Client Alert

March 5, 2015

Top Ten International Anti-Corruption Developments for February 2015

By the MoFo FCPA and Global Anti-Corruption Team

This installment of MoFo's Top Ten International Anti-Corruption Developments highlights a number of significant domestic and global anti-corruption enforcement developments for busy in-house counsel and compliance professionals. Here is our February 2015 Top Ten list:

1. DOJ Closes Long-Running FCPA Investigations and Issues Declination Letters:

- **News Corp. and 21st Century Fox**. On February 2, 2015, 21st Century Fox and News Corp. jointly announced that the Department of Justice (DOJ) was declining to prosecute either company for conduct related to the interception of voicemails and bribery of public officials in London. According to the filings of 21st Century Fox and News Corp. with the Securities and Exchange Commission (SEC), DOJ notified the companies on January 28, 2015, that it had concluded its investigation and would not be filing charges. DOJ launched the investigation in 2011, following widely publicized accounts that reporters and editors at the News Corp.-owned U.K. newspaper *The News of the World* had engaged in phone-hacking and bribed public officials. The revelations prompted the UK Prime Minister to initiate an ongoing public inquiry and also led to civil lawsuits as well as criminal investigations and prosecutions.

- **Eli Lilly**. In a February 19, 2015, filing with SEC, Eli Lilly and Company reported that DOJ was closing its FCPA investigation of improper payments made by foreign subsidiaries of the Indianapolis-based pharmaceutical company. DOJ's declination came more than two years after the company's settlement with the SEC for related conduct. In December 2012, following a multi-year investigation that had been ongoing since at least 2003, Eli Lilly agreed to pay $29.4 million to settle SEC charges. In its civil complaint, SEC alleged that from 1994 to 2009, subsidiaries of the company in Russia, China, Brazil, and Poland had paid bribes to government officials to obtain millions of dollars in business.

2. Eleventh Circuit Affirms Money Laundering Conviction of Haiti Government Official

In *United States v. Duperval*, the Eleventh Circuit upheld the conviction and nine-year sentence of Jean Rene Duperval, the first foreign official to be convicted at trial for money laundering based on an underlying FCPA bribery scheme. From June 2003 to April 2004, Duperval served as the Assistant Director General and Director of International Affairs of Telecommunications D'Haiti, S.A.M. ("Haiti Teleco"), a state-owned telecommunications company. While in that role, he participated in two separate schemes to launder a total of approximately $500,000 in bribes paid to him by two Miami-based telecommunications companies, in exchange for various business favors. Following a March 2012 trial, Duperval was convicted of two counts of conspiracy to commit money laundering and nineteen counts of money laundering, based on financial transactions involving the

proceeds of wire fraud and violations of the FCPA and Haitian bribery laws. In its February 9, 2015, opinion, the Court of Appeals rejected Duperval's challenge to his conviction on the basis that he was not a "foreign official" under the FCPA, because Haiti Teleco was not an "instrumentality" of Haiti. The court relied on its decision in a related case, *United States v. Esquenazi*, which set forth a non-exhaustive, multi-factor test for when an entity will be deemed an "instrumentality" for purposes of the FCPA. The court also addressed the "routine governmental action" exception (also known as the "grease payments" or "facilitating payments" exception) under the FCPA, rejecting Duperval's argument that the payments he received fell within its scope. Its discussion of the issue confirms the limited scope of the exception. Given the successful use of money laundering charges to convict Duperval at trial, based on an underlying FCPA bribery scheme, the DOJ will almost certainly continue to use these charges to prosecute foreign officials as bribe recipients. For more on this opinion, please see our client alert on the *Duperval* decision.

3. SEC Fines Goodyear $16 Million Over FCPA Violations

On February 24, 2015, SEC announced a resolution with Goodyear Tire & Rubber Company. Goodyear agreed to pay $16.2 million to settle SEC charges that between 2007 and 2011, its subsidiaries paid more than $3.2 million in bribes to win sales in Kenya and Angola. SEC alleged that by failing to prevent or detect the bribes, Goodyear violated the books and records and internal controls provisions of the FCPA. Scott Friestad, Associate Director of the SEC's Enforcement Division, stated: "Public companies must keep accurate accounting records, and Goodyear's lax compliance controls enabled a routine of corrupt payments by African subsidiaries that were hidden in their books." Notably, it was not alleged that Goodyear knew or played any role in the accounting violations. The enforcement action underscores the seemingly strict liability exposure that parent companies may face from SEC under the FCPA's accounting provisions for the actions of their subsidiaries — even when they have no knowledge of or involvement in the subsidiaries' conduct. Under the cease-and-desist order, the company agreed to pay disgorgement of $14.1 million and prejudgment interest of $2.1 million, and to self-report the status of its remediation and compliance measures over a three-year period. Because DOJ did not simultaneously announce an enforcement action, it is highly likely that it declined to prosecute Goodyear, although such decisions are not made public by DOJ. For more on this resolution, please see our client alert on the Goodyear settlement.

4. DOJ Concludes Deferred Prosecution Agreement with Alcatel-Lucent S.A.

On February 9, 2015, DOJ's deferred prosecution agreement (DPA) with Paris-based telecommunications company Alcatel-Lucent, S.A., officially terminated following a motion to dismiss by DOJ. In December 2010, Alcatel and three of its subsidiaries paid $137 million to resolve criminal charges with the DOJ and in disgorgement to the SEC, for using consultants to bribe foreign officials in Costa Rica, Honduras, Malaysia, and Taiwan. Under the terms of a three-year DPA, which was extended in June 2014, Alcatel-Lucent agreed to retain an independent compliance monitor and also made what DOJ characterized as an "unprecedented pledge" to cease using third-party agents in conducting its worldwide business. In its motion to dismiss the charges, filed on

January 30, 2015, DOJ stated that Alcatel-Lucent had fully met its obligations under the DPA by paying the monetary penalty, fully cooperating with the government, implementing an enhanced compliance program and procedures, and successfully completing the monitorship. On February 9, the district court ordered the dismissal of the pending criminal information.[1]

5. Deferred Prosecution Agreements Scrutinized:

- **Judge rejects Deferred Prosecution Agreement (DPA) with Fokker Services B.V.** A federal judge in the U.S. District Court for the District of Columbia rejected a DPA between DOJ and Fokker Services B.V. to resolve allegations that the Dutch aerospace services provider violated U.S. sanctions laws applicable to Iran, Sudan, and Burma. The rejection of the DPA reflects continued judicial scrutiny[2] of some settlement agreements between the government and defendants, and thus has implications for the use of DPAs to resolve allegations of FCPA violations. In June 2014, Fokker Services had agreed to forfeit $10.5 million and enter into an 18-month DPA as part of a settlement with the U.S. Attorney's Office for the District of Columbia; the company also paid an additional $10.5 million as part of a parallel settlement with the Commerce Department's Bureau of Industry and Security and the Treasury Department's Office of Foreign Assets Control. In a February 5, 2015, memorandum opinion, Judge Richard J. Leon called the prosecution "anemic[]" and the DPA "grossly disproportionate to the gravity of Fokker Services' conduct in a post-9/11 world." The judge noted that egregious conduct had been committed over a five-year period, and that the defendant was not being required to pay more than the revenue it collected from its illegal transactions. He also commented on the DPA's failure to require an independent monitor or any periodic reporting over the "very brief" 18-month duration of the agreement. Concluding that the DPA did "not constitute an appropriate exercise of prosecutorial discretion," he declined to approve it in its current form.

  This is not the first time that Judge Leon has criticized a negotiated settlement with the government. He previously expressed concerns about two proposed SEC settlements to resolve FCPA allegations, with IBM Corp. and with Tyco International Ltd., respectively. In both cases, he required the companies to make annual reports to him before approving the settlement agreements.[3] In an interesting twist, Fokker Services filed a notice of appeal on February 18, 2015, and it remains to be seen whether the DPA will ultimately be approved in its current form. While Judge Leon incorporated the logic and reasoning of Judge Gleeson's seminal opinion in the HSBC matter, setting forth the legal basis for a district court's approval of DPAs, it appears that the D.C. Circuit will be the first appellate court to grapple with both a district court's authority to approve DPAs, as well as the standard by which such DPAs should be judged. Regardless of the outcome, the decision will have an impact on this much-used, some may say over-used, resolution vehicle employed by DOJ.

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[1] United States' Motion to Dismiss Criminal Information, *United States v. Alcatel-Lucent, S.A.*, No. 10-cr-20907 (S.D. Fla. Jan. 30, 2015), ECF No. 82; *see also id.*, Order, Feb. 9, 2015, ECF No. 83 (dismissing criminal information).

[2] *See also United States v. HSBC Bank USA, N.A.*, No. 12-cr-763, 2013 WL 3306161, at *4 (E.D.N.Y. July 1, 2013) (finding that the court had "authority to approve or reject" a DPA "pursuant to its supervisory power").

[3] *See* Final Judgment, *Securities & Exchange Commission v. Int'l Bus. Mach. Corp.*, at 3-4, No. 11-cv-563 (D.D.C. July 25, 2013), ECF No. 12; Final Judgment, *Securities & Exchange Commission v. Tyco Int'l Inc.*, at 5-6, No. 12-cv-1583 (D.D.C. June 17, 2013), ECF No. 6.

- **Criminal Division AAG calls DPAs "overused" and says to expect more declinations.** In remarks made to members of San Francisco's defense bar in late January, Leslie Caldwell, Assistant Attorney General of DOJ's Criminal Division, which oversees the Fraud Section's FCPA Unit, emphasized that the Division would aim to bring more and bigger cases under the FCPA and seek to cut down on its use of DPAs. Calling DPAs the "default" means to resolve corporate cases, she stated that they "were a bit overused." Caldwell also indicated that the government would be providing more declinations to communicate to individual and corporate targets, as well as the public, when an investigation was being terminated without filing charges.

6. Petrobas Corruption Probe Widens

New developments in the far-reaching Petrobas corruption investigation continue to rock Brazil:

- On February 24, 2015, Brazilian prosecutors filed racketeering, bribery, and money laundering charges against a former Petrobas Director. The former Director, who was arrested in January, is accused of accepting bribes in exchange for helping engineering and construction firms obtain contracts with the majority state-owned oil company. The former Director and other executives allegedly conspired to inflate the value of billions of dollars in contracts, with the excess kicked back to Petrobas executives or given as campaign contributions to the current President's political party.

- Petrobas' CEO and five senior executives have stepped down.

- According to an internal audit led by the former Minister of the Federal Supreme Court, some two thousand Petrobas employees are now under investigation in connection with the alleged kickback scheme involving hundreds of millions of dollars in bribes. The computers and mobile phones of more than two thousand employees were seized in connection with the investigation.

7. Employees of UK Printing Company Sentenced for Their Roles in Bribery Scheme

On February 12, 2015, two executives of a UK printing company, Smith and Ouzman Ltd., were sentenced for their roles in a foreign bribery scheme, following their December 2014 trial and conviction for making £395,074 in corrupt payments to officials in Kenya and Mauritania in order to win business contracts. The company's chairman, Christopher John Smith, received a two-year suspended sentence of 18 months' imprisonment and a three-month curfew, and was ordered to carry out 250 hours of unpaid work. Nicholas Charles Smith, sales and marketing director, was sentenced to three years' imprisonment. Both employees were disqualified from acting as company directors for six years. The printing company, which was also convicted at trial, will be sentenced at a later date. A hearing to address confiscation proceedings against the company and individual defendants is set for October 19, 2015. In a statement released by the Serious Fraud Office (SFO), Director David Green CB QC commented that "[t]his case marks the first convictions secured against a corporate for foreign bribery, following a contested trial. The convictions recognize the corrosive impact of such conduct on growth and the integrity of business contracts in the Developing World."

8. Loretta Lynch Addresses Criticisms of FCPA Enforcement

In written responses submitted to the U.S. Senate Committee on the Judiciary in connection with her confirmation proceedings, Loretta Lynch, nominee to be the next attorney general and current United States attorney for the Eastern District of New York, discussed a number of issues related to FCPA enforcement in response to questions by Senator Chuck Grassley of Iowa and Senator Ted Cruz of Texas. Lynch's responses made clear that aggressive FCPA enforcement — without any reform — is likely to continue under her watch.

On February 26, 2015, the Committee voted to approve the nomination, which now moves to the Senate floor for a final confirmation vote.

9. Bribery Charges Prompt Lawsuit by Former Chadian Ambassador to Canada

The former ambassador to Canada from the Republic of Chad, Mahamoud Bechir, and his wife have filed a $150 million lawsuit alleging harm to their reputations based on a bribery case involving Canadian oil-and-gas company Griffiths Energy International Inc. In 2013, Griffiths Energy pleaded guilty in Canadian court to paying Bechir and his wife bribes to secure oil rights in Chad, in violation of the Canadian Corruption of Foreign Public Officials Act. Griffiths Energy agreed to pay a fine of CAD$10.35 million. In November 2014, DOJ filed a civil forfeiture complaint against Bechir, who served as the Chadian ambassador to Canada and the United States from 2004 to 2012, seeking recovery of approximately $100,000 traceable to a bribe payment made by Griffiths Energy. Bechir is suing in the Canadian court counsel for Griffiths Energy in the 2013 corruption case and Glencore PLC, which acquired Griffiths Energy's successor company, Caracal Energy Inc., in 2014.

10. Continued Foreign Enforcement of Anti-Corruption Laws:

- **Canada charges SNC-Lavalin for Libya bribes.** On February 19, 2015, Canada announced charges against SNC-Lavalin Inc. and two of its business units. The Royal Canadian Mounted Police National Division charged the three entities with one count of fraud and one count of violating the Corruption of Foreign Public Officials Act in connection with alleged bribe payments to one or more public officials of the "Great Socialist People's Libyan Arab Jamahiriya," the regime of former Libyan leader Mu'ammar al-Qadhafi. Riadh Ben Aissa, a former executive at the Canadian engineering firm, pleaded guilty last year to charges brought by Swiss authorities, including corruption of a foreign public official and money laundering.
- **Australia charges construction company directors for Iraq bribes.** Federal police in Australia have charged two directors of a Sydney-based construction company with foreign bribery offenses. The investigation appears to be only the second ever foreign bribery prosecution brought in Australia. Mamdouh and Ibrahim Elomar, of Lifese Pty Ltd, are accused of attempting to bribe Iraqi government officials in order to win contracts in Iraq. At least one other individual associated with Lifese has also been charged as part of the investigation.

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