Debevoise & Plimpton

FCPA Update
January 2015
Volume 6
Number 6

FCPA Update

A Global Anti-Corruption Newsletter

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The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

I. Introduction

As in many legal arenas, FCPA and global anti-bribery enforcement more generally were marked in 2014 by a number of milestones, transitions, and trends.

The U.S. Department of Justice ("DOJ"), whose leader, Attorney General Eric H. Holder, Jr., announced his retirement on September 25 after more than five years in the cabinet, and the U.S. Securities and Exchange Commission ("SEC") together collected or obtained agreements to pay a total of $1.6 billion in corporate FCPA cases,[1] one of the largest annual money totals, if not the largest such recovery ever.

While dwarfed by eleven-figure settlements against major banks in various cases arising from the financial crisis, as well as other large U.S.

Continued on page 2

1. A chart identifying the principal features of the FCPA-related corporate resolutions in 2014 [hereinafter "FCPA 2014 Corporate Enforcement Chart"] appears at the end of this article.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 1

settlements in trade sanctions and other cases, 2014's FCPA matters included a record-breaking $772 million criminal fine against Alstom, S.A. ("Alstom"), which still faces ongoing investigations and proceedings in other countries for alleged bribe-related misconduct.

The U.S. government also entered into a string of corporate and individual resolutions that appeared, even more than previously, to be crafted to raise the costs for corporate entities that learn of serious, systematic conduct and yet do not self-report the conduct and/or robustly cooperate. Among the aspects of these resolutions highlighted by U.S. government representatives in public remarks were rewards for companies whose cooperation included providing evidence against individuals and other entities. The government also broadly publicized its actions under non-FCPA statutes against bribe takers that, in the short run at least, may generate even more evidence to utilize against bribe payers.

The government's pressure on companies to assist in investigating and prosecuting individuals raises significant challenges for in-house legal and compliance personnel as they work to navigate the potentially conflicting interests in anti-bribery compliance and internal investigations. This pressure has produced legitimate concerns that a failure to self-report could, in and of itself, be met with, or be the cause for imposing, monetary penalties. Although the U.S. Sentencing Guidelines provide for a reduction in fines for a heightened level of cooperation, outside of a narrow range of arenas (such as where duties to self-report are imposed on U.S. government contractors), the government generally lacks any statutory basis for imposing financial penalties against companies for the failure to self-report potential misconduct. Since there is no legal obligation to self-report, it is our view that the government should exercise caution when discussing bases for monetary penalties and should rely solely on laws passed by Congress and the Sentencing Guidelines provisions that properly draw their authority from a duly-passed statute. It would be a disturbing trend indeed were the government to begin to impose monetary penalties for failing to self-report where there is no legal obligation to do so. The actions by U.S. regulators in the coming year will continue to warrant close scrutiny, and their more explicit concurrence in the point made here would be welcome.[2]

At the same time, the renewed focus on producing evidence that may be used to prosecute individuals may signal a coming new wave of judicial interpretation of the FCPA, as individuals, who have a greater incentive to litigate, bring issues to the courts for authoritative resolution. Yet this possibility remains just that.

Continued on page 3

2. For examples of last year's discussions by U.S. enforcement officials on the topics of cooperation and self-disclosure, see, *e.g.*, the statements regarding resolutions in the Alcoa, Alstom, Bio-Rad, Bruker, Layne Christensen, Marubeni, and PetroTiger cases, as well as more general statements by individual U.S. government officials, discussed at notes 8-19, and accompanying text, *infra*.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 2

The year 2014 was yet another in which the FCPA remained stubbornly bereft of judicial construction, although the Eleventh Circuit's 2014 interpretation of the "foreign official" provisions provided some guidance.

Beyond these points about the U.S. government's enforcement actions, which continue to lead trans-national bribery enforcement in terms of both the number of cases brought and the size of recoveries obtained, perhaps the most significant development was the growing role of non-U.S. enforcement, and, relatedly, the increasing sophistication of the U.S. government's coordination with other governments in enforcing anti-bribery norms.

Prominent in this respect were the roughly $490 million penalty assessed by the Chinese government against GlaxoSmithKline China and the $240 million settlement by the Netherlands with SBM Offshore. These nine-figure resolutions

"[A]s hinted at in the large fine in the Alstom matter, the U.S. government may increase the price of resolving U.S. charges if a company's home country does not act – a fact that may push more non-U.S. governments to step up their own enforcement."

from outside the United States – the first significant wave since the Munich Prosecutor's resolution of the Siemens AG case in 2008 – show how anti-bribery enforcement has become global, with the United States just one of many nations to which multinational firms must pay serious heed when it comes to compliance. As indicated by the DOJ's declination in the SBM Offshore matter, if a non-U.S. resolution is sufficiently significant, U.S. regulators may choose to hold their fire. And, as hinted at in the large fine in the Alstom matter, the U.S. government may increase the price of resolving U.S. charges if a company's home country does not act – a fact that may push more non-U.S. governments to step up their own enforcement.

Nor is there any indication that the intense government scrutiny, potentially serious consequences, and complex enforcement outcomes will abate any time soon.

Larger trends, including continuing traditions of corrupt behavior in many countries, ever-increasing globalization and cross-border investment, market volatility, and incentives for whistleblowers to bring forward allegations of corruption, will likely keep the pipeline of anti-bribery cases full. With major new laws such as Brazil's Clean Company Law coming fully into force alongside

Continued on page 4

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 3

other transnational regimes such as the UK Bribery Act 2010, in-house legal and compliance professionals will be increasingly challenged to manage anti-bribery risks in an environment of continued economic uncertainty and limited corporate budgets.

To assist in managing those risks, we provide below overviews of the trends and statistics from last year's FCPA-related cases, and then discuss observations and facts from the more important of those U.S. matters. We then discuss non-U.S. anti-bribery enforcement in the United Kingdom, Germany, China, Russia, and Brazil.

II. Overview of Corporate and Individual Enforcement Actions in 2014

A. Corporate Enforcement

Although there were significant increases in the dollar amounts collected by the DOJ and SEC from companies for FCPA violations in 2013 as compared to 2011 and 2012, those amounts rose even further in 2014, and included some of the largest monetary penalties and disgorgements in the FCPA's history.[3]

The Alstom and Alcoa World Alumina LLC ("Alcoa") settlements, for example – resulting in payments of $772 million and $384 million, respectively – represented the second and fifth largest FCPA enforcement actions in history.[4]

In total, ten companies that resolved FCPA charges in 2014 paid a total of $1.56 billion to the government,[5] whereas nine companies paid $721 million in 2013; in 2012, twelve companies paid $259.4 million and, in 2011, fifteen companies paid $508.6 million.[6] The total government recovery in 2014 almost reached the record amount of approximately $1.8 billion paid by companies in settlement of alleged FCPA violations in 2010, but with fewer than half of the number of cases.[7]

Continued on page 5

3. *See* Paul R. Berger, Sean Hecker, Andrew M. Levine, Bruce E. Yannett, Steven S. Michaels, Philip Rohlik, and Jane Shvets, "Anti-Corruption Compliance in 2013: Post-Guidance Trends and Signals for the Future," *FCPA Update*, Vol. 5, No. 6 (Jan. 2014), http://www.debevoise.com/insights/publications/2014/01/fcpa-update [hereinafter "FCPA Update Annual Review of 2013 Enforcement"]; Michael Koehler, "Corporate FCPA Enforcement in 2014 Compared to Prior Years," *FCPA Professor* (Jan. 13, 2015)," http://www.fcpaprofessor.com/corporate-fcpa-enforcement-in-2014-compared-to-prior-years.
4. With the addition of Alstom, resolutions involving three French companies (Alstom, Total, and Alcatel-Lucent) are now among the ten largest FCPA matters in terms of total financial payout, with non-U.S. companies, including foreign private SEC issuers, comprising eight of the ten.
5. *See* FCPA 2014 Corporate Enforcement Chart, *infra*.
6. *See* FCPA Update Annual Review of 2013 Enforcement, note 3, *supra* at 2.
7. Depending on whether the roughly $400 million recovered in the BAE Systems case in 2010 based on alleged violations of the federal false statements statute, 18 U.S.C. § 1001, in connection with representations about the company's anti-bribery compliance program, is counted as FCPA-related, the years 2010 or 2014 hold the record for the total monetary recovery in corporate matters. We have taken the view that the BAE Systems matter is sufficiently FCPA-related that it should be counted towards 2010's totals, and thus 2014 would not be a record-breaking year for total recoveries in corporate matters. *See* Paul R. Berger, Sean Hecker, Bruce E. Yannett, Steven S. Michaels, Aaron M. Tidman, and Michael Janson, "The FCPA Matures: A Look Back at Enforcement in 2010," *FCPA Update*, Vol. 2, No. 6 (Jan. 2011), http://www.debevoise.com/insights/publications/2011/01/fcpa-update.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 4

Just under half of the corporate resolutions in 2014 were achieved through simultaneous resolutions with the DOJ and the SEC, with the remaining six one-agency resolutions split evenly between the DOJ and the SEC. In a number of these resolutions, the government credited the success of its investigation to the assistance of international authorities as well as the cooperation of the targeted companies, and emphasized the importance of voluntary disclosure and remediation in determining settlement amounts. It remains difficult to draw precise conclusions about the practical implications of self-reporting on the ultimate penalties imposed given the multitude of factors present in each enforcement action. In the Alcoa matter, for example, the DOJ praised the cooperation and disclosure efforts of the company as well as the steps taken to remediate defects in compliance procedures, and yet the company paid one of the largest FCPA penalties ever. Yet while bargaining over the total amounts of bribes paid, business won thereby, and thus the amounts of gain or loss to be included in a negotiated plea or other form of settlement – an undoubted factor in the Alcoa matter and in many other FCPA cases – is undoubtedly a feature of FCPA corporate matter resolutions, the government at least appeared to send strong signals that cooperation and self-reporting would be appropriately rewarded.

As demonstrated in the table on the next page, for those companies whose cooperation was recognized, the numbers at least in DOJ matters reflect significant reductions as a proportion of the fines that could have resulted under the application of U.S. Sentencing Guidelines-based calculation.[8] By contrast, the fines were proportionally much higher in the cases of Alstom and Marubeni, which the DOJ singled out for their less robust and less timely cooperation and their failure to self-report. The comparison is particularly striking with last year's resolution of the Alcoa matter, as well as with the 2008 resolution against Siemens AG, both of which had been identified as having provided extensive, and in the case of Siemens, "exemplary," cooperation.[9]

Continued on page 6

8. For each of the resolutions listed in the table, the agreed-upon fine is tabulated as a percentage of the maximum and minimum fines that could have been imposed under the Sentencing Guidelines fine range as stipulated in the relevant agreement resolving the matter. For example, the stipulated Guidelines fine range for Alstom was calculated at between $532.8 million and $1.0656 billion. *See United States v. Alstom, S.A.*, No. 3:14-cr-00246-JBA, Plea Agreement ¶ 17 (D. Conn. Dec. 22, 2014); *see also United States v. Marubeni Corp.*, No. 3:14-cr-52-JBA, Plea Agreement ¶ 16 (D. Conn. Mar. 19, 2014) (stipulating a Guidelines fine range between $63.7 million and $127.4 million); *United States v. Avon Prods. (China) Co. Ltd.*, No. 1:14-cr-00828-GBD, Plea Agreement at 6-7 (S.D.N.Y. Dec. 15, 2014), (stipulating a Guidelines fine range between $73.9 million and $147.9 million); *United States v. Hewlett-Packard Polska, SP. Z.O.O.*, 14-cr-202, Deferred Prosecution Agreement ¶ 7 (N.D. Cal. filed Apr. 9, 2014) (stipulating a Guidelines fine range between $19.3 million and $38.6 million); *United States v. Dallas Airmotive, Inc.*, 3:14-cr-483, Deferred Prosecution Agreement ¶ 7 (stipulating a Guidelines fine range between $17.5 million and $35 million); *United States v. ZAO Hewlett-Packard A.O.*, 14-cr-201, Deferred Prosecution Agreement ¶ 38 (N.D. Cal. Apr. 9, 2014) (stipulating a Guidelines fine range between $87 million and $104 million); *United States v. Alcoa World Alumina LLC*, No. 2:14-cr-00007-DWA, Plea Agreement ¶ 34 (W.D. Pa. Jan. 9, 2014) (stipulating a Guidelines fine range between $446 million and $892 million); *United States v. Siemens AG*, No. 1:08-cr-367-RJL, Plea Agreement ¶ 4 (D.D.C. Dec. 15, 2008) (stipulating a Guidelines fine range between $1.35 billion and $2.7 billion).

9. *See* DOJ Press Rel. 14-019, Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay $223 Million in Fines and Forfeiture (Jan. 9, 2014), http://www.justice.gov/opa/pr/alcoa-world-alumina-agrees-plead-guilty-foreign-bribery-and-pay-223-million-fines-and; *United States v. Siemens AG*, No. 1:08-cr-367-RJL, Department's Sentencing Memorandum at 18 (D.D.C. Dec. 15, 2008).

Continued from page 5

Corporate Resolution	Agreed DOJ Fine	Percent of U.S. Sentencing Guidelines Maximum	Percent of U.S. Sentencing Guidelines Minimum
Alstom, S.A.	$772,290,000	72.5 percent	145.0 percent
Marubeni Corporation	$88,000,000	69 percent	138.0 percent
Avon Products (China) Co. Ltd.	$67,648,000	45.7 percent	91.4 percent
HP Poland	$15,450,224	40.0 percent	80.0 percent
Dallas Airmotive, Inc.	$14,000,000	40.0 percent	80.0 percent
HP Russia	$58,772,250	33.7 percent	67.5 percent
Alcoa World Alumina LLC	$209,000,000	23.4 percent	46.8 percent
Siemens AG	$450,000,000	16.7 percent	33.3 percent

B. Individual Enforcement

As in 2013, the government last year emphasized the importance of pursuing individual enforcement actions and concluded a number of pending actions against individuals, such as Frederic Cilins and the two Noble executives whose cases had not yet been resolved. The SEC and DOJ each concluded six cases against individuals with settlements, default judgments, or guilty pleas.

A number of these cases involved multiple executives from the same companies; Benito Chinea and Joseph DeMeneses, for example, became the fifth and sixth individual defendants to plead guilty in connection with the DirectAccess bribery scheme. The government also resolved prosecutions of foreign-national bribe takers, including Asem Elgawhary, a bribe recipient in the Alstom case, as well as a member of the Indian Parliament accused of taking bribes in connection with the issuance of mining licenses.

III. Key Observations Relating to 2014 U.S. Enforcement Actions

A. Continued Incentives for Corporate Cooperation

The DOJ and SEC continued to encourage companies to self-report and cooperate fully throughout the course of a government investigation, appearing to extract more significant penalties from companies perceived as uncooperative.

Last year's largest penalty – a $772 million criminal fine agreed to by Alstom – was, at least according to the DOJ, negatively affected by the company's failure

Continued on page 7

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 6

to self-report and its weak initial cooperation efforts. The DOJ noted in the plea agreement with Alstom that the company "failed to voluntarily disclose the conduct even though it was aware of related misconduct at Alstom Power, Inc., a U.S. subsidiary, which entered into a resolution for corrupt conduct in connection with a power project in Italy several years prior to the Department reaching out to Alstom regarding its investigation," and "initially failed to cooperate with the Department's investigation, responding only to the Department's subpoenas to the Defendant's subsidiaries."[10] And, in its plea agreement levying an $88 million fine against Alstom's alleged co-conspirator, Japanese company Marubeni, the DOJ cited Marubeni's lack of voluntary disclosure, and its lack of cooperation when given the option to cooperate, as factors considered by the DOJ in determining the penalty.[11]

"The DOJ entered into an instructive non-prosecution agreement with Bio-Rad, a California-based medical diagnostics and life sciences manufacturing and sales company alleged to have falsified its books and records and to have failed to implement adequate internal controls in connection with sales it made in Russia."

By contrast, the DOJ and SEC declined to charge or entered into non-prosecution agreements with companies that the government viewed as having fully cooperated. Throughout the year, several DOJ officials touted as a model cooperator PetroTiger Ltd., which self-reported the involvement of its two co-CEOs and general counsel in an alleged scheme to pay bribes to a Colombian official to secure a $39 million oil services contract.[12] In an address last November, Assistant Attorney General Leslie Caldwell cited PetroTiger as "a fine example of the kind of cooperation we expect," noting in particular the company's willingness to provide "facts about the individuals responsible for the misconduct, no matter how high their rank may be."[13] No charges were filed against PetroTiger.

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Continued on page 8

10. *United States v. Alstom, S.A.*, No. 3:14-cr-00246-JBA, Plea Agreement ¶ 18 (D. Conn. Dec. 22, 2014).
11. DOJ Press Rel. 14-290, Marubeni Corporation Agrees to Plead Guilty to Foreign Bribery Charges and to Pay an $88 Million Fine (Mar. 19, 2014), http://www.justice.gov/opa/pr/marubeni-corporation-agrees-plead-guilty-foreign-bribery-charges-and-pay-88-million-fine.
12. Leslie R. Caldwell, Assistant Attorney Gen., Criminal Division, DOJ, Address at the American Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014), http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-conference-institute-s-31st [hereinafter "Caldwell ACI Address"]; Marshall L. Miller, Principal Deputy Assistant Attorney Gen., Criminal Division, DOJ, Address at the Global Investigations Review Live (Sept. 17, 2014), http://www.justice.gov/criminal/pr/speeches/2014/crm-speech-1409171.html [hereinafter "Miller Address"]; David A. O'Neil, then-Deputy Assistant Attorney Gen., Criminal Division, DOJ, Address at the Southeastern White Collar Crime Institute (Sept. 12, 2014), http://www.justice.gov/opa/speech/remarks-deputy-assistant-attorney-general-criminal-division-david-oneil-southeastern [hereinafter "O'Neil Address"].
13. Caldwell ACI Address, note 12, *supra*.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 7

company alleged to have falsified its books and records and to have failed to implement adequate internal controls in connection with sales it made in Russia. Bio-Rad's self-reporting and extensive cooperation was cited as forming a "large part" of the basis for the DOJ's decision to enter into a non-prosecution agreement with the company, with the government explicitly noting the company's decision to "voluntarily mak[e] U.S. and foreign employees available for interviews, voluntarily produc[e] documents from overseas, and summariz[e] the findings of its internal investigation."[14] Bio-Rad's cooperation efforts were also cited as the reason that the SEC declined to impose any civil penalty in addition to the $40.7 million assessed in disgorgement and interest.[15]

Several other companies against which enforcement actions were brought also appeared to reap the benefits of cooperation in the form of reduced penalties. In announcing its plea agreement with Alcoa, the DOJ cited the company's "extensive cooperation," including a comprehensive internal investigation, proffers, and making available current and former employees for interviews and producing documents, as a factor that reduced the size of the $223 million criminal fine and forfeiture sum.[16] In an address last October, Assistant Attorney General Caldwell gave context to the reduction, stating that, "absent cooperation, Alcoa could have faced a fine of more than $1 billion."[17] Similarly, in the SEC enforcement arena, both Bruker Corporation and Layne Christensen paid relatively small civil penalties of $375,000, which the SEC said reflected the companies' cooperation in their respective cases.[18]

Although the DOJ and SEC have been criticized for a lack of transparency in identifying the degree of credit both self-disclosure and robust cooperation can generate for a corporate defendant, the foregoing illustrates that, at a minimum, the agencies will seek to incentivize companies to self-report violations on a timely basis, and that they will expect companies to conduct a thorough investigation of the misconduct, to make available witnesses and documents, including those located overseas, and, critically, to assist the government in identifying and providing

Continued on page 9

14. DOJ Press Rel. 14-1221, Bio-Rad Laboratories Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $14.35 Million Penalty (Nov. 3, 2014), http://www.justice.gov/opa/pr/bio-rad-laboratories-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-1435.

15. SEC Press Rel. 2014-245, SEC Charges California-Based Bio-Rad Laboratories with FCPA Violations (Nov. 3, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543347364#.VLDBWIrF-Bs.

16. DOJ Press Rel. 14-019, note 9, *supra*.

17. Leslie R. Caldwell, Assistant Attorney Gen., Criminal Division, DOJ, Address at the 22nd Annual Ethics and Compliance Conference (Oct. 1, 2014), http://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-22nd-annual-ethics [hereinafter "Caldwell Ethics and Compliance Conference Address"].

18. SEC Press Rel. 2014-280, SEC Charges Massachusetts-Based Scientific Instruments Manufacturer with FCPA Violations (Dec. 15, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543708934#.VLDA3IrF-Bs; SEC Press Rel. 2014-240, SEC Charges Texas-Based Layne Christensen Company with FCPA Violations (Oct. 27, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543291857#.VLCofIrF-Bt.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 8

evidence concerning the individuals responsible for the violations.[19]

B. Increased Coordination with Non-U.S. Law Enforcement

As non-U.S. governments, including Brazil, which implemented its 2013 Clean Company Law,[20] and China, which also made headlines by its actions against western life sciences firms,[21] ramped up enforcement, U.S. enforcement personnel increasingly noted the cooperation provided by foreign regulators in U.S. anti-bribery prosecutions.

In no fewer than eight of last year's cases did the DOJ expressly thank foreign law enforcement officials for their assistance with the investigations.[22] In many of those cases, foreign authorities not only cooperated with the United States by extraditing individual defendants, but also conducted their own investigations and prosecuted foreign nationals involved in the schemes.[23] DOJ officials have also noted that their "deepening relationships with foreign governments" have allowed them to overcome companies' claims of being unable to gather foreign documents as a result of foreign data protection laws, a key development in cross-border investigations.[24]

The proliferation of non-U.S. anti-bribery prosecutions and increased cross-border coordination among law enforcement officials around the world not only has implications for companies navigating multiple parallel investigations, but may also affect whether and how the DOJ chooses to prosecute extraterritorial activity.

The Alstom and SBM Offshore cases starkly illustrated this phenomenon. In the former matter, the DOJ indicated its willingness to defer to the World Bank's investigation, which had already led to the appointment of a corporate monitor, by not requiring a second monitor if the company complied with its World Bank

Continued on page 10

19. *See* Section III.D, *infra*.
20. *See* Section VII.E, *infra*.
21. *See* Section VII.C, *infra*.
22. DOJ Press Rel. 14-1448, Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery; DOJ Press Rel. 14-1383, Dallas Airmotive Inc. Admits Foreign Corrupt Practices Act Violations and Agrees to Pay $14 Million Criminal Penalty (Dec. 10, 2014), http://www.justice.gov/opa/pr/dallas-airmotive-inc-admits-foreign-corrupt-practices-act-violations-and-agrees-pay-14; DOJ Press Rel. 14-1357, Former Bechtel Executive Pleads Guilty in Connection with a $5.2 Million Kickback Scheme (Dec. 4, 2014), http://www.justice.gov/opa/pr/former-bechtel-executive-pleads-guilty-connection-52-million-kickback-scheme; DOJ Press Rel. 14-358, Hewlett-Packard Russia Agrees to Plead Guilty to Foreign Bribery (Apr. 9, 2014), http://www.justice.gov/opa/pr/hewlett-packard-russia-agrees-plead-guilty-foreign-bribery; DOJ Press Rel. 14-333, Six Defendants Indicted in Alleged Conspiracy to Bribe Government Officials in India to Mine Titanium Minerals (Apr. 2, 2014), http://www.justice.gov/opa/pr/six-defendants-indicted-alleged-conspiracy-bribe-government-officials-india-mine-titanium; DOJ Press Rel. 14-290, note 11, *supra*; DOJ Press Rel. 14-019, note 9, *supra*; DOJ Press Rel. 14-007, Foreign Bribery Charges Unsealed Against Former Chief Executive Officers of Oil Services Company (Jan. 6, 2014), http://www.justice.gov/opa/pr/foreign-bribery-charges-unsealed-against-former-chief-executive-officers-oil-services-company.
23. For example, in connection with the Alstom case, Indonesian authorities charged a former Parliament member with accepting bribes; he was found guilty and sentenced to three years in prison. DOJ Press Rel. 14-1448, note 22, *supra*. In the PetroTiger case, the United States received significant assistance from Colombian authorities, which charged a PetroTiger employee in Colombia for his involvement in the scheme and are continuing to investigate the case. *See* Caldwell ACI Address, note 12, *supra*.
24. *See* Miller Address, note 12, *supra*; *see also* Caldwell ACI Address, note 12, *supra*.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 9

settlement's monitoring process. In the latter case, the DOJ declined to prosecute in the wake of an enforcement action by the Netherlands. How the DOJ will respond in the face of future parallel investigations remains to be seen. Recent comments by DOJ officials indicate that the department will evaluate its approach on a case-by-case basis, with an eye towards avoiding competition with other governments for the role of bringing particular cases or, relatedly, inappropriately meting out "double-punish[ment]."[25]

C. Cases Against Bribe Takers

The DOJ in 2014 also vigorously prosecuted foreign-bribe recipients and pursued proceeds of corruption via the Kleptocracy Asset Recovery Initiative, in which forfeiture actions have been used to recover bribe payments to foreign officials.

In connection with its investigation of Alstom, the DOJ filed criminal charges against Asem Elgawhary, a former executive of a joint venture working on behalf of the state-owned Egyptian Electricity Holding Company, for his acceptance of $5.2 million in kickbacks from Alstom and other power companies in exchange for providing them with an unfair advantage in the bidding process. In December 2014, Elgawhary pleaded guilty in the U.S. District Court for the District of Maryland to mail fraud, conspiring to launder money, and tax fraud.[26] Likewise, the DOJ resolved charges against Alfonso Portillo, the former president of Guatemala, for taking $2.5 million in bribes from Taiwan in exchange for continuing to recognize the country diplomatically. He pleaded guilty in March 2014 to one count of money laundering.[27]

In respect to the Kleptocracy Asset Recovery Initiative, the DOJ last year announced the successful resolution of four pending forfeiture actions involving individuals from Africa and Asia, yielding more than $511 million in recoveries,

Continued on page 11

25. "Transcript: Leslie Caldwell Q&A at the American Conference Institute's 2014 FCPA Conference," *Main Justice: Just Anti-Corruption* (Nov. 19, 2012), http://www.mainjustice.com/justanticorruption/2014/11/19/assistant-attorney-general-leslie-caldwell-answers-questions-at-fcpa-conference.

26. DOJ Press Rel. 14-1357, note 22, *supra*.

27. Portillo was indicted in 2010 and extradited to the United States last year. Nate Raymond, "Ex-Guatemalan Leader Admits Taking Taiwan Bribes in U.S. Court," *Reuters* (Mar. 18, 2014), http://www.reuters.com/article/2014/03/18/us-guatemala-portillo-idUSBREA2H1QD20140318. Also of note is the successful prosecution in 2013 of another bribe recipient, Maria De Los Angeles Gonzalez De Hernandez, a senior official of Venezuela's state economic development bank, Banco de Desarrollo Económico y Social de Venezuela ("BANDES"), for her role in facilitating trading business to Direct Access Partners, for which she received $5 million in kickbacks. *See* Section VI.A.3, *infra*.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 10

as well as the initiation of a new action against Chad's former ambassador to the United States and Canada.[28] Most notable were the court-ordered forfeiture of more than $480 million in assets from now-deceased Nigerian dictator Sani Abacha, and the settlement of a forfeiture action filed in 2011 against Teodoro Nguema Obiang Mangue, the Second Vice President of the Republic of Equatorial Guinea, pursuant to which Mangue must forfeit U.S-based property worth $30 million, as well as the sum of $1 million, representing the value of Michael Jackson memorabilia already removed from the United States.[29] Assistant Attorney General Caldwell stated recently that the Kleptocracy Initiative's "successes demonstrate that we are ready, willing, and able to confiscate the riches of corrupt leaders who drain the resources of their countries for their own benefit," suggesting that this trend will likely continue in 2015.[30]

For companies, the significance of the Kleptocracy Initiative is two-fold. First, to the extent the initiative reduces the incidence of bribe-seeking, it has a potential, at least at the margin, to ameliorate the risks of operating in those countries where

"[I]nvestigations of bribe takers may lead to multiple new enforcement matters, raising the risks even higher in those markets whose government leaders are known to solicit bribes."

the word has gotten out to local officials. But much more likely would need to be done for the initiative to give rise to any significant reduction in the size of compliance budgets or the allocation of compliance resources.

Second, and in the short run more likely, the initiative and the prosecution of bribe

Continued on page 12

28. DOJ Press Rel. 14-1240, Department of Justice Seeks Recovery of Approximately $100,000 in Bribes Paid to Former Chad Ambassador (Nov. 7, 2014), http://www.justice.gov/opa/pr/department-justice-seeks-recovery-approximately-100000-bribes-paid-former-chad-ambassador; DOJ Press Rel. 14-1114, Second Vice President of Equatorial Guinea Agrees to Relinquish More than $30 Million of Assets Purchased with Corruption Proceeds (Oct. 10, 2014), http://www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agrees-relinquish-more-30-million-assets-purchased; DOJ Press Rel. 14-927, Justice Department Seizes an Additional $500,000 in Corrupt Assets Tied to Former President of Republic of Korea (Sept. 3, 2014), http://www.justice.gov/opa/pr/justice-department-seizes-additional-500000-corrupt-assets-tied-former-president-republic; DOJ Press Rel. 14-835, U.S. Forfeits over $480 Million Stolen by Former Nigerian Dictator in Largest Forfeiture Ever Obtained Through a Kleptocracy Action (Aug. 7, 2014), http://www.justice.gov/opa/pr/us-forfeits-over-480-million-stolen-former-nigerian-dictator-largest-forfeiture-ever-obtained.

29. DOJ Press Rel. 14-1114, note 28, *supra*; DOJ Press Rel. 14-230, U.S. Freezes More than $458 Million Stolen by Former Nigerian Dictator in Largest Kleptocracy Forfeiture Action Ever Brought in the U.S. (Mar. 5, 2014), http://www.justice.gov/opa/pr/us-freezes-more-458-million-stolen-former-nigerian-dictator-largest-kleptocracy-forfeiture.

30. Caldwell ACI Address, note 12, *supra*.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 11

takers presents yet another potential avenue for surfacing evidence of corruption (and potential FCPA violations) as targeted foreign officials engage in their own cooperation calculus. Just as investigation of specific third-party intermediaries can lead to wider investigation of the multiple FCPA-covered entities with whom they deal, or even an industry "sweep," investigations of bribe takers may lead to multiple new enforcement matters, raising the risks even higher in those markets whose government leaders are known to solicit bribes.

D. New Focus on Corporate Cooperation in Prosecuting Individuals

The number of individual prosecutions held fairly steady from 2013 to 2014. But in 2014, DOJ personnel put new emphasis on obtaining evidence from companies that the DOJ can use to prosecute the individuals responsible for a company's allegedly illegal actions.

Until recently, corporate cooperation credit analysis tended to focus more on a company's voluntary disclosure of corporate malfeasance and robust provision of information gleaned from internal investigations and less on the specific assistance proffered with regard to potential charges against individual responsible employees.

Last year, however, several DOJ officials stated that, to receive full cooperation credit following a self-report, a company must demonstrate that it undertook significant efforts to identify the individuals responsible for the misconduct and that it provided the DOJ any facts and evidence that could lead to their prosecution.[31]

Although this shift in attention comes largely in response to public criticism regarding a perceived dearth of individual prosecutions in the wake of the financial crisis,[32] DOJ officials have used FCPA cases to illustrate their point, citing again last year the 2012 declination in the Morgan Stanley case, and, specifically, the bank's assistance in identifying Garth Peterson as the individual executive responsible for FCPA violations in China, as well as last year's declination in the PetroTiger case, after the company brought the actions of its co-chief executive officers and general counsel to the DOJ's attention.[33] As noted above, in her November 2014 address, Assistant Attorney General Caldwell called attention to PetroTiger's provision of "facts about the individuals responsible for the misconduct, no matter how high their rank may be" as a key factor in the DOJ's decision to not prosecute the company.[34]

Continued on page 13

31. Caldwell Ethics and Compliance Conference Address, note 17, *supra*; Miller Address, note 12, *supra*; O'Neil Address, note 12, *supra*.
32. *See* Eric Holder, Attorney Gen., Remarks on Financial Fraud Prosecutions at New York University School of Law (Sept. 17, 2014), http://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law.
33. Caldwell ACI Address, *See* note 12, *supra*; *see also* Caldwell Ethics and Compliance Conference Address, note 17, *supra*; Miller Address, note 12, *supra*; O'Neil Address, note 12, *supra*.
34. Caldwell ACI Address, note 12, *supra*.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 12

Multinational firms with significant FCPA compliance issues likely will not be able to run the risk of awaiting further indication of how serious the government is about the need for companies to assist in providing evidence about responsible individuals. Those firms, guided by counsel, will need to address the impact of the DOJ's new emphasis on any internal investigations they conduct, particularly with respect to the interactions between employee witnesses and in-house and/or outside counsel, as the perception of a more adversarial and mistrustful relationship may have significant effects on the tenor, pace, and reliability of those investigations.[35]

The government's focus on individual prosecutions is not without its benefits, however. First, as a theoretical matter, there ought not be any corporate criminal resolution absent an individual who has committed a crime. Thus, the DOJ's focus on identifying individual wrongdoers could help impose some discipline and reduce the incidence of corporate criminal resolutions that have no prosecuted wrongdoers. Second, in stark contrast to cases involving charges against corporations, charges against individuals are far more likely to result in adversarial proceedings, judicial review, and trials, all of which may have a beneficial impact on development of the law.[36] This is particularly helpful in the FCPA context, where judicial guidance remains largely absent, and companies must rely primarily on guidance issued by the DOJ and SEC, discounted by the law actually handed down in judicial decisions in non-FCPA cases that might have impact, by analogy, or on specific issues in enforcement generally.

E. The SEC's Continued Use of Administrative Proceedings

As it did in 2013, the SEC continued to resolve a significant portion of its FCPA docket through administrative orders. Of the seven FCPA-related enforcement actions it brought in 2014, the SEC invoked administrative proceedings to resolve six of them, with only the Avon settlement being subject to federal court approval. The cases resolved by administrative proceeding included those that were brought in parallel with DOJ criminal proceedings against Alcoa, Bio-Rad, and Hewlett-Packard. The SEC obtained in those cases a total of roughly $236 million (primarily attributable to Alcoa's $161 million disgorgement), indicating that the SEC

Continued on page 14

35. *See* Sean Hecker, Andrew M. Levine, Bruce E. Yannett, David Sarratt, and Blair R. Albom, "DOJ Officials Encourage Companies to Cooperate Against Potentially Culpable Individuals," *FCPA Update*, Vol. 6, No. 2 (Sept. 2014), http://www.debevoise.com/~/media/files/insights/publications/2014/09/fcpa_udate_september2014.pdf.

36. *Id.*; *see also* Matthew E. Fishbein, "Why Individuals Aren't Prosecuted for Conduct Companies Admit," *New York Law Journal* (Sept. 19, 2014), http://www.newyorklawjournal.com/id=1202670499295/Why-Individuals-Arent-Prosecuted-for-Conduct-Companies-Admit?slreturn=20150021112830.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global
Continued from page 13

continues to view administrative proceedings as appropriate even for major alleged violations, an apparent agency position that will continue to fuel the debate about the proper role of administrative proceedings in FCPA (as well as other) SEC enforcement actions.

Yet despite the concerns that have been raised, SEC officials, such as Director of Enforcement Andrew J. Ceresney, have stressed that the principal new aspect of administrative enforcement is that the agency is "simply making use of the administrative forum in cases where we previously could only obtain penalties in federal district court," and that administrative proceedings are fair as well as efficient.[37]

IV. Major Corporate Resolutions of 2014

A. Alstom, S.A.

On December 22, 2014, Alstom admitted to having violated the FCPA by falsifying its books and failing to maintain adequate internal controls, and pleaded guilty to the charges brought against it by the DOJ in the United States District Court for the District of Connecticut.[38] As part of the plea, Alstom agreed to pay the largest criminal fine ever levied in an FCPA enforcement action – $772 million – making Alstom the second largest FCPA settlement in history.

Although the allegations against Alstom were not surprising given the bribery risks in the energy and transportation markets in which Alstom operates, Alstom's alleged violations were notable for their alleged duration and geographic reach. In announcing the settlement on December 22, 2014, Deputy Attorney General James Cole focused on the alleged pervasiveness of the company's corrupt practices, noting that "Alstom's corruption scheme was sustained over more than a decade and across several continents. It was breathtaking in its breadth, its brazenness, and its worldwide consequences. And it is both my expectation – and my intention – that the comprehensive resolution we are announcing today will send an unmistakable message to other companies around the world . . . ."[39]

Indeed, in announcing the settlement, the DOJ noted how its prosecution of related employees had proceeded apace even in the absence of the company's robust cooperation. On July 17, 2014, William Pomponi, a former sales executive at

Continued on page 15

37. "SEC Official Andrew Ceresney Defends Agency's Enforcement Policies at Business Law Fall Meeting," *ABA News* (Nov. 25, 2014), http://www.americanbar.org/news/abanews/aba-news-archives/2014/11/sec_official_andrew0.html." from "*ABA News*, "SEC Official Andrew Ceresney Defends Agency's Enforcement Policies at Business Law Fall Meeting" (Nov. 25, 2014), http://www.americanbar.org/news/abanews/aba-news-archives/2014/11/sec_official_andrew0.html."

38. DOJ Press Rel. 14-1448, note 22, *supra*.

39. James M. Cole, Deputy Attorney Gen., DOJ, Remarks at Press Conference Regarding Alstom Bribery Plea (Dec. 22, 2014), http://www.justice.gov/opa/speech/remarks-deputy-attorney-general-james-m-cole-press-conference-regarding-alstom-bribery.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 14

Alstom Power, Inc., a Connecticut-based subsidiary of Alstom, S.A., pleaded guilty to conspiring to violate the FCPA in connection with the awarding of a power project in Indonesia.[40] According to charges first filed in July 2013, Pomponi and other executives, through third-party consultants, paid bribes to Indonesian officials, including a member of the Indonesian Parliament and high-ranking members of Indonesia's state-owned electricity company, to help secure a $118 million contract, known as the Tarahan project, to provide power-related services to Indonesian citizens.[41] Pomponi is to be sentenced following the June 2015 scheduled trial of his co-defendant Lawrence Hoskins, former senior vice president for Alstom's Asia region, against whom FCPA and money laundering charges remain pending.[42]

Pomponi is the fourth individual defendant to plead guilty to charges stemming from the DOJ's investigation. In 2012 and 2013, two former sales executives, Frederic Pierucci and David Rothschild, each pleaded guilty to one count of conspiring to violate the FCPA and one count of violating the FCPA.[43] These prosecutions, along with the Elgawhary prosecution against an alleged bribe taker in the Alstom matter,[44] give teeth to the notion that the window for seeking corporate cooperation credit may not be open for long, and, if DOJ has to prosecute individuals without their employer's full cooperation, there may be potentially severe consequences for the company.

"These prosecutions . . . give teeth to the notion that the window for seeking corporate cooperation credit may not be open for long, and, if DOJ has to prosecute individuals, without their employer's full cooperation, there may be potentially severe consequences for the company."

Continued on page 16

40. DOJ Press Rel. 14-752, Former Executive of French Power Company Subsidiary Pleads Guilty in Connection with Foreign Bribery Scheme (Jul. 17, 2014), http://www.justice.gov/opa/pr/former-executive-french-power-company-subsidiary-pleads-guilty-connection-foreign-bribery.

41. *Id.*

42. *United States v. Pierucci*, 12-cr-238-JBA, Order (D. Conn. Sept. 18, 2014).

43. *United States v. Pierucci*, No. 3:12-cr-238-JBA, Plea Agreement (D. Conn. July 29, 2013), http://www.justice.gov/criminal/fraud/fcpa/cases/pieruccif/de46-pierucci-plea-agreement.pdf; *United States v. Rothschild*, No. 3:12-cr-223-WWE, Plea Agreement (D. Conn. Nov. 2, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/rothschildd/rothschild-guilty-plea.pdf.

44. DOJ Press Rel. 14-1357, note 22, *supra*. *See also* Joel Schectman, "Former Bechtel Executive Changes Bribery Plea to Guilty," *Wall Street Journal Risk & Compliance Blog* (Dec. 5, 2014), http://blogs.wsj.com/riskandcompliance/2014/12/05/former-bechtel-executive-changes-plea-to-guilty-over-bribery-charges/.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global
Continued from page 15

B. Alcoa World Alumina LLC

On January 9, 2014, both the SEC and DOJ announced settlements with Alcoa and its subsidiaries. One such subsidiary pleaded guilty in the United States District Court for the Western District of Pennsylvania to bribing members of Bahrain's royal family and other government officials in conjunction with its alumina contracts.[45]

According to the government, two Alcoa subsidiaries made improper payments to government officials in Bahrain through a middleman, in the course of supplying alumina to a government-controlled company, Aluminum Bahrain B.S.C. ("Alba").[46] In numerous transactions, this middleman was alleged to have acted either as a consultant, who was paid a "commission" by the Alcoa subsidiaries, or a distributor, who distributed the Alcoa alumina at a marked-up price through one of his shell companies.[47] In both instances, the middleman was alleged to have used the funds from Alcoa to pay bribes in an effort to secure business and to enrich himself.[48]

In particular, the government focused on a 2004 transaction in which Alba and the Alcoa entities codified the role of the middleman as a sham distributor in a supply agreement between the two entities. This transaction was voluntarily disclosed by Alcoa to the DOJ in February 2008.[49] Alcoa then conducted an internal investigation and worked to strengthen compliance and otherwise to remediate violations.

Alcoa agreed to pay $384 million in fines and disgorgements,[50] making the resolution the then-fifth-largest FCPA settlement ever (since dropping to sixth following the Alstom matter).[51] Despite the enormity of the agreed financial impact, the DOJ stated – first in its court filings and later in speeches by its representatives[52] – that the penalty had been significantly reduced as a result of the extent of Alcoa's cooperation with the government. The DOJ also commended Alcoa's diligent internal investigation and voluntary disclosure of relevant information.[53]

Continued on page 17

45. *See* DOJ Press Rel. 14-019, note 9, *supra*; SEC Press Rel. 2014-3, SEC Charges Alcoa with FCPA Violations (Jan. 9. 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936#.VK_zpNLwuM8.
46. *See In the Matter of Alcoa, Inc.*, SEC Admin. Pro. 3-15673, Order Instituting Cease-and-Desist Proceedings, Section III (Jan. 9, 2014), http://www.sec.gov/litigation/admin/2014/34-71261.pdf.
47. *See id.*
48. *See id.*
49. *See* DOJ Press Rel. 14-019, note 9, *supra*.
50. The amount paid to the SEC was ultimately reduced by $14 million, based on the forfeiture that Alcoa paid to the DOJ. *See In the Matter of Alcoa, Inc.*, SEC Admin. Pro. 3-15673, Order Instituting Cease-and-Desist Proceedings, Section IV(b) (Jan. 9, 2014), http://www.sec.gov/litigation/admin/2014/34-71261.pdf.
51. Julia DiMauro, "Alcoa Settles FCPA Charge, Pays $384 Million to DOJ, SEC," *FCPA Blog* (Jan. 9, 2014), www.fcpablog.com/blog/2014/1/9/alcoa-settles-fcpa-charge-pays-384-million-to-doj-sec.html.
52. Caldwell Ethics and Compliance Conference Address, note 17, *supra*.
53. *Id.*

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global
Continued from page 16

C. Marubeni Corporation

Having paid a $54.6 million dollar fine in 2012 under a deferred prosecution agreement to resolve charges of aiding and abetting FCPA violations in a Nigerian joint-venture,[54] Japanese company Marubeni pleaded guilty to a new round of FCPA charges on March 19, 2014, specifically, to one count of conspiracy to violate the FCPA and seven additional FCPA-related violations, after admitting to paying bribes to high-ranking government officials in Indonesia in order to secure a lucrative electricity contract for itself and its partner, Alstom.[55] According to the government, the bribes were paid through consultants, whose commissions were allotted based on their willingness to bribe officials at the company's instruction.[56]

In contrast to the Alcoa investigation, which was hailed by the DOJ as exemplary in terms of agency cooperation and voluntary disclosure of relevant information, the DOJ cited Marubeni's lack of cooperation and failure to voluntarily disclose as a factor in determining the penalty.[57] In public statements, DOJ officials described the Marubeni case as a cautionary tale for foreign companies that wish to do business in the United States.[58]

D. Hewlett-Packard

On April 9, 2014, Hewlett-Packard reached a settlement with the DOJ and SEC to resolve bribery charges surrounding the company's business in Russia, Poland, and Mexico. The government alleged that Hewlett-Packard's Russian subsidiary used agents to pay more than $2 million in bribes in order to retain a lucrative government contract.[59] A similar scheme was alleged in Poland, where more than $600,000 in gifts and bribes were allegedly paid to government officials to obtain contracts with Poland's police agency.[60] In Mexico, inflated commissions were allegedly paid to a third party with the understanding that the money would be passed along to Mexican officials in order to win a bid to supply software to a state-owned oil company.[61]

Continued on page 18

54. DOJ Press Rel. 12-060, Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $54.6 Million Criminal Penalty (Jan. 17, 2012), http://www.justice.gov/opa/pr/marubeni-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-546.
55. DOJ Press Rel. 14-290, note 11, *supra*.
56. *Id.*
57. *Id.*
58. Caldwell ACI Address, note 12, *supra*; Miller Address, note 12, *supra*; O'Neil Address, note 12, *supra*.
59. SEC Press Rel. 2014-73, SEC Charges Hewlett-Packard with FCPA Violations (Apr. 9, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541453075#.VLAiOdLwuM9.
60. *Id.*
61. *Id.*

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 17

Hewlett-Packard agreed with the SEC to pay $29 million in disgorgement and $5 million in pre-judgment interest and with the DOJ to pay a $74.2 million fine.[62] The company consented to findings by the SEC of books and records and internal controls violations, and its Russian subsidiary pleaded guilty to criminally violating the FCPA.[63]

This case was noteworthy for the roles played by other governments, such as those in Germany and Poland, whose investigations had resulted in individual prosecutions in those jurisdictions. The DOJ touted this case as an example of the synergies achieved through cross-border government coordination during investigations.[64]

E. Bio-Rad Laboratories

On November 3, 2014, Bio-Rad Laboratories entered into a non-prosecution agreement with the DOJ and consented to an administrative order by the SEC, thereby resolving bribery and related allegations concerning its business in Russia, Vietnam, and Thailand. The thrust of the government's allegations related to alleged inadequate internal controls and poor recordkeeping that permitted Bio-Rad to ignore red flags that signaled bribe payments.[65]

In connection with the non-prosecution agreement, Bio-Rad agreed to pay a $14.35 million penalty, periodically to report to the DOJ for a period of two years, and to strengthen its compliance and internal controls procedures.[66] The DOJ explicitly stated that the decision to offer a non-prosecution agreement was the product of Bio-Rad's voluntary disclosure, full cooperation with the department, and strong remediation efforts once it discovered the improper conduct.[67]

Bio-Rad agreed with the SEC to cease and desist from violating the FCPA and to pay disgorgement of $40.7 million, the tenth-largest disgorgement of all time.[68]

F. Dallas Airmotive, Inc.

On December 10, 2014, Dallas Airmotive entered into a deferred prosecution agreement with the DOJ after admitting FCPA violations relating to conduct involving its aircraft maintenance business in a number of Latin American countries.[69]

Continued on page 19

62. *Id.*
63. *See id.*; DOJ Press Rel. 14-358, note 22, *supra*.
64. DOJ Press Rel. 14-358, note 22, *supra*.
65. DOJ Press Rel. 14-1221, note 14, *supra*.
66. *Id.*
67. *Id.*
68. *See In the Matter of Bio-Rad Labs.*, SEC Admin. Pro. 3-16231 Order Instituting Cease-and-Desist Proceedings, Section IV, http://www.sec.gov/litigation/admin/2014/34-73496.pdf.
69. DOJ Press Rel. 14-1383, note 22, *supra*.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 18

According to the criminal information filed in conjunction with the settlement, Dallas Airmotive used a variety of mechanisms to pay bribes to high-ranking foreign officials in order to retain government business in countries including Brazil, Peru, and Argentina, allegedly entering into sham agreements with front companies owned by government actors, using third parties to make impermissible payments to foreign officials, and directly providing things of value to those officials.[70] Ultimately, the company paid a $14 million criminal penalty to resolve the charges brought against it in Texas federal court, which included one count of conspiring to violate the FCPA and one count of violating the Act's anti-bribery provisions.[71]

"The amounts assessed against Avon for the alleged FCPA violations totaled over $135 million, making it the third-largest FCPA settlement ever with a U.S. company. Furthermore, according to *The Wall Street Journal*, the internal investigation launched by the company cost Avon an additional $340 million."

G. Avon

On December 17, 2014, Avon Products Inc. ("Avon") settled with the DOJ and the SEC, resolving FCPA charges arising out of alleged improper payments made by Avon's subsidiary in China (Avon Products (China) Co. Ltd. ("Avon China")) between 2004 and 2008.[72] The government's allegations were two-fold. First, the Avon subsidiary had made a number of improper payments to government officials in China in order to obtain the first direct selling license in that country after a new set of regulations allowed for the issuance of such licenses.[73] Second, Avon became aware of these improper payments as early as 2005, but failed to report or remediate the practices that allowed for these improper payments, instead covering up the issues and allowing them to continue.[74]

Continued on page 20

70. *Id.*; *see also United States v. Dallas Airmotive, Inc.*, No. 3-14CR-483-D, Criminal Information (N.D. Tex. Oct. 10, 2014), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/10/information_dallas_airmotive_inc.pdf.

71. DOJ Press Rel. 14-1383, note 22, *supra.*

72. *See* SEC Press Rel. 2014-285, SEC Charges Avon with FCPA Violations (Dec. 17, 2014), http://www.sec.gov/news/pressrelease/2014-285.html#.VJnFUoAA; DOJ Press Rel. 14-1419, Avon China Pleads Guilty to Violating the FCPA by Concealing More than $8 Million in Gifts to Chinese Officials (Dec. 17, 2014), http://www.justice.gov/opa/pr/avon-china-pleads-guilty-violating-fcpa-concealing-more-8-million-gifts-chinese-officials.

73. SEC Press Rel. 2014-285, note 72, *supra*.

74. *Id.*

Continued from page 19

In resolving its criminal charges, Avon entered into a three-year deferred prosecution agreement with the DOJ, admitting to the improper payments and accounting failures. The company agreed to pay $67,648,000 in criminal penalties, and consented to future cooperation with the government and to monitoring for at least 18 months.[75] Avon China pleaded guilty to conspiring to violate the FCPA's accounting provisions.[76] Avon itself agreed in an SEC settlement to disgorge $67,365,013.[77] The amounts assessed against Avon for the alleged FCPA violations totaled over $135 million, making it the third-largest FCPA settlement ever with a U.S. company. Furthermore, according to *The Wall Street Journal*, the internal investigation launched by the company cost Avon an additional $340 million.[78]

Avon was another case in which the government seized the opportunity to send a message to similarly situated corporations about voluntary disclosure. Although the DOJ noted in the case documents Avon's cooperation, it also stressed, as did the SEC, that Avon's lack of disclosure and active concealment of the practices that it had discovered years prior to a whistleblower complaint and the government investigation had contributed to the size of the fines and disgorgement that it eventually had to pay.

V. Declinations in Corporate Matters

Ten companies disclosed that they had been investigated by U.S. authorities in 2014, but that no charges were brought against them. These companies were LyondellBassel Industries NV, Baxter International, Merck and Co., Inc., SL Industries Inc., Smith and Wesson, Dialogic Inc., Layne Christensen, Image Sensing Systems, Agilent Technologies, and SBM Offshore.[79] A number of these declinations appeared to be part of the government's continued attempts to conclude long-running investigations, such as those into Baxter, Smith and Wesson, Layne Christensen, and Dialogic, which had each been going on for almost four years.

As has been the case in prior years, the lack of information about the agency's reasoning for not prosecuting makes it difficult to extrapolate from these cases what factors are critical in obtaining a declination. This is particularly true given the many reasons the government may decline to prosecute, even if a conviction might be obtained, as well as reasons why the government might conclude weaknesses in any case that might be filed warrant exercising the discretion not to test the matter.

Continued on page 21

75. DOJ Press Rel. 14-1419, note 72, *supra*.
76. *Id*.
77. SEC Press Rel. 2014-285, note 72, *supra*.
78. Rachel Louise Ensign, "Details of $135 Million Avon FCPA Settlement Emerge," *Wall Street Journal Risk & Compliance Report* (May 1, 2014), http://blogs.wsj.com/riskandcompliance/2014/05/01/details-of-135-million-avon-fcpa-settlement-emerge/.
79. Richard L. Cassin, "The 2014 FCPA Enforcement Index," *FCPA Blog* (Jan. 5, 2015), http://fcpablog.squarespace.com/blog/2015/1/5/the-2014-fcpa-enforcement-index.html.

Continued from page 20

In declining to prosecute, the DOJ made comments to a number of companies about their voluntary disclosure and cooperation being factors in the agency's decision, in line with the agency's general encouragement of self-reporting. Nevertheless, there did not appear to be a strong correlation between self-reporting and declinations. Of the companies that disclosed that they had been investigated but not prosecuted, approximately half had voluntarily disclosed potential irregularities and the other half had not. Although publicity about declinations remains the apparent exception rather than the rule, what limited information was disseminated in 2014 only reinforces the general conclusion that self-reporting remains a highly complex decision for companies faced with evidence of possible FCPA violations.

VI. Individual Resolutions of 2014

A. Individual Prosecutions

1. Noble Executives

Perhaps the most significant activity of 2014's individual prosecutions arose out of the SEC's charges, originally filed in February 2012, against three executives of Noble Corporation, an offshore drilling contractor. The three individuals were charged with violating various provisions of the FCPA and related laws in the course of their interactions with public officials in Nigeria's energy sector.[80] The executives were alleged to have made illegal payments to process false paperwork to show the export and re-import of oil rigs in order to allow Noble to circumvent certain customs duties and avoid ceasing operations when applying for renewed permits.

Noble's former controller and head of internal audit, Thomas O'Rourke, settled with the SEC in 2012, paying a $35,000 penalty and agreeing to injunctions preventing future violations of aiding and abetting bribery, aiding and abetting books and records violations, and violations of the internal controls provisions.[81]

The other two individuals charged – Mark Jackson, a former chief executive, and James Ruehlen, the current director of Noble's Nigerian subsidiary – chose to litigate. On July 2, 2014, less than a week before trial was to begin in the Southern District of Texas, the SEC settled with Jackson and Ruehlen.[82] Jackson consented to an injunction for being a control person with respect to Noble's books and records violations, and Ruhlen consented to an injunction for aiding and abetting books and

Continued on page 22

80. SEC Lit. Rel. 22290, SEC Charges Three Executives at Noble Corporation with Bribing Customs Officials in Nigeria (Mar. 14, 2012), http://www.sec.gov/litigation/litreleases/2012/lr22290.htm.

81. *Id.*

82. SEC Lit. Rel. 23038, SEC Settles Pending Civil Action Against Noble Executives Mark A. Jackson and James J. Ruehlen (July 7, 2014), http://www.sec.gov/litigation/litreleases/2014/lr23038.htm.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 21

records violations.[83] Neither Jackson nor Ruehlen was required to pay penalties or other amounts in settlement, and neither defendant admitted or denied wrongdoing.

As in most settlements, the specific factors motivating the parties were not publicized. It appeared the resolution was driven in part by the District Court's pre-trial rulings on the scope of the facilitation payment exception, and a statute of limitations issue affected by the Supreme Court's 2013 ruling in *S.E.C. v. Gabelli*. The Supreme Court held that the discovery rule, which allows a cause of action to accrue upon discovery of the violation rather than when the violation actually took place, did not apply to penalty claims brought by the SEC.[84] Because the alleged violations in the Noble case occurred between 2003 and 2007, the SEC, even with tolling agreements, was limited to pursuing penalties for alleged wrongdoing after May 2006.[85]

In a separate civil action filed in 2010, Noble Corporation settled with both the SEC and the DOJ, paying disgorgement of $5.6 million to the former and signing a non-prosecution agreement that included a $2.6 million penalty with the latter.[86]

2. PetroTiger Executives

In January 2014, two former co-chief executive officers of PetroTiger Ltd., a British Virgin Islands oil and gas company, were charged in the District of New Jersey with conspiracy to violate the FCPA, to commit wire fraud, and to launder money, and with substantive FCPA and money laundering violations for their alleged participation in a scheme to pay bribes to a Colombian government official in exchange for assistance in securing approval for a $39 million oil services contract.[87]

The defendants were alleged to have first attempted to make payments to the official's wife for consulting services she never performed, and then directly to the official's bank account.[88] The defendants were also alleged to have solicited

Continued on page 23

83. *Id.*

84. *See* Paul R. Berger, Sean Hecker, Andrew M. Levine, Steven S. Michaels, and Marisa Taney, "The SEC *Noble* Prosecution: Takeaways from the *O'Rourke*, *Jackson* and *Ruehlen* Settlements," *FCPA Update*, Vol. 6, No. 1 (August 2014), http://www.debevoise.com/~/media/files/insights/publications/2014/08/fcpa_update_august2014.pdf.

85. *Id.*

86. SEC Lit. Rel. 21728, SEC Charges Noble with FCPA Violations (Nov. 4, 2010), http://www.sec.gov/litigation/litreleases/2010/lr21728.htm; DOJ Press Rel. 10-1251, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More than $156 Million in Criminal Penalties (Nov. 4, 2010), http://www.justice.gov/opa/pr/oil-services-companies-and-freight-forwarding-company-agree-resolve-foreign-bribery.

87. DOJ Press Rel. 14-007, note 22, *supra*.

88. *Id.*

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 22

kickback payments from the owners of a target company that was to be acquired on behalf of PetroTiger; in exchange for agreeing to increase the purchase price of the target, the defendants allegedly received a portion of the increase.[89] They were also alleged to have concealed the entirety of the alleged conduct from PetroTiger and its board of directors.[90]

One month after the charges were unsealed, one of the co-CEOs, Knut Hammarskjold, pleaded guilty to one count of conspiracy to violate the FCPA and to commit wire fraud.[91] This followed a 2013 guilty plea to the same charge by Gregory Weisman, PetroTiger's former general counsel.[92] PetroTiger's other co-CEO, Joseph Sigelman, chose to plead not guilty and was indicted in May 2014.[93] Trial is currently scheduled for April 2015. Both Hammarskjold and Weisman are expected to testify as cooperating witnesses for the government and will be sentenced following the trial.[94] As noted above, the case was brought to the DOJ's attention as a result of a voluntary disclosure by PetroTiger, and the DOJ ultimately decided not to charge the company. As Assistant Attorney General Leslie Caldwell stated, the firm's response was "a fine example of the kind of cooperation we expect."[95]

"In addition to illustrating how a routine SEC broker-dealer examination can uncover FCPA violations, the case may result in clarification of how criminal forfeiture statutes interact with the SEC's equitable remedy of disgorgement."

3. *DirectAccess Executives*

During the past year, the DOJ expanded its prosecution of officers and employees of New York broker-dealer Direct Access Partners LLC ("DAP") for their alleged scheme to pay $5 million in bribes to Maria De Los Angeles Gonzalez De

Continued on page 24

89. *Id.*

90. *Id.*

91. DOJ Press Rel. 14-171, Former Chief Executive Officer of Oil Services Company Pleads Guilty to Foreign Bribery Charges (Feb. 18, 2014), http://www.justice.gov/opa/pr/former-chief-executive-officer-oil-services-company-pleads-guilty-foreign-bribery-charges.

92. Weisman's guilty plea was not unsealed until January 2014. *See* DOJ Press Rel. 14-007, note 22, *supra*.

93. DOJ Press Rel. 14-489, Former Chief Executive Officer of Oil Services Company Indicted in New Jersey on Foreign Bribery and Kickback Charges (May 9, 2014), http://www.justice.gov/opa/pr/former-chief-executive-officer-oil-services-company-indicted-new-jersey-foreign-bribery-and.

94. *United States v. Weisman*, No. 13-cr-730-JEI, Endorsement Order (D.N.J. Oct. 9, 2014); *United States v. Hammarskjold*, No. 14-cr-065-JEI, Endorsement Order (D.N.J. Oct. 9, 2014).

95. Caldwell ACI Address, note 12, *supra*; *see also* Miller Address, note 12, *supra*.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 23

Hernandez, a senior official at Venezuela's state economic development bank, Banco de Desarrollo Económico y Social de Venezuela ("BANDES"), in exchange for Gonzalez's help in directing trading business to DAP.[96] From late 2008 to 2012, DAP employees generated more than $60 million in trading commissions from BANDES.[97]

In April 2014, DAP's former chief executive officer, Benito Chinea, and former managing director, Joseph DeMeneses, were charged in a multi-count indictment with conspiracy to violate the FCPA and Travel Act, as well as with substantive violations of those statutes.[98] In December, Chinea and DeMeneses pleaded guilty to the conspiracy count and agreed to forfeit their earnings from the bribery scheme, amounting to $3.6 million and $2.7 million, respectively.[99] They are scheduled to be sentenced in March 2015.[100]

Chinea and DeMeneses are the fifth and sixth defendants to plead guilty in connection with the scheme. In 2013, Gonzalez, as well as three other DAP employees – Ernesto Lujan, Tomas Alberto Clarke Bethancourt, and Jose Alejandro Hurtado – pleaded guilty to conspiracy, money laundering, and substantive FCPA violations;[101] all are expected to be sentenced later this year.

Excluding Gonzales, the defendants continue to face SEC civil charges in the Southern District of New York for fraud, manipulation, and making false statements in SEC filings, which are currently stayed pending completion of the criminal proceedings.[102] The SEC is seeking disgorgement of ill-gotten gains and financial penalties.[103] In addition to illustrating how a routine SEC broker-dealer examination can uncover FCPA violations, the case may result in clarification of how criminal forfeiture statutes interact with the SEC's equitable remedy of disgorgement.

4. Bernd Kowalewski (BizJet)

In July 2014, Bernd Kowalewski, the former chief executive of BizJet International Sales and Support, Inc., a U.S.-based subsidiary of Lufthansa Technik AG, pleaded

Continued on page 25

96. DOJ Press Rel. 14-1421, CEO and Managing Director of U.S. Broker-Dealer Plead Guilty to Massive International Bribery Scheme (Dec. 17, 2014), http://www.justice.gov/opa/pr/ceo-and-managing-director-us-broker-dealer-plead-guilty-massive-international-bribery-scheme.

97. *Id.*

98. DOJ Press Rel. 14-381, CEO and Managing Partner of Wall Street Broker-Dealer Charged with Massive International Bribery Scheme (Apr. 14, 2014), http://www.justice.gov/opa/pr/ceo-and-managing-partner-wall-street-broker-dealer-charged-massive-international-bribery.

99. DOJ Press Rel. 14-1421, note 96, *supra*.

100. *Id.*

101. *Id.*; *see* FCPA Update Annual Review of 2013 Enforcement, note 3, *supra*.

102. SEC Press Rel. 2014-74, SEC Charges Brokerage Firm Executives in Kickback Scheme to Secure Business of Venezuelan Bank (Apr. 14, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541487258#.VK8MHFJ0x9A; *SEC v. Clarke Bethancourt*, No. 1:13-cv-3074-JMF, Order (S.D.N.Y. Aug. 2, 2013) .

103. SEC Press Rel. 2014-74, note 102, *supra*.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 24

guilty to conspiracy to violate the FCPA and to a substantive violation of the FCPA in connection with a scheme to pay bribes to officials in Mexico and Panama in exchange for their help in securing aircraft maintenance and repair contracts.[104] The improper payments were alleged to have been made both directly to the foreign officials and indirectly through a shell company that operated under the pretense of providing aircraft maintenance brokerage services and was owned and operated by Jald Jensen, BizJet's former sales manager.[105] Kowalewski was first charged in January 2012, but was not arrested until March 2014 in Amsterdam, where he waived extradition.[106] On November 18, 2014, Kowalewksi was sentenced in the Northern District of Oklahoma to time served during his detention in the Netherlands and ordered to pay a $15,000 fine.[107]

Kowalewski is the third and most senior BizJet executive to plead guilty to charges relating to alleged FCPA offenses in Latin America. In 2013, Peter DuBois, a former vice president of sales and marketing, and Neal Uhl, a former vice president of finance, were sentenced to probation and home detention pursuant to guilty pleas for conspiring to violate the FCPA (and in the case of DuBois, an additional count of violating the FCPA).[108] The fourth defendant, Jensen, is believed to be living abroad and remains at large.[109] In 2012, BizJet settled criminal charges with an $11.8 million criminal fine and a three-year deferred prosecution agreement with the DOJ.[110]

5. *Frederic Cilins*

On July 25, 2014, U.S. District Judge William Pauley of the Southern District of New York sentenced French national Frederic Cilins to two years in prison for obstructing an FCPA-related grand jury investigation into whether a mining company with which he was affiliated paid bribes to officials of a former governmental regime in the Republic of Guinea in order to win lucrative mining concessions.[111]

Continued on page 26

104. DOJ Press Rel. 14-778, Former Chief Executive Officer of Lufthansa Subsidiary BizJet Pleads Guilty to Foreign Bribery Charges (Jul. 24, 2014), http://www.justice.gov/opa/pr/former-chief-executive-officer-lufthansa-subsidiary-bizjet-pleads-guilty-foreign-bribery.

105. *Id.*

106. *Id.*

107. *United States v. Kowalewski*, No. 12-cr-7-GKF, Judgment (N.D. Okla. Nov. 18, 2014).

108. DOJ Press Rel. 13-388, Four Former Executives of Lufthansa Subsidiary Bizjet Charged with Foreign Bribery (Apr. 5, 2013), http://www.justice.gov/opa/pr/four-former-executives-lufthansa-subsidiary-bizjet-charged-foreign-bribery.

109. DOJ Press Rel. 14-778, note 104, *supra*.

110. DOJ Press Rel. 12-321, Bizjet International Sales and Support Inc., Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $11.8 Million Criminal Penalty (Mar. 14, 2012), http://www.justice.gov/opa/pr/bizjet-international-sales-and-support-inc-resolves-foreign-corrupt-practices-act.

111. DOJ Press Rel. 14-783, French Citizen Sentenced for Obstructing a Criminal Investigation into Alleged Bribes Paid to Win Mining Rights in Guinea (July 25, 2014), http://www.justice.gov/opa/pr/french-citizen-sentenced-obstructing-criminal-investigation-alleged-bribes-paid-win-mining.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 25

Cilins pleaded guilty in March 2014 to a one-count superseding information that alleged he had "agreed to pay substantial sums of money to induce a witness to the alleged bribery scheme to leave the United States to avoid questioning by the FBI, as well as to give documents to Cilins for destruction that had been requested by the FBI as part of the investigation."[112] According to court filings, the witness was the "former wife of a now-deceased Guinean government official who held an office in Guinea that allowed him to influence the awarding of mining concessions."[113] The documents that Cilins allegedly sought to destroy included a contract that provided for the transfer of $2 million from the mining company and its affiliates to a company owned by the official's wife, as well as an additional sum to be distributed to others whose help was needed to secure the concessions.[114]

Although the mining company under investigation was not identified in the information filed against Cilins, subsequent filings reveal it to have been BSG Resources ("BSG"), the mining arm of the conglomerate owned by Israeli billionaire Beny Steinmetz.[115] In April of last year, an inquiry by the Republic of Guinea concluded that BSG had obtained mining concessions through corrupt practices.[116] Illustrating one of the many collateral consequences that can befall a company mired in an anti-bribery investigation, the Guinean government subsequently revoked certain licenses for iron ore concessions held by BSG and its Brazilian joint venture partner, Vale S.A., which were not implicated in the scheme but which nonetheless suffered the consequences.[117] BSG denies any wrongdoing, and in September 2014, filed an arbitration claim against Guinea for wrongful termination of the concessions.[118]

The DOJ sought a three-year term of imprisonment for Cilins, who faced a five-year maximum term. Judge Pauley imposed a two-year sentence and ordered Cilins to pay a $75,000 fine and to forfeit $20,000.[119]

Continued on page 27

112. *Id.*

113. *Id.*

114. DOJ Press Rel. 14-249, French Citizen Pleads Guilty to Obstructing Criminal Investigation into Alleged Bribes Paid to Win Mining Rights in the Republic of Guinea (Mar. 10, 2014), http://www.justice.gov/opa/pr/french-citizen-pleads-guilty-obstructing-criminal-investigation-alleged-bribes-paid-win.

115. *United States v. Cilins*, No. 13 Cr. 315 (WHP), 2014 WL 173414, at *1 (S.D.N.Y. Jan. 15, 2014); Samuel Rubenfeld, "French Man Sentenced for Obstructing FCPA Probe," *Wall Street Journal Risk & Compliance Blog* (July 25, 2014), http://blogs.wsj.com/riskandcompliance/2014/07/25/french-man-sentenced-for-obstructing-fcpa-probe; *see also* Patrick Radden Keefe, "Buried Secrets: How an Israeli Billionaire Wrested Control of One of Africa's Biggest Prizes," *The New Yorker* (July 8, 2013), http://www.newyorker.com/magazine/2013/07/08/buried-secrets.

116. Ian Cobain, Juliette Garside, and Anne Penketh, "Guinea to Strip Beny Steinmetz Company of Mining Concessions," *The Guardian* (Apr. 9, 2014), http://www.theguardian.com/business/2014/apr/09/guinea-strips-beny-steinmetz-bsg-resources-mining-contracts-corruption.

117. Paul Kiernan, "Guinea Revokes Mining Licenses for Vale Joint Venture," *Wall Street Journal* (Apr. 25, 2014), http://www.wsj.com/articles/SB10001424052702304788404579524331299546654.

118. *See* BSG Press Rel., BSGR Files Arbitration Claim Against Guinea (Sept. 10, 2014), http://www.bsgresources.com/media/bsgr-files-arbitration-claim-against-guinea/.

119. DOJ Press Rel. 14-249, note 114, *supra*.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 26

6. Dmitry Firtash and Associates

In yet another case that spans multiple jurisdictions, on April 2014, the U.S. District Court for the Northern District of Illinois unsealed charges against six foreign nationals, alleging their participation in a purported racketeering and money laundering conspiracy to bribe state and central government officials in India to secure titanium mining licenses.[120] Billionaire Ukrainian industrialist Dmitry Firtash, alleged to have been the leader of the enterprise, was arrested in March 2014 in Vienna; he was released after posting $174 million in bail and pledging to remain in Austria pending extradition proceedings.[121] His four business associates – Andras Knopp (Hungary), Suren Gevorgyan (Ukraine), Gajendra Lal (India), and Periyasamy Sunderalingam (Sri Lanka) – remain at large. The sixth defendant, K.V.P. Ramachandra Rao, an alleged bribe-taker and former member of India's Parliament and official of the state in which licenses were sought, is also at large.[122]

The indictment charges defendants with one count each of racketeering conspiracy and money laundering conspiracy, and two counts of interstate travel in aid of racketeering. Five of the six, excluding Rao, are charged with conspiracy to violate the FCPA. The indictment also seeks forfeiture of more than $10.5 million from all six defendants, including Firtash's interests in his company, Group DF.[123]

"[T]he [Eleventh Circuit's] May 16, 2014 decision upholding the FCPA-related convictions, including the longest sentence in the history of FCPA enforcement, ultimately set out a multi-factor test likely to spawn additional litigation, even in the lower federal courts bound by the decision, *i.e.*, those in Alabama, Florida and Georgia."

The indictment alleges that the defendants conspired to pay at least $18.5 million in bribes to secure licenses to mine minerals in the eastern coastal Indian state of Andhra Pradesh, and in fact paid over $10.5 million between 2006 and 2010 through U.S. financial institutions.[124] Along with travel within the United States, and the use of cell phones and the internet within the territory of the United States, the use of such means of payment provided jurisdiction for the charges, making the case

Continued on page 28

120. DOJ Press Rel. 14-333, note 22, *supra*.

121. *Id.*

122. *Id.*

123. *United States v. Firtash*, No. 13-cr-515, Indictment (N.D. Ill. Jul. 20, 2013).

124. *Id.*

Continued from page 27

another prime example of the broad reach of the FCPA. The mining project was expected to generate more than $500 million per year in revenue, including sales of titanium-ore derivatives to an unnamed, uncharged Chicago-based company, which press reports have identified as aerospace and defense conglomerate Boeing.[125] Upon announcing the charges, the DOJ noted its close cooperation with its law enforcement counterparts in Austria as well as the Hungarian National Police.[126]

B. The Eleventh Circuit's *Esquenazi* Decision

Many had hoped the *Esquenazi*[127] case decided by the U.S. Court of Appeals for the Eleventh Circuit last year would clarify who is a "foreign official" under the FCPA. However, the court's May 16, 2014 decision upholding the FCPA-related convictions, including the longest sentence in the history of FCPA enforcement, ultimately set out a multi-factor test likely to spawn additional litigation, even in the lower federal courts bound by the decision, *i.e.*, those in Alabama, Florida and Georgia.

In 2011, Joel Esquenazi and Carlos Rodriguez were convicted of money laundering, conspiracy, and FCPA violations. The federal jury in Miami found that, as owners of a U.S.-based telecommunications company, Esquenazi and Rodriguez caused their firm to become indebted to a Haitian telecommunications company, Teleco, which was almost entirely owned by Haiti's National Bank. To reduce the debts, Esquenazi and Rodriguez began paying bribes to Teleco officials.[128] Each were found guilty of various charges and sentenced to federal prison; Esquenazi's prison sentence was fifteen years while Rodriguez was sentenced to seven years in prison.

Esquenazi and Rodriguez appealed their convictions, arguing that the definition of "foreign official" used in the trial court's jury instructions was unduly expansive. They argued that Teleco did not qualify as a "government instrumentality" under the FCPA, and therefore its officers did not qualify as foreign officials, which the Act defines as "any officer or employee of a foreign government or any department, agency, or *instrumentality* thereof."[129] Their arguments challenged the District Court's jury instruction relating to the meaning of that term, the sufficiency of the evidence supporting a finding that Teleco was a government instrumentality, and the use of that term in the FCPA as unconstitutionally vague.

Continued on page 29

125. DOJ Press Rel. 14-333, note 22, *supra*; *see, e.g.*, Jason Meisner, "Billionaire Ukraine Industrialist Indicted in Chicago on Bribery Charges," *Chicago Tribune* (Apr. 2, 2014), http://articles.chicagotribune.com/2014-04-02/news/chi-billionaire-ukrainian-industrialist-indicted-in-chicago-on-bribery-charges-20140402_1_bribery-charges-foreign-corrupt-practices-act-chicago.

126. DOJ Press Rel. 14-333, note 22, *supra*.

127. *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. May 16, 2014).

128. For additional background, see Sean Hecker, Andrew M. Levine, Colby A. Smith, Bruce E. Yannett, and Michael T. Leigh, "U.S. Appellate Court Defines Government "Instrumentality" Under the FCPA," *FCPA Update*, Vol. 5, No. 10 (May 2014), http://www.debevoise.com/~/media/files/insights/publications/2014/05/fcpa%20update/files/view%20fcpa%20update/fileattachment/fcpa_update_may2014.pdf.

129. 15 U.S.C. §§ 78dd-2(h)(2)(A) (emphasis added).

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 28

Rejecting these arguments, the court of appeals affirmed, and set out a two-prong test – based on the extent of any government control and whether the entity could be said to perform a government function – to determine whether an entity was a "government instrumentality." Looking to the plain meaning of "instrumentality" and the use of similar terms in other statutes, such as the Americans with Disabilities Act, the court defined an instrumentality under the FCPA as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own."[130]

The Eleventh Circuit provided additional guidance as to what constituted a government function in this inquiry. The court noted that certain parts of the FCPA, such as its facilitation payments exception, specify that routine governmental actions can include commercial actions, and go so far as to list "providing phone service" as one example of commercial government action.[131] The court also looked to the 1998 amendments that Congress made to the FCPA pursuant to the United States' obligations under the OECD Convention, which had been ratified that same year. Given that the only change Congress made to the definition of foreign official was to add employees of "public international organizations" to the list of persons covered, the court reasoned that Congress must have believed that the existing definition encompassed all other elements of the OECD's classification of what constituted a foreign official, including government entities performing a commercial function.[132]

The court stated that the test for whether an entity performs a government function ultimately is whether the government in question "*treats* the function the foreign entity performs as its own."[133] Based on this interpretation, the Eleventh Circuit held that Teleco met the function and control test, because the evidence at trial established that Teleco was controlled by the Haitian government and that the government treated the company's commercial functions as its own.

The court recognized that the application of its test was a "fact-bound question," leaving unclear what the result might be in an array of cases, including those involving other functions identified in the FCPA's facilitating payments exception, or, even, functions in the telecom sector in countries where that sector had been sufficiently privatized that the government would not treat the business in the sector as its own. [134]

Continued on page 30

130. *Esquenazi*, 752 F.3d at 925.

131. *Id.* at 922.

132. *Id.* at 923-24 (quoting the OECD Convention, Art. 1.4).

133. *Id.* at 925.

134. *Id.* (citing 15 U.S.C. § 78dd-2(h)(4)(A)).

Continued from page 29

Esquenazi and Rodriguez petitioned the United States Supreme Court for certiorari, but on October 6, 2014 the petition was denied. This outcome leaves the DOJ and SEC free to continue to press for a broad view of the "foreign official" provisions of the FCPA in both federal trial courts outside, and, subject to the "fact-bound" limitations of the *Esquenazi* ruling, even within the Eleventh Circuit.

VII. Developments Outside the United States

A. United Kingdom

1. Deferred Prosecution Agreements and Sentencing Guidelines

Perhaps the most important development in anti-corruption enforcement in the United Kingdom in 2014 was the February 24, 2014 enactment of legislation permitting the government to enter into deferred prosecution agreements ("DPAs").[135]

Under the new law, the Director of the Serious Fraud Office ("SFO") and the Director of Public Prosecutions (the head of the Crown Prosecution Service) can now enter into a DPA with a corporate offender with respect to, *inter alia*, bribery offenses under the Bribery Act 2010 and under the previous UK anti-bribery legislation. The prosecution of a cooperating corporate defendant can be suspended and, if the DPA goes to term, discontinued in light of the payment of a fine, the disgorgement of profits, and a range of other possible penalties. Unlike in the United States, UK DPAs are subject to strict judicial scrutiny; the Court has to approve both the prosecutor's proposal to enter into negotiations and the final agreement between the prosecutor and the corporation.

The DPA Code of Practice (the "Code"), published on February 14, 2014, sets out the factors a prosecutor should consider before negotiating a DPA.

First, there must be admissible evidence against the corporation sufficient, to *either* provide a reasonable prospect of conviction, *or* to give rise to a reasonable suspicion that the corporation in question has committed the offense as well as reasonable grounds to believe that a continued investigation would provide further admissible evidence within a reasonable time to provide a realistic prospect of conviction.

Second, the prosecutor must consider whether the public interest is better served by a DPA than by a prosecution.

Additional factors supporting a DPA-based resolution include whether the corporation actively engaged with the authorities when the suspected offense

Continued on page 31

135. Paragraph 2 of The Crime and Courts Act 2013 (Commencement No. 8) Order 2014, bringing into force section 45 and Schedule 17 of the Crime and Courts Act 2013. The Criminal Procedure (Amendment No. 2) Rules 2013 (S.I. 2013/3183) inserted a new Part 12 of the Criminal Procedure Rules.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 30

was discovered; whether it had a "proactive corporate compliance programme" at the time of the offense; and whether it undertook significant remedial efforts to prevent further violations. Effective cooperation includes identifying witnesses and making them available for interviews, and providing a report on any internal investigation with source documents, including interview memoranda. No DPAs have been announced to date, though SFO Director David Green has stated that the SFO is undertaking investigations that may prove suitable.[136]

Nearly as significant as the introduction of DPAs – and vital to their success – was the introduction of the first sentencing guidelines for corporate offenses of fraud, bribery, and money laundering. First published on January 31, 2014, the guidelines were created specifically to support the introduction of DPAs and will apply to sentences passed on or after October 1, 2014. For corporate bribery offenses, fines will in principle be calculated by taking the gross profit of the contract obtained

"Because the Bribery Act covers offenses committed after July 1, 2011 only, cases under the old law will continue to wind their way through the system."

or sought and applying a multiplier of between 20% and 400% depending on the corporation's culpability. The guidelines are expected to produce fines in an order of magnitude greater than those previously levied against corporations.[137]

2. First Convictions for Commercial Bribery under the Bribery Act 2010

Late in 2014, the SFO secured convictions in the first case in which it has brought charges under the Bribery Act 2010. The case concerned a scheme to sell biofuel investment products involving Jatropha tree plantations in Southeast Asia.[138] On December 5, 2014, Gary Lloyd West, former Director and Chief Commercial Officer of Sustainable AgroEnergy plc was convicted of, *inter alia*, two offenses of being bribed. Stuart John Stone, Director of SJ Stone Ltd, a sales agent of unregulated

Continued on page 32

136. *See* David Green QC, Speech to Cambridge Symposium on Economic Crime, Jesus College (Sept. 2, 2014), http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2014/cambridge-symposium-2014.aspx.

137. *See* Debevoise & Plimpton Client Update, "Proposed UK Sentencing Guidelines for Corporate Offences" (July 1, 2013), http://www.debevoise.com/clientupdate20130701a. The complete guideline, applicable to both individuals and corporations, was published on May 23, 2014 and also came into effect on October 1. The maximum sentence for individuals convicted of an offence under the Bribery Act 2010 is 10 years' imprisonment.

138. *See* Caroline Binham, "SFO Claims Biofuel Group Used Ponzi Scheme," *Financial Times* (Oct. 8, 2014), http://www.ft.com/intl/cms/s/0/234e06d6-4ee1-11e4-a1ef-00144feab7de.html#axzz3POGUx63c.

Continued from page 31

pension and investment products, was convicted of, *inter alia*, two offenses of bribing another person.

In the first application of the new sentencing guidelines, Judge Beddoe imposed sentences at the highest end of the range; Stone received six years imprisonment and West received a total of thirteen years' imprisonment, four of which were related to the bribery offenses.[139]

3. Cases Brought Under Pre-Bribery Act 2010 Law

Because the Bribery Act covers offenses committed after July 1, 2011 only, cases under the old law will continue to wind their way through the system. The UK aspects of the Alcoa/Alba bribery case came to an end with the sentencing of former CEO of Alba, Bruce Hall, a co-defendant of, and prosecution witness against, Victor Dahdaleh. Dahdaleh had been accused of corruption in violation of Section 1 of the Prevention of Corruption Act 1906 (the "PCA 1906"), but the SFO's case against him collapsed in December 2013.[140] On July 22, 2014, Hall received a sentence of 16 months' imprisonment (reduced from six years based on his cooperation) and was ordered to pay £3 million in confiscation and a further £500,000 in restitution to Alba.[141]

In addition, the prosecution of four Innospec executives for their roles in bribing state officials in Indonesia and Iraq came to a conclusion, resulting in the four executives receiving prison sentences of between 16 months and three years.[142]

At the very end of 2014, the SFO secured a rare conviction of a corporate entity for offenses involving bribery of a foreign public official when security and financial printing company Smith & Ouzman Ltd was found guilty of three offenses of corruptly agreeing to make payments contrary to the PCA 1906.[143] The case

Continued on page 33

139. SFO Press Rel., City Directors Sentenced to 28 years in Total for £23m "Green Biofuel" Fraud (Dec. 8, 2014), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/city-directors-sentenced-to-28-years-in-total-for-23m-green-biofuel-fraud.aspx.

140. *See* FCPA Update Annual Review of 2013 Enforcement, note 3, *supra* at 21.

141. SFO Press Rel., Bruce Hall Sentenced to 16 Months in Prison (July 22, 2014), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/bruce-hall-sentenced-to-16-months-in-prison.aspx.

142. SFO Press Rel., Four Sentenced for Role in Innospec Corruption (Aug. 4, 2014), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/four-sentenced-for-role-in-innospec-corruption.aspx.

143. SFO Press Rel., UK Printing Company and Two Men Found Guilty in Corruption Trial (Dec. 22, 2014), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/uk-printing-company-and-two-men-found-guilty-in-corruption-trial.aspx. The SFO has brought two previous successful prosecutions of companies for overseas corruption: In July 2009, engineering company Mabey & Johnson Ltd pleaded guilty to conspiring to pay bribes to government officials in the Caribbean, Africa and the Middle East (SFO Press Rel., Mabey & Johnson Ltd Sentencing (Sept. 25, 2009), http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2009/mabey--johnson-ltd-sentencing-.aspx, and in March 2010, petrochemical supplier Innospec Ltd pleaded guilty to corruption of Indonesian public officials (SFO Press Rel., Innospec Judgment (Mar. 26, 2010), http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2010/innospec-judgment.aspx.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 32

concerned payments totaling nearly half a million pounds between November 2006 and December 2010 to public officials in Kenya and Mauritania for business contracts.[144] Smith & Ouzman's former chairman and former sales and marketing director were each found guilty of equivalent offenses.[145] To secure the conviction of Smith & Ouzman, the SFO needed to meet the English common law burden of criminal corporate liability, which requires proving that a "directing mind and will" of Smith & Ouzman was knowingly involved in the offense. This requirement was eliminated under the "corporate offence" provision of the Bribery Act 2010, which makes a corporation liable for "failing to prevent bribery." Sentencing has been adjourned until February 12, 2015.

Providing further clarification of the old legislative regime, in December 2013 the Court of Appeal ruled on the "principal's consent" defense in relation to offenses committed under the PCA 1906. In *R v. J*,[146] individuals were prosecuted for conspiring corruptly to give agents of a foreign tax authority money in order to induce a favorable tax calculation. The court held that the informed consent of a commercial principal might be a defense to a charge that a payment for a prohibited purpose constitutes an offense under the PCA 1906, but not so for a payment to a government official, as the government could never give its consent to a payment for a prohibited purpose. The case illustrates one of the changes effected by the Bribery Act 2010: under the new Act, the defense of "principal's consent" will not be available.

The SFO also continued its investigation of UK subsidiaries of Alstom. In July 2014, Alstom Network was charged with three offenses of corruption contrary to section 1 of the PCA 1906, as well as three offenses of conspiracy to make corrupt payments contrary to section 1 of the Criminal Law Act 1977.[147] The charges relate to alleged conduct occurring between June 1, 2000 and November 30, 2006 concerning large transport projects in India, Poland, and Tunisia. Charges have also been brought by the SFO against a former senior manager of Alstom in the UK. At the end of the year, the SFO also brought charges against Alstom Power Ltd. in respect of alleged bribes (said to have been disguised as consultancy payments) made to secure a supply contract in Lithuania between February 2002 and March 2010.[148]

Continued on page 34

144. *See, e.g.*, Simon Nias, "Smith & Ouzman Denies Paying Over £400k in Bribes in 'Chickengate' Case," *PrintWeek* (Nov. 25, 2014), http://www.printweek.com/print-week/news/1148334/smith-ouzman-denies-paying-gbp400k-bribes-chickengate.

145. One former employee and an agent were acquitted. *See* SFO Press Rel., UK Printing Company and Two Men Found Guilty in Corruption Trial (Dec. 22, 2014), note 143, *supra*.

146. [2013] EWCA Crim 2287 (Lord Justices Thomas CJ, Rafferty and Henriques).

147. SFO Press Rel., Criminal Charges Against Alstom in the UK (July 22, 2014), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/criminal-charges-against-alstom-in-the-uk.aspx.

148. *See* "UK Adds to Alstom's Legal Woes as Power Unit Faces Bribe Charge," *Reuters* (Dec. 22, 2014), http://www.reuters.com/article/2014/12/22/alstom-bribery-uk-idUSL6N0U62C220141222.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global
Continued from page 33

4. Bribery-Related Civil Litigation

Other English and Scottish law developments involved civil claimants' attempts to regain amounts paid in bribes or achieved as a result of bribery. In *FHR European Ventures LLP v. Cedar Capital Partners LLC*,[149] the Supreme Court overruled prior authority by holding that a principal is entitled to a proprietary remedy against an agent who has breached his duties by accepting a bribe, thereby giving the principal priority over the agent's unsecured creditors.

In *Novoship (UK) Ltd & Ors v. Nikitin & Ors*,[150] the Court of Appeal issued a reminder that the "dishonest assister" of a bribe payer (such as a professional who helps create a network of entities to serve a corrupt scheme) risks serious consequences by holding that such an actor may be liable to account for profits to the injured beneficiary as if he were a trustee, provided his actions caused any improper profit.

However, the principle that recovery of bribery-related proceeds remains subject to common law rules of causation, remoteness, and measure of damages was illustrated by the ruling in *Jalal Bezee Mejel Al-Gaood v. Innospec Ltd*.[151] The claimant, a competitor of Innospec, sought damages for losses incurred resulting from the bribery of officials in the Iraqi Ministry of Oil. Despite Innospec's conviction, the court decided that the claimant had failed to establish that Innospec's admitted bribery had in fact caused the Ministry to refrain from switching from Innospec's lead-based petrol additives to the claimant's less toxic product.

In Scotland, a pre-acquisition due diligence of Aberdeen-based oil and gas contractor International Tubular Services Limited ("ITS") revealed that ITS had profited from corrupt payments made by a former employee in Kazakhstan in order to secure further contracts. The issue was reported to the Crown Office and Procurator Fiscal Service ("COPFS") in late 2013 and on December 17, 2014, COPFS announced that ITS, since it had been acquired by Parker Drilling Company, had paid £172,200 to COPFS' Civil Recovery Unit under proceeds-of-crime legislation.[152]

Continued on page 35

149. [2014] UKSC 45 (Lords Neuberger, Mance, Sumption, Carnwath, Toulson, Hodge and Collins).

150. [2014] EWCA Civ 908 (Lord Justices Longmore, Moore-Bick and Lewison).

151. [2014] EWHC 3147 (Comm) (judgment on Oct. 8, 2014).

152. COPFS Press Rel., Aberdeen Company Pays Over £170,000 After Admitting Bribery and Corruption in Kazakhstan (Dec. 17, 2014), http://www.copfs.gov.uk/media-site/media-releases/935-aberdeen-company-pays-over-170-000-after-admitting-bribery-and-corruption-in-kazakhstan.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 34

5. Continued Policing by the Financial Conduct Authority

Meanwhile, the Financial Conduct Authority ("FCA"), the United Kingdom's principal financial markets regulator, continued its focus on the insurance broker industry. The FCA's March 2014 Final Notice and penalty of £315,000 against Besso for shortcomings in its anti-bribery and corruption procedures were based upon the increased risk that payments Besso made to third-party intermediaries could be used for corrupt purposes, even though there was no actual violation.[153]

The action against Besso, the broker subsidiary of Besso Insurance Group Limited, exemplifies the FCA's risk-based approach to enforcement and is one of a number of similar enforcement actions.[154] It also follows a significant amount of guidance issued to the insurance sector by the FCA and its predecessor, the Financial Services Authority ("FSA"), since November 2007, including the November 2014 update to the FCA's Thematic Review: "Managing Bribery and Corruption Risk in Commercial Insurance Broking."[155]

"[C]ompanies and their counsel conducting internal investigations must consider the extent to which privilege assertions will be respected in the context of SFO investigations going forward."

6. Politics, Policy, and Anti-Corruption Practice

Following judicial criticism of the SFO for its apparent reliance on investigations conducted by a third-party law firm linked to a party engaged in civil proceedings against Victor Dahdaleh, the SFO has apparently re-thought its approach to internal investigations. The finding that the SFO was not in control of the underlying material and that it could not satisfy its disclosure obligations has led the SFO to reassess what cooperation means in the context of internal investigations. It is likely that the SFO will seek to retain much greater oversight and control over the methodology adopted by the company and the law firm conducting

Continued on page 36

153. FCA Final Notice re: Besso Ltd. (Mar. 17, 2013), http://www.fca.org.uk/static/documents/final-notices/besso-limited.pdf. *See also* Karolos Seeger, Bruce E. Yannett, Matthew H. Getz, Robin Lööf, and Robert Maddox, "UK Financial Conduct Authority Imposes Fine on Besso Limited," *FCPA Update,* Vol. 5, No. 8 (Mar. 2014), www.debevoise.com/insights/publications/2014/03/fcpa-update.

154. *See* Karolos Seeger, Bruce E. Yannett, Robin Lööf, and Robert Maddox, "UK Financial Conduct Authority Imposes Limited Fine on JLT Specialty," *FCPA Update*, Vol. 5, No. 7 (Feb. 2014), http://www.debevoise.com/fcpa-update-2-27-2014/.

155. *See, e.g.*, FSA "Dear CEO" Letter (Nov. 22, 2007), http://www.fsa.gov.uk/pubs/ceo/ttp_letter.pdf; FSA, "Anti-Bribery and Corruption in Commercial Insurance Broking (May 2010), http://www.fsa.gov.uk/pubs/anti_bribery.pdf; FCA, "Managing Bribery and Corruption Risk in Commercial Insurance Broking: Update (Nov. 14, 2014), http://www.fca.org.uk/your-fca/documents/thematic-reviews/tr14-17.

Continued from page 35

the investigation. This has an obvious impact on the way in which internal investigations are conducted and reported to the SFO, particularly if a company wishes to display the level of cooperation required to benefit from a DPA.

Of equal importance is the SFO's criticism of corporations' assertion of attorney-client privilege in connection with internal investigations which, Director Green claims, sometimes "transcend extravagance and amount to a strategy of deliberate obstruction."[156] Such comments are primarily aimed at privilege asserted over the accounts of corporate employees and other individuals interviewed during internal investigations. Green and General Counsel Alun Milford have stated that the SFO will litigate what they see as "false or exaggerated claims of privilege."[157]

Whether and how the SFO will make good on this promise remains to be seen. But companies and their counsel conducting internal investigations must consider the extent to which privilege assertions will be respected in the context of SFO investigations going forward.

The SFO's funding arrangements and its very existence have been questioned this past year. With a relatively modest annual budget of £35.2 million for the 2014-15 financial year, the agency had to obtain from the Treasury a further £26.5 million in "blockbuster" funding so that it can pursue its largest investigations.[158] More controversially, Home Secretary Theresa May has signaled that she is considering abolishing the SFO entirely, folding it into the new UK-wide police force, the National Crime Agency.[159] In contrast, the Labour opposition appears to favor putting the SFO's funding on a more secure footing.[160] Because 2015 is an election year, the outcome may very well significantly change the landscape of foreign corrupt practices enforcement in the United Kingdom.

B. Germany

1. *Enforcement Activity*

Germany, second only to the United States in the number of corruption cases pursued by enforcement authorities according to the latest OECD tracking data,[161] saw continued enforcement activity in 2014, particularly against companies in the defense sector.

Continued on page 37

156. Green QC, note 136, *supra*.

157. Alun Milford, Speech to Cambridge Symposium on Economic Crime (Sept. 2, 2014), alun-milford-the-use-of-information-to-discern-and-control-risk. *See also* David Green QC, Speech to the Pinsent Masons Regulatory Conference (Oct. 23, 2014), http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2014/david-green-cb-qc-speech-to-the-pinsent-masons-regulatory-conference.aspx.

158. Caroline Binham, "Serious Fraud Office Seeks 75% Extra Funding," *Financial Times* (Oct. 23, 2014), http://www.ft.com/intl/cms/s/0/d172db9a-5a05-11e4-be86-00144feab7de.html#axzz3POGUx63c.

159. Caroline Binham and Helen Warrell, "Theresa May Revives Attempts to Abolish SFO," *Financial Times* (Oct. 5, 2014), http://www.ft.com/intl/cms/s/0/e15dc7c0-4ae9-11e4-b1be-00144feab7de.html#axzz3POGUx63c.

160. *Id.*

161. OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials at 9 (Dec. 2, 2014).

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 36

An investigation by Bremen prosecutors of Rheinmetall Defense Electronics GmbH ("RDE"), a subsidiary of defense contractor Rheinmetall AG, concluded in December 2014 with the imposition of a €37.07 million fine for RDE's failure to detect potentially improper payments made in connection with submarine-equipment sales to Greece. Working in cooperation with their Greek counterparts, the Bremen prosecutors had launched the investigation with mid-2013 raids at the offices of RDE and another supplier, Atlas Elektronik (a former BAE subsidiary now owned by ThyssenKrupp AG and Airbus). The relatively swift resolution of the RDE investigation may be attributable in part to the widespread publication of statements by a former high-ranking Greek Ministry of Defense official cooperating with Greek investigators in the wake of the investigation of Ferrostaal AG. Among other admissions, the official stated that he had accepted so many bribes in connection with the submarine sales, as well as other procurement items, that he could not remember them all.[162]

There has been no public indication that prosecutors are currently pursuing similar charges against Atlas Elektronik for its role in the Greek submarine affair. Press reports indicate that ThyssenKrupp voluntarily halted the questionable payments after acquiring its share in Atlas and notified German authorities of its concerns in 2010. Reportedly, it was the findings of a 2012 tax audit of RDE that eventually prompted Bremen authorities to take action.[163]

Atlas's other parent, Airbus, figures in another German investigation into potentially improper payments to foreign officials. In December, Munich prosecutors confirmed that they were investigating Airbus for possible bribes paid by its Defense and Space subsidiary in connection with the award of border-security contracts in Romania and Saudi Arabia worth approximately $3.7 billion. The investigation was apparently triggered by the identification of unusual payment flows during an inquiry into the sale of certain military equipment to Austria, an investigation that had started in earnest and become public the year before. Airbus is reportedly cooperating with the probe of its Romanian and Saudi Arabian dealings.[164]

Continued on page 38

162. "Rheinmetall Is the New Name in German-Greek Corruption," *The Press Project* (Dec. 24, 2013), http://www.thepressproject.net/article/53734/Rheinmetall-is-the-new-name-in-German---Greek-web-of-corruption.

163. "Razzia Bei Deutschen Rüstungsfirmen," *Süddeutsche Zeitung* (Aug. 24, 2013), http://www.sueddeutsche.de/politik/geschaefte-mit-griechenlands-regierung-razzia-bei-deutschen-ruestungsfirmen-1.1753716 (German).

164. Ulrike Dauer and Robert Wall, "Germany Investigates Airbus Defense Deals in Saudi Arabia, Romania," *Wall Street Journal* (Dec. 3, 2014), http://www.wsj.com/articles/germany-investigates-airbus-defense-deals-in-saudi-arabia-romania-1417607252.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 37

German prosecutors, particularly those in Munich, also continue to crack down on individuals involved in bribery schemes, as evidenced by the prosecution of Bernie Ecclestone, who ended up paying about €100 million to end criminal proceedings against him for alleged bribery of a Bavarian state bank member in connection with the sale of Formula One operations.[165]

2. Legislative Developments

In 2014, the German Federal Parliament (*Bundestag*) significantly expanded the scope of a section of the German Penal Code ("GPC") relating to benefits received by members of parliamentary bodies.[166] Until September 2014, when the amended version of the relevant GPC section went into effect, the GPC prohibited only the buying or selling of votes in domestic assemblies (municipal, state, and federal) or in the European Parliament. Following the amendment, the GPC provision also criminalizes the offer, promise, or solicitation of any "undue advantage" to a member of these bodies,[167] either directly or to a third party, for the purpose of influencing that member to act, or abstain from acting, according to an "order or instruction."[168] The amended section of the GPC likewise outlaws the acceptance, promise, or solicitation of such an undue advantage by a parliamentary member.[169]

As a result of the amendment, preliminary discussions with a parliamentary member with the aim of influencing a specific act or omission by that member may lead to criminal exposure under this section of the GPC, even though attempted bribery is itself not a crime in Germany. The eventual reach of the amended GPC section will hinge, in part, on the determination of whether the advantage in question is "undue." On that issue, the amended section states only that the advantage is not undue if it is "compatible with provisions relevant to the legal status of the member," such as political donations permitted by law.[170]

The amendment of the GPC had been under discussion by German lawmakers since 2003, when Germany signed the United Nations Convention Against Corruption, which sets standards for legislation governing certain forms of influence on parliamentary members. With the expansion of the parliament-related

Continued on page 39

165. *See* "Ecclestone-Prozess Gegen 100 Millionen Dollar Eingestellt," *Süddeutsche Zeitung* (Aug. 5, 2014), http://www.sueddeutsche.de/wirtschaft/bestechungs-prozess-in-muenchen-richter-beraten-ueber-ecclestone-deal-1.2077395 (German).

166. Strafgesetzbuch (StGB) (Penal Code), § 108e.

167. The amendment also extended the applicability of the GPC provision to members of parliamentary bodies of foreign countries and to assemblies associated with international organizations. *See id.* § 108e(3).

168. *Id.* § 108e(1).

169. *Id.* § 108e(2).

170. *Id.* § 108e(4).

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global
Continued from page 38

anti-bribery rules, Germany was able to ratify the Convention in November 2014.[171]

One initiative that has thus far failed to gain traction is the effort to adopt a criminal liability regime for corporations. One reason the initiative has not progressed is that Germany already has a corporate liability scheme that makes companies administratively liable for failing to take sufficient precautions to avoid certain crimes committed by their employees. Another reason is that the current system, while addressing corporate liability under administrative misdemeanor rules, has been tightened recently by providing maximum penalties of €10 million per case plus disgorgement, which may lead, as shown in the case of Siemens under the previous scheme, to hundreds of millions in fines and disgorgements.

"These [anti-coruption] efforts, taken together with other elements of President Xi Jinping's undertakings stated to be designed to clean up corrupt or unethical behavior by party cadres – such as the Eight-Point Regulations that were adopted by the CPC Politburo and the multiple anti-graft and anti-extravagance measures that have been implemented – show no sign of abating in 2015."

C. People's Republic of China ("PRC")

1. Developments in the PRC

President Xi Jinping's anti-corruption campaign, which began when he took office in 2012, continued in 2014 with investigations and prosecutions of both "tigers" (senior leaders) and "flies" (lower ranking bureaucrats) within the Chinese government.[172] The most notable of these investigations, which is still ongoing, involved Zhou Yongkang, who was the former domestic security chief.[173] The investigation is focused on, among others, senior and mid-level officials in the nation's biggest oil and gas conglomerate, the China National Petroleum Corporation.[174] In December, Zhou's case was transferred to prosecuting authorities, along with dossiers on 29 other former high-ranking officials.[175]

Continued on page 40

171. "Belatedly, Germany Ratifies UN Anti-Corruption Convention," *Deutsche Welle* (Nov. 14, 2014), http://www.msn.com/en-ca/news/world/belatedly-germany-ratifies-un-anti-corruption-convention/ar-BBdMLgd.

172. President Xi Jinping's Speech, Second Plenary Session of the Eighteenth Central Commission for Discipline Inspection (Jan. 22, 2013), http://news.xinhuanet.com/politics/2013-01/22/c_114461056.htm (Chinese).

173. Chris Buckley and Andrew Jacobs, "China Says Former Security Chief Is Being Investigated for Corruption," *New York Times* (July 29, 2014), http://www.nytimes.com/2014/07/30/world/asia/china-says-zhou-yongkang-former-security-chief-is-under-investigation.html?_r=0.

174. Senmiao Qiu, "The Price of China's Anti-corruption Campaign," *Waltham Economy of Asia Review* (Oct. 11, 2014), https://brandeisear.wordpress.com/2014/10/11/the-price-of-chinas-anti-corruption-campaign/.

175. Zhang Yan, "Ex-security Chief Closer to Trial Date," *China Daily* (Jan. 8, 2015), http://www.chinadaily.com.cn/china/2015-01/08/content_19267023.htm.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 39

In addition, the Central Commission for Discipline Inspection ("CCDI"), the internal disciplinary organ of the Communist Party of China ("CPC"), dispatched investigative teams on a two-month nationwide audit as part of the country's five-year plan to combat national corruption. The audit team's on-site inspections targeted a range of sites, including massive-scale construction projects like the high-speed railways and the Three Gorges Dam,[176] the technology ministry, Fudan University, the food conglomerate COFCO,[177] and a number of other state-owned enterprises. In addition to this crackdown on corruption itself, authorities have also cracked down on what they called immoral behavior, such as adultery and prostitution, which they believe to be associated with corruption.[178]

These efforts, taken together with other elements of President Xi Jinping's undertakings stated to be designed to clean up corrupt or unethical behavior by party cadres – such as the Eight-Point Regulations[179] that were adopted by the CPC Politburo and the multiple anti-graft and anti-extravagance measures that have been implemented – show no sign of abating in 2015.[180]

In fact, these efforts may increase in the coming years, as evidenced by the Central Government's approval, at the Fourth Plenary Session of the 18th CPC Central Committee (the "Plenum") held in October, of the founding of a new anti-corruption administration, which will directly investigate major corruption cases.[181] The head of the new administration will be a vice-ministerial-level official, and, once established, the administration will manage the country's entire anti-graft system.[182]

The CPC has given other indications that fighting corruption in China will remain a priority, such as the publication of a decision at the Plenum to expedite legislation to fight corruption and to make it tougher for local officials to exert control over the judiciary,[183] as well as the release for public comment of draft amendments to

Continued on page 41

176. Patricia Adams, "The Probe of Three Gorges Officials Is Getting Too Close for Communist Party Leaders," *Huffington Post* (Apr. 18, 2014), http://www.huffingtonpost.ca/patricia-adams/gorges-officials-china_b_5169808.html.

177. "Make Discipline Inspection 'Sword of Damocles': Anti-corruption Chief," *Xinhuanet* (Mar. 15, 2014), http://news.xinhuanet.com/english/china/2014-03/15/c_133188981.htm.

178. Heng He, "What Made Dongguan China's Sex Capital," *The Epoch Times* (Feb. 19, 2014), http://m.theepochtimes.com/n3/516644-what-made-dongguan-chinas-sex-capital/.

179. *See* Shi Jiangtao, "Xi Jinping's Guidelines to Cut Back Extravagance Go into Effect," *South China Morning Post* (Jan. 4, 2013), http://www.scmp.com/news/china/article/1119384/xi-jinpings-guidelines-cut-back-extravagance-go-effect.

180. *See* Nicole Goodkind, "China Is Making Communist Party Stronger than Ever," *Yahoo! Finance* (Jan. 5, 2015), http://finance.yahoo.com/news/chinese-president-xi-jinping-to-become-most-powerful-in-40-years--wharton-school-dean-071620419.html.

181. Zhang Zhiping, "Upgrading Anti-Corruption Efforts," *Beijing Review* (Nov. 15, 2014), http://www.bjreview.com.cn/print/txt/2014-11/15/content_653109.htm.

182. *Id.*

183. "CPC Move Toward Rule of Law Significant Step for China: Experts," *Xinhuanet* (Oct. 20, 2014), http://news.xinhuanet.com/english/china/2014-10/20/c_127115051.htm.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 40

China's Criminal Law,[184] a number of which broaden the definition of criminal conduct in the PRC and strengthen penalties related to bribery and corruption.

Despite the significant ramp-up in national anti-corruption efforts, it remains to be seen what impact the Chinese policy will have on foreign companies and non-party officials. The largest Chinese prosecution against a global multinational, *i.e.*, that against GlaxoSmithKline China, resulted in a 3 billion yuan ($491.5 million) fine last year related to alleged sales and marketing practices. This settlement ranks as the largest penalty ever assessed against a drug company in China.[185] As the impact of a domestic bribery resolution of this size reverberates alongside the numerous FCPA resolutions involving alleged misconduct in the PRC, multinationals will continue to be called on to devote disproportionate compliance resources required to address the unique risks in the world's second largest economy.

2. Developments in Hong Kong

In 2014, Hong Kong's courts handled the territory's most significant corruption trial in several decades (and perhaps ever) and provided guidance as to the extraterritorial reach of the Prevention of Bribery Ordinance ("POBO"). Hong Kong's main anti-corruption regulator, the Independent Commission Against Corruption ("ICAC"), celebrated forty years of existence, but could not escape becoming ensnared in the territory's political strife.

In 2014, the government brought to trial a very senior former-government official and two of its most prominent property businessmen. Rafael Hui, the former Chief Secretary of the Hong Kong government, was charged with violating the POBO in accepting benefits from, among others, Thomas and Raymond Kwok, brothers and former co-chairmen of one of the territory's largest property companies, Sun Hung Kai Properties ("SHKP").[186] After a five-day jury deliberation, Hui was found to have received almost HK$20 million in bribes and more than HK$5 million in unsecured loans between 2000 and 2009, including partial payment of a bribe and an unsecured loan in 2005, after he was appointed Chief Secretary.[187] Hui was allegedly paid to be the "eyes and ears" of brothers Thomas and Raymond Kwok in government, and to be or remain favorably disposed to SHKP.[188] During the trial, prosecutor David Perry QC described Hui as "hopelessly compromised" and the alleged collusion as

Continued on page 42

184. "Amending Anti-Graft Clauses Is a Deterrent in Time," *Xinhuanet* (Oct. 28, 2014), http://news.xinhuanet.com/english/china/2014-10/28/c_133748763.htm.

185. Hester Plumridge and Laurie Burkitt, "GlaxoSmithKline Found Guilty of Bribery in China," *Wall Street Journal* (Sept. 19, 2014), http://www.wsj.com/articles/glaxosmithkline-found-guilty-of-bribery-in-china-1411114817.

186. *Hong Kong v. Rafael Hui & Ors.*, HCCC98/2013.

187. *See* Stuart Lau, "Review: The Verdicts Are Out in Explosive Graft Trial of Hui, Kwoks," *South China Morning Post* (Dec. 19, 2014), http://www.scmp.com/news/hong-kong/article/1663193/rafael-hui-guilty-five-counts-misconduct-and-bribery-thomas-kwok.

188. *See* Stuart Lau, "Rafael Hui Trial Revealed Rotten Heart of Hong Kong Government, Says Prosecutor," *South China Morning Post* (Nov. 5, 2014), http://www.scmp.com/news/hong-kong/article/1632609/rafael-hui-trial-revealed-rotten-heart-hong-kong-government-says.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 41

representing "something rotten at the heart of the government of Hong Kong."[189] Hui was found guilty of bribery and misconduct in public office.[190] Thomas Kwok, another former SHKP director, and a former Hong Kong Stock Exchange Official were all found guilty of conspiracy in connection with bribes provided to Hui.[191] Raymond Kwok was found not guilty.

The Court of Final Appeal (Hong Kong's highest court) provided guidance last year with respect to the extraterritorial reach of the POBO. Although the POBO contains no explicit prohibition on bribing foreign officials, bribing a foreign official can be prosecuted under Section 9(2) of the Ordinance, the offense applicable to private bribery. In August 2014, the Court of Final Appeal held in *Hong Kong v. Krieger & Anor.* that Section 9(2) has no extraterritorial reach and applies only to offers made in the territory of Hong Kong.[192] The case involved two Hong Kong-based defendants, executives of a Macau waste management company, who allegedly conspired with a Macanese businessman to offer a bribe to the then-Secretary of Transport and Public Works of Macau. The alleged proposal to bribe was devised in Hong Kong and most activities relating to the bribe took place in Hong Kong. However, the Court, relying on a close reading of the statutory language, held that "the offer of an advantage was to be made to [the then-Secretary] in Macau . . . ." when it was received from the defendants via their Macau-based co-conspirator.[193] It should be noted, however, that other theories, not presented in the prosecution, could still potentially be used by the government to seek to criminalize much of the activity alleged in the case.[194]

In addition, the ICAC could not escape becoming ensnared in political disputes. While the ICAC maintains a sterling reputation within Hong Kong and among anti-corruption agencies worldwide,[195] it came under criticism for investigations, instigated by complaints filed by politicians, of several politically connected persons

Continued on page 43

189. *Id.*

190. Hui's sentence: 7.5 years' imprisonment and HK$11.182 million in disgorgement (the amount Hui received as an Executive Council member after leaving the post of Chief Secretary). Stuart Lau, "Rafael Hui Jailed for Seven-and-a-Half Years; Thomas Kwok Locked Up for Five Years," *South China Morning Post* (Dec. 23, 2014), http://www.scmp.com/news/hong-kong/article/1668154/live-thomas-kwok-jailed-five-years.

191. Their sentences: Thomas Kwok (five years' imprisonment, HK$500,000 fine, and disqualification from becoming a company director for five years); Thomas Chan (six years' imprisonment and HK$500,000 fine), and Francis Kwan (five years' imprisonment). *Id.*

192. [2014] H.K.C.F.A.R. 68 at ¶¶ 9-11; *see also* Philip Rohlik and Sebastian Ko, "Hong Kong Court Rules on Extraterritorial Limits to the Territory's Anti-Corruption Law," *FCPA Professor* (Aug. 13, 2014), http://www.fcpaprofessor.com/hong-kong-court-rules-on-extraterritorial-limits-to-the-territorys-anti-corruption-law.

193. [2014] H.K.C.F.A.R. 68 at ¶ 10.

194. *See* Rohlik and Ko, note 192, *supra*.

195. *See* Bryane Michael, "Can the Hong Kong ICAC Help Reduce Corruption on the Mainland?" *Chin. J. Comp. Law.* (Jan. 31, 2014), http://cjcl.oxfordjournals.org/content/early/2014/01/31/cjcl.cxt024.full.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global
Continued from page 42

(including the territory's chief executive and the owner of the territory's largest opposition newspaper).[196]

D. Russia

Despite the enactment in recent years of a variety of measures targeting corruption, Russia appeared to be an outlier to the general trend of greater cross-border cooperation in anti-corruption enforcement matters. In fact, Transparency International cited this lack of cross-border cooperation, along with lackluster domestic enforcement efforts and lack of transparency, as reasons behind Russia's performance on its annual Corruption Perceptions Index. Russia received 27 out of 100 points, one less than in 2013, and tied with Nigeria, Lebanon, Kyrgyzstan, Iran, and Cameroon for 136th place, 38 ranks from the bottom of the list.[197] The reluctance of Russian anti-corruption authorities to cooperate with their counterparts is not surprising, however, given the tensions between Russia and the West arising in a large part from the Ukrainian crisis.

"Russia's anti-corruption enforcement in 2014 can only be described as lackluster. Few high-profile corruption cases were actively pursued, and many prosecutions appeared to languish."

Domestically, the Russian government has continued making public statements that emphasize the fight against corruption as a top priority, as exemplified by the new National Anti-corruption Plan for 2014-15 (the "Plan"), adopted in April 2014.[198] The Plan sets forth the government's main anti-corruption aims, including: (1) improvement of coordination among governmental agencies; (2) obliging

Continued on page 44

196. For instance, the incumbent and the former chief executives of Hong Kong (the head of the Hong Kong government), C.Y. Leung and Donald Tsang, the former ICAC chief, Timothy Tong, and the founder and chairman of Next Media, Jimmy Lai, are under ICAC investigation. *See* Samuel Chan, "Hong Kong Urged to Act on 'Trend' of Public-service Corruption," *South China Morning Post* (Jan. 27, 2014), http://www.scmp.com/news/hong-kong/article/1414885/more-civil-servants-abusing-power-personal-gain-icac-watchdog; Samuel Chan and Joyce Ng, "CY in the Dark over Probe into Australian Contract," *South China Morning Post* (Oct. 10, 2014), http://www.scmp.com/news/hong-kong/article/1613155/cy-dark-over-probe-australian-contract; Samuel Chan and Clifford Lo, "Jimmy Lai Visits ICAC Headquarters 3 Weeks After Graft-Busters Raid His Home," South China Morning Post (Sept. 17, 2014), http://www.scmp.com/news/hong-kong/article/1594445/jimmy-lai-arrives-icac-headquarters-questioning?page=all.

197. "Corruption Perceptions Index 2014: Russia's Score Falls by 1 Point,"*Transparency International* (Dec. 3, 2014), http://www.transparency.org.ru/indeks-vospriiatiia-korruptcii/indeks-vospriiatiia-korruptcii-2014-otcenka-rossii-upala-na-odin-ball.

198. The previous National Anti-corruption Plan was adopted for 2012-13. For more details, see Bruce E. Yannett, Alyona N. Kucher, Anna V. Maximenko, and Michael T. Leigh, "Russia's Turn Toward Anti-Corruption Enforcement?", *FCPA Update*, Vol. 3, No. 7 (Feb. 2012), http://www.debevoise.com/~/media/files/insights/publications/2012/02/fcpa%20update/files/view%20the%20update/fileattachment/fcpa_update_feb_2012.pdf, and Bruce E. Yannett, Alyona N. Kucher, Anna V. Maximenko, and Michael T. Leigh, "More Developments in Russian Anti-Corruption Efforts," *FCPA Update*, Vol. 3, No. 10 (May 2012), http://www.debevoise.com/~/media/files/insights/publications/2012/05/fcpa%20update/files/view%20the%20update/fileattachment/fcpa_update_may_2012.pdf.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 43

auditors to inform law enforcement of corruption offenses they uncover; and (3) enforcement of the requirement that legal entities implement anti-corruption compliance systems.[199] The Plan also lists specific action items to be undertaken by governmental agencies, including the General Prosecutor's Office.

Notwithstanding enactment of the Plan and declarations by the Russian leadership in the past several years, Russia's anti-corruption enforcement in 2014 can only be described as lackluster. Few high-profile corruption cases were actively pursued, and many prosecutions appeared to languish.[200] Although Russian investigative authorities have initiated several major new anticorruption cases in 2014, it remains to be seen whether these investigations will result in convictions or even trials. Among them are:

- A case against an investigator of the Russian Ministry for Internal Affairs, Alexander Sidorov, and an attorney, Olga Arkhipova, who are said to have been caught *in flagrante* while accepting a $500,000 bribe in exchange for terminating a criminal case against a person accused of fraud. Sidorov was taken into custody, and Arkhipova was put under house arrest.[201] The investigation is continuing.
- The "ChelPipe" case, in which Andrey Komarov, a majority shareholder and a member of the Board of Directors of Joint Stock Company Chelyabinsk Pipe-Rolling Plant ("ChelPipe"), and Alexander Shibanov, a member of the Corporate Governance Committee of ChelPipe's Board of Directors, were detained on charges of attempted commercial bribery. It is alleged that Komarov and Shibanov offered a $300,000 bribe to an official conducting an audit of ChelPipe in exchange for concealment of an improper expenditure of the company's funds. Komarov was placed under house arrest, and the court rejected his application for release on bail.[202] Shibanov was taken into custody for two months.[203] The investigation is continuing.

Continued on page 45

199. For more details, see Paul R. Berger, Dmitri V. Nikiforov, Bruce E. Yannett, Jane Shvets, and Anna V. Maximenko, "Anticorruption Compliance Programs Under Russian Law: Article 13.3 and the FCPA/UKBA Experience," *FCPA Update*, Vol. 4, No. 9 (Apr. 2013), http://www.debevoise.com/~/media/files/insights/publications/2013/04/fcpa%20update/files/view%20the%20update/fileattachment/fcpa_update_apr_2013_proof_3.pdf, and Dmitri Nikiforov, Bruce E. Yannett, Anna V. Maximenko, and Jane Shvets, "Russia Issues Detailed Recommendations on Compliance with Russian Anti-Corruption Law," *FCPA Update*, Vol. 5, No. 5 (Dec. 2013), http://www.debevoise.com/~/media/files/insights/publications/2013/12/fcpa%20update/files/view%20fcpa%20update/fileattachment/fcpa_update_dec2013.pdf.

200. *See, e.g.*, "Chaotic Character of Anticorruption Measures Leave Russia in the Last Third of the Corruption Perceptions Index," *Interfax* (Dec. 3, 2014), http://www.interfax.ru/410863.

201. "Pogorevshy na vzyatke sledovatel po osobo vazhnym delam otpravilsya v SIZO," *PASMI.RU* (Jan. 16, 2014), http://pasmi.ru/archive/100805.

202. "Vladelets Chelyabinskogo Truboprokatnogo Zavoda otpravlen pod domashniy arest – ego podozrevauyt v kommecheskom podkupe," *Newsru.com* (Mar. 14, 2014), http://www.newsru.com/russia/14mar2014/chtpz.html.

203. "Advokata ChTPZ Shibanova arestovali na dva mesyatsa," *RBC Daily* (Mar. 14, 2014), http://www.rbcdaily.ru/society/562949990833272.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 44

Against this background, businesses operating in Russia could see a greater risk of anti-bribery enforcement by the United States and other OECD countries related to their conduct in Russia. These other governments have continued to scrutinize Russian operations of companies that fall under their jurisdiction, as illustrated by the resolution of the Bio-Rad investigation in 2014. Notably, the Russian subsidiary of Bio-Rad does not appear to have been subject to any enforcement actions in Russia.[204]

But in one move likely to have effects on compliance tasks in Russia, the government passed a series of laws aimed at "domestication" of both money and data.

First, after public discussion, in November 2014 Russia adopted amendments to its tax code, aimed at removing tax advantages of holding funds in offshore bank accounts and providing incentives for Russian nationals to repatriate the money to Russia. Whether the law will have the desired effect remains to be seen, and a Russian national's repatriation calculus is likely to be complicated by the current political climate and sanctions. If the law's stated aims are met, however, it could make it more difficult to conceal corruptly obtained funds and provide for greater transparency of Russian companies and their ownership.[205]

Second, more controversial legislation is aimed at "data domestication." Federal Law No. 242-FZ, adopted on July 21, 2014 and amended on December 31, 2014,[206] requires all "personal data processors" handling personal data of Russian citizens to maintain such data on servers located in Russia.[207] The law, which is set to come into force on September 1, 2015, could have broad impact on companies that store information about their Russian clients or employees on servers that are located or may be transferred abroad, including companies that may be required to produce such information to non-Russian authorities in connection with anti-corruption or other investigations.[208]

In the current environment, increased cooperation between Russia and the West in the anti-corruption sphere appears unlikely. It remains to be seen

Continued on page 46

204. "Corruption Perceptions Index 2014: Russia's Score Falls by 1 Point," note 197, *supra*.

205. *See* Alan Kartashkin, Andrew M. Levine, Dmitri V. Nikiforov, Anna V. Maximenko, and Jane Shvets, "Bringing Money and Data Back to Russia," *FCPA Update*, Vol. 5, No. 12 (July 2014), http://www.debevoise.com/~/media/files/insights/publications/2014/07/fcpa%20update/files/view%20fcpa%20update/fileattachment/fcpa_update_july2014.pdf.

206. "Personal Data of Russians Must Be Stored in Russia," *RG.ru*, (Dec. 31, 2014), http://www.rg.ru/2014/12/31/personal-dannye-site.html.

207. *See* Debevoise & Plimpton Client Update, "Data Domestication," (Aug. 11, 2014), http://www.debevoise.com/insights/publications/2014/08/data-domestication.

208. *See* Kartashkin, *et al.*, note 205, *supra*.

Continued from page 45

whether the situation Russia faces, precipitated by economic sanctions and falling oil prices, will provide the much-needed impetus for tougher anti-corruption enforcement in 2015.

E. Brazil

In 2014, Brazil began a new era in anti-corruption enforcement, as the country's Clean Company Law officially came into force.[209] The new law imposes strict civil and administrative liability on corporate entities doing business in Brazil for corruption or bribery of Brazilian or foreign public officials.[210] It applies broadly to corporations, partnerships, and proprietorships, as well as to for-profit and non-profit entities.[211] It also provides for monetary fines ranging from 0.1% to 20.0% of a company's annual gross revenues.[212]

Although the new law represents a major step forward, many aspects of Brazil's anti-corruption framework remain uncertain. The federal government has yet to enact the required regulation implementing the new law, which is expected to include guidelines for assessing the effectiveness of corporate compliance programs, among other things.[213] Given Brazil's multi-layered administrative and legal system, the new statute has left companies concerned whether the same conduct can or will be penalized at the federal, state, and municipal levels.[214]

Despite this uncertainty, the Office of the Comptroller General ("CGU") appears eager to enforce the new law and already has advised companies not to wait for formal decrees before ensuring they have strong compliance measures in place.[215] The CGU has signaled that it will evaluate compliance programs and cooperation with the government in alignment with international instruments such as the OECD Anti-Bribery Convention and the DOJ Sentencing Guidelines.[216]

Continued on page 47

209. Federal Law No. 12.846/2013 (Aug. 1, 2013). *See* Andrew M. Levine, Bruce E. Yannett, Renata Muzzi Gomes de Almeida, Steven S. Michaels, and Ana L. Frischtak, "Brazil Enacts Long-Pending Anti-Corruption Legislation," *FCPA Update*, Vol. 5, No. 1 (Aug. 2013), http://www.debevoise.com/insights/publications/2013/08/fcpa-update.

210. Federal Law No. 12.846/2013 (Aug. 1, 2013) at Arts. 1 & 2.

211. *Id.* Art. 1 (Sole Paragraph).

212. *Id.* Art. 6.

213. *See* Ana Paula Martinez and Mariana Tavares de Araujo, "What to Expect from Brazil's New Anti-Corruption Law," *Ethic Intelligence* (Feb. 2014), http://www.ethic-intelligence.com/experts/400-what-can-be-expected-from-brazil-s-new-anti-corruption-law/; *see also* OECD Working Group on Bribery, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Brazil at 22 (Oct. 2014) (recommending that Brazil issue its regulation "as a matter of priority").

214. *See* "CGU: We Will Rectify Flaws in Brazil's Clean Company Act," *Global Investigations Review* (Oct. 27, 2014), http://globalinvestigationsreview.com/article/1863/cgu-will-rectify-flaws-brazils-clean-company-act.

215. *Id.*

216. *Id.*

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 46

In addition, some states and municipalities, such as São Paulo, already have issued their own regulations implementing the Clean Company Law.[217] The coming year will likely provide greater perspective on whether agencies situated throughout Brazil's different jurisdictions adopt cohesive enforcement criteria and guidance. The evolution of Brazil's anti-corruption regime will doubtless continue to receive considerable scrutiny, given its focus on conduct both in Brazil and abroad, and the fact that that corruption continues to significantly harm the country's GDP.[218]

The importance of this legislation and a strong anti-corruption regime was highlighted by a number of high-profile corruption scandals in 2014, including:

- Several instances of alleged bribery at Petrobras, including an investigation into improper payments by SBM Offshore NV in an attempt to secure contracts;[219] an arrest of a former Petrobras director for taking bribes in connection with the company's purchase of a Texas refinery;[220] and a landmark series of indictments charging several executives of Petrobras and major Brazilian construction companies with fixing construction bids, offering and accepting bribes, and funneling money to political leaders.[221]
- Charges filed against Embraer SA employees accused of bribing officials in the Dominican Republic in exchange for providing supplies to the country's armed forces.[222]

Although the official arrival of the Clean Company Law represents a significant milestone in Brazil's anti-corruption efforts, the focus on government initiatives will likely only intensify. As pressure grows on the CGU to clarify different aspects of the law, Brazil's states and municipalities also may continue to play important roles in implementation. Companies operating in Brazil will need to closely monitor

Continued on page 48

217. *See* Carlos Ayres, "How the City of São Paulo Is Fighting Corruption," *FCPAméricas Blog* (May 23, 2014), http://fcpamericas.com/english/brazil/city-sao-paulo-fighting-corruption/; *see also* Martinez and Tavares de Araujo, note 213, *supra*.

218. *See* OECD Working Group on Bribery, note 213, *supra* at 9.

219. *See* Sean Hecker, Andrew M. Levine, and Taz R. Shahabuddin, "Small Country, Big Punch: The Netherlands' Anti-Bribery Prosecution of SBM Offshore," *FCPA Update*, Vol. 6, No. 5 (Dec. 2014), http://www.debevoise.com/insights/publications/2014/12/fcpa-update-december-2014; Sabrina Valle and Peter Millard, "SBM Bribery Probe in Brazil Puts Petrobras Work at Risk," *Bloomberg* (Nov. 13, 2014), http://www.bloomberg.com/news/2014-11-13/sbm-bribery-probe-in-brazil-puts-petrobras-work-at-risk.html.

220. *See* Rogerio Jelmayer and Will Connors, "Brazil Police Arrest Another Ex-Petrobras Executive," *Wall Street Journal* (Jan. 14, 2015), http://www.wsj.com/articles/brazil-police-arrest-another-ex-petrobras-executive-1421231142

221. *See* "Petrobras Scandal: Brazilian Oil Executives Among 35 Charged," *The Guardian* (Dec. 11, 2014), http://www.theguardian.com/world/2014/dec/12/petrobras-scandal-brazilian-oil-executives-among-35-charged; *see also* "Brazil Prosecutor Seeks Indictment Against Former Petrobras CEO," *Reuters* (Dec. 16, 2014), http://www.reuters.com/article/2014/12/16/us-brazil-petrobras-idUSKBN0JU27X20141216.

222. *See* Joe Palazzolo and Rogerio Jelmayer, "Brazil Files Bribery Charges in Embraer Aircraft Sale to Dominican Republic," *Wall Street Journal* (Sept. 23, 2014), http://www.wsj.com/articles/brazil-files-bribery-charges-in-embraer-aircraft-sale-to-dominican-republic-1411502236.

The Year 2014 in Anti-Bribery Enforcement: New Records, New Trends, and New Complexity as Anti-Bribery Enforcement Truly Goes Global

Continued from page 47

these regulatory developments, along with the continued fallout from cases against Petrobras and others, in order to meet Brazil's heightened regulatory expectations and to manage the larger cross-border compliance risks arising from the many anti-bribery regimes that are likely to apply to firms operating in and from Brazil.

VIII. Conclusion

Last year's record of global anti-bribery enforcement sets the stage for new compliance challenges in 2015. Although the theme of global enforcement and parallel proceedings has become something of a drumbeat in recent years, last year's cases show clearly that anti-corruption enforcement is now a multi-nation affair.

While the United States, with far and away the largest enforcement budget for anti-corruption matters, will likely continue to lead in the number of cases opened, investigated, and prosecuted, multinational companies that remain inattentive to the risks from the skein of anti-bribery laws they face in Europe, Asia, and Latin America, the will of non-U.S. regulators to use those laws, and the related enforcement/compliance programs by development banks and other counter-parties, will do so at their peril.

– The Editors

This month's issue of FCPA Update was prepared by Debevoise partners Paul R. Berger, Sean Hecker, Andrew M. Levine, Dmitri V. Nikiforov, Dr. Thomas Schürrle, Karolos Seeger, and Bruce E. Yannett, counsel Steven S. Michaels, international counsel Matthew Getz and Philip Rohlik, and associates Blair R. Albom, Bernardo Becker Fontana, Thomas Jenkins, Sebastian Ko, Joe Lin, Robin Lööf, Anna V. Maximenko, Miheer Mhatre, Peter John Michalik, Matthew Platkin, Jane Shvets, and Marisa R. Taney.

They may be reached at prberger@debevoise.com, shecker@debevoise.com, amlevine@debevoise.com, dvnikiforov@debevoise.com, tschuerr@debevoise.com, kseeger@debevoise.com, beyannett@debevoise.com, ssmichaels@debevoise.com, mgetz@debevoise.com, prohlik@debevoise.com, bralbom@debevoise.com, bbeckerfontana@debevoise.com, tjenkins@debevoise.com, sko@debevoise.com; jlin@debevoise.com, rloof@debevoise.com, avmaximenko@debevoise.com, mmhatre@debevoise.com, pumichal@debevoise.com, mplatkin@debevoise.com, jshvets@debevoise.com, and mrtaney@debevoise.com.

Their biographies and additional contact information are available at www.debevoise.com.

Continued on page 49

Company	Settlement Amount	Citations
Alcoa World Alumina LLC	DOJ: $223 M (disgorgement and penalty) SEC: $161 M (disgorgement)	*United States v. Alcoa World Alumina LLC*, No. 2:14-cr-7-DWA-1 (W.D. Pa. Jan 9., 2014) DOJ Press Rel. 14-019, Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay $223 Million in Fines and Forfeiture (Jan. 9, 2014), http://www.justice.gov/opa/pr/alcoa-world-alumina-agrees-plead-guilty-foreign-bribery-and-pay-223-million-fines-and *In re Alcoa, Inc.*, SEC Admin. Pro. 3-15673 (Jan. 9, 2014) SEC Press Rel. 2014-3, SEC Charges Alcoa with FCPA Violations (Jan. 9, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936#.VJOD7oAA
Alstom S.A.	DOJ: $772.3 M (penalty)	*United States v. Alstom S.A.*, No. 14-CR-246-JBA (D. Conn. Dec. 22, 2014) DOJ Press Rel. 14-1448, Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery
Avon Products (China) Co. Ltd.	DOJ: $67.7 M (penalty) SEC: $67.4 M (disgorgement and pre-judgment interest)	*United States of America v. Avon Prods. (China) Co. Ltd.*, No. 1:14-cr-828-GBD (S.D.N.Y. Dec. 17, 2014) DOJ Press Rel. 14-149, Avon China Pleads Guilty to Violating the FCPA by Concealing More than $8 Million in Gifts to Chinese Officials (Dec. 17, 2014), http://www.justice.gov/opa/pr/avon-china-pleads-guilty-violating-fcpa-concealing-more-8-million-gifts-chinese-officials *Securities and Exchange Commission v. Avon Products, Inc.*, No. 14-cv-9956 (KPF) (S.D.N.Y. Dec. 17, 2014) SEC Press Rel. 2014-285, SEC Charges Avon with FCPA Violations (Dec. 17, 2014), http://www.sec.gov/news/pressrelease/2014-285.html#.VJnFUoAA

Continued on page 50

Company	Settlement Amount	Citations
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Bruker Corp.	SEC: $2.4 M (disgorgement, penalty, and pre-judgment interest)	*In re Bruker Corp.*, SEC Admin. Pro. 3-16314 (Dec. 15, 2014) SEC Press Rel. 2014-280, SEC Charges Massachusetts-Based Scientific Instruments Manufacturer with FCPA Violations (Dec. 15, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543708934#.VJnCEoAA
Dallas Airmotive, Inc.	DOJ: $14 M (penalty)	*United States v. Dallas Airmotive, Inc.*, No. 3:14-cr-483-D (N.D. Tex. Dec. 10, 2014) DOJ Press Rel. 14-1383, Dallas Airmotive Inc. Admits Foreign Corrupt Practices Act Violations and Agrees to Pay $14 Million Criminal Penalty (Dec. 10, 2014), http://www.justice.gov/opa/pr/dallas-airmotive-inc-admits-foreign-corrupt-practices-act-violations-and-agrees-pay-14
HP	DOJ: $74.2 M (penalty) SEC: $34 M (disgorgement and pre-judgment interest) (Note: $2.53 M of the disgorgement was a forfeiture to the IRS)	*United States v. ZAO Hewlett-Packard A.O.*, No. 5:14-cr-201 (N.D. Cal. Apr. 9, 2014) *United States v. Hewlett-Packard Polska, S.P. Z.O.O.*, 5:14-cr-00202 (N.D. Cal. Apr. 9, 2014) *United States v. Hewlett-Packard Mexico, S. de R.L. de C.V.* (Apr. 9, 2014) DOJ Press Rel. 14-358, Hewlett-Packard Russia Agrees to Plead Guilty to Foreign Bribery (Apr. 9, 2014), http://www.justice.gov/opa/pr/hewlett-packard-russia-agrees-plead-guilty-foreign-bribery *In re Hewlett-Packard Co.*, Sec Admin. Pro. 3-15832 (Apr. 9, 2014) SEC Press Rel. 2014-73, SEC Charges Hewlett-Packard with FCPA Violations (Apr. 9, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541453075#.VJmIvoAB

Continued on page 51

Company	Settlement Amount	Citations
Layne Christensen Company	SEC: $5.1 M (disgorgement, penalty, and pre-judgment interest)	*In re Layne Christensen Co.*, SEC Admin. Pro. 3-16216 (Oct. 27, 2014) SEC Press Rel. 2014-240, SEC Charges Texas-Based Layne Christensen Company with FCPA Violations (Oct. 27, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543291857#.VLBJAaJmacY
Marubeni	DOJ: $88 M (penalty)	*United States v. Marubeni Corp.*, No. 3:14-cr-52-JBA (D. Conn. Mar. 19, 2014) DOJ Press Rel. 14-290, Marubeni Corporation Agrees to Plead Guilty to Foreign Bribery Charges and to Pay an $88 Million Fine (Mar. 19, 2014), http://www.justice.gov/opa/pr/marubeni-corporation-agrees-plead-guilty-foreign-bribery-charges-and-pay-88-million-fine
Smith and Wesson	SEC: $2 M (disgorgement, penalty, and pre-judgment interest)	*In re Smith & Wesson Holding Corp.*, SEC Admin. Pro. 3-15986 (July 28, 2014) SEC Press. Rel. 2014-148, SEC Charges Smith & Wesson with FCPA Violations (July 28, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542384677#.VJQ6ToAB

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

www.debevoise.com

Paul R. Berger
Co-Editor-in-Chief
+1 202 383 8090
prberger@debevoise.com

Sean Hecker
Co-Editor-in-Chief
+1 212 909 6052
shecker@debevoise.com

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

Matthew Getz
Co-Managing Editor
+44 20 7588 4180
mgetz@debevoise.com

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

Blair R. Albom
Assistant Editor
+1 212 909 6022
bralbom@debevoise.com

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

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

Steven S. Michaels
Executive Editor
+1 212 909 7265
ssmichaels@debevoise.com

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

Jane Shvets
Deputy Managing Editor
+1 212 909 6573
jshvets@debevoise.com

Marisa R. Taney
Assistant Editor
+1 212 909 6138
mrtaney@debevoise.com

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

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