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FCPA Update

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Recent Developments in U.S. Domestic Bribery Case Law Reaffirm Various Risks – and Tensions – in FCPA Prosecutions

As recognized in the November 2012 *Resource Guide* published by the U.S. Department of Justice ("DOJ") and U.S. Securities and Exchange Commission ("SEC"), case law interpreting federal laws governing domestic corrupt conduct can aid in interpreting key FCPA provisions. The usefulness of such analysis reflects the statutory similarities between the FCPA and domestic anti-bribery counterparts, as well as the relative dearth of case law interpreting the FCPA. Of the judicial opinion citations in the *Resource Guide* itself, only ten directly discuss the FCPA.[1] And after the U.S. Supreme Court's recent denial of review of the Eleventh Circuit's *Esquenazi* decision interpreting the FCPA's definition of "foreign official," it may be years before the Court has another opportunity to offer definitive guidance on a fundamental issue under the FCPA.[2]

Aside from addressing arguments that recur with some frequency in FCPA investigations and prosecutions, this year's crop of appellate developments in domestic bribery cases also evidences the U.S. government's continuing commitment to fighting domestic corruption. This provides some answer to critics who have suggested that the United States spends disproportionate resources on fighting foreign corruption in the context of FCPA investigations and prosecutions. Like authorities in many other countries, the U.S. government has a vigorous program of prosecuting domestic bribery.

CONTINUED ON PAGE 2

1. *See A Resource Guide to the U.S. Foreign Corrupt Practices Act* [hereinafter "DOJ/SEC Guidance"] at 105 n.21 (citing *Lamb v. Phillip Morris, Inc.*, 915 F2d 1024 (6th Cir. 1990) and *McLean v. Int'l Harvestor Co.*, 817 F.2d 1214 (5th Cir. 1987)); *id.* at 106 n.43, 108 nn.84-85 (citing *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007)); *id.* at 109 n.100 (citing *United States v. Liebo*, 923 F.2d 1308 (8th Cir. 1991)); *id.* at 109 n.119 (citing Order, *United States v. Carson*, 2011 WL 5101701, No. 09-cr-77 (C.D. Cal. May 18, 2011); *United States v. Aquilar*, 783 F. Supp. 2d 1108 (C.D. Cal. 2011); Order, *United States v. Esquenazi*, No. 09-cr-21010 (S.D. Fla. Aug. 5, 2011); Order, *United States v. Nguyen*, No. 08-cr-522 (E.D. Pa. Dec. 30, 2009)); *id.* at 110 n.143 (citing *United States v. Kozeny*, 582 F. Supp. 2d 535 (S.D.N.Y. 2008)); *id.* at 115 n.279 (citing *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991)), http://www.justice.gov/criminal/fraud/fcpa/guidance/. A number of the decisions cited, moreover, such as *Lamb*, *McLean*, and *Castle*, deal with collateral issues such as whether the FCPA contains a private right of action (it does not) or whether foreign officials can be charged with conspiracy to violate the FCPA (they may not). The DOJ/SEC Guidance relies expressly in part on decisions interpreting U.S. domestic bribery statutes. *See, e.g., id.* at 108 n.87; *id.* at 113 n.202. The vast majority of "case citations" contained in the DOJ/SEC Guidance are to non-contested filings by the government as well as the documents evidencing settled resolutions of various FCPA matters.

2. *See* Order List (S. Ct. Oct. 6, 2014), http://www.supremecourt.gov/orders/ordersofthecourt/14.

Also in this issue:

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Recent Developments in U.S. ■ Continued from page 1

Here, we analyze five of the most significant domestic bribery cases in 2014 at the federal appellate level: (1) the Ninth Circuit's decision in *United States v. Renzi*,[3] which interpreted the "anything of value" language of the federal honest services fraud and federal officer bribery statutes (18 U.S.C. §§ 1346 and 201(b)); (2) the D.C. Circuit's decision in *United States v. Verrusio*,[4] which addressed the "official act" requirement of the federal anti-gratuity statute (18 U.S.C. § 201(c)); (3) the Seventh Circuit's analysis, in *United States v. Whiteagle*,[5] of a middleman's defense that he was a mere "rainmaker" who passed on nothing to a government official in a case involving the federal conspiracy and program bribery laws (18 U.S.C. §§ 371 and 666); (4) the Third Circuit's discussion of *"quid pro quo"* requirements in connection with solicitation of charitable contributions in *United States v. Salahuddin*,[6] which dealt with conspiracy to violate the Hobbs Act (18 U.S.C. §§ 371 and 1951(a)); and (5) the Sixth Circuit's harmless error review in *United States v. Dimora*,[7] in which a defendant was convicted under the federal racketeering statute (18 U.S.C. §§ 1962(c), (d)), even though his arguably exculpatory disclosure reports were excluded from evidence at trial.

Although arising in differing contexts, each of these decisions constituted a victory for the government, highlighting some of the very serious practical challenges defendants in bribery cases face when confronted with significant evidence of corrupt conduct. But the degree of victory, as always, lies in the details of each case, which illustrate the often painstaking nature of bribery prosecutions and the complex transactions at issue. Such careful extrapolation is essential, given that the DOJ, the SEC, and private lawyers almost certainly will continue to rely on case law from the domesic bribery context as they spar over the FCPA's various terms.

United States v. Renzi

In *Renzi*, the Ninth Circuit affirmed the conviction of former Arizona Congressman Richard Renzi on charges of honest services fraud and other crimes. This conviction related to, among other things, a complicated deal in which a company called The Aries Group in 2005 sought to obtain congressional approval for a land exchange by which Aries would obtain federal land near Florence, Arizona.

While serving as a member of the Natural Resources Committee of the House of Representatives, Renzi told Aries' owner that if Aries bought property owned by one James Sandlin, and sought to trade that land for the Florence property, Renzi would use his authority on the committee to obtain passage of a bill authorizing the exchange. Renzi did not disclose to Aries that Sandlin, Renzi's business partner, owed Renzi roughly $700,000 and that Sandlin's property was being leased to an alfalfa farmer whose farming operations were being threatened by a federal court order requiring reduced water consumption in the region.

CONTINUED ON PAGE 3

3. 2014 WL 5032356 (9th Cir. Oct. 9, 2014).
4. 762 F.3d 1 (D.C. Cir. Aug. 1, 2014).
5. 759 F.3d 734 (7th Cir. July 21, 2014).
6. 765 F.3d 329 (3rd Cir. Sept. 3, 2014).
7. 750 F.3d 619 (6th Cir. Apr. 30), *cert. denied*, No. 14-15, 2014 WL 3556514 (S. Ct. Oct. 6, 2014).

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Recent Developments in U.S. ■ Continued from page 2

Aries' owner testified that Aries purchased the requested property from Sandlin for $4.5 million (after which Sandlin "immediately" wrote a $200,000 check to a company Renzi owned) and "would not have bought the tract absent Renzi's promise."[8]

After being convicted of extortion and honest-services fraud, Renzi appealed, asserting that the government had failed to prove that he or Sandlin (with whom Renzi was also charged with conspiring) had solicited or received "something of value" in exchange for the promise to support the land exchange legislation.

Specifically, Renzi argued that because Sandlin owed Renzi $700,000, regardless whether Aries purchased the property from Sandlin, and the Sandlin land purchase was "an equal value exchange," he had not obtained "something of value." The Ninth Circuit rejected that argument, stating that "[t]he money [given] had subjective value to Renzi, not only because it was a $200,000 payment, but because it was the early repayment of a large private debt."[9] Addressing the corrupt nature of the transaction, the court held that "Renzi received money from The Aries Group that he was not otherwise entitled to receive. This money clouded his judgment in performing his official duties and deprived his constituents of the honest services of their elected representative."[10]

Not lost on the court of appeals was substantial evidence that, prior to the Aries transaction, Renzi had sought to extort a similar land purchase from Sandlin from a different company, Resolution Copper Company, to which Renzi had stated: "No Sandlin property, no bill."[11] Rarely is evidence of a proposed *quid pro quo* so explicitly stated.

> "[T]he government may well seek to rely upon *Renzi*'s reference to 'subjective value' in future corrupt transaction cases, including under the FCPA."

Although the FCPA is focused on bribe-payers, rather than bribe-takers (or extorters), the *Renzi* decision's language that "subjective value," rather than necessarily a market value, can form the basis of a corrupt transaction was a win for the government. And the government may well seek to rely upon *Renzi*'s reference to "subjective value" in future corrupt transaction cases, including under the FCPA. In this respect, rather than clarifying the law of corrupt transactions, the Ninth Circuit may well have muddled it. Although the asking price for the Sandlin property appeared to have been inflated, both in light of the general circumstances and the referenced court order reducing the land's water allotment, the court of appeals chose to focus on the immediate benefit to Renzi of receiving an early payment – an obvious objective benefit. How the "subjective value" standard will apply in future cases thus remains to be seen.

United States v. Verrusio

In another case involving corruption in the national legislature, the D.C. Circuit this summer upheld the conviction of Fraser Verrusio, the former policy director of the Transportation Committee of the U.S. House of Representatives, for his receipt of improper gratuities from Jack Abramoff's former lobbying group. The case revolved around 2003 World Series tickets, hotel charges, and payments for cover charges, drinks, and lap dances at a strip club, which were given to Verrusio and another legislative aide by lobbyists for the equipment rental company United Rentals. The lobbyists testified that these benefits were provided to the legislative aides "because 'they were in positions to be helpful'" in connection with amendments to a 2003 highway bill that were being negotiated during the very period during which the World Series was being played.[12]

On appeal, Verrusio challenged his conviction for improper receipt of gratuities on the ground that "the evidence failed to 'connect the item of value received by the public official to a specific official act.'"[13] Dispatching that argument based on an array of evidence, including contemporaneous emails soliciting specific help, the court of appeals found it irrelevant that United Rentals' preferred language

CONTINUED ON PAGE 4

8. 2014 WL 5032356 at *5.
9. *Id.* at *7.
10. *Id.*
11. *Id.* at *4.
12. 762 F.3d at 7.
13. *Id.* at 15.

Recent Developments in U.S. ■ Continued from page 3

for the highway bill did not make it into the House of Representatives version of the bill. The D.C. Circuit reasoned that "there was nonetheless substantial evidence that Verrusio also kept trying to help with the language until the very end" of the legislative process. The court of appeals further held that "the evidence was sufficient for the jury to find that Verrusio accepted the gift knowing it was being given for the particular act of influencing the language of the federal highway bill."[14] In a footnote, the court observed that this "heightened level of intent" would have sufficed for a more serious charge of bribery, thus sealing Verrusio's fate on appeal.[15]

> "First, the court of appeals held, it is not necessary, to obtain a conviction for bribery, for a bribe to have been known about by the ultimate official intended *by the payor* to receive the corrupt payment."

Apart from its obvious implications about the provision of inappropriate hospitality to a government official at the very time that the official is being asked to assist a private party, the *Verrusio* decision reaffirms the general rule in bribery cases that a bribe need not produce its intended end.[16] It also makes clear that advisors who do not hold actual decision-making authority, like foreign officials whose "influence with a foreign government" can be the target of improper activity under the FCPA, can be just as much within the ambit of federal anti-corruption laws as the ultimate decision-makers.

United States v. Whiteagle

In its *Whiteagle* decision, the Seventh Circuit affirmed a federal program bribery and conspiracy conviction of Timothy Whiteagle, a member of the Ho-Chunk Indian Nation in Wisconsin. The court of appeals described Whiteagle as an "influence peddler" who "held himself out as an insider whose relationships with other tribal members and legislators offered interested vendors an entrée into the tribe's governance and gaming operations and, once there, a means of preserving the firm's business relationship with the tribe."[17]

After being convicted of bribery offenses for his role in securing a $7 million service contract with Cash Systems, Inc., for cash-access services at the tribe's casinos, Whiteagle appealed on the ground, among others, that he had personally "pocketed" all the money he allegedly solicited as bribes to be paid to tribal legislator Clarence Pettibone. The court of appeals noted that "[t]his is not an uncommon defense in bribery cases: the middleman who has solicited a bribe on behalf of a public official contends that he was merely puffing or 'rainmaking' when he held himself out as an agent of the official, the aim being to extract money from someone hoping to corruptly influence the official and keep the bribes for himself, without the official knowing of or participating in the scheme."[18] The Seventh Circuit then swiftly rejected this claim.

First, the court of appeals held, it is not necessary, to obtain a conviction for bribery, for a bribe to have been known about by the ultimate official intended *by the payor* to receive the corrupt payment. As the FCPA's intermediary-payee provisions make clear for FCPA cases, it is the intent with which a bribe is given to a middleman or third party that is critical to the transaction. Thus, "[t]he jury could have found that Whiteagle agreed with one or more officials of a company wishing to do business with the Nation . . . to bribe Pettibone, and that the company transmitted a bribe to Whiteagle for that purpose, without having to additionally find that Pettibone was, in fact, bribed."[19]

The Seventh Circuit then went on to note the inherent implausibility of the "rainmaker" defense, which requires the defendant's testimony that he was lying all along to be believed. The court further cited email evidence from Whiteagle to company officials, as well as to Pettibone, who was cc'd, stating: "'We have devoted many months to prepare your way into the HCN *without pay* and be assured the next 5 days will determine what we do next with you with the HCN.'" Other inculpatory email evidence that, as the court observed,

CONTINUED ON PAGE 5

14. *Id.* at 17.
15. *Id.* at 17 n.10.
16. This is confirmed in the Fifth Circuit's decision in *United States v. Grace*, 568 F. App'x 344 (5th Cir. May 22, 2014), which held "a public official can be guilty of bribery 'even if he has no intention of actually fulfilling his end of the bargain.'" *Id.* at 350 (citing *United States v. Valle*, 538 F.3d 341, 347 (5th Cir. 2008)).
17. 759 F.3d at 737.
18. *Id.* at 750.
19. *Id.*

Recent Developments in U.S. ■ Continued from page 4

"left little to the imagination," was sent to Pettibone by company employees. For example, one email stated that "'[w]e cannot compensate you outright, as in a direct payment,'" but the company "can pay me, then I can compensate you [but] [w]e must be careful to protect your position as paying you directly is a criminal offense. . . ."[20] Still other evidence showed that Whiteagle had asked a company employee to deliver a paper bag full of cash to Pettibone, explaining that "[t]his is how deals are done up here."[21] The court of appeals also affirmed convictions on charges of agreeing to give a bribe to Pettibone, rejecting again the idea that the federal program bribery statute (like the FCPA's bar against bribe paying) requires a completed bribe.[22]

The Seventh Circuit also affirmed Whiteagle's aiding and abetting conviction in connection with a scheme in which Pettibone sought to have a tribal vendor hire one of Pettibone's relatives. In response to Whiteagle's arguments that the vendor, MCA, had been asked only to exercise independent judgment, the court cited evidence that Whiteagle had "sought employment of Pettibone's relative at a specified, substantial salary." This request had come "amongst other emails from Whiteagle to [MCA's CEO] making express financial demands on MCA as a condition of Pettibone's assistance." Thus, "it would be natural to read [Whiteagle's request] as a demand for a bribe and not merely a suggestion for MCA's chief executive to consider in the exercise of his independent business judgment." The demand was "not merely a suggestion that MCA was free to accept or reject without consequence as to its prospects for doing business with the Nation."[23]

The court of appeals also affirmed a sentence of ten years' imprisonment, which could have been substantially longer, but for the district court's decision to reduce the sentence in light of the defendant's age and a variety of medical conditions.[24]

United States v. Salahuddin

Meanwhile, in the Third Circuit, the court of appeals in May affirmed the conviction of Ronald Salahuddin, who had served as the Deputy Mayor for Public Safety in Newark, New Jersey. Salahuddin was charged with conspiring to violate the Hobbs Act by using his position to obtain charitable and political contributions and to direct Newark demolition contracts to a demolition company that had agreed to subcontract part of the work to an acquaintance of Salahuddin's who owed Salahuddin money. Unbeknownst to Salahuddin, the demolition company that was the object of the Hobbs Act extortion was owned by an informant, who became the lead government witness.

The court of appeals affirmed Salahuddin's convictions for conspiracy, even though Salahuddin "had no official power over the awarding of demolition contracts." The court focused on the fact that Salahuddin, as Deputy Mayor, had influence with relevant decision-makers, including Newark's Demolition Director, and agreed to use his position to obtain charitable contributions to two organizations, Newark Now and Empower Newark, as well as to then-Mayor Cory Booker.[25] Salahuddin was acquitted of bribery, but was convicted of conspiracy. He based his appeal primarily on the argument that the jury was required to find, but did not find, "that there was an explicit *quid pro quo* agreement."[26] The court of appeals rejected the argument: "We have previously rejected attempts to require an explicit *quid pro quo* arrangement outside of the campaign contribution context."[27]

Like the *Renzi* and *Whiteagle* cases, which involved third-party intermediaries, the *Salahuddin* case also turned on third party payments – in this case by the informant's company to the demolition company owned by Salahuddin's acquaintance, and in which Salahuddin had an interest as a creditor. The decision is an important indication of the Third Circuit's view that *"quid pro quo* lite" – the notion that no specific *quid pro quo* need be shown in a bribery or extortion case – is a permissible theory upon which the government may seek a conviction. In addition, *Salahuddin* reiterates the theme that is well known to FCPA compliance

CONTINUED ON PAGE 6

20. *Id.* at 751.
21. *Id.* at 752.
22. *Id.* at 753.
23. *Id.* at 756.
24. *Id.* at 759-60.
25. 765 F.3d at 334, 342.
26. *Id.* at 342.
27. *Id.* at 343 (citing *United States v. Bradley*, 173 F.3d 225, 232 (3d Cir. 1999)).

Recent Developments in U.S. ■ Continued from page 5

specialists, namely, that third party relationships are often at the bottom of corrupt schemes in that they mask from the public the true financial dealings in government procurement and related activities.[28]

United States v. Dimora

Finally, in the Sixth Circuit ruling in *United States v. Dimora*, the court of appeals affirmed convictions of two Cuyahoga County, Ohio officials under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), whose predicate offenses include bribery and extortion. As the court noted, "[t]hrough thousands of wiretaps and other means, the investigation revealed that Dimora's tenure as commissioner was rife with *quid pro quo* arrangements between him and individuals seeking favors of one sort or another from the county and other governments." While his co-defendant, Gabor, "did not wield Dimora's authority or receive as many meals, gifts, trips and home improvements, [Gabor] was not afraid to use his influence in similar ways for similar reasons."[29]

Given a record that the court held contained "plenty of evidence to convict" based on the statements of the defendants' co-conspirators and defendants themselves, the court of appeals rejected the defendants' sufficiency-of-the-evidence challenges. The principal corrupt payments received ran from home improvements, to first-class plane tickets to Las Vegas, to cash and other kickbacks on county government contracts.

The court of appeals was nevertheless faced with a more complex question arising from the district court's exclusion from evidence of Dimora's end-of-year ethics reports and other evidence of his noncriminal acts. Dimora claimed that the ethics reports and similar evidence disclosed – and thereby dispelled any inference that he was a corrupt politician – a variety of payments received from constituents. The court of appeals agreed that it was error to refuse to admit them based on their status as hearsay, because Dimora was contending that the reports bore on his intent in acting as a public official.

> "Domestic bribery cases like those discussed above will continue to form a substantial part of the precedent available to district court judges who are called upon to interpret the FCPA."

The panel majority rejected his appeal on the ground of harmless error. As the majority observed, "the government produced overwhelming evidence against Dimora," and "[t]hat Dimora apparently reported some $75 in things of value says nothing about whether he undertook corrupt bargains."[30] Judge Merritt dissented, stating that "[s]ubjective intent is the keystone of bribery." He noted that "[t]he exchange of money for a vote is a crime that threatens the foundation of democracy," while "[t]he exchange of money for 'ingratiation and access is not corruption' at all; indeed, the exchange is so essential to the foundation of democracy that it is protected by the First Amendment."[31] For the trial court to exclude the disclosure forms, he asserted, was not harmless error.

Conclusion

Domestic bribery cases like those discussed above will continue to form a substantial part of the precedent available to district court judges who are called upon to interpret the FCPA. And given that domestic bribery cases are far more common, and much more frequently litigated, than FCPA cases, federal judges are likely to be much more familiar with the rules that apply in a domestic bribery case than with some of the issues that arise in FCPA matters. Core issues of what constitutes "corrupt intent," a *"quid pro quo,"* an "official act," and related concepts such as how the harmless error doctrine applies in a corruption case, are common to both domestic bribery and FCPA matters. At the same time, there are some very important differences between

CONTINUED ON PAGE 7

28. Indeed, in a recent speech, DOJ Senior Deputy Chief of the Fraud Section James Koukios reminded an audience that "'[t]hird parties pose a significant risk . . . What we find in most cases where a bribe has been paid, is that it has been paid by a third party – inserted into the transaction for precisely that purpose.'" *"DoJ Expects More Cooperation Between US and Latin American Enforces,"* Global Investigations Review (Oct. 22, 2014), http://globalinvestigationsreview.com/article/1836/doj-expects-cooperation-us-latin-american-enforcers.

29. 750 F.3d at 624-25.

30. *Id.* at 628-29.

31. *Id.* at 632 (Merritt, J., dissenting).

Recent Developments in U.S. ■ Continued from page 6

domestic bribery laws and the FCPA, such as the definition of "foreign official." In this respect, the denial of review in the *Esquenazi* case is truly a missed opportunity for clarification of the FCPA.

Moreover, the domestic bribery cases discussed here, which are generally reflective of the kinds of matters seen by the federal appellate courts, point up a central irony of FCPA enforcement, in that none of these leading cases involved prosecutions of bribe payers, illustrating the tensions and ambivalence in U.S. anti-bribery law inherent in a regime such as the FCPA which contains no language allowing the government to prosecute corrupt foreign officials, without whom bribe transactions could not take place.

More generally, particularly as the United States concludes another election season in which direct and indirect campaign contributions have again hit record levels, the concerns expressed by some judges concerning the tensions within the U.S.'s method of financing its politics will continue to generate questions in some quarters about the consistency of – or at a minimum the difficulty of applying – U.S. criminal law when it comes to addressing risks of corruption in foreign bribery cases. As the District Judge noted before sentencing Mr. Whiteagle: "[T]he extreme sums of money that are regularly paid to lobbyists and others, as well as contributed to campaigns, by special interest groups ostensibly to influence legitimately, rather than corruptly, the votes of public officials at virtually every level of government in this nation" are factors that raise concerns about the fairness of imposing the longest possible sentences in domestic bribery cases, raising questions about sentencing policies in FCPA cases as well.[32]

These concerns will no doubt continue to be raised in anti-corruption matters in the years to come.

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32. 759 F.3d at 748.

Wal-Mart's Delaware Document Dilemma – An Update

The Delaware Chancery Court, considering arguments on remand from the Delaware Supreme Court's ruling in *Indiana Electrical Workers Pension Trust Fund IBEW v. Wal-Mart Stores Inc*,[1] recently issued a ruling that slightly narrowed the scope of Wal-Mart's disclosure obligations under Section 220 of the Delaware General Corporation Law, while also expanding the scope of Wal-Mart's obligation to produce a privilege log of withheld responsive documents. The bottom line: despite another skirmish with the demanding shareholder on remand, Wal-Mart's expansive document production obligations largely remained in place.

The Chancery Court's ruling resulted from a motion by Wal-Mart (the "Motion") seeking clarification of its disclosure obligations following the Delaware Supreme Court's ruling that Wal-Mart was required to make an extensive production of documents related to an earlier investigation of corruption issues at its Mexican subsidiary, Walmex. The Supreme Court's ruling also had included an order requiring the production of certain privileged documents under the exception to the attorney-client privilege set forth in *Garner v. Wolfinbarger*.[2]

Wal-Mart's Motion was heard by Chancellor Bouchard, who replaced Chancellor Strine, who had presided over the original trial of the case before he became Chief Justice of the Delaware Supreme Court. At issue in the latest proceeding was the Final Order that had been entered by Chancellor Strine, which, in pertinent part, required Wal-Mart to produce documents related to three "responsive topics": (1) "any aspect of the Walmex Investigation;" (2) Wal-Mart's "FCPA general compliance policies and procedures;" and (3) Wal-Mart's "internal investigation policies, procedures, and/or protocols." The "Relevant Period" covered by the order was from September 1, 2005 through June 6, 2012. In addition, Chancellor Strine had ordered Wal-Mart to provide an updated privilege log identifying all responsive documents over which Wal-Mart purported to assert either the attorney-client privilege or work product protection.

In a motion for clarification, Wal-Mart argued that the Final Order was ambiguous in at least two respects and needed to be clarified.[3] *First*, according to Wal-Mart, the order's reference to the "Walmex investigation" was unclear, because investigations had been undertaken in 2005-2006 and again in 2011. Wal-Mart claimed that the 2011 investigation should not be covered by the order. *Second*, Wal-Mart argued that it should not be required to produce a privilege log for any documents withheld after January 1, 2011, because the Delaware Supreme Court had limited the application of the *Garner* exception to the period before that date.

The Scope of Wal-Mart's Production Obligation

With respect to the first issue, Wal-Mart conceded that documents generated in the 2005-2006 investigation of corruption allegations fell within the scope of the Final Order. Wal-Mart argued, however, that documents generated in the course of the second internal review in 2011 were distinct and should not be considered part of the "Walmex investigation."

The IBEW characterized Wal-Mart's motion as untimely and an attempt to relitigate issues that had been resolved by the Final Order, which had defined the "Relevant Period" covered by IBEW's Section 220 requests as September 1, 2005 through June 6, 2012 – a period that the IBEW said unambiguously included both the 2011 investigation and the 2005-2006 investigation.

Chancellor Bouchard ultimately ruled in Wal-Mart's favor on these issues. With respect to timeliness, he agreed with the IBEW that Wal-Mart's request for clarification was untimely, because the motion should have been filed within five days after entry of the Final Order.

CONTINUED ON PAGE 9

1. No. 614, 2013, 2014 WL 3638848 (Del. July 23, 2014); *see* "Privileged and Work Product Documents from Investigations Now at Risk: How the *Wal-Mart* Ruling Increases the Risk Shareholders Will Pursue Documents from FCPA Internal Investigations," *FCPA Update* (April 2014), http://www.debevoise.com/files/Publication/10ef278d-5b33-4dc3-b08e-5d2a88b09f0a/Presentation/PublicationAttachment/d8b57e2f-bdfa-419e-9d24-7363352a220c/FCPA_Update_August2014.pdf.
2. 430 F.2d 1093 (5th Cir. 1970).
3. Wal-Mart originally had argued that the order was ambiguous in five respects, but was able to resolve three of the issues without intervention from Chancellor Bouchard.

Wal-Mart's Delaware Document Dilemma ■ Continued from page 8

Even if the Final Order date were generously interpreted as the date of the Delaware Supreme Court's mandate from its ruling, Wal-Mart failed to file until 60 days later. Chancellor Bouchard decided that he would not reject Wal-Mart's motion, even though it was untimely. Instead, he found nevertheless that he had discretion to manage a case on his docket and therefore could assist the parties in clarifying the prior order.

On the merits, he determined that the meaning of "Walmex Investigation" in the Final Order was predicated on *The New York Times* article that had prompted the IBEW's original Section 220 demand.[4] That article, according to Chancellor Bouchard, had clearly focused on the original internal review in 2005-2006. While the article mentioned the 2011 investigation in passing, he did not view that mention as sufficient to suggest that the 2011 investigation was a subject of the IBEW's original Section 220 demand. He therefore rejected the IBEW's request for access to 2011 investigation records.

The Need to Log All Responsive Privileged Documents

With respect to Wal-Mart's second contention – that it should not be required to log post-January 1, 2011 privileged documents – Chancellor Bouchard found that the prior order was clear and that a log was required, even though he recognized that it would be burdensome. In reaching this conclusion, Chancellor Bouchard rejected Wal-Mart's argument that Chancellor Strine's ruling that documents should be produced under the *Garner* exception through January 1, 2011 had made privileged documents after that date irrelevant. Instead, Chancellor Bouchard appeared to accept the IBEW's argument that a privilege log was needed in the case to act as an "independent check" on the potentially inappropriate claims of privilege.

> "Chancellor Bouchard therefore ordered the privilege log to include a listing of all privileged, withheld documents through June 6, 2012 – the ending date of the IBEW's original document request."

Chancellor Bouchard therefore ordered the privilege log to include a listing of all privileged, withheld documents through June 6, 2012 – the ending date of the IBEW's original document request. In reaching this conclusion, Chancellor Bouchard acknowledged Wal-Mart's argument that producing the log would require "extraordinary effort" that would not be "reasonable" given the October 29, 2014 deadline for the completion of production. The Chancellor found, however, that Wal-Mart was a company with "enormous resources" to apply to the task and that any difficulty presented by the deadline was largely a result of its own delays.

The Implications of the Latest Rulings

The latest skirmish between the IBEW and Wal-Mart in this ongoing battle over the use of Section 220 in the context of an FCPA investigation clearly produced mixed results for Wal-Mart. What remains unchanged, however, is the continuing prospect that future high-profile FCPA investigations likely will be attended by expansive shareholder requests for corporate records – including those potentially related to the conduct of the investigation itself – and the companies will need to be prepared for vigorous litigation over the scope and propriety of those demands.

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4. David Barstow, "Wal-Mart Hushed Up a Vast Mexican Bribery Case," *The New York Times* (Apr. 21, 2012), http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html.

Transparency International Progress Report Finds that Global Anti-Bribery Enforcement Remains Inadequate

Despite continued media focus on both domestic and cross-border corruption scandals, significant anti-corruption challenges persist. As concluded in Transparency International's ("TI's") 2014 Progress Report on global enforcement of the Organization for Economic Cooperation and Development's ("OECD's") Anti-Bribery Convention (the "Convention"), "[t]he fundamental goal of creating a corruption-free level playing field for global trade is still far from being achieved."[1] Echoing a refrain from many prior TI reports, the latest report stated that "the performance of the majority of the 40 countries that agree to combat foreign bribery in international business transactions is far from satisfactory."[2]

As in 2013, only four of the 40 countries that subscribe to the Convention (the United States, the United Kingdom, Germany, and Switzerland) engage in active enforcement, according to TI.[3] The 2014 Progress Report lamented that "there are still 22 countries with Little or No Enforcement and eight countries with only Limited Enforcement."[4] The TI 2014 Progress Report noted that Canada and New Zealand both have improved their ranking by one level, with Canada joining Italy, Australia, Austria, and Finland in the category of countries with "moderate" enforcement efforts, and New Zealand moving into the category of countries in which there is "limited enforcement."[5] Two countries, Bulgaria and Denmark, regressed, falling into the category of countries with "little or no enforcement."[6]

The 22 countries identified as having little or no enforcement (ranked here from strongest to weakest in terms of their enforcement programs) are Japan, the Netherlands, South Korea, Russia, Spain, Belgium, Mexico, Brazil, Ireland, Poland, Turkey, Denmark, the Czech Republic, Luxembourg, Chile, Israel, the Slovak Republic, Colombia, Greece, Slovenia, Bulgaria, and Estonia.[7]

For in-house counsel and compliance professionals looking to assess the significance of these rankings and similar work done by the OECD itself, the goal of the TI Progress Report must be kept in context. By focusing on the status of cross-border anti-corruption regimes, the TI Progress Reports essentially concede that domestic anti-bribery enforcement in much of the world is weak, and thus cross-border enforcement by the major exporting nations who have signed the Convention is important to achieving anti-corruption compliance. Nevertheless, while the TI Progress Report – the tenth annual report on the subject that TI has published – is a useful reminder of the still-nascent stage of many cross-border anti-bribery regimes, compliance professionals should not rely too heavily on the country-by-country assessments. From the perspective of a global company, what matters most in assessing the enforcement environment in any particular country is the *combined* government resources devoted to anti-bribery enforcement, that is, those devoted by both local and foreign governments active in enforcing anti-bribery laws in and with respect to a given jurisdiction.

CONTINUED ON PAGE 11

1. Transparency International, *Exporting Corruption Progress Report 2014: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery* at 2, http://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2014_assessing_enforcement_of_the_oecd [hereinafter "TI 2014 Progress Report"].
2. *Id.* at 4.
3. The TI 2014 Progress Report ranks countries as exhibiting "active enforcement," "moderate enforcement," "limited enforcement," or "little or no enforcement," through an export-level weighted scale that measures the commencement and conclusion of investigations, as well as of "major" and "other" cases. *See id.* at 6-7.
4. *Id.* at 4.
5. *Id.* at 5.
6. *Id.* at 4.
7. *Id.* at 7.

Transparency International Progress Report ■ Continued from page 10

Those resources will include those of governments with concurrent jurisdiction over a particular transaction, such as the United States in situations in which the FCPA applies, the United Kingdom in matters in which the UK Bribery Act 2010 applies, as well any government with authority under any local anti-bribery law. In this respect, the TI 2014 Progress Report serves more as a roadmap to *which* governments are most likely to prosecute corrupt conduct that is subject to regulation under a trans-national anti-bribery regime, rather than necessarily *whether* corrupt conduct will be prosecuted. Nor does the TI 2014 Progress Report necessarily provide strong signals of where the risk of corruption itself is greatest. The TI Corruption Perceptions Index, long a mainstay of compliance risk assessments and due diligence prioritization, provides significantly more guidance in that respect.

> "[T]he TI 2014 Progress Report may be most significant for the calls it has set out for additional legislative and policy reforms in the OECD Convention signatory countries."

Given the TI Progress Reports' past impact, the TI 2014 Progress Report may be most significant for the calls it has set out for additional legislative and policy reforms in the OECD Convention signatory countries. The report noted, for example, that following past calls for reform over a number of years, including by TI, Brazil, Canada, Germany, Portugal, and Spain have strengthened their anti-corruption regimes, while Denmark, France, Hungary, Iceland, Portugal, and the UK have improved protections against whistleblowers.[8] In its press release accompanying the TI 2014 Progress Report, TI called upon the OECD Working Group on Bribery as well as OECD Convention signatories to take the following steps:

1. Continue the OECD monitoring program, and improve it by including civil society organizations in on-site visits and making available replies to questionnaires submitted to Convention signatories available to civil society organizations.
2. Convene meetings in countries where there has been substantial foreign bribery to discuss how the interests of those countries in which bribery takes place can be better represented in foreign bribery proceedings, thus increasing the input of countries affected by foreign bribery.
3. Prepare a study on the practice of settlements, including analysis of the varying approaches to court approval, transparency, and deterrent effects.
4. Collect and publish data on mutual legal assistance requests related to foreign bribery.
5. Provide additional information about pending and concluded cases, particularly in countries (such as Germany) that do not release certain details about defendants.[9]

As such reforms are debated in OECD member countries and ultimately embodied in future legislation, multinational firms subject to multiple cross-border and domestic anti-bribery regimes will continue to need to manage a complex and dynamic regulatory environment.

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8. *Id.* at 9.
9. Transparency International, "How Do We Stop Countries from Exporting Corruption" (Oct. 23, 2014), http://www.transparency.org/news/feature/how_do_we_stop_countries_from_exporting_corruption.