

Client Alert

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Top Ten International Anti-Corruption Developments for November 2014

By the MoFo FCPA and Global Anti-Corruption Team

For busy in-house counsel and compliance professionals, we have tried to summarize the most important international anti-corruption developments in the past month with links to primary resources. November was definitely a busy month with a variety of developments. Here is our Top Ten list:

- Bio-Rad \$55 Million FCPA Resolution.** On November 3, 2014, DOJ and SEC simultaneously announced resolutions with Bio-Rad Laboratories. DOJ entered into a two-year non-prosecution agreement (NPA) with Bio-Rad arising from conduct in Russia. The NPA included a monetary penalty of \$14.35 million and self-reporting obligations regarding Bio-Rad's continuing implementation of an enhanced compliance program (i.e., no corporate monitor). SEC entered into a cease and desist order against Bio-Rad in which the company agreed to pay \$40.7 million in disgorgement and prejudgment interest in connection with the company's sales in Russia, as well as in Thailand and Vietnam. Continuing to add to the debate about voluntary disclosure, the matter was voluntarily disclosed by Bio-Rad more than four years ago and cost the company \$55 million, exclusive of attorneys' and consultants' fees.
- Opinion Release 14-02.** DOJ publicly released its second opinion release of the year on November 7, 2014. In many ways this opinion release was unsurprising, as it was largely consistent with the *FCPA Resource Guide* released in November 2012. (The release can be found here.) But what was most interesting about this release was what it did not mention: the Halliburton Opinion, Op. Rel. 08-02. In a move that appears designed to put further distance between DOJ and the Halliburton Opinion from 6 years ago, DOJ chose not to mention the seminal release previously seen as reflecting the Department's rather draconian approach to post-acquisition integration. We issued a client alert describing our analysis on this issue in more detail, which can be found here.
- New "Instrumentality" Challenge.** There are a number of pending FCPA-related cases against individuals, including in Connecticut, New Jersey, and New York. In the case in New Jersey, *United States v. Joseph Sigelman*, filed on November 8, 2013, the defendant, who is the former co-CEO of a company called PetroTiger, has raised a familiar challenge in the FCPA context: attacking DOJ's interpretation of the "instrumentality" provision of the FCPA. In the *Sigelman* case, the defendant has filed a motion to dismiss that argues that, as a matter of law, Colombia's Ecopetrol does not qualify as an instrumentality of the Colombian Government. DOJ has filed an opposition. This is definitely a case to watch. Two alleged co-conspirators, a former co-CEO and a former General Counsel of PetroTiger, have pleaded guilty and are cooperating. Trial is currently set for April 20, 2015.
- Third FCPA-Related Case This Year Denied Certiorari by the Supreme Court.** First, there was the *Esquenazi*¹ case, which sought review of the 11th Circuit's ruling on what entities qualify as "instrumentalities"

¹ *United States v. Esquenazi*, 752 F.3d 912 (11th Cir.) cert. denied, 135 S. Ct. 293 (2014).

Client Alert

under the FCPA. Second, there was the Court's rejection of a certiorari petition in the *Kim*² case related to the defendant's effort to challenge the FCPA charges pending against the defendant in the Central District of California while the defendant remained in Korea. Third, in November 2014, the Court rejected a certiorari petition filed by the target of a Philadelphia grand jury investigation into violations of the FCPA who was challenging the 3d Circuit's decision applying the crime-fraud exception to the attorney-client privilege in the matter.³

5. **SEC Sanctions Two Former Employees of a U.S.-based Defense Contractor for FCPA Violations.** On November 16, 2014, SEC announced that two former employees in the Dubai office of a U.S.-based defense contractor had agreed to sanctions for violating the FCPA by paying for gifts and personal travel for government officials in Saudi Arabia to help secure business for the company. Both employees later falsified records in an attempt to hide their misconduct. This is the third FCPA-related action this year where SEC has pursued charges and DOJ has not, the other two being the *Layne Christensen* and *Smith & Wesson* matters.
6. **ACI FCPA Conference.** In what has become a November tradition, the American Conference Institute held its annual conference on the FCPA on November 17-20, 2014. As in years past, a number of DOJ and SEC officials attended in addition to more than 500 other in-house counsel, compliance professionals, and private practitioners. Keynote remarks were delivered by **Leslie Caldwell**, Assistant Attorney General of the DOJ's Criminal Division, which oversees the Fraud Section's FCPA Unit, and **Andrew Ceresney**, the SEC's Director of Enforcement. Ms. Caldwell underscored the Department's long-term commitment to foreign bribery enforcement using all of the tools available to the Department:

Our commitment to the fight against foreign bribery is reflected in our robust enforcement record in this area, which includes charges against corporations and individuals alike from all over the world. Since 2009, we have convicted more than 50 individuals in FCPA and FCPA-related cases, and resolved criminal cases against more than 50 companies with penalties and forfeiture of approximately \$3 billion. Twenty-five of the cases involving individuals have come since 2013 alone. And those are just the cases that are now public. These individuals run the gamut of actors involved in bribery schemes: corporate executives, middlemen, and corrupt officials.

Her full remarks can be found [here](#).

Mr. Ceresney focused on a number of issues, including SEC's focus on individuals, the importance of FCPA compliance programs, the value of voluntary disclosure and cooperation, and the broad scope of the FCPA's provisions to capture "anything of value" given as a bribe, and on this latter issue he underscored SEC's commitment to scrutinize potential misconduct:

[B]ribes come in many shapes and sizes. So it is critical that we carefully scrutinize a wide range of unfair benefits to foreign officials when assessing compliance with the FCPA—whether it is cash, gifts, travel, entertainment, or employment of the family and friends of foreign officials.

² *In re Han Yong Kim*, 571 F. App'x 556 (9th Cir.) cert. denied sub nom. *Hang Yong Kim v. U.S. Dist. Court for Cent. Dist. of California*, 135 S. Ct. 426 (2014).

³ *In re Grand Jury Subpoena*, 745 F.3d 681 (3d Cir. 2014), cert. denied sub nom. *Corp. & Client v. United States*, No. 14-389, 2014 WL 5799229 (U.S. Nov. 10, 2014).

Client Alert

We should and will continue to pursue a broad interpretation of the FCPA that precludes bribery in all forms.

His full remarks can be found [here](#).

In addition to senior DOJ and SEC leadership, the conference included panels with many of DOJ's and SEC's FCPA enforcement leaders, including **Patrick Stokes** and **Kara Brockmeyer**, who head DOJ's and SEC's respective FCPA Units. Meanwhile, MoFo partner and head of DOJ's FCPA Unit until January 2014, **Charles Duross**, was on a panel with **Lisa Phelan**, Chief of the National Criminal Enforcement Section of DOJ's Antitrust Division, among others, discussing the convergence of various criminal laws with the FCPA.

7. **SBM Offshore Hit with a \$240 million penalty by Dutch Prosecutors.** On November 12, 2014, SBM Offshore announced that it had reached a [\\$240 million settlement](#) with the Dutch Public Prosecutor's Office related to payments to sales agents in Equatorial Guinea, Angola and Brazil in the period from 2007 through 2011. In the same announcement, SBM Offshore indicated that DOJ closed out the matter with no action.
8. **TRACE Business Bribery Risk Matrix.** On November 11, 2014, TRACE International announced the launch of the TRACE Matrix, the first business bribery risk index specifically tailored to the needs of the compliance community. Developed in collaboration with RAND Corporation, the TRACE Matrix provides the business community with a powerful new tool for anti-bribery risk assessment. The Matrix can be found [here](#). In announcing this new tool for companies and compliance professionals, TRACE quoted **Charles Duross**, who acted as the outside reviewer for RAND Corporation in its efforts to develop the business bribery risk matrix: "Assessment of country risk is fundamental to developing an effective compliance program and risk-based due diligence procedures," said Charles Duross, partner at Morrison & Foerster LLP and former Deputy Chief in the Fraud Section in the Criminal Division of the U.S. Department of Justice. "Multinational companies need additional tools beyond those currently available to more effectively measure country risk."
9. **Civil Forfeiture Action Against Former Chad Ambassador for Proceeds Related to Griffiths Energy International Case.** DOJ [announced](#) on November 7, 2014, that it filed a civil forfeiture complaint seeking the forfeiture of \$106,488.31 in allegedly laundered funds traceable to a \$2 million bribe payment made by Griffiths Energy International, Inc., a Canadian energy company, to Chad's former ambassador to the United States and Canada and his wife. The case follows the January 2013 guilty plea by Griffiths Energy and its payment of a CAD\$10.35 million criminal fine arising from the bribery scheme. This case was brought by the Kleptocracy Asset Recovery Initiative, which is part of the Criminal Division's Asset Forfeiture and Money Laundering Section.
10. **SEC Office of the Whistleblower (OWB) Files its Annual Report to Congress on the Dodd-Frank Whistleblower Program.** On November 17, 2014, the SEC OWB released its [annual report](#) to Congress on the whistleblower program for fiscal year 2014. This year has been OWB's most active year to date in terms of whistleblower awards, with 9 of the 14 awards OWB has made since its inception in 2011 occurring in 2014. Moreover, the number of whistleblower tips received by OWB has continued to increase each year. 2014 also saw the largest whistleblower award to date—over \$30 million. Not only was the size of this award unprecedented, it was the fourth award to a whistleblower living in a foreign country, underscoring the program's international reach. The Commission also brought its first enforcement action under the anti-retaliation provisions of the Dodd-Frank Act in 2014, ordering a company to pay \$2.2 million to settle retaliation and other charges. This indicates that OWB is actively coordinating with Enforcement staff to

Client Alert

identify matters where retaliatory measures are taken against whistleblowers. One statistic on whistleblower tips worth noting is that among the award recipients who were current or former employees, over 80% had previously raised their concerns internally to their supervisors or compliance personnel. This is a reminder of the importance of ensuring that internal whistleblowers feel the company is taking their concerns seriously, in hopes that this will deter them from feeling the need to report to the government.

There were many more FCPA/anti-corruption-related developments in November 2014. For example, there has been much discussion about Loretta Lynch, the current U.S. Attorney for the Eastern District of New York, in the media and on Capitol Hill following her nomination to be the next Attorney General by President Obama on November 9. But one aspect of Ms. Lynch's nomination has been largely overlooked: her office's partnership with the Criminal Division's Fraud Section on a number of significant FCPA matters such as the *Garth Peterson* (Morgan Stanley declination),⁴ *Ralph Lauren Corporation*,⁵ and *Comverse Technology* matters.⁶ If Ms. Lynch is confirmed as the next Attorney General of the United States, the next chief law enforcement officer of the United States will have deep experience in FCPA enforcement.

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⁴ <http://www.justice.gov/criminal/fraud/fcpa/cases/petersong.html>

⁵ <http://www.justice.gov/criminal/fraud/fcpa/cases/ralph-lauren.html>

⁶ <http://www.justice.gov/criminal/fraud/fcpa/cases/rae-converse.html>

Client Alert

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