Client Alert

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Top Ten International Anti-Corruption Developments for October 2015

By the MoFo FCPA and Global Anti-Corruption Team

In order to provide an overview for busy in-house counsel and compliance professionals, we summarize below some of the most important international anti-corruption developments in the past month with links to primary resources. October saw another SEC-only corporate FCPA settlement, an explanation from DOJ as to why the apparent decrease in volume of FCPA criminal actions does not mean anti-corruption is no longer an enforcement priority, an important ruling in an FCPA whistleblower case, and a variety of other anti-corruption developments in the U.S. and abroad. Here is our October 2015 Top Ten list:

1. **SEC Reaches $14 Million Settlement with Bristol-Myers Squibb Relating to Alleged Failures to Maintain Effective Controls Over Chinese Joint Venture.**

On October 5, 2015, the SEC announced that it had reached an agreement with U.S. pharmaceutical company Bristol-Myers Squibb Co. (BMS) to settle alleged FCPA accounting violations related to BMS's majority-owned joint venture in China (BMS China). According to SEC's administrative Cease and Desist Order (Order), employees of BMS China improperly provided "corrupt inducements" to health care providers at state-owned and state-controlled hospitals in the form of cash payments, gifts, travel, entertainment and conference sponsorships and falsely recorded them as legitimate business expenses. The Order cited a number of alleged compliance failures at BMS China that were allegedly brought to BMS's attention but not properly addressed, in part because BMS allegedly lacked sufficient compliance resources on the ground in China. The Order requires BMS to pay disgorgement and a civil penalty totaling $14 million and to self-report on its compliance upgrades for a two-year period. Notably absent from the Order were any allegations concerning BMS's operations in Germany, which the SEC began investigating as early as 2006 after a local German prosecutor launched a probe into BMS's activities there. BMS disclosed in its latest 10-Q that DOJ had completed its own investigation without taking any action, making this the ninth SEC-only FCPA corporate resolution so far in 2015—a phenomenon we're calling the "Great Divide."

2. **Recent DOJ and SEC Commentary Highlights Enforcement Priorities.**

- **DOJ Focusing on Higher Impact Cases.** One potential reason for the Great Divide may be a slight shift in enforcement priorities at DOJ. When asked in a recent interview whether there was a "slow down" in DOJ FCPA enforcement, Assistant Attorney General Leslie Caldwell stated that the Criminal Division is currently focusing on "bigger, higher impact" FCPA cases that involve bribery in multiple countries or wrongdoing by senior executives. This may help explain why DOJ has not joined any of the nine corporate enforcement actions brought by SEC this year, all of which were relatively small—

ranging from $75,000 to $25 million in total penalties and disgorgement—and most of which alleged only FCPA accounting provision violations. As the Yates Memo suggests, however, this does not mean that DOJ is going away, and the IAP Worldwide Services resolution from earlier this year demonstrates that DOJ is willing to pursue even a relatively small case in certain circumstances.

- **SEC Continued Focus on Financial Industry.** As we discussed in our August 2015 Top Ten, Bank of New York Mellon (BNY) was the first bank to be subject to an enforcement action arising from SEC industry sweeps into the financial services industry's hiring practices and dealings with sovereign wealth funds. It may not be the last. When asked during an October 22, 2015, conference call to discuss SEC's recent enforcement record, SEC Director of Enforcement Andrew Ceresney told reporters that the BNY action was the first case the agency brought against a financial institution for violations of the FCPA but that he would be "surprised if it were the last." Ceresney described financial institutions as "another area of focus for us."

3. **Former President of United Nations (UN) General Assembly Charged in Connection with Bribery Scheme.**

On October 6, 2015, the U.S. Attorney's Office for the Southern District of New York charged John Ashe, former president of the UN Assembly General, with two counts of tax fraud in connection with more than $1.2 million in income he allegedly received as part of a bribery scheme. According to the complaint, Ashe accepted over a million dollars in bribes from a Chinese real estate mogul, Ng Lap Seng, and other business associates in exchange for his support for a multi-billion dollar, UN-sponsored conference center in Macau. While Ashe was alleged to have orchestrated a bribery scheme that turned the UN into a "platform for profit," Ashe was not charged with any bribery-related offenses. Also of note, the four defendants who allegedly bribed Ashe were charged with bribing and conspiring to bribe an official of an organization receiving federal funding rather than with violating the FCPA, even though Ashe would be considered a "foreign official" under that statute. In September, Ng and his assistant, Jeff Yin, were arrested on separate charges of lying to U.S. customs officials in connection with bringing more than $4.5 million into the country—some of the money now alleged to have been used to make the bribe payments to Ashe.

4. **Corporate Deferred Prosecution Agreements (DPAs) Once Again Face Judicial Scrutiny.**

Over the last several years, a number of federal judges have openly grappled with what role, if any, they should play in reviewing the terms of a DPA filed in their courts. In July 2013, Eastern District of New York Judge John Gleeson issued a lengthy order approving the HSBC DPA after concluding that a district judge does have authority, albeit limited, to approve, or disapprove, a DPA. In February 2015, D.C. District Judge Richard Leon rejected a DPA between Fokker Services B.V. and the D.C. U.S. Attorney's Office in connection with a U.S. sanctions investigation on the grounds that the terms of the "anemic" DPA were "grossly disproportionate to the gravity of Fokker Services' conduct in a post 9/11 world." On October 21, 2015, D.C. District Judge Emmet Sullivan approved DPAs involving two companies that allegedly paid bribes to win U.S. government contracts. Largely agreeing with Judge Gleeson, Judge Sullivan found that the district court had an important, but limited, role in approving DPAs and went on to approve both. Nevertheless, echoing Judge

Leon's concerns, Judge Sullivan, in dicta, harshly criticized DOJ's use of DPAs in the corporate context. In calling the DPA in an unrelated case a "shocking example" of potentially culpable individuals not being charged, Judge Sullivan pointedly criticized DOJ for failing to follow its newly issued guidance set forth in the Yates Memo. Judge Sullivan called for reforms in the criminal justice system through the use of DPAs and "other similar tools," such as pretrial diversion, for individuals. Although none of the cases discussed above involved the FCPA, this continued scrutiny of DPAs in other cases might ultimately impact how DOJ resolves criminal FCPA cases against both corporate and individual defendants.

5. **IAP Worldwide Services Former Vice-President Sentenced.**

In June 2015, James Rama, the former vice-president of Florida-based IAP Worldwide Services Inc., pleaded guilty to one count of conspiracy to violate the FCPA in connection with a scheme to bribe Kuwaiti officials through a third-party intermediary to obtain a government security contract. On October 9, 2015, Eastern District of Virginia Judge Gerald Bruce Lee sentenced Rama to 120 days' imprisonment. The sentence marks a downward departure from the five-year term recommended by the sentencing guidelines and the one-year sentence requested by the prosecutors. At sentencing, Judge Lee focused on the fact that Rama—the only individual facing criminal prosecution for the scheme—was not the decision-maker who authorized the improper conduct.

6. **Bio-Rad's Former General Counsel's FCPA-Related Whistleblower Lawsuit against Company Allowed to Continue.**

As we reported earlier, in June 2015, Bio-Rad Laboratories Inc.'s former general counsel, Sanford Wadler, sued the company in federal court in northern California, alleging that the company fired him in retaliation for raising concerns about suspected kickbacks in China. (In November 2014, Bio-Rad reached a combined $55 million resolution with DOJ and SEC over bribery allegations in Russia, Vietnam, and Thailand.) Bio-Rad moved to dismiss Wadler's complaint, in part, on the grounds that Wadler could not be considered a "whistleblower" under Dodd-Frank's anti-retaliation provisions because he did not provide any information to SEC. Relying on the approach taken in the Fifth Circuit in *Asadi v. G.E. Energy (U.S.A.), LLC*,[1] Bio-Rad argued that Dodd-Frank does not protect individuals, like Wadler, who only provide information to others within the company. On October 23, 2015, Chief Magistrate Judge Joseph Spero denied Bio-Rad's motion to dismiss. Judge Spero found that Dodd-Frank was ambiguous on its face and therefore concluded that SEC's interpretation of the statute—which provides equal protection to internal whistleblowers, as stated in SEC Rule 21F-2(b)(1)—was controlling. In rejecting *Asadi*, Judge Spero noted that the majority of courts have found that SEC's interpretation of the anti-retaliation provisions of Dodd-Frank is entitled to deference. The court's decision means Wadler's claims against the company will continue to be litigated and, moreover, further highlights the risks faced by companies related to whistleblowers.

[1] 720 F.3d 620 (5th Cir. 2013).

7. **African Development Bank Group (AfDB) Reaches Settlement with SNC-Lavalin in Connection with Projects in Uganda and Mozambique.**

   On October 1, 2015, AfDB announced a settlement with SNC-Lavalin Group Inc. following an investigation by the Bank's Integrity and Anti-Corruption Department into contracts awarded to SNC-Lavalin on two AfDB-financed projects in Uganda and Mozambique. SNC-Lavalin did not contest AfDB's finding that former employees at SNC-Lavalin's subsidiary ordered improper payments to public officials in order to secure the contracts. SNC-Lavalin agreed to pay a $1.5 million settlement payment that will be used to fund programs combatting corruption in Africa. Under the agreement, SNC-Lavalin's relevant subsidiary received a conditional non-debarment for a period of two years and ten months, on the condition that SNC-Lavalin commit to maintaining an effective company-wide compliance program subject to review by AfDB. SNC-Lavalin's ability to avoid debarment from AfDB-funded projects is in stark contrast with the harsh sanction the company received in 2013 when the World Bank barred the company and its subsidiaries from bidding on any World Bank development projects for a period of ten years. AfDB's case against SNC-Lavalin serves to highlight the increasing role multilateral development banks are playing in anti-corruption enforcement and the severity of the potential consequences faced by companies facing the threat of cross-debarment.

8. **U.S. Investigates Alleged Widespread Corruption at Venezuela's State-Owned Oil Company.**

   In March 2015, the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) announced that senior managers at Banca Privada d'Andorra (BPA) took bribes in order to help launder money for organized crime groups. According to FinCEN's notice of action designating BPA as a foreign financial institution of primary money laundering concern, a BPA manager assisted numerous Venezuelan money launderers. FinCEN said that the manager accepted unusually large commissions to set up shell companies to siphon about $2 billion from Venezuela's state-owned oil company, Petroleos de Venezuela, S.A. (PDVSA). In October 2015, various news sources reported that U.S. officials have expanded the FinCEN inquiry and launched a widespread investigation into a multi-billion dollar embezzlement, bribery, and money laundering scheme allegedly involving PDVSA's senior leaders. The coordinated, multi-agency investigation reportedly involves officials from, among others, the Department of Homeland Security, the Drug Enforcement Administration, the Federal Bureau of Investigation, and DOJ. If the Petrobras investigation in Brazil is any indicator, the PDVSA investigation could have far-reaching consequences for companies in many sectors, though with the poor diplomatic relationship currently existing between the U.S. and Venezuela, cross-border cooperation will likely be significantly more challenging.

9. **Discovery Dispute Continues in FCPA Prosecution of Former Alstom Executive.**

   Former Alstom SA executive Lawrence Hoskins is facing a 12-count superseding indictment arising out of allegations that he conspired with Alstom's subsidiary in Connecticut and others to violate the FCPA by paying bribes to Indonesian officials in exchange for a lucrative power station project contract. As we noted earlier, Hoskins is mounting a defense premised, in part, on the argument that he was not an "agent" of a domestic concern and therefore, as a UK citizen, not subject to FCPA jurisdiction. Hoskins's attempts to seek exculpatory evidence related to his relationship with the company's U.S. subsidiary were met with various

challenges, particularly with respect to seeking evidence from the home office of his former employer where strict French data privacy laws severely restrict the transfer of data. At the end of September 2015, District of Connecticut Judge Janet Arterton ordered DOJ and Alstom to work together to find the remaining documents Hoskins is seeking. In October, DOJ filed a status report notifying the court that, working together with Alstom, the government identified potentially relevant documents in France. The government submitted an expedited request to the French government pursuant to the countries' Mutual Legal Assistance Treaty, and Alstom has provided the documents to the French authorities. It is now up to the French government to decide whether it will make these documents available to the U.S. government, which in turn would have to produce them to Hoskins. Notably, in recent speeches, DOJ has warned parties that the invocation of data privacy laws should not be used as a shield by would-be defendants to hide information from the government. The *Hoskins* discovery dispute highlights the flip side of this paradigm, with the government being hampered by foreign data privacy laws in complying with its potential discovery obligations.

10. **PRC Update.**

- **Focus on Reforming State-Owned Enterprises (SOEs) to Include Financial Institutions.** In September 2015, we reported that, as part of its intense anti-graft campaign, China issued guidelines to reform its SOEs, including increasing the supervision of SOEs to prevent corruption. It was announced this month that, as part of this growing effort, China's anti-corruption body will inspect various state-owned financial institutions, including the central bank and other sovereign funds, the stock exchanges, financial regulators, and insurance companies. Much like the SEC's sweep into the financial industry here in the United States, the Chinese government has cast a wide net across all aspects of its financial markets. In October 2013, DOJ and SEC brought FCPA enforcement actions against Diebold Inc. in connection with allegations that the company had bribed officials at Chinese state-owned and controlled banks.

- **Anti-Graft Campaign Topples Two More Senior Officials.** China's sweeping fight against corruption in its oil industry led to the conviction and sentencing of two senior officials in October 2015. Jiang Jiemin, former chairman of state-owned China National Petroleum Corp. was sentenced to 16 years in prison after being convicted of accepting more than $2 million in bribes. Similarly, Li Chuncheng, a former deputy party chief, was sentenced to 13 years' imprisonment for his role in a bribery scheme where it was alleged he accepted more than $6 million in bribes.

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