Union Cabinet, led by Prime Minister Modi, approved amendments to the PCA Amendment.[21] The PCA Amendment was necessary to bring India in line with the United Nations Convention Against Corruption ("UNCAC"), which was ratified in 2011. The most important amendments include:[22]

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17 *Russia Considers Imposing Criminal Liability on Legal Entities,* FCPA BLOG (June 11, 2015), http://www.fcpablog.com/blog/2015/6/11/russia-considers-imposing-criminal-liability-on-legal-entiti.html.

18 *Russia Mulls Whistleblower Reward Law,* FCPA BLOG (Apr. 16, 2015), http://www.fcpablog.com/blog/2015/4/16/russia-mulls-whistleblower-reward-law.html.

19 *Corruption Allegations Look Set to Disrupt Narendra Modi's Agenda,* THE WALL STREET JOURNAL (July 20, 2015), http://blogs.wsj.com/indiarealtime/2015/07/20/corruption-allegations-look-set-to-disrupt-narendra-modis-agenda/.

20 The Prevention of Corruption (Amendment) Bill, 2013, as introduced in the Rajya Sabha, http://www.prsindia.org/administrator/uploads/general/1376983957~~PCA%20Bill%202013.pdf.

21 *Proposal to Move Official Amendments to the Prevention of Corruption (Amendment) Bill, 2013,* Press Information Bureau, Government of India, Cabinet (Apr. 29, 2015), http://pib.nic.in/newsite/PrintRelease.aspx?relid=119910; *India: Government Ratifies Two UN Conventions Related to Transnational Organized Crime and Corruption,* UN Office on Drugs and Crime, http://www.unodc.org/southasia/en/frontpage/2011/may/indian-govt-ratifies-two-un-conventions.html.

22 *Id.*

- Designating corruption as a "heinous crime" by enhancing "penal provisions … from minimum 6 months to 3 years and from maximum 5-7 years."
- Establishing "more stringent punishment" for the bribe taker and the bribe giver.
- "Expanding the ambit of provision for containing inducement of public servant from individuals to commercial entities is being added to contain supply side of corruption."
- "Providing for issue of guidelines for commercial organizations to prevent persons associated with them from bribing a public servant."
- Requiring trials be completed within two years.

The PCA Amendment includes a number of developments of which businesses doing business in India should be aware, including increasing penalties for corruption and addressing the legal entity as the bribe giver. The continued development of the anti-corruption framework will be followed as it moves through Parliament, as will the implementation and enforcement of these laws once passed.

Spotlight: CHINA

Anti-corruption efforts have been front and center in China, as President Xi Jinping continues his self-described strategy of "killing tigers and swatting flies" to combat corruption among both high-ranking and petty officials. Corruption remains a major issue facing China, with nearly two million public officials considered to be corrupt and not currently being investigated.[23] The president's focus on rooting out corruption, for various reasons that have been proposed, is occurring against the backdrop of a declining economy. Some have said that the aggressive anti-corruption campaign may be threatening the economy as it stalls investment decisions by government officials.[24]

Anti-Corruption Developments

Anti-corruption efforts have been at the fore of Chinese politics, as President Xi Jinping has led an aggressive anti-corruption campaign against government officials since taking office in 2012. In 2014, these efforts focused on top-ranking party officials and military officials as well as state-owned entities ("SOEs"). For example, the former high-ranking official and former security chief of the Communist Party, Zhou Yongkang, was convicted of taking bribes, among other crimes, and sentenced in June 2015 to life imprisonment.[25] In 2014 alone, over 100,000 individuals have been investigated, disciplined, or prosecuted since Xi came to power.[26]

In February 2015, Wang Qishan, the chief of China's Central Commission for Discipline Inspection ("CCDI") – the Party's anti-graft division – announced that 26 SOEs in the industrial and energy sectors are under investigation for graft,[27] a reality that may affect China's weakening economy.

Anti-Corruption Framework

There are two major statutes that control anti-corruption activity: the Criminal Law of the People's Republic of China ("CL") and the Anti-Unfair Competition Law of the People's Republic of China ("AUCL"). The CL addresses commercial bribery, and the AUCL addresses both official bribery and commercial bribery. Official bribery involves bribery of a government official, while commercial bribery covers offering a bribe to a representative of a private organization. Importantly, unlike with the FCPA, bribing private individuals and entities is prohibited.

Penalties can be substantial, and unlike with the FCPA or the UK Bribery Act, public officials face imprisonment for life for bribery violations under the CL. Specifically, for official bribery, punishment ranges from confiscation of property to life imprisonment. For commercial bribery, individuals face up to 10 years in prison. Under the AUCL, individuals/companies face a penalty of approximately $30,000 and forfeiture of illegal income.

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23 *The Anti-Corruption Drive and Risk of Policy Paralysis in China,* COUNCIL ON FOREIGN RELATIONS (Apr. 24, 2015), http://blogs.cfr.org/asia/2015/04/24/the-anti-corruption-drive-and-risk-of-policy-paralysis-in-china/.

24 *See For Anticorruption Exit Strategy, Xi Could Look to Hong Kong,* THE WALL STREET JOURNAL (June 16, 2015), http://www.wsj.com/articles/for-anticorruption-exit-strategy-xi-could-look-to-hong-kong-1434437679.

25 *Zhou Yongkang, Ex-Security Chief in China, Gets Life Sentence,* NEW YORK TIMES (June 11, 2015), http://www.nytimes.com/2015/06/12/world/asia/zhou-yongkang-former-security-chief-in-china-gets-life-sentence-for-corruption.html?_r=0.

26 *China's Anti-Corruption Campaign Ensnares Tens of Thousands More,* FOREIGN POLICY (Jan. 9, 2015), http://foreignpolicy.com/2015/01/09/chinas-anti-corruption-campaign-ensnares-tens-of-thousands-more/.

27 *Chinese State-Owned Companies Under Scrutiny,* BROOKINGS (Mar. 1, 2015), http://www.brookings.edu/research/opinions/2015/02/26-china-anti-corruption-leutert.

Recently, China has announced the intention to develop national anti-corruption legislation.[28] President Xi stressed the importance of laws and regulations in the fight against corruption and the strengthening of institutions. While not many details on the proposed laws have been provided, they may include harsher punishment, especially for those offering the bribes,[29] and should be monitored by companies doing business in China.

28 China's Anti-Corruption Campaign Ensnares Tens of Thousands More, FOREIGN POLICY (Jan. 9, 2015), http://foreignpolicy.com/2015/01/09/chinas-anti-corruption-campaign-ensnares-tens-of-thousands-more/.

29 *'Harsher Punishment' Is Coming for China's Corrupt,* BUSINESS INSIDER (Mar. 8, 2015), http://www.businessinsider.com/r-china-to-implement-new-anti-graft-law-2015-3.

Legal Developments and New and Ongoing Investigations

FIFA Corruption Sweep

On May 27, 2015, the United States Attorney's Office for the Eastern District of New York announced, in a 47-count, 161-page-long indictment, that nine officials and five corporate executives from the Fédération Internationale de Football Association ("FIFA") were being charged with corruption-related offenses, including racketeering, money laundering, wire fraud, tax evasion, and obstruction of justice.

And in the weeks since the indictment, the United States Attorney's Office has further revealed an alleged 24-year scheme in which FIFA officials and its constituent entities were paid over $150 million in bribes from sports marketing companies and certain FIFA representatives received millions of dollars from South African officials in exchange for votes in favor of that country's 2012 World Cup bid. The then-president of FIFA, Sepp Blatter, announced he would resign his role after revealing that he was a focus of the still-ongoing investigation.

As the government's case stands now, the United States submitted formal extradition requests to the Swiss government for officials arrested in Zurich as they attended the 2015 annual FIFA Congress meeting. At this time, at least one official has already been extradited from Switzerland and has pled not guilty to the charges, posting $10 million bail. Some defendants have been placed on Interpol's wanted list, while extradition requests to other nations either are in progress or will be made public soon. Federal prosecutors have also moved to seize some of the indicted officials' property and assets in the United States.

Bilfinger – Identifying Bribes Connected with 2014 World Cup

After paying a $32 million fine and entering into a DPA with the DOJ for FCPA violations in Nigeria in 2013, German engineering firm Bilfinger reported in March that an internal investigation found that employees of a subsidiary paid bribes to public officials in Brazil for contracts related to the 2014 World Cup. Bilfinger, which agreed with the DOJ as part of the DPA to retain an independent corporate compliance officer for at least 18 months, stated that its compliance system is "in line with international standards and is reviewed and developed on an ongoing basis."

Bilfinger is still subject to its three-year DPA with the DOJ, which came out of allegations that Bilfinger conspired to pay more than $6 million in bribes for $387 million in contracts with Nigeria's Eastern Gas Gathering System project.

Electrobras

In June 2015, Electrobras, a Brazilian-owned electric company (52 percent owned by the government), announced in an SEC filing that the company has hired a law firm to investigate whether the company acted in a manner that violated the FCPA and the Brazilian anti-corruption law. Under scrutiny are any projects in which Electrobras affiliates participated as well as the company's business relationships with construction companies connected to Operation Car Wash, which is a government-initiated anti-corruption dragnet in Brazil related to the Petrobras investigation. Electrobras has indicated that it will keep the market informed about the progress of the investigation.

General Cable Corporation

In February 2015, Kentucky-based General Cable Corporation, a manufacturer of copper and fiber-optic cables, announced in a securities filing that it reserved $24 million toward a possible settlement with the SEC for FCPA violations relating to payments made by its subsidiaries in Portugal and Angola to Angolan public utility officials from 2002 through 2013. The filing indicates that this amount is a reasonable estimate of "the amount of profit derived from sales made to the Angolan government-owned public utilities in connection with the[se] payments … , which we believe are likely to ultimately be disgorged." General Cable Corporation previously disclosed that it was conducting an internal investigation with the assistance of external counsel of its use and payment of agents in connection with its operations in Angola, Thailand, and India; had voluntarily disclosed these matters to the SEC and the DOJ; and was cooperating with their investigations. General Cable Corporation also previously disclosed that it was implementing a screening process relating to sales agents it uses outside of the United States.

United Technologies Corporation

In April 2015, the Hartford, Connecticut-based United Technologies Corporation ("UTC") announced that it had received a second subpoena from the SEC seeking documents relating to alleged violations of anti-bribery laws from UTC's aerospace and commercial businesses in, among other places, China. UTC previously voluntarily disclosed the possibility of these violations and the status of its internal investigation regarding a nonemployee sales agent to the DOJ, the SEC, and the United Kingdom's Serious Fraud office in late 2013 and early 2014. UTC's disclosure noted that the investigations are ongoing and that the DOJ and the SEC continue to request information.

Hyperdynamics Corporation

In May 2015, Hyperdynamics Corporation announced that the DOJ had closed its FCPA investigation of the Houston-based oil and gas company without bringing any charges. The DOJ and the SEC previously served subpoenas on Hyperdynamics in 2013 concerning possible FCPA violations in connection with its business in Guinea, particularly whether its activities with charitable organizations violate the FCPA and anti-money-laundering statutes. The SEC's investigation is still pending.

Prosecutions, Settlements, and Declinations

Chestnut – First DOJ Enforcement Action of 2015 is Against Former Executive

In February 2015, the DOJ announced an enforcement action against Dmitrij Harder, the former owner and president of Chestnut Consulting Group Inc. ("Chestnut Group"), for allegedly bribing an official with the European Bank for Reconstruction and Development ("EBRD"). Of note, the enforcement action invokes the "public international organization" prong of the FCPA's "foreign official" element.

The indictment alleges that Harder, a Russian national, German citizen, and permanent resident alien of the U.S., engaged in a scheme to pay "approximately $3.5 million in bribe payments for the benefit of a foreign official to corruptly influence the foreign official's actions on applications for financing submitted to the [EBRD]" by Harder's clients and the Chestnut Group. Harder also attempted to use these bribes to "influence the foreign official to direct business to Harder and the Chestnut Group, and others." After payment of these bribes, the EBRD approved financing from two of the Chestnut Group's corporate clients, the first resulting in an $85 million investment and a $90 million loan, and the second resulting in a $40 million investment and a $60 million loan. From these loans, the Chestnut Group earned approximately $8 million in "success fees."

Harder was charged with one count of conspiracy to violate the FCPA and the Travel Act, five counts of violating the FCPA, five counts of violating the Travel Act, one count of conspiracy to commit international money laundering, and two counts of money laundering.

Bechtel – Former Executive Sentenced to Prison for Kickback Scheme

In March 2015, Asem Elgawhary, a former vice president of Bechtel Corporation ("Bechtel"), a U.S. construction, engineering, and project management corporation, was sentenced to 42 months in prison for accepting $5.2 million in kickbacks from Egyptian power companies. Elgawhary pled guilty in December 2014 to mail fraud, conspiracy to commit money laundering, and obstruction and interference with the administration of tax laws.

From 1996 to 2011, Elgawhary was the general manager at the Power Generation Engineering and Services Company, a joint venture between Bechtel and Egypt's state-owned electricity company. Elgawhary, a dual citizen of the U.S. and Egypt, was instrumental in identifying possible subcontractors, soliciting bids, and awarding contracts to perform power projects for the state-owned company. After admitting to accepting a total of $5.2 million from three power companies seeking to secure a competitive and unfair advantage in the bidding process, Elgawhary explained how he attempted to conceal the scheme through a network of offshore bank accounts.

Elgawhary had, over the years, sent various documents and "representation letters" to Bechtel executives and members of the joint venture's board of directors, falsely certifying that he had no knowledge or suspicion of any fraud and that there were no possible violations of law or regulations that should have been disclosed in the company's financial statements.

PBSJ – First SEC Enforcement Action of 2015 Includes DPA

The SEC's first FCPA enforcement action of 2015 was against PBSJ Corporation ("PBSJ"), an engineering, architectural, and planning services firm operating in international markets. The action was against the company and Walid Hatoum, a former PBSJ executive, for making offers of payment and bribes to certain "Qatari government officials in order to secure two multi-million-dollar development contracts in Qatar and Morocco." Hatoum had offered bribes to a former business colleague—and then-director of international projects at Qatari Diar, the Qatari government's real estate development company.

But shortly after winning the contracts, Hatoum told PBSJ's then-general counsel that PBSJ offered "agency fees" in order to win the contracts. The general counsel immediately launched an investigation into the issue. Weeks later, a Qatari government official informed Hatoum and the then-president of PBSJ that they knew of the bribery attempt and terminated their contracts.

PBSJ conducted a full internal investigation, self-reported its preliminary findings to the SEC and the DOJ, and suspended

Hatoum for his conduct. After providing "substantial cooperation" to the SEC, PBSJ agreed to pay disgorgement and interest of $3,032,875 and a penalty of $375,000 as part of a two-year deferred prosecution agreement ("DPA"). Further, Hatoum agreed to personally pay a $50,000 penalty without having to admit or deny any of the SEC's findings against him.

BHP Billiton

In May 2015, the Securities and Exchange Commission charged BHP Billiton with violating the internal controls and accounting provisions of the FCPA when it sponsored the attendance of foreign government officials at the Beijing Summer Olympics. The investigation revealed that BHP Billiton failed to create and maintain internal controls over its 2008 Summer Olympic hospitality program. Foreign government officials from Africa and Asia enjoyed hospitality packages and tours at BHP Billiton's expense. Although BHP Billiton required employees to fill out hospitality forms for invitees to the Olympics, including government officials, the employees were not trained in evaluating the bribery risks of the invitations. Due to this failure, BHP Billiton extended Olympic invitations to government officials connected to pending contract negotiations. The SEC's order finds that BHP Billiton violated Sections 13(b)(2)(A) and 13(b)(2)(B) of the Securities Exchange Act of 1934. The $25 million civil settlement, in which the company neither admits nor denies the SEC's findings, reflects BHP Billiton's remedial efforts and cooperation with the SEC's investigation and requires the company to report to the SEC on the operation of its FCPA and anti-corruption compliance program for a one-year period.

Cobalt International

Cobalt International Energy, Inc. ("Cobalt"), announced on January 29, 2015, that the SEC sent the company a termination letter advising that the SEC's FCPA investigation relating to Cobalt's operations in Angola had concluded and that the SEC does not intend to recommend any enforcement action against Cobalt.

The SEC investigation began in 2011 in response to allegations of a connection between senior Angolan government officials and Nazaki Oil and Gaz, an Angolan company that held a working interest alongside Cobalt. The company had received a formal investigative order from the SEC in November 2011 and a Wells Notice on August 4, 2014, which led to an over 10 percent drop in its stock price. This notice of termination officially concludes the investigation without a finding that Cobalt violated the FCPA.

The Goodyear Tire & Rubber Company

In February 2015, The Goodyear Tire & Rubber Company entered into a settled administrative order to resolve the SEC's investigation relating to Goodyear's alleged failure to prevent or detect more than $3.2 million in bribes paid by its subsidiaries to officials in sub-Saharan Africa from 2007 through 2011. According to the order, Goodyear did not admit or deny the SEC's findings and is ordered to pay disgorgement in the amount of $14,122,525 and prejudgment interest in the amount of $2,105,540 and to report the status of its remediation to the SEC every year for three years. Notably, Goodyear was not ordered to pay a civil penalty in connection with the settlement, based upon its cooperation. In particular, the SEC indicated that Goodyear's cooperation and remediation included, among other things (i) halting the allegedly improper payments and self-reporting to the SEC; (ii) conducting an internal investigation and providing such information to the SEC; (iii) divesting ownership interest in a particular subsidiary and ceasing all business dealings with it; (iv) disciplining certain employees who had oversight responsibility over the particular operations; and (v) enhancing its compliance program by updating policies and procedures, expanding training, facilitating regular audits, assessing risk on a quarterly basis and certifying assessments, implementing new compliance structure, and hiring additional compliance staff.

Gold Fields Ltd. and Net1 UEPS Technologies, Inc.

In June 2015, the South African mining company Gold Fields Ltd. announced that the SEC had concluded its investigation relating to a 2010 Gold Fields Black Economic Empowerment transaction in which a financial stake was granted to the ruling African National Congress's chairwoman, and declined to bring

an enforcement action against Gold Fields.

Similarly, in June 2015, South African payment processing company Net1 UEPS Technologies, Inc., announced that the SEC had declined to bring an enforcement action with respect to alleged payments in connection with bids for a contract with South Africa's Social Security Agency. Net1 indicated in its announcement that a DOJ investigation remains open.

The government's investigations of Gold Fields and Net1 are noteworthy because of the involvement of alleged foreign-cubed payments—specifically, payments by a South African company in South Africa to South Africans. The only nexus to the United States is that both companies have secondary listings on U.S. exchanges.

PetroTiger – DOJ Announces Public Declination

For the second time in FCPA history, the DOJ announced in June 2015 that it would decline to prosecute a company, PetroTiger, a hydrocarbon production and services company, after the company's co-founder and former chief, Joseph Sigelman, pleaded guilty to one count of conspiracy to violate the FCPA. PetroTiger had brought the case to the DOJ through a voluntary disclosure and fully cooperated with the investigation, likely leading to the DOJ's public declination. The DOJ had not previously issued a public declination in an FCPA case since April 2012. Sigelman, among other defendants, allegedly paid an employee of the state-owned Colombian company Ecopetrol to win business for PetroTiger. In the DOJ's public statement, the department recognized the company's voluntary disclosures, cooperation, and remediation.

Miscellaneous

Avon – Shareholder Derivative Suit Connected to FCPA Scrutiny in 2014

A shareholder of Avon Products, Inc. ("Avon"), the global manufacturer of beauty and personal care products, brought a derivative claim alleging breach of fiduciary duty claims against current and former Avon officers and directors in connection with previously resolved FCPA scrutiny in 2014. The shareholder, Sylvia Pritika, brought her action in the Southern District of New York, asserting that the federal court had subject-matter jurisdiction over the claims because they were "dependent on the resolution of substantial questions of federal law."

But the breach of fiduciary duties claims are state law claims arising under the corporation's state of incorporation, so the defendants filed a motion to dismiss for lack of subject-matter jurisdiction. This motion was granted. Judge Paul Gardephe concluded that "Plaintiff's jurisdiction argument falters, however ... [because they] do not raise a substantial federal issue, because any issue related to the FCPA that is presented by this case lacks the requisite 'importance ... to the federal system as a whole.'" Even though Avon's compliance with the FCPA would be a critical issue, the case "does not implicate the validity of the FCPA or the requirements that the Act imposes." Judge Gardephe's decision was a clear message that shareholder derivative actions based on FCPA-related conduct should be brought in state, not federal, court.

BioRad – Former GC Brings Employment Claims After FCPA Enforcement Action

As reported in our 2014 FCPA end-of-year update, Bio-Rad Laboratories ("Bio-Rad"), a specialty chemicals company based in Berkeley, California, agreed in November 2014 to pay approximately $55 million to resolve DOJ and SEC FCPA enforcement actions. But in June of this year, Sanford Wadler, the former general counsel and secretary of Bio-Rad, filed a civil complaint against the company and certain executive officers and board members in the Northern District of California, alleging unfair employment practices.

Wadler had, when he was made aware of Bio-Rad's involvement in bribery in Russia, Thailand, and Vietnam, investigated the activity as required under federal securities laws (as he was Bio-Rad's chief legal officer) and, after concluding that the conspiracy to violate the FCPA went all the way to the executives and board of directors, reported his concerns to the company's audit committee.

Wadler's complaint alleges that Bio-Rad fired him "just shortly before Bio-Rad was scheduled to present to the SEC and [the] DOJ regarding the Company's investigation into potential FCPA violations" because he "refused to be complicit in its wrongdoing."

Biomet – DPA Extended

Biomet's existing three-year DPA with the Department of Justice was extended in March 2015 for one year. The three-year DPA was set to expire on March 26. But after the company self-reported more possible FCPA violations in Brazil and Mexico that predated the 2012 settlement, the DOJ extended the DPA. This also included an extension of Biomet's independent compliance monitor. In March 2012, Biomet agreed to pay $22.7 million as penalty for FCPA violations involving bribing doctors at government hospitals in Argentina, Brazil, and China from 2000 to 2008. Under the DPA, the DOJ has sole discretion to determine whether Biomet's conduct is a breach of the DPA. The company continues to cooperate with the DOJ and the SEC.

Direct Access Partners – Chinea and DeMeneses Sentenced

Benito Chinea, the former chief executive officer of U.S. broker-dealer Direct Access Partners, and Joseph DeMeneses, the company's former managing director, were each sentenced in March 2015 to four years in prison and were also ordered to pay $3,636,432 and $2,670,612 in forfeiture, respectively, after each pleaded guilty to one count of conspiracy to violate the FCPA and the Travel Act in December 2014.

Chinea and DeMeneses admitted that they participated in a scheme to pay bribes to a senior official in Venezuela's state economic bank in return for trading business that generated more than $60 million in commissions. Chinea and DeMeneses, based in New York, together with three Miami-based employees, convinced the official to direct trading business to Direct

Access Partners and, in return, split the revenue from the trading business with the official.

DOJ Announces New Full-Time Expert in Compliance Programs

On July 30, 2015, Andrew Weissman, the chief of the Fraud Section of the U.S. Department of Justice (DOJ) Criminal Division, announced that the DOJ is in the process of hiring a former prosecutor to serve as a full-time expert in compliance programs. With this move, the DOJ is taking a significant step to ensure that companies have tough but realistic compliance programs that detect and deter wrongdoing by executives. The new compliance expert will be tasked with investigating corporate compliance programs to determine whether they are effective or mere window dressing. Weissman said the fraud section will not just focus on securities and FCPA violations, but will increasingly focus on compliance in health care, such as Medicaid and Medicare fraud. Weissman said that the DOJ would "like to make sure we hold companies to a tough but realistic standard."

Wal-Mart – Court Dismisses Shareholder FCPA-Related Derivative Claims

In April 2015, Judge Susan Hickley of the Western District of Arkansas dismissed eight Wal-Mart shareholder FCPA-related derivative claims that were consolidated into one action. In order for the claims to survive, plaintiffs needed to allege with particularity that the directors failed to exercise due care as to the conduct at issue. Judge Hickley held that "[n]othing in the Complaint suggests any particularized basis to infer that a majority of the Board had actual or constructive knowledge of the alleged misconduct, let alone that they acted improperly with scienter." Further, the complaint failed to contain "any particularized facts that link a majority of the Director Defendants to any actual decision."

Wal-Mart has, in the past three years, spent over $220 million in its global compliance program in reaction to its high-profile FCPA scrutiny. According to Wal-Mart, its Audit Committee "held 15 meetings in 2015, seven of which related primarily to its ongoing FCPA-related investigation and compliance matters."

Eli Lilly – Investigation Closed

In February 2015, Eli Lilly said in an SEC filing that the DOJ closed its FCPA investigation into the company. In late 2012, Lilly resolved civil FCPA charges brought by the SEC by paying a $29.4 million settlement for offenses related to bribes to government officials in Russia, Brazil, China, and Poland. Lilly agreed to the settlement without admitting or denying the SEC's allegations. Additionally, the company agreed to have an independent compliance consultant conduct a review of the FCPA internal controls and programs.

Fokker Services B.V.

In February 2015, the U.S. District Court for the District of Columbia declined the government's and Fokker Services B.V.'s Joint Consent Motion for Excursion of Time under the Speedy Trial Act in United States v. Fokker Services B.V. The government previously filed an information and deferred prosecution agreement in which Fokker, a Dutch aerospace services provider, accepted responsibility for violating the International Emergency Economic Powers Act through transactions involving the export of aircraft parts, technologies, and services to customers in Iran, Sudan, and Burma over a five-year period from 2005 to 2010. These transactions required over 1,100 separate shipments to receive approximately $21 million in revenue. The deferred prosecution agreement indicated that Fokker (i) self-reported the violations in 2010; (ii) retained outside counsel to conduct an internal investigation; (iii) cooperated with the government's investigation; and (iv) instituted remedial measures, including, among other things, firing its president, demoting or reassigning certain personnel, training employees on U.S. export control and economic sanctions, adapting a new compliance program, and ceasing all business with U.S.-sanctioned countries.

Pursuant to the deferred prosecution agreement, Fokker would pay a $10.5 million penalty and be subject to prosecution for 18 months. The court refused to grant the joint motion, noting that the parties "essentially request[ed] the court to serve as a rubber stamp" and "leverage over the head of the company." Citing the public's interest, the court found that the deferred prosecution agreement was "anemic" and "grossly disproportionate to the gravity of

Fokker Services' conduct in a post-9/11 world." In particular, the court noted that no individuals were being prosecuted and the agreement does not require Fokker "to pay as its fine a penny more than the $21 million in revenue it collected from its illegal transactions" or to engage an independent monitor, or to make any periodic reports to the court or the government verifying compliance with U.S. law "over this very brief 18-month period." The court concluded that it was merely declining to approve the document before it and that it was "open to considering a modified version in the future." Meantime, Fokker sought an interlocutory appeal of this order in March 2015, which is pending before the U.S. Court of Appeals for the D.C. Circuit.

FCPA Practice Team – Events, Alerts, Articles, and Attorney Biographies

Events

BakerHostetler and PricewaterhouseCoopers Conduct Targeted FCPA and Related Compliance Training at 51st Paris Air Show

On June 17, to showcase the firm's depth of experience counseling aerospace clients, a BakerHostetler cross-practice team partnered with PricewaterhouseCoopers (PwC) to present a legal and compliance seminar at the 51st Paris Air Show, the largest aerospace trade show in the world. Drawing in high-level executives from more than 2,000 companies and 40 countries, 300 of which are based in the U.S., the venue provided the perfect location for BakerHostetler's White Collar Defense and Corporate Investigations, Export Controls, and Government Contracts teams to conduct the comprehensive training seminar. The presentations focused on developments in anti-corruption enforcement, export control compliance, and government contracting rules. Discussions also covered ways that companies and senior executives can avoid compliance violations. Seminar attendees included key executives from major aerospace companies, as well as professionals from other industries.

Participating in the seminar were Congressman and BakerHostetler Of Counsel Mike Oxley, BakerHostetler Partners Ray Whitman, John Carney, George Stamboulidis,Jonathan Barr, Mel Schwechter, Hilary Cairnie, and Sonny Carpenter, along with Bill Waldie, Mark Gerber, John May, and Jeannette Chu from PwC.

Alerts

Pointing the Finger – The New Price of Corporate Cooperation
John J. Carney, George A. Stamboulidis, Patrick T. Campbell, Denise D. Vasel

"On September 9, 2015, Sally Quillian Yates, the Deputy Attorney General, issued a memorandum announcing the Department of Justice's (DOJ) new guidelines regarding its intensifying focus on individual wrongdoers in the context of corporate misconduct (Yates Memo). The Yates Memo is the latest in a line of pronouncements by the DOJ concerning the framework federal prosecutors must use in determining whether and how to charge corporations and their employees in criminal cases. It is the most significant ever for corporate officers and employees. As Ms. Yates explained in a September 10, 2015 speech at New York University's program on corporate compliance and enforcement, the new guidelines 'are institutional policy shifts that change the way we investigate, charge, and resolve cases.'"

AML and Investment Advisers: Understanding FinCEN's New Anti-Money Laundering Rules
Lauren J. Resnick and Margaret E. Hirce

"On August 25, 2015, the Financial Crimes Enforcement Network (FinCEN) proposed rulemaking that would require registered investment advisers, including certain hedge funds and asset managers, to establish anti-money

laundering (AML) programs and monitor and report suspicious activity. [1] In 2003, a similar rule was proposed and later withdrawn, and this new proposal comes amid an increasing focus on criminal and regulatory enforcement actions for AML, Office of Foreign Assets Control (OFAC), and Foreign Account Tax Compliance Act (FATCA) violations."

Pulling Back the Curtain: DOJ to Take Action Against Window Dressing Corporate Compliance Programs
John J. Carney, Patrick T. Campbell, Andres A. Muñoz, and George A. Stamboulidis

"On July 30, 2015, Andrew Weissman, the chief of the Fraud Section of the U.S. Department of Justice (DOJ) Criminal Division, announced that the DOJ is in the process of hiring a former prosecutor to serve as a full-time expert in compliance programs. With this move, the DOJ is taking a significant step to ensure that companies have tough but realistic compliance programs that detect and deter wrongdoing by executives. The new compliance expert will be tasked with investigating corporate compliance programs to determine whether they are effective or mere window dressing…"

Managing Anti-Corruption and Export Control Risk in the Aerospace Industry
Jonathan R. Barr, Hilary S. Cairnie, John J. Carney, María R. Coor, Melvin S. Schwechter, George A. Stamboulidis, Susrut A. Carpenter, Kaitlyn A. Ferguson, Francesca M. Harker, Denise D. Vasel

" While any company conducting business globally should be concerned about avoiding conduct that would violate the Foreign Corrupt Practices Act (FCPA), the UK Bribery Act (UKBA), and other similar anti-corruption laws, companies working in the aerospace industry are at special risk. This special risk is created by two main factors inherent in the industry – a high percentage of government-owned or -controlled airlines and the prominent use of third parties in countries with high risk of corruption, payments to which are prohibited if all or a part of that payment would be passed on to a foreign official. This special risk is not limited to airplane manufacturers but also exists in the repair and supply sector of the aerospace industry. In fact, no other industry has been the subject of more scrutiny: American Airlines cash payments to then-president Nixon's reelection campaign served as a catalyst to prompt Congress to pass the FCPA, and since then 12 percent of FCPA enforcement actions have involved airlines, aerospace manufacturers, suppliers, and service companies. This is second only to the oil and mining industry. In the realm of anticorruption enforcement, aerospace is the world's third-most investigated, prosecuted, and fined industry. In a word, the aerospace industry has been a clear "target" of the government, a trend that is likely to continue."

No Room for Companies to Gamble as the Feds Double Down on FCPA Enforcement
Jonathan R. Barr, John J. Carney, Kendall E. Wangsgard

"In 2014, a record-setting year for Foreign Corrupt Practices Act (FCPA) enforcement, the Department of Justice (DOJ) announced the largest-ever DOJ FCPA resolution—an over $772 million criminal fine for French power company Alstom S.A. That resolution, in turn, was the driving force behind the collection of over $1.25 billion by the DOJ for FCPA violations, also a historical record. Recent moves signal that 2015 promises to continue and expand upon this trend."

Foreign Corrupt Practices Act 2014 Year End Update
Jonathan R. Barr, John J. Burke, John J. Carney, Jimmy Fokas, , Robert F. Morwood, Jonathan B. New, Lauren J. Resnick, Gregory S. Saikin, Edmund W. Searby, George A. Stamboulidis, Susrut A. Carpenter, Jenna N. Felz, Kaitlyn A. Ferguson, Francesca M. Harker, Margaret E. Hirce, Samuel M. Light

Articles

New, McMillan Author Article About Law Enforcement Searches for Electronic Evidence Overseas
Jonathan B. New and David M. McMillan

Partner Jonathan New and Associate David McMillan authored an article in the September 2015 issue of Business Crimes Bulletin titled "Searches Without Frontiers: The U.S. Aggressively Seeks Ability to Reach Electronic Evidence Overseas." The article discusses the evolving means used by law enforcement officials to obtain electronic communications and other evidence stored in another country. New and McMillan conclude:

It is critical that in today's increasingly globalized world, companies that employ cloud-based computing or otherwise store data outside the United States pay close attention to the rapidly changing legal landscape regarding U.S. law enforcement's ability to search and seize overseas evidence.
Read the article (subscription required).

Rivkin, Casey Make Case for States Enacting Their Own Iran Sanctions
Lee A. Casey and David B. Rivkin Jr.

Partners David Rivkin and Lee Casey authored an opinion piece for July 26, 2015, issue of *The Wall Street Journal*. The article, "The Lawless Underpinnings of the Iran Nuclear Deal," makes the argument that, because the Iran nuclear agreement was not concluded as a treaty pursuant to the Constitution—which requires the Senate's advice and consent by a two-thirds majority—it does not preempt state law and, as a result, the states may be able to derail the deal if they enact their own Iran sanctions legislation.
Read the article (subscription required).

Carney, Carpenter Analyze Corruption Risks in Aerospace Industry for Law360

John J. Carney and Susrut A. Carpenter

Partner John Carney and Associate Sonny Carpenter co-authored an article published on Law360 on June 3, 2015, headlined "Aerospace Cos. Face More Corruption Risk Than Ever Before." The article examines the growth of government oversight, which, the authors write, "heightens the risk of prosecution and enforcement actions concerning unlawful and unethical sales practices" in the aerospace industry.

The authors review the regulatory landscape, including the Foreign Corrupt Practices Act, the U.K. Bribery Act, and similar laws, and offer best practices for anti-corruption compliance programs. The article concludes: "Enacting robust and comprehensive compliance programs is the key to clearing a predictable path through these stormy skies of anti-corruption enforcement. Such programs will strengthen a companies' financial stability and set them up for success going forward in this new aggressive anti-corruption environment."
Read the article.

Carpenter Discusses FCPA Compliance in American Bar Association Criminal Justice Magazine

Susrut A. Carpenter

In an article in the Winter 2015 edition of the *American Bar Association Criminal Justice Magazine*, "Avoid an Investigation: Automate FCPA Compliance," Associate Sonny Carpenter discusses the FCPA and the problems with technological advances prohibiting proper communication to the C-level executives.

Carpenter states, "Corporations now must uncover inappropriate conduct faster and more efficiently to prevent intrusive government investigations."

He concludes with a new idea that can cut down on human error and ensure all proper precautions are taken by the company.
Read full article here.

John J. Carney, Partner

John J. Carney, a former securities fraud chief, assistant United States attorney, U.S. Securities and Exchange Commission senior counsel, and practicing CPA, serves as co-leader of the firm's national White Collar Defense and Corporate Investigations group. He focuses his practice on advising and defending corporations and senior officers on FCPA compliance, investigation and defense. His significant experience in conducting investigations of possible FCPA violations and other potentially improper foreign, country-based financial transactions has included working on major matters in the key BRIC countries (Brazil, Russia, India, and China). Mr. Carney's "hands on," detail-oriented approach to client advocacy has earned him recognition from both Chambers USA and Securities Docket as one of the country's top white collar and securities regulatory defense attorneys.

George A. Stamboulidis, Partner

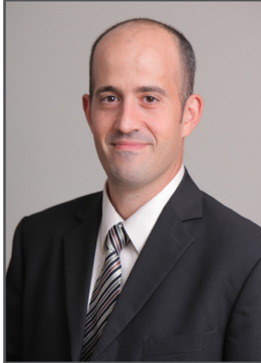
George A. Stamboulidis, former chief of the Long Island Division of the U.S. Attorney's Office for the Eastern District of New York and lead prosecutor in several significant high-profile cases, has been selected as an independent monitor on five separate occasions, more than any other attorney. He applied and refined his deep knowledge of the FCPA while reviewing policies and procedures for the various institutions as part of these monitorships. Additionally, he regularly conducts internal investigations, evaluates financial transaction controls, and makes recommendations for changes to ensure that adequate internal review procedures exist for clients' organizations. Mr. Stamboulidis was quoted in the Best Practices section in *Managing Independent Monitors in Foreign Corrupt Practices Act Compliance Guidebook—Protecting Your Organization from Bribery and Corruption* by Martin and Daniel Biegelman. He received the DOJ's coveted Director's Award for Superior Performance three times and was named a Fellow of the Litigation Counsel of America, a trial lawyer honorary society composed of experienced and effective litigators throughout the U.S.

Jonathan R. Barr, Partner

Jonathan R. Barr, a former U.S. Department of Justice Fraud Section trial attorney, assistant United States attorney in the District of Columbia, and a former senior counsel at the U.S. Securities and Exchange Commission's Division of Enforcement, focuses a significant portion of his practice on conducting internal investigations for public and non-public corporations, defending corporations and individuals in FCPA criminal and civil enforcement investigations, and advising corporations on FCPA compliance. He has significant experience representing corporations making voluntary disclosures to the U.S. government. He has represented clients in FCPA investigations relating to Eastern Europe, Southeast Asia, Brazil, and China and has advised public and nonpublic corporations on creating and implementing FCPA compliance programs.

Lauren J. Resnick, Partner

Lauren J. Resnick, former assistant United States attorney, has conducted numerous internal investigations on behalf of international companies in the financial services, pharmaceutical, healthcare, and oil and natural gas industries regarding FCPA violations, accounting irregularities, and conflicts of interest. She has considerable investigatory experience conducting due diligence for clients seeking overseas joint ventures and has led internal FCPA investigations for clients in countries such as Nigeria, China, and Spain. She regularly advises corporate clients on optimizing internal controls and corporate governance, revising business codes of conduct, and designing policies and procedures to enhance statutory and regulatory compliance. She has extensive experience advising clients on FCPA compliance issues and has remediated numerous books and records violations. Additionally, Ms. Resnick has supervised numerous monitorships in connection with the firm's appointment by the DOJ and other governmental agencies to assess compliance procedures, including FCPA policies and procedures. She was recognized among The Best Lawyers in America® 2013 and as a New York "Super Lawyer" since 2011 and twice received the DOJ's prestigious Director's Award for Superior Performance.



Jimmy Fokas, Partner

Jimmy Fokas, a former senior counsel in the Division of Enforcement in the New York Regional Office of the SEC, has extensive FCPA investigatory experience. He has reviewed compliance policies and recommended remedial measures regarding books, records, and internal controls violations for numerous clients. He conducted an investigation of possible bribes to government officials involving a supplier and a subcontractor in India, reviewed compliance policies, and recommended remedial measures. He also managed a legal team in connection with the firm's appointment as independent monitor of a non-prosecution agreement between the DOJ and Mellon Bank, N.A., which involved assessment of the bank's global compliance and employee training programs. He subsequently made recommendations for enhancements to policies and procedures for data privacy, government contracting, FCPA, and other compliance programs.

Jonathan B. New, Partner

Jonathan B. New, former assistant United States attorney, handled international money-laundering cases, public corruption issues, and financial fraud while serving in a variety of frontline positions in the DOJ. He has considerable FCPA compliance and investigatory experience and has spoken and written extensively on these issues. He has advised clients on legal and regulatory compliance issues and has represented individuals, companies, and professionals in connection with criminal investigations conducted by the DOJ, the FBI, and the IRS.

He successfully defended the U.S. in landmark NAFTA litigation, was lead counsel for the Overseas Private Investment Corporation in claims against the Islamic Republic of Iran, and has defended numerous federal agencies in a wide range of lawsuits. Mr. New received a special commendation award for outstanding service in the Civil Division of the DOJ.

John W. Moscow, Partner

John W. Moscow has spearheaded investigations into some of the most complex frauds cases of the past 25 years. He has led investigations and conducted prosecutions involving money laundering and fraud at Bank of Credit and Commerce International; bank fraud in Caracas, Venezuela; the corrupt A.R. Baron & Co., Inc., stock brokerage; the Beacon Hill money-laundering case in New York; and theft by top Tyco, Inc., executives. He spent 30 years with the New York County District Attorney's Office, where he served as the chief of the Frauds Bureau and deputy chief of the Investigations Division. While there, he investigated and prosecuted cases involving international bank and tax fraud, securities fraud, theft, fraud on governmental entities, and fraud in money transfer systems.

Mr. Moscow works frequently with bank and securities regulators at the state and federal levels and abroad. He has extensive experience in the international tracing of assets and is a leading authority on international corruption matters.

John J. Burke, Partner

John J. Burke has advised clients on FCPA compliance issues, particularly with respect to their dealings with India, China, and the Middle East, and has developed FCPA compliance programs for multinational companies with operations around the world. He has developed clauses in distribution agreements for U.S. companies to reduce their exposure to FCPA liability through the actions of their foreign distributors. Additionally, he has conducted FCPA and anti-corruption due diligence on companies being acquired by clients and has assisted companies in revising their FCPA compliance policies to incorporate requirements of the British Bribery Act 2010.

Mr. Burke has held numerous in-house FCPA compliance seminars for clients, which include financial institutions, healthcare companies, data processing companies, defense contractors, and consumer product companies.

Edmund W. Searby, Partner

Edmund W. Searby is a former federal prosecutor with the DOJ and the Office of the Independent Counsel. He has conducted criminal investigations and internal investigations involving the FCPA, export controls, and international money laundering. In particular, he has conducted a number of FCPA investigations arising in the context of due diligence on potential mergers and acquisitions. He has also drafted and implemented FCPA, antitrust and general compliance policies for a number of FORTUNE 500 companies and other corporations. Mr. Searby has spoken and published articles on the FCPA and other anti-bribery issues. In recognition for his work as a federal prosecutor, Mr. Searby received letters of commendation from the attorney general of the United States and the director of the FBI.

Gregory S. Saikin, Partner

Gregory S. Saikin served as an assistant United States attorney in the Southern District of Texas, investigating and prosecuting individual and corporate targets for a variety of fraud, public corruption, and money-laundering violations. These investigations and prosecutions involved conduct occurring in Mexico, requiring close coordination with the FBI Border Liaison Office and various Mexican law enforcement agencies. Mr. Saikin began his career in large law firms representing corporations, corporate officers, and audit committees in connection with FCPA compliance and enforcement matters. He is an author and speaker on a wide range of white collar topics, including grand jury practice, corporate charging policies, and the federal sentencing guidelines. As a federal prosecutor, he received a number of awards, including the Integrity Award from the inspector general of the U.S. Department of Health and Human Services. He was also recognized by the FBI director for outstanding prosecutorial skills and by the U.S. Secret Service director for superior contributions to law enforcement.

Jonathan A. Forman, Associate

Jonathan Forman focuses his practice on corporate internal investigations, government investigations and regulatory examinations, and white collar criminal defense and securities enforcement-related litigation. Mr. Forman also advises clients with respect to their compliance programs as well as FCPA risk in connection with various transactions. During law school, Mr. Forman assisted an independent review board's oversight of a national labor union pursuant to a consent decree, and interned in the Prosecutor's Office at the United Nations International Criminal Tribunal for the Former Yugoslavia and for Judge Donald C. Pogue at the U.S. Court of International Trade.

Francesca M. Harker, Associate

Francesca M. Harker obtained significant FCPA experience while conducting investigatory work in Mexico, China, India, and Brazil to assist U.S. clients in ascertaining the nature and extent of alleged bribe payments made to foreign officials by distributors, contractors, and subsidiaries. She also has experience structuring and implementing FCPA compliance programs in an effort to help clients avoid potential violations and lessen government sanctions, and has assisted clients in connection with criminal investigations conducted by the DOJ. During law school, Ms. Harker was an associate editor for the *University of Michigan Law Review.*

Sonny A. Carpenter, Associate

A former Army prosecutor, Sonny A. Carpenter represents individuals and corporations in complex commercial litigation as well as white collar and corporate criminal matters. While in the government, he tried numerous bench and jury trials and led complex investigations with the Department of Justice, the Department of Homeland Security, and the Department of Defense. Mr. Carpenter uses that experience to support clients by conducting FCPA and other investigations and by handling various matters for corporations and individuals involving compliance measures and allegations of fraud. His disciplined nature heightens his professional organization and further regiments his thorough approach to client needs.

Margaret E. Hirce, Associate

Margaret E. Hirce focuses her practice on securities litigation, regulatory enforcement, and complex commercial litigation. Ms. Hirce has experience conducting FCPA due diligence on companies in connection with potential acquisitions by clients. Among other matters, she has experience representing underwriters of mortgage-backed securities in a multibillion-dollar securities fraud class action before the U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit, as well as representing a healthcare technology company in a multimillion-dollar contract dispute in arbitration in London.

Kaitlyn Ferguson, Associate

Kaitlyn Ferguson works on a variety of litigation matters. She is also a member of the team overseeing the anti-corruption investigations and the enforcement of the consent decree of a local union. Ms. Ferguson's professional interests include national security law, government investigations, and international relations.

Samuel M. Light, Associate

Sam Light focuses his practice on white collar criminal defense, corporate investigations, and complex commercial litigation. With an educational background in anthropology and economics, Sam's comprehension of a depth of topics and situations provides him with a unique point of view and approach to his practice.

For more information about the Foreign Corrupt Practices Act, or if you have questions about how FCPA may impact your business, please contact the following BakerHostetler attorneys or visit our website (http://www.bakerlaw.com/foreigncorruptpracticesact/).

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