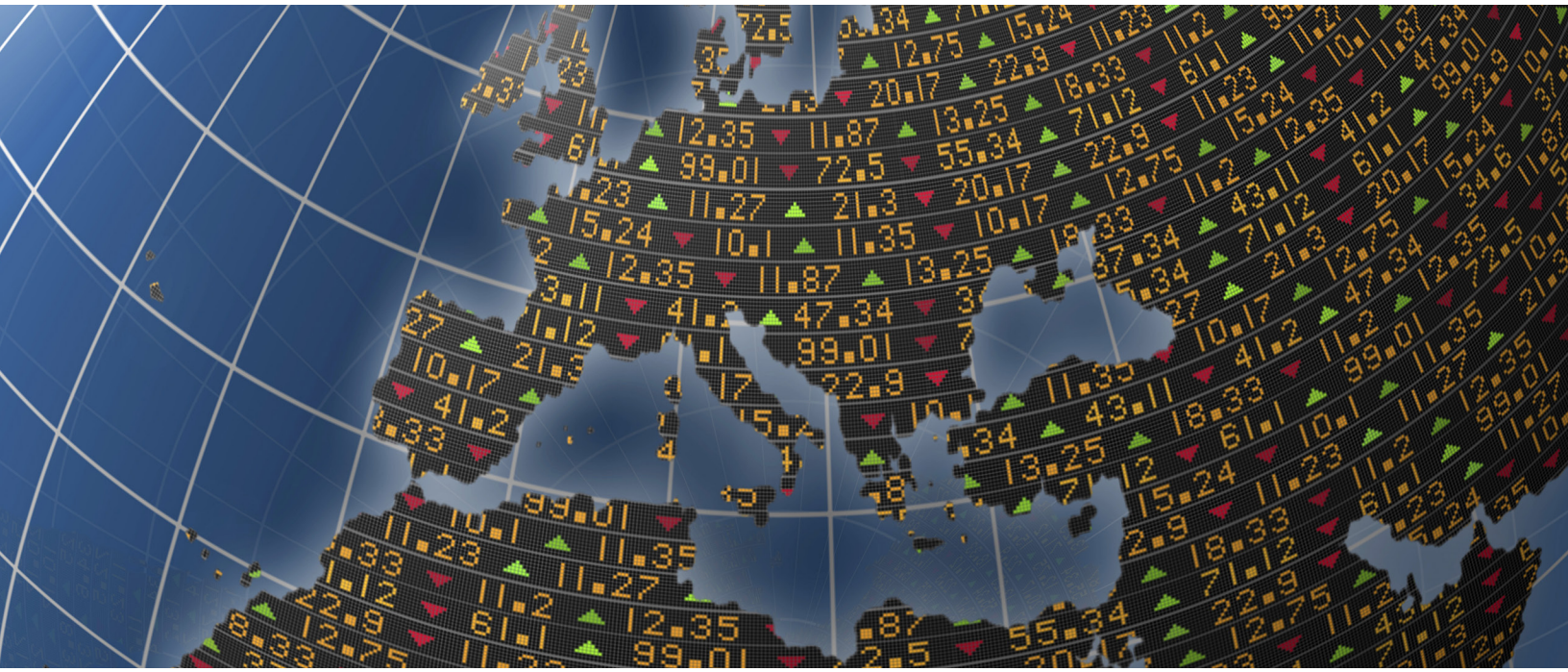
FCPA Update

A Global Anti-Corruption Newsletter



Click here for an index of all FCPA Update articles

If there are additional individuals within your organization who would like to receive *FCPA Update*, please email prohlik@debevoise.com, eogrosz@debevoise.com, or pferenz@debevoise.com

Same Company, Same Conduct: Beam Settles with DOJ Two Years After SEC

On October 23, 2020, Beam Suntory Inc. ("Beam"), a Chicago-based producer and seller of alcoholic beverages, agreed to enter into a DPA with DOJ and pay $19.6 million to settle FCPA charges.[1] The underlying conduct involves improper payments made between 2006 and 2012 by an Indian subsidiary that Beam had acquired in 2006. Significantly, DOJ's resolution with Beam lags more than two years behind Beam's settlement with the SEC for the same underlying conduct,[2] and it comes more than six years after the company's self-report to DOJ and the SEC in 2012.[3]

Continued on page 2

1. Deferred Prosecution Agreement, *United States v. Beam Suntory Inc.*, No. 20-CR-745 (N.D. Ill. Oct. 23, 2020), https://www.justice.gov/opa/press-release/file/1331666/download [hereinafter "Oct. 2020 Beam DOJ DPA"].
2. Order, *In re Beam Inc., n/k/a Beam Suntory Inc.*, Securities Exchange Act Rel. No. 83575 (July 2, 2018), https://www.sec.gov/litigation/admin/2018/34-83575.pdf [hereinafter "July 2018 Beam SEC Order"].
3. Beam Inc., Quarterly Report (Form 10-Q), at 18 (Nov. 8, 2012).

Same Company, Same Conduct: Beam Settles with DOJ Two Years After SEC

Continued from page 1

DOJ's action against Beam raises questions as to the government's and companies' responsibilities under DOJ's 2018 Policy on Coordination of Corporate Resolution Penalties (the "Anti-Piling On Policy").[4] In July 2018, Beam agreed to pay the SEC $6.1 million in disgorgement and pre-judgment interest and a $2 million civil penalty to settle charges for alleged violations of the FCPA's accounting provisions. Just over two years later, Beam agreed to pay an additional $19.6 million criminal penalty imposed by DOJ for the same underlying conduct.

DOJ and the SEC regularly bring parallel FCPA enforcement actions against a company for the same conduct. But this appears to be the first time since the Anti-Piling On Policy's adoption that DOJ has explicitly refused to credit towards a criminal penalty the related civil penalty that a company already agreed to pay the SEC. To justify departing from its policy discouraging piling on, DOJ generally considers several factors, including whether the facts of a particular case are sufficiently egregious and whether a company's cooperation was deficient. In this instance, DOJ attributed its decision, at least partly, to Beam's failure to "seek to coordinate a parallel resolution with [DOJ]."[5] That rationale raises the question of whether DOJ is signaling that the burden of coordination rests with target companies rather than the U.S. enforcement agencies, or whether Beam is an outlier.

The DOJ Settlement

Beam entered into a three-year DPA with DOJ stemming from allegations that the company, through its Indian subsidiary, violated the FCPA's anti-bribery, books and records, and internal controls provisions. Under the DPA's terms, Beam agreed to pay a $19.6 million criminal penalty – reflecting a ten-percent discount off the bottom of the applicable U.S. Sentencing Guidelines range[6] – and to self-report on the status of its enhanced anti-corruption compliance policies and procedures to DOJ for three years.[7] The admissions made in the DPA relate primarily to activities by high-level Beam India executives and regional executives, including the use of third-party sales promoters to direct improper payments to government officials and the falsification of records to hide this activity, as well as Beam's failure to implement proper internal controls to detect employees' misconduct.[8]

Continued on page 3

4. U.S. Dep't of Justice, Memo from Deputy Attorney General Rod. J. Rosenstein, "Policy on Coordination of Corporate Resolution Penalties" (May 9, 2018), https://www.justice.gov/opa/speech/file/1061186/download [hereinafter "Anti-Piling On Policy"].
5. Oct. 2020 Beam DOJ DPA ¶ 4k.
6. As with Beam, DOJ's two prior corporate FCPA resolutions have carried penalties reflecting ten-percent discounts. *See* Deferred Prosecution Agreement, *United States v. The Goldman Sachs Group, Inc.*, No. 20-CR-437 (E.D.N.Y. Oct. 22, 2020), https://www.justice.gov/criminal-fraud/file/1329926/download; Plea Agreement, *United States v. J&F Investimentos SA*, No. 20-CR-365 (MKB) (E.D.N.Y. Oct. 14, 2020), https://www.justice.gov/usao-edny/press-release/file/1327471/download.
7. Oct. 2020 Beam DOJ DPA at D-1.
8. *Id.* at A-4 – A-16.

Same Company, Same Conduct: Beam Settles with DOJ Two Years After SEC

Continued from page 2

According to the DPA, between 2006 and 2012, Beam used third-party sales promoters to market its products in six highly-regulated Indian states. It authorized the promoters to make improper payments to Indian government officials at retail stores, depots, and other government offices that had the ability to secure better positioning of Beam's products on store shelves, expedite the processing of license and registration labels, and facilitate product distribution. For example, Beam admitted to paying a bribe of roughly $18,000 to a senior Indian government official in exchange for his approval of a license to bottle "Ready to Drink" products that Beam intended to market and sell through its Indian subsidiary.[9] A high-ranking executive from Beam's Asia Pacific/South America business unit authorized the bribe and directed that the payment be made through Beam India's third-party bottler. These and similar "expenses" were not properly recorded.[10]

"Particularly notable was DOJ's decision to give Beam no credit for the civil penalty paid to the SEC in 2018 because 'the Company did not seek to coordinate a parallel resolution with' DOJ."

During the same period, Beam engaged a global accounting firm to conduct a compliance review that included transaction testing and employee interviews. The firm reported that third-party "'promoters are likely making grease payments' to government officials."[11] Beam then retained law firms in the United States and India to expand on the accounting engagement. According to the SEC's Order, the U.S. law firm forwarded to Beam's general counsel's office a July 2011 SEC enforcement action concerning FCPA violations in India by Beam's peer Diageo plc, which included payments through third-party promoters to government officials to obtain spirit orders in government sales channels and to secure label registrations and other approvals.[12] DOJ's DPA states that Beam failed to address anti-corruption red flags raised during the compliance review of Beam India, did not substantively follow up on those red flags despite the advice of its U.S. counsel, and declined to follow the recommendation of its outside counsel in India to conduct additional interviews with Beam India operational employees who interacted with third-party sales promoters.[13]

Continued on page 4

9. *Id.* at A-8 – A-10.
10. *See id.* ¶ 4i.
11. *Id.* ¶ 25 at A-11.
12. July 2018 Beam SEC Order ¶ 19.
13. Oct. 2020 Beam DOJ DPA ¶¶ 25–26, 35–37 at A-14–15; *see also* July 2018 Beam SEC Order ¶¶ 18–21.

Same Company, Same Conduct: Beam Settles with DOJ Two Years After SEC

Continued from page 3

According to the DPA, DOJ did not find Beam's efforts to voluntarily disclose, cooperate, or remediate to be sufficient to give the company full credit in any category.[14] For example:

- Beam received no voluntary disclosure credit despite its self-report to DOJ in 2012 because DOJ found the disclosure to be untimely. DOJ already had received an email – sent to the company with U.S. and Indian government agencies copied – from a former Beam employee raising concerns about the ties between the company's Indian distributors and "illegal cash transactions."[15]
- The company received partial cooperation credit for providing all known relevant facts, making factual presentations to DOJ, making non-U.S.-based employees available for interviews, and producing documents from foreign countries. But Beam did not receive full credit because of what the DPA called "inconsistent, and at times, inadequate cooperation" and "significant delays caused by the Company in reaching a timely resolution and its refusal to accept responsibility for several years."[16]
- Similarly, Beam received only partial remediation credit for enhancing its compliance program and internal controls, and it ultimately agreed to self-report on the status of its enhanced anti-corruption compliance policies and procedures to DOJ and to continue cooperating. The company did not receive full credit also because of the alleged egregiousness and duration of the conduct in addition to the company's failure to discipline certain employees.[17]

Particularly notable was DOJ's decision to give Beam no credit for the civil penalty paid to the SEC in 2018 because "the Company did not seek to coordinate a parallel resolution with" DOJ.[18] DOJ also considered the company's willful failure to implement an adequate system of internal controls, which included affirmative efforts by a then-member of Beam's Legal Department to avoid uncovering information related to improper activities by the third parties the company engaged in India.[19]

Continued on page 5

14. Oct. 2020 Beam DOJ DPA ¶ 4.
15. *Id.* ¶ 4a.
16. *Id.* ¶ 4b–d.
17. *Id.* ¶ 4e–g.
18. *Id.* ¶ 4k.
19. *Id.* ¶ 4i.

Same Company, Same Conduct: Beam Settles with DOJ Two Years After SEC

Continued from page 4

Notable Differences Between Beam's SEC and DOJ Resolutions

DOJ's resolution with Beam differs in several meaningful ways from the SEC's enforcement action against Beam, including the following:

- As noted, although Beam self-disclosed to the SEC and DOJ in 2012, DOJ did not credit Beam's voluntary disclosure; the SEC did recognize the disclosure as timely and voluntary.[20]
- Unlike DOJ, which refused to give Beam full cooperation credit, claiming that the cooperation was sometimes inconsistent, inadequate, and mired in significant company-caused delays, and citing Beam's refusal to "accept responsibility for several years," the SEC found extensive evidence of voluntary cooperation.[21]
- While DOJ refused to give Beam full remediation credit, claiming that the company failed to "discipline certain individuals involved in the conduct," the SEC expressly credited Beam for "terminating certain Beam India employees who were involved in the misconduct."[22]

Without more information from DOJ or the SEC explaining such differences in the two enforcement actions, it is difficult to pinpoint why the two agencies were unable or unwilling to coordinate parallel resolutions.

Reconciling the Beam Resolutions with DOJ's Anti-Piling On Policy and Updated Guidance

In 2018, DOJ adopted its Anti-Piling On Policy to encourage and increase coordination both within DOJ and between DOJ and other enforcement authorities "to achieve an equitable result" when imposing multiple penalties for the same conduct.[23] Particularly pertinent to parallel DOJ and SEC FCPA enforcement actions, the Anti-Piling On Policy advises DOJ attorneys to "*endeavor, as appropriate*, to coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct."[24]

Continued on page 6

20. *Id.* ¶ 4a; July 2018 Beam SEC Order ¶ 28.
21. Oct. 2020 Beam DOJ DPA ¶ 4c; July 2018 SEC Order ¶ 28.
22. July 2018 Beam SEC Order ¶ 29.
23. Anti-Piling On Policy.
24. *Id.* (emphasis added).

Same Company, Same Conduct: Beam Settles with DOJ Two Years After SEC

Continued from page 5

DOJ's and the SEC's recently-updated Resource Guide reiterates that:

> In determining *whether* and *how much* to credit another authority, prosecutors are to consider, among other factors, "the egregiousness of a company's misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving a final resolution; and the adequacy and timeliness of a company's disclosures and its cooperation with the Department, separate from any such disclosures and cooperation with other relevant enforcement authorities."[25]

Despite the encouragement to coordinate, DOJ retains the option to refuse or reduce cooperation credit regardless of how other agencies handle those issues, including if DOJ identifies particularly egregious facts or the absence of DOJ-specific disclosures or cooperation. But since the introduction of the Anti-Piling On Policy, such explicit refusal has been exceedingly rare.

DOJ has demonstrated a commitment to its Anti-Piling On Policy since its adoption. In an October 2019 speech, for example, Attorney General William Barr pointed to the "impressive record of joint enforcement" between DOJ and the SEC, touting the enforcement agencies' close coordination on FCPA cases: "[t]hese [FCPA] matters often involve complicated financial transactions, significant sums of money, sophisticated parties, and voluminous evidence scattered throughout the world. But by working together in close coordination, the SEC and the DOJ are often able to focus our work, and succeed in vindicating the law."[26] Attorney General Barr praised DOJ and the SEC's coordination in the parallel resolutions reached with Mobile TeleSystems, in which DOJ credited the $100 million that the company paid to resolve the parallel SEC matter.[27]

Such coordination also has been achieved with non-U.S. enforcement counterparts. For example, DOJ's press release announcing its recent resolution with Goldman Sachs described the case as "historic because of the unprecedented coordination" that led to "parallel resolutions with no fewer than nine other U.S. and foreign authorities." DOJ and the SEC also thanked 17 regulatory and/or law

Continued on page 7

25. U.S. Dep't of Justice, Criminal Div. and U.S. Sec. & Exch. Comm'n, Enf't Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act: Second Edition 71 (July 2020), https://www.justice.gov/criminal-fraud/file/1292051/download (emphasis added).
26. U.S. Dep't of Justice, "U.S. Attorney General William P. Barr Delivers Remarks at the U.S. Securities and Exchange Commission's Criminal Coordination Conference" (Oct. 3, 2019), https://www.justice.gov/opa/speech/us-attorney-general-william-p-barr-delivers-remarks-us-securities-and-exchange-commission.
27. *Id.* (noting "[t]he [Mobile TeleSystems] matter first came to the DOJ as a referral from the SEC, and our two agencies were able to work closely together to investigate and resolve the matter.").

Same Company, Same Conduct: Beam Settles with DOJ Two Years After SEC

Continued from page 6

enforcement agencies and offices in several jurisdictions.[28] Against this backdrop of DOJ's Anti-Piling On Policy and DOJ's demonstrated efforts to reach parallel FCPA resolutions with the SEC and other enforcement authorities, DOJ's resolution with Beam is exceptional.

DOJ appears to have determined that Beam's failure to coordinate with DOJ and its inconsistent and sometimes inadequate cooperation warranted departing from DOJ's usual anti-piling on posture.[29] While the time lag between the SEC and DOJ resolutions does not itself contradict the policy, there is only one other recent case in which DOJ's FCPA resolution lagged behind the SEC's FCPA resolution for the same underlying conduct. In that case, Las Vegas Sands Corp. ("LVSC") agreed to pay a $6.96 million criminal penalty to resolve DOJ's FCPA enforcement action

"Companies should be mindful that future DOJ and SEC FCPA resolutions may also involve a time lag or inconsistent findings as between the two agencies or between either agency and other enforcement authorities."

nine months after paying a $9 million civil penalty to resolve the SEC's FCPA enforcement action for the same conduct. That resolution was reached in 2017, before the Anti-Piling On Policy.[30] Further, unlike in the Beam DPA, DOJ considered the SEC's resolution with LVSC in determining a criminal penalty[31] and did not call out LVSC for failing to coordinate parallel resolutions.[32]

Continued on page 8

28. The DOJ resolution with Goldman Sachs credited more than 50% of the amounts paid to the SEC and non-U.S. counterparts against the $2.3 billion criminal penalty DOJ assessed, and the SEC deemed the entirety of the $606.3 million in disgorgement satisfied by payments made pursuant to a parallel settlement with Malaysia. *See* Goldman DPA; Order, *In re The Goldman Sachs Group, Inc.*, Securities Exchange Act Rel. No. 90243 (Oct. 22, 2020), https://www.sec.gov/litigation/admin/2020/34-90243.pdf; *see also*, Jane Shvets, Bruce E. Yannett & Andreas A. Glimenakis, "Goldman Sachs' 1MDB Settlement Brings Record-Breaking FCPA Recovery for U.S. Authorities," FCPA Update, Vol. 12, No. 3 (Oct. 2020), https://www.debevoise.com/insights/publications/2020/10/fcpa-update-october-2020.

29. *Compare* Oct. 2020 Beam DOJ DPA, *with* July 2018 Beam SEC Order.

30. Letter from the U.S. Dep't of Justice, Criminal Division to Laurence Urgenson, Esq., Re: Las Vegas Sands Corp., Non-Prosecution Agreement (Jan. 17, 2017), https://www.justice.gov/opa/press-release/file/929836/download [hereinafter "Jan. 2017 LSVC DOJ NPA"]; *see also*, Order, *In re Las Vegas Sands Corp.*, Securities Exchange Act Rel. No. 77555 (Apr. 7, 2016), https://www.sec.gov/litigation/admin/2016/34-77555.pdf.

31. Jan. 2017 LSVC DOJ NPA ¶¶ f, i.

32. *Id.* ¶¶ a–m.

Same Company, Same Conduct: Beam Settles with DOJ Two Years After SEC
Continued from page 7

Looking Forward

Companies should be mindful that future DOJ and SEC FCPA resolutions may also involve a time lag or inconsistent findings as between the two agencies or between either agency and other enforcement authorities. Companies will need to consider and account for the possibility that enforcement authorities may not always see eye to eye. Indeed, in unveiling the Anti-Piling On Policy in May 2018 (two months before Beam's SEC settlement), Deputy Attorney General Rod Rosenstein observed that, although "[s]ometimes government authorities coordinate well" to act as "force multipliers" and "achieve efficiencies," parallel investigations can also "sound less like singing in harmony, and more like competing attempts to sing a solo."[33]

In the face of potential solos to be sung, Beam's uncoordinated settlements may weaken companies' incentives to voluntarily disclose potential FCPA issues under DOJ's Corporate Enforcement Policy. More specifically, companies may hesitate at the prospect of DOJ or the SEC taking different views of relevant facts or the extent of cooperation.

Given DOJ's view that Beam "did not seek to coordinate a parallel resolution with [DOJ]," and Beam's failure to receive cooperation credit at least in part because of what the DPA called "inconsistent, and at times, inadequate cooperation," "significant delays . . . in reaching a timely resolution," and a "refusal to accept responsibility for several years,"[34] the implication is that DOJ did not consider Beam's SEC settlement or other relevant factors to reflect sufficient acceptance of responsibility. In any event, the Beam case serves as an important reminder that "[c]ooperating with a different agency or a foreign government is not a substitute for cooperating with [DOJ]."[35]

Andrew M. Levine

Jane Shvets

Andreas A. Glimenakis

Liliana Ramirez

Andrew M. Levine and Jane Shvets are partners in the New York office. Andreas A. Glimenakis and Liliana Ramirez are associates in the Washington, D.C. office. Full contact details for each author are available at www.debevoise.com.

33. U.S. Dep't of Justice, "Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute" (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

34. Oct. 2020 Beam DOJ DPA at ¶ 4c.

35. U.S. Dep't of Justice, "Deputy Attorney General Rod. J. Rosenstein Delivers Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act" (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes.

FCPA Update

FCPA Update is a publication of
Debevoise & Plimpton LLP

919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

London
+44 20 7786 9000

Paris
+33 1 40 73 12 12

Frankfurt
+49 69 2097 5000

Moscow
+7 495 956 3858

Hong Kong
+852 2160 9800

Shanghai
+86 21 5047 1800

Tokyo
+81 3 4570 6680

Luxembourg
+352 27 33 54 00

Bruce E. Yannett
Co-Editor-in-Chief
+1 212 909 6495
beyannett@debevoise.com

Andrew J. Ceresney
Co-Editor-in-Chief
+1 212 909 6947
aceresney@debevoise.com

David A. O'Neil
Co-Editor-in-Chief
+1 202 383 8040
daoneil@debevoise.com

Jane Shvets
Co-Editor-in-Chief
+44 20 7786 9163
jshvets@debevoise.com

Philip Rohlik
Co-Executive Editor
+852 2160 9856
prohlik@debevoise.com

Kara Brockmeyer
Co-Editor-in-Chief
+1 202 383 8120
kbrockmeyer@debevoise.com

Andrew M. Levine
Co-Editor-in-Chief
+1 212 909 6069
amlevine@debevoise.com

Karolos Seeger
Co-Editor-in-Chief
+44 20 7786 9042
kseeger@debevoise.com

Erich O. Grosz
Co-Executive Editor
+1 212 909 6808
eogrosz@debevoise.com

Andreas A. Glimenakis
Associate Editor
+1 202 383 8138
aaglimen@debevoise.com

Please address inquiries regarding topics covered in this publication to the editors.

All content © 2020 Debevoise & Plimpton LLP. All rights reserved. The articles appearing in this publication provide summary information only and are not intended as legal advice. Readers should seek specific legal advice before taking any action with respect to the matters discussed herein. Any discussion of U.S. Federal tax law contained in these articles was not intended or written to be used, and it cannot be used by any taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer under U.S. Federal tax law.

Please note:
The URLs in *FCPA Update* are provided with hyperlinks so as to enable readers to gain easy access to cited materials.