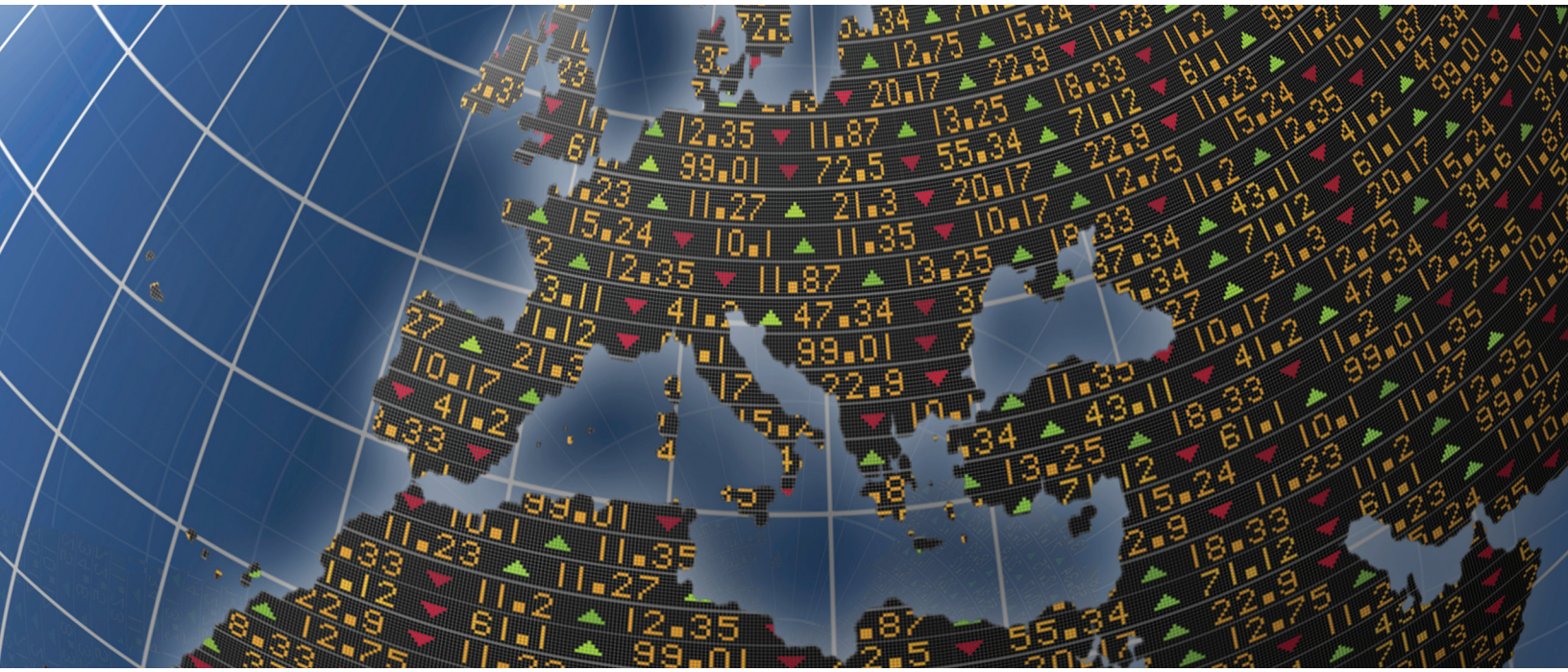
FCPA Update

A Global Anti-Corruption Newsletter



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U.S. Reaches Belated Settlements with Dun & Bradstreet and Panasonic

So far in 2018, there have been five corporate FCPA resolutions announced: one joint resolution with the SEC and DOJ, three SEC-only resolutions, and one DOJ-only resolution.[1] Last month saw settlements in two corporate actions that have been in the pipeline for many years: Dun & Bradstreet ("D&B") settled with

Continued on page 2

1. We have previously covered two of these settlements. Paul R. Berger, Jonathan R. Tuttle, Bruce E. Yannett, Philip Rohlik, and Jil Simon, "Beyond 'Virtual Strict Liability': SEC Brings First FCPA Enforcement Action of 2018," FCPA Update, Vol. 9, No. 8 (Mar. 2018) https://www.debevoise.com/~/media/files/insights/publications/2018/03/fcpa_update_march_2018.pdf; Kara Brockmeyer, Jane Shvets, and Andreas A. Glimenakis, "Transport Logistics and DOJ Settle First Corporate FCPA Enforcement Action of 2018," FCPA Update Vol. 9, No. 9 (Apr. 2018) https://www.debevoise.com/~/media/files/insights/publications/2018/04/fcpa_update_april_2018.pdf. The other 2018 SEC settlement was with Kinross Gold. *In the Matter of Kinross Gold Corp.*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 82946, Accounting and Auditing Enforcement Rel. No. 3930, Admin. Proc. File No. 3-18407 (March 26, 2018), https://www.sec.gov/litigation/admin/2018/34-82946.pdf.

U.S. Reaches Belated Settlements with Dun & Bradstreet and Panasonic

Continued from page 1

the SEC six years after first disclosing the investigation,[2] and Panasonic settled with both the SEC and DOJ more than five years after the investigation was first reported.[3]

In addition to the considerable time between launching and resolving these matters, the settlements underscore difficulties in conducting business in jurisdictions posing heightened corruption risks and dangers in ignoring or inadequately addressing such risks. In the case of D&B, the SEC's order describes a situation where management failed to react fully to information discovered in due diligence and then waited up to two years before integrating its new subsidiaries into the company's compliance program.

Regarding the much more serious allegations against Panasonic and its subsidiary, the SEC's order details the creation of a discretionary account outside the subsidiary's normal controls, in order to pay third parties without proper internal review. While there can be a natural temptation to ignore questionable business practices in difficult jurisdictions, the D&B and Panasonic settlements demonstrate serious dangers in doing so.

Additionally, although the alleged payments took place long before DOJ's new Corporate Enforcement Policy, both resolutions provide some insight into the policy's application. In particular, DOJ's declination letter to D&B suggests some flexibility in determining whether a company voluntarily disclosed, and the deferred prosecution agreement ("DPA") with Panasonic's subsidiary reflects the importance of cooperation and, especially, timely remediation.

Dun & Bradstreet

On April 23, 2018, Dun & Bradstreet, a NYSE-traded provider of credit reporting and business information, entered into a cease-and-desist order with the SEC (the "D&B Order").[4] The SEC found that D&B violated the accounting provisions of the FCPA, and D&B neither admitted nor denied any of the SEC's findings. The underlying allegations relate to methods used by two D&B Chinese joint-venture subsidiaries to obtain commercial and personal data in China.[5]

Continued on page 3

2. Michael Cole, "Dun and Bradstreet China Subsidiary Nailed in Corruption Case," Mingtiandi (Mar. 18, 2012), https://www.mingtiandi.com/real-estate/dun-and-bradstreet-china-subsidiary-nailed-in-corruption-case; Kathy Chu, "Dun & Bradstreet Fined, Four Sentenced in China" Wall St. J. (Jan. 9, 2013), https://www.wsj.com/articles/SB10001424127887323482504578230781008932240.
3. Christopher M. Matthews & Joe Palazzolo, "Panasonic Draws U.S. Bribery Probe," Wall St. J. (Mar. 31, 2013), https://www.wsj.com/articles/SB10001424127887323361804578390681535147150.
4. *In the Matter of Dun & Bradstreet Corp.*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act of 1934 Rel. No. 83088, Accounting and Auditing Enforcement Rel. No. 3936, Admin. Proc. File No. 3-18446 (April 23, 2018), https://www.sec.gov/litigation/admin/2018/34-83088.pdf [hereinafter "D&B Order"].
5. *Id.* ¶¶ 5-6.

U.S. Reaches Belated Settlements with Dun & Bradstreet and Panasonic

Continued from page 2

As part of this settlement, D&B agreed to pay approximately $7.2 million in disgorgement and pre-judgment interest, and a civil penalty of $2 million. On the same day, DOJ issued a "declination" letter to D&B under DOJ's Corporate Enforcement Policy.[6]

The D&B resolutions raise questions about the surprisingly long delay in settling – six years after the company first disclosed the investigation and more than five and a half years after a Chinese court convicted one of D&B's subsidiaries, imposing an RMB one million fine on the subsidiary and sentencing four executives to fines and up to two years' imprisonment.[7] The Order demonstrates yet again the importance of responding promptly to negative information found in acquisition due diligence and post-acquisition integration, and the declination suggests some flexibility in DOJ's definition of "voluntary self-disclosure" under the enforcement policy.

"In addition to the considerable time between launching and resolving these matters, the settlements underscore difficulties in conducting business in jurisdictions posing heightened corruption risks and dangers in ignoring or inadequately addressing such risks."

The D&B Order

The SEC's findings in the D&B Order, which D&B neither admitted nor denied, pertain to data collection practices in China between 2006 and 2012. In 2006, D&B's Asia Pacific subsidiary formed HDBC, a joint venture with Huaxia Intenational Credit Consulting Co. Limited ("Huaxia").[8] According to the D&B Order, one reason Huaxia was an attractive partner was because of its "'government connections.'"[9] The D&B Order states that, during the course of due diligence, D&B learned that Huaxia could use those government connections to obtain restricted information about Chinese businesses from the State Administration of Industry and Commerce

Continued on page 4

6. Letter from U.S. Dep't of Justice, Criminal Division, Fraud Section to Peter Spivack, Re: The Dun & Bradstreet Corporation, (Apr. 23, 2018), https://www.justice.gov/criminal-fraud/file/1055401/download [hereinafter "D&B Declination"].
7. *See supra* note 1.
8. *Id.* ¶¶ 5, 10.
9. *Id.* ¶ 10 (in quotation marks in the D&B Order).

U.S. Reaches Belated Settlements with Dun & Bradstreet and Panasonic

Continued from page 3

("SAIC") and that some information had been obtained through unofficial payments by agents to local SAIC officials.[10] D&B allegedly failed to act on the information discovered in due diligence and did not fully integrate HDBC into its operations for two years following creation of the joint venture. Even after the integration, the D&B Order found that D&B failed to stop the unofficial payments from being used to obtain information from the SAIC.[11]

In 2009, D&B acquired a 90% stake in the Chinese company Roadway, a leading provider of direct marketing services in China.[12] At around the same time, China amended its criminal law to create a criminal offense of selling, providing, or obtaining citizens' data, and Roadway's ability to comply with the new law was a focus of D&B's due diligence.[13] According to the D&B Order, during due diligence, Roadway told D&B that it could not warrant that no improper payments had been made to obtain citizens' data from its vendors, but D&B took no further action.[14] According to the Order, Roadway continued post-acquisition to make improper payments to "decision-makers" at 1,036 customers to obtain citizens' data, 156 of which were state-owned enterprises.[15]

On International Consumer Protection Day in China – celebrated March 15 each year since the 1990s – China Central Television ("CCTV") presents what is referred to as the "315 Gala," a two-hour special program featuring undercover investigative reporting on consumer protection violations, usually targeting foreign-owned businesses, which have historically been subject to police raids or regulatory action on the same day.[16] On March 15, 2012, Roadway was featured on the 315 Gala (complete with a secretly recorded admission by a Roadway sales executive regarding its collection of citizens' data) and raided by the police. Later that year, Roadway and five of its executives were convicted of violating Chinese law.[17]

Continued on page 5

10. *Id.* ¶¶ 13-15.
11. *Id.* ¶¶ 16-17.
12. *Id.* ¶ 19.
13. Criminal Law of the People's Republic of China, Art. 253A; Amendment VII to the Criminal Law of the People's Republic of China, § 7 (effective Feb. 28, 2009) (adding Art. 253A). Unofficial Translations of both the Criminal Law and Amendment VII are available from Westlaw China. Criminal Law of the People's Republic of China: http://app.westlawchina.com/maf/china/app/document?&src=nr&docguid=i3cf76ad30000011ef35156c3633ee790&lang=en. Amendment VII to the Criminal Law of the People's Republic of China: http://app.westlawchina.com/maf/china/app/document?&src=nr&docguid=i3cf76ad30000011fc2e6272629cbb9db&lang=en.
14. D&B Order ¶ 21.
15. *Id.* ¶ 25.
16. *Id.* ¶ 23; *see also supra* note 1. For background on the 315 Gala, *see also* Jake Newby, "Why Consumer Rights Day has Companies Quaking in China," Radii China (Mar. 15, 2018), https://radiichina.com/why-consumer-rights-day-has-companies-quaking-in-china/; Jane Li & Iris Deng, "China names and shames Volkswagen, toothbrush makers in annual consumer gripe show," South China Morning Post (Mar. 15, 2018), http://www.scmp.com/business/china-business/article/2137401/china-names-and-shames-german-carmaker-volkswagen-annual; Li Hui & Major Tian, "Why Companies in China Fear the World Consumer Rights Day," Cheung Kong Graduate School of Business CKGSB Knowledge (Mar. 12, 2015), http://knowledge.ckgsb.edu.cn/2015/03/12/consumers/why-companies-in-china-fear-the-world-consumer-rights-day/.
17. D&B Order ¶¶ 23-24.

U.S. Reaches Belated Settlements with Dun & Bradstreet and Panasonic
Continued from page 4

Takeaways from the D&B Order

The SEC found that D&B violated both the books and records and internal controls provisions of the FCPA. Because HDBC's and Roadway's books and records were consolidated into D&B's, those subsidiaries' misstatements regarding improper payments became misstatements in D&B's books and records.[18]

With regard to the internal controls provision, the D&B Order does not specifically state the factual predicate for the alleged violations.[19] However the SEC's findings in the D&B Order suggest that the violations relate to D&B's failure to act on information it discovered during due diligence of HDBC and Roadway. In high-risk jurisdictions, it is common to discover problematic information when acquiring a local company. The D&B Order, like numerous DOJ Opinion Releases and prior DOJ and SEC resolutions,[20] makes clear the expectation of U.S. enforcement authorities that companies remedy problematic findings as soon as practicable after acquisition, or run the risk that the government will find an internal controls violation. The inclusion of a more than nominal civil penalty in the D&B Order suggests that D&B's failure to act on red flags for several years was particularly troubling to the SEC.

Why the SEC took six years from the time D&B self-reported to the date of the Order remains a mystery. When resolutions are so delayed, companies may end up being held to a more stringent standard that has evolved since the underlying conduct occurred. For instance, HDBC was established in 2006, two years prior to the Halliburton Opinion Release, which was the first Opinion Release to highlight the importance of post-acquisition remediation and integration. Furthermore, the conduct at Roadway had been the subject of Chinese proceedings that ended in early 2013 – raising the question of why the SEC decided in 2018 to proceed at all, given both the passage of time and the preexisting local enforcement action against one of the subsidiaries.

Continued on page 6

18. *Id.* ¶ 28.

19. *Id.*

20. *See* U.S. Dep't of Justice Op. Procedure Rel. 14-02 (Nov. 7, 2014), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/11/14/14-02.pdf; U.S. Dep't of Justice Op. Rel. 08-02 (June 13, 2008), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/0802.pdf; *see also United States v. Johnson & Johnson (DePuy, Inc.)*, Deferred Prosecution Agreement at 35-36, No. 1:11-cr-00099-JDB (D.D.C. filed Apr. 8, 2011), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/04/27/04-08-11depuy-dpa.pdf.

U.S. Reaches Belated Settlements with Dun & Bradstreet and Panasonic

Continued from page 5

DOJ's D&B "Declination"

In the declination letter, DOJ states that it "declined prosecution [of violations of the anti-bribery provisions] consistent with the FCPA Corporate Enforcement Policy.[21] DOJ credits the ""the full amount of disgorgement as determined by the SEC"[22] and cites "the Company's prompt voluntary self-disclosure," as a reason for the declination. According to the Corporate Enforcement Policy, in order to obtain credit for "Voluntary Self-Disclosure in FCPA Matters," the disclosure must occur: (i) "prior to an imminent threat of disclosure or government investigation;" (ii) "within a reasonably prompt time after becoming aware of the offense;" and (iii) include all relevant facts known to the company.[23]

It is somewhat surprising that DOJ credited the disclosure as voluntary. As noted in the SEC's Order, the disclosure took place "shortly after local police raided its Roadway subsidiary"[24] and after a TV broadcast (with a potential audience in the hundreds of millions) that featured covert recordings of a Roadway executive essentially admitting a violation of Chinese law.[25] In any event, DOJ's willingness to be flexible on what constitutes prompt voluntary self-disclosure is welcome as companies balance competing concerns in deciding whether to self-report potential FCPA violations.

Finally, DOJ's declination letter announces that DOJ will not prosecute violations of the FCPA's anti-bribery provisions (15 U.S.C. § 78dd-1 *et seq.*) rather than potential criminal violations of the accounting provisions. However, the letter does not assert any U.S. nexus (e.g., that D&B headquarters was involved or that any payments went through a U.S. bank). Nor is such a nexus included in the SEC's order, likely because such allegations are unnecessary for violating the accounting provisions. From this letter settlement, it is therefore impossible to know if DOJ satisfied the minimum jurisdictional predicate for the provisions listed in the order, the prosecutions of which are being declined.

Panasonic

On April 30, 2018, Panasonic Corporation ("Panasonic"), a Japan-headquartered multinational corporation, and its wholly-owned subsidiary, Panasonic Avionics Corporation ("PAC"), agreed to pay over $280 million to resolve alleged violations of the FCPA's anti-bribery and accounting provisions. Panasonic consented to the

Continued on page 7

21. D&B Declination, *supra* note 5.
22. *Id.*
23. U.S. Dep't of Justice, "United States Attorneys' Manual" § 9-47.120, ¶ 3 (updated Nov. 29, 2017), https://www.justice.gov/criminal-fraud/file/838416/download (internal quotations omitted).
24. D&B Order ¶ 31.
25. *Id.* ¶ 23.

U.S. Reaches Belated Settlements with Dun & Bradstreet and Panasonic

Continued from page 6

SEC's Cease and Desist Order (the "Panasonic Order")[26] requiring the payment of $143 million in disgorgement and prejudgment interest. At the same time, PAC – Panasonic's California-headquartered subsidiary – entered into a deferred prosecution agreement (the "PAC DPA") with DOJ, agreeing to pay a $137.4 million criminal penalty.[27]

"DOJ's willingness to be flexible on what constitutes prompt voluntary self-disclosure is welcome as companies balance competing concerns in deciding whether to self-report potential FCPA violations."

Both resolutions settle charges in connection with PAC's unlawful payments to consultants, which were falsely recorded as legitimate business expenses. DOJ brought only books and records charges, while the SEC brought substantive anti-bribery and accounting charges, as well as anti-fraud and reporting violations under Sections 10(b) and 13(a) in connection with fraudulent revenue recognition allegations.

Panasonic is 2018's first combined resolution involving DOJ and the SEC; it is also the first time the SEC has recognized assistance from Japan, Malaysia, and Pakistan. Like D&B, it brings closure to underlying conduct long in the enforcement pipeline, a more than five-year-old investigation relating to conduct that started six years before that.[28]

PAC is a provider of in-flight entertainment and communication systems for airlines and airplane manufacturers.[29] The PAC DPA outlined three schemes, each featuring unlawful payments made to consultants and sales agents linked to state-owned airlines in the Middle East and Asia in order to gain competitive advantages. These payments were improperly recorded and consolidated into the parent company's financials.

Continued on page 8

26. *In the Matter of Panasonic Corp.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, ¶ 1, Securities Exchange Act Rel. No. 83128, Accounting and Auditing Enforcement Rel. No. 3938, Admin Proc. File No. 3-18459 (Apr. 30, 2018), http://www.sec.gov/litigation/admin/2018/34-83128.pdf [hereinafter "Panasonic Order"].
27. *United States v. Panasonic Avionics Corp.,* Deferred Prosecution Agreement ¶¶ 4, 7, No. 18-CR-00118 RBW, ¶¶ 4, 7 (D.D.C. Apr. 30, 2018), https://www.justice.gov/opa/press-release/file/1058466/download [hereinafter "PAC DPA"].
28. *See* Matthews & Palazzolo, *supra* note 2.
29. PAC DPA at A-2.

U.S. Reaches Belated Settlements with Dun & Bradstreet and Panasonic

Continued from page 7

According to the PAC DPA, between 2007 and 2013, PAC employees and senior executives engaged in schemes to retain consultants for improper purposes through a third-party vendor, compensating them (through invoices to the third-party vendor) from a discretionary account that lacked meaningful oversight.[30] This account, the "Office of the President Budget," was set annually by a PAC finance executive in consultation with a high-level PAC executive (later named a Panasonic executive officer) based on the previous year's costs and any expected changes in expenses – and it was neither reviewed nor approved by any Panasonic personnel.[31]

- In July 2007, PAC executives hired a "senior contracts official" at a state-owned "Middle East Airline" while he was involved in negotiating a lucrative contract amendment on behalf of Middle East Airline with PAC.[32] According to the DPA, PAC paid the contracts official-turned consultant $875,000 over six years, which was booked as "consulting payments." PAC earned over $92 million in profits from portions of the contract over which the official had influence while employed with the Middle East Airline.
- In October 2007, PAC retained a consultant who was then also serving as a consultant for a publicly-owned domestic airline. The consultant was engaged to obtain confidential non-public business information about the domestic airline in exchange for $825,000 over five years, which PAC again recorded as legitimate consulting expenses.[33]
- Between 2007 and 2016, PAC employees concealed PAC's use of sales agents in Asia that had not satisfied due diligence checks by hiring them as "sub-agents" through an approved Malaysia-based sales agent.[34] The sales agent (which had obtained TRACE certification in accordance with PAC's 2009 efforts to bolster internal controls) passed payments to the sub-agents and received fees in exchange.[35] Using this workaround, PAC employees concealed more than $7 million in payments to at least thirteen sub-agents, recording the payments as legitimate commission payments in exchange for services by approved sales agents.

Continued on page 9

30. *Id.* at A-5 – A-6.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at A-6.
35. Panasonic Order ¶¶ 32, 35; PAC DPA at A-17.

U.S. Reaches Belated Settlements with Dun & Bradstreet and Panasonic

Continued from page 8

In 2010, PAC's Internal Audit Department identified as a "critical risk" PAC's use of the third-party vendor (whose contract with PAC had expired in 2009) – the "lack of clarity in deliverables" was flagged as "high risk." A later audit report suggested review of the vendor in light of FCPA concerns, but the misconduct continued.[36] The DPA charges PAC with one count of knowingly and willfully causing its parent company to falsify its books and records in violation of the FCPA.

PAC did not receive voluntary disclosure credit because its disclosures occurred only after the SEC requested documents related to possible FCPA violations – and several years after PAC and Panasonic became aware of alleged bribery through a whistleblower and civil suit. However, PAC did receive a 20% discount off the low end of the U.S. Sentencing Guidelines fine range owing to its cooperation and significant, though "untimely," remediation.[37] PAC's remedial measures included an enhanced compliance program and internal controls. But in part because the enhancements had not been fully implemented or tested prior to the DPA's execution, the DPA imposed an independent compliance monitor for two years.

The Panasonic Order

Based on the same underlying conduct, Panasonic consented to the SEC's Order finding that it violated the FCPA's anti-bribery, books and records, and internal controls provisions. The SEC also charged Panasonic with anti-fraud and reporting violations under Sections 10(b) and 13(a) of Securities Exchange Act in connection with fraudulent revenue recognition allegations based on PAC's backdating of an agreement with a state-owned airline in order to (prematurely) recognize revenue in a quarter critical to Panasonic – in violation of PAC's revenue recognition policy and GAAP principles that revenue should not be recognized until realizable and earned.[38] PAC's financial statements were incorporated into Panasonic's books and records, leading to a material misstatement on the parent's books in violation of the federal securities laws.[39]

In reaching its resolution, the SEC considered Panasonic's remedial efforts and cooperation with the SEC in the later stages of the staff's investigation.[40] The Order notes that the SEC considered Panasonic's replacement of the senior PAC executives

Continued on page 10

36. Panasonic Order ¶¶ 28-29; PAC DPA at A-8–A-9.
37. *Id.* at 3-4.
38. The SEC found that Panasonic violated the anti-fraud provisions by backdating contracts in order to recognize revenue early, thereby overstating pre-tax income by at least $38.5 million and its net income by $22.4 million for the quarter ending June 30, 2012. Panasonic Order ¶¶ 2, 42-46.
39. *Id.* ¶¶ 55-60.
40. Panasonic Order ¶ 62.

U.S. Reaches Belated Settlements with Dun & Bradstreet and Panasonic

Continued from page 9

involved in the violations, its establishment of an Office of Compliance and Ethics led by a new Chief Compliance Officer, its implementation of new compliance and accounting procedures, and its enhanced internal accounting controls.[41]

Takeaways from Panasonic

The Panasonic resolution demonstrates the continued value of cooperation and remediation under the Enforcement Policy. Even though the alleged misconduct, which included an executive-run slush fund, was arguably egregious, and no self-reporting credit was given, the 20% discount off the bottom of the Guidelines range resulted in a significant fine reduction.

The resolution also highlights the challenging issue of "management override," whereby, in this case, a senior PAC executive used discretionary funds to make improper payments. When senior executives are obstructive and withhold information, even the best compliance policies and internal controls will likely be ineffective at identifying improper conduct. Creating a culture of compliance and a strong "tone at the top" therefore is critical in helping to prevent such a situation of management override.

"The Panasonic resolution demonstrates the continued value of cooperation and remediation under the [DOJ] Enforcement Policy . . . [and] highlights, yet again, that third-party agents are a key anti-corruption risk."

Finally, the Panasonic settlement highlights, yet again, that third-party agents are a key anti-corruption risk. PAC's initial agency contracts were entered into directly with foreign officials, a remarkably unsophisticated scheme likely reflecting the age of the allegations more than anything else. However, the more sophisticated scheme involving the approved agent in Malaysia to pass payments to sub-agents represented a deliberate circumvention of the due diligence process, suggesting that this process was little more than a "check-the-box" exercise. Effective third-party risk management requires more than just an initial due diligence check. It must include ongoing monitoring for red flags, recognizing that a third party's risk profile may change as the relationship evolves or as the third party undergoes material changes.

Continued on page 11

41. *Id.*

U.S. Reaches Belated Settlements with Dun & Bradstreet and Panasonic

Continued from page 10

The resolution also highlights the importance of timely remediation, the lack of which resulted in Panasonic losing some credit under the Corporate Enforcement Policy and, more importantly, the imposition of a monitor, one of the most intrusive remedies available in corporate resolutions.[42] Ideally, the time to begin remediating is early in a government investigation. While issues like employee discipline often must wait until later, a company can improve its compliance program in tandem with a government investigation, allowing it both to demonstrate its commitment to remediation at the time of resolution and to argue effectively that a monitor would be duplicative and inefficient.

Conclusion

The D&B and Panasonic resolutions serve as additional reminders that FCPA enforcement continues as usual under the current administration. The length of time between the opening of the government's investigations and their resolutions also raises questions about how far back the government's pipeline goes. Of particular significance, both resolutions demonstrate the risks of ignoring red flags, whether in the context of transactional due diligence or from ongoing dealings with agents and other third parties.

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Continued on page 12

42. *See* Paul R. Berger, et al., "Trends for 2010 Part II: DOJ's Latest Case Regarding Monitors and Compliance," FCPA Update, Vol. 1, No. 6 (Jan. 2010), https://www.debevoise.com/~/media/files/insights/publications/2010/01/fcpa%20update/files/view%20the%20update/fileattachment/fcpaupdatejanuary2010.pdf ("The issues prompting concerns over the imposition of monitors in the FCPA arena can be particularly acute, in that monitors can impose many millions of dollars of remediation costs on a company seeking to resolve an FCPA dispute, on top of the indirect burdens of a monitorship.").

Malaysia Strengthens its Anti-Corruption Law

Shortly prior to Malaysia's May 2018 election, the government then in power introduced amendments to the country's anti-corruption law designed to align it more closely with international standards. Then, on May 9, 2018, the Malaysian opposition unexpectedly won the general election, unseating the alliance that had led Malaysia since independence.[1] The opposition's surprise victory was in part driven by its anti-corruption stance, and new Prime Minister Mahathir Mohamad has promised to reduce corruption to a "very minimal level."[2] While the prior government's entanglement with the 1MDB scandal[3] might have justified some skepticism as to whether it actually would have used any anti-corruption tools at its disposal, the new Malaysian Anti-Corruption Commission Amendment Act (the "MACCAA")[4] could prove a powerful means to proceed against graft in the Southeast Asian country.[5]

The MACCAA, which was approved by the Malaysian Parliament on April 4, 2018, amends the Malaysian Anti-Corruption Commission Act of 2009 (Act 694)[6] (the "2009 Act"). The MACCAA will become effective following royal assent. The 2009 Act prohibited both commercial and public bribery (offering or accepting) as well as bribery of foreign public officials.[7] The most significant change is that the new law imposes corporate liability with an adequate procedures defense, similar to the U.K. Bribery Act. However, the MACCAA also introduces the presumption of criminal liability for corporate managers and grants the Malaysian Anti-Corruption Commission significant new evidentiary powers.

During the next several years, it will be important to observe how the new government enforces the new law. While companies doing business in Malaysia

Continued on page 13

1. Angie Chan, "Understanding Malaysia's Political Earthquake," New York Times (May 17, 2018), https://www.nytimes.com/2018/05/17/world/asia/malaysia-elections-mahathir.html.
2. Karishma Vaswani, "Corruption, money and Malaysia's election," BBC News (May 11, 2018), http://www.bbc.com/news/business-44078549; Channel News Asia, "Malaysia govt to probe Attorney-General, Election Commission, anti-graft body for corruption: Mahathir" (May 11, 2018), https://www.channelnewsasia.com/news/asia/malaysia-attorney-general-election-commission-corruption-probe-10225022.
3. *See, e.g.,* Bradley Hope, Tom Wright, and Patrick Barta, "How a Malaysian Scandal Spread Across the World," Wall Street Journal (Dec. 21, 2016), http://www.wsj.com/graphics/1mdb-how-a-malaysian-scandal-spread-across-the-world/.
4. D.R. 2/2018. The English text of the Act is available at http://www.parlimen.gov.my/bills-dewan-rakyat.html?&uweb=dr&lang=en# (hereinafter "MACCAA")
5. Debevoise & Plimpton LLP is not licensed to practice law in Malaysia and does not offer opinions on or advice regarding Malaysian law. This article is a summary drawn from a review of the relevant laws and other publicly available information.
6. Laws of Malaysia, Act 694, Malaysian Anti-Corruption Commission Act, http://www.sprm.gov.my/index.php/en/142-knowledge/1059-malaysian-anti-corruption-commission-act-2009-act-694.
7. *Id.* at Sections 16-28.

Malaysia Strengthens its Anti-Corruption Law
Continued from page 12

that already have well-developed compliance procedures are unlikely to need to make significant changes, the MACCAA will require a broad swath of managers and directors to exercise due diligence to attempt to prevent corruption at their organizations.

The main amendments introduced by the MACCAA are as follows.

- New Section 17A(1) creates a corporate offense of failure to prevent bribery[8] by an associated person,[9] similar to the U.K. Bribery Act.[10]

The corporate offense covers companies and partnerships established under Malaysian law as well as all other commercial organizations (wherever established) that carry on "a business or part of a business in Malaysia." As with the U.K. Bribery Act, this language suggests the possibility for the extraterritorial application of the law. Like the U.K. Bribery Act, the MACCAA includes an adequate procedures defense.[11] The MACCAA requires the Minister responsible for the Malaysian Anti-Corruption Commission (the "Minister") to issue guidelines relating to the adequate procedures defense.[12]

- New Section 17A(3) creates a presumption[13] of managerial criminal liability in connection with the corporate offense.[14]

Under Section 17A(3), a "director, controller, officer or partner" or person "concerned in the management of [a commercial organization's] affairs" at the time of the commission of the corporate offense is presumed to be guilty of an offense. This definition is notably vague and broad. The manager can escape liability by proving either: (i) that the offense was committed without his or her consent or connivance; or (ii) that he or she "exercised due diligence to prevent the commission of the offence as he ought to have exercised having regard to the

Continued on page 14

8. This offense is defined as "corruptly giv[ing], agree[ing] to give, promis[ing] or offer[ing] to any person any gratification whether for the benefit of that person or another person with intent – (a) to obtain or retain business for the commercial organization; or (b) to obtain or retain an advantage in the conduct of business for the commercial organization."
9. "Associated person" is defined as "a director, partner or an employee of a commercial organization or [] a person who performs services for or on behalf of the commercial organization" determined "by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between him and the commercial organization." MACCA § 4, adding new Sections 17A(6) and 17A(7).
10. MACCAA § 4, adding new Section 17A(1) to the 2009 Act.
11. *Id.*, new Section 17A(4).
12. *Id.*, new Section 17A(5).
13. Other anti-corruption laws also contain offenses that effectively reverse the burden of proof. For example, Hong Kong's Prevention of Bribery Ordinance (Cap. 201) § 10, creates the offense of "Possession of Unexplained Property," making it a crime for current or former public servants to possess property or live a lifestyle "disproportionate to his present or past official emoluments," with the burden on the public servant to explain the legitimate source of his income or lifestyle. The new Section 17A(3) goes even further, in that it creates a presumption of vicarious criminal liability applicable to a large group of private citizens.
14. MACCAA §4, new Section 17A(3).

Malaysia Strengthens its Anti-Corruption Law
Continued from page 13

nature of his function in that capacity and to the circumstances." While it will be necessary to see how this new Section 17A(3) is applied, it potentially provides the Malaysian Anti-Corruption Commission and prosecutors with broad discretion to arrest and charge directors and managers in connection with an investigation of the corporate offense.

"The amendments to the 2009 Act strengthen Malaysia's anti-corruption framework and bring it in line with international norms. . . . With the backing of a new regime and new legal tools at its disposal, the Malaysian Anti-Corruption Commission may also be galvanized . . ."

- Penalties for violations of new Section 17A offenses will be ten times the amount of the bribe or one million ringgit (approximately USD 260,000), whichever is higher, and/or imprisonment of up to twenty years.[15] Under the 2009 law, the penalty for public bribery-related offenses was up to twenty years imprisonment and a fine of five times the amount of the bribe or approximately USD 2,500, whichever is higher. The penalty for bribery of an agent to deceive his principal (commercial bribery) was up to ten years imprisonment or approximately USD 2,500.
- New Section 41A provides for the admissibility of any document obtained by the Malaysian Anti-Corruption Commission, "notwithstanding anything to the contrary in any other written law."[16] This amendment suggests that otherwise inadmissible evidence, potentially including illegally obtained documents and documents subject to the attorney-client privilege, will now be admissible in corruption cases.
- The amendments replace the definition of "bank" with "financial institution," which covers not just banks, but also insurers and investment banks licensed under various Malaysian laws.[17] This change expands the already broad powers of public prosecutors and the Malaysian Anti-Corruption Commission to

Continued on page 15

15. *Id.*, new Section 17A(2).
16. MACCAA § 11, adding new Section 41A.
17. MACCAA § 2, amending Section 3 of the 2009 Act.

Malaysia Strengthens its Anti-Corruption Law
Continued from page 14

investigate and obtain evidence from financial institutions and to freeze or seize property.[18]

Conclusion

The amendments to the 2009 Act strengthen Malaysia's anti-corruption framework and bring it in line with international norms. Like the law, the guidelines relating to the adequate procedures defense (when issued) will likely mirror those of the U.K. Companies doing business in Malaysia should study the new guidelines to determine whether it is necessary to update the compliance policies applicable to their Malaysian business. With the backing of a new regime and new legal tools at its disposal, the Malaysian Anti-Corruption Commission may also be galvanized, with the potential to ramp up anti-corruption enforcement activity in the resource-rich Southeast Asian state.

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18. MACCAA §§ 6-9, amending Sections 33, 35, 36, and 37 of the 2009 Act.

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