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FCPA Trends From The Last 6 Months

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After a relatively quiet third quarter in which there was only one corporate settlement of a Foreign Corrupt Practices Act enforcement action, 2014 ended with a flurry of activity, with the U.S. Department of Justice and the U.S. Securities and Exchange Commission each announcing a number of resolutions, including the largest criminal penalty ever levied under the FCPA: a $772 million settlement against French power and transport company Alstom SA.

The total amount collected by the DOJ and SEC in 2014 was approximately $1.5 billion — the most collected since 2010. Significantly, this total amount for the year came through the resolutions of only 10 matters; in 2010, the agencies collected $1.8 billion from the resolution of 23 matters. In addition, two of the settlements this year made the top 10 list for all time, measured in total collections.

These enforcement actions reflect several continuing trends and provide important reminders for companies operating abroad.

First, the average cost for companies to settle FCPA matters with the DOJ and SEC has increased. While there are many factors that account for any particular settlement, on average, 2014 shows a marked increase per action from previous years, to wit: $156 million in 2014; $61 million in 2013; $22 million in 2012; $34 million in 2011; and $78 million in 2010.

Second, the SEC brought enforcement actions against two companies involving alleged improper payments that were, in each case, well below the aggregate amounts typically seen in FCPA enforcement actions. These cases provide examples of the SEC's "broken windows" policy — announced by SEC Chairwoman Mary Jo White in 2013 — pursuant to which the SEC pursues all violations (both large and small) of the federal securities laws in order to achieve greater general deterrence.

Third, the SEC continued its push to resolve FCPA enforcement actions through its administrative processes, as opposed to civil actions filed in federal district court. This year, all but one of its eight enforcement actions were resolved this way, including large settlements with Alcoa and Hewlett-Packard. Some have criticized this trend as an attempt by the SEC to litigate cases on its home turf and

avoid judicial scrutiny of settlements.

Fourth, nearly all the resolutions during the second half of 2014 involved, at least in part, payments made through third-party intermediaries. This follows a clear trend: As reported by the Organization for Economic Cooperation and Development, of the 427 corruption cases resolved globally since 1999, 75 percent involved improper payments made through third-party intermediaries. The continuation of this trend also underscores the importance of risk-based due diligence for third-party business partners, including background investigations, contractual protections, training and ongoing monitoring.

Fifth, the second half of 2014 brought several examples of both the carrot and the stick in the DOJ and SEC's approach to corporate self-disclosure and cooperation. On the benefits side of the ledger, multiple declinations were achieved, at least in part, through timely self-disclosure, cooperation and remediation. In addition, the SEC credited "significant cooperation" when it announced that Layne Christensen Co. would pay a total of $5 million to resolve its FCPA violations, with only $375,000 of that amount paid as a fine. Similarly, the DOJ referenced Bio-Rad's self-disclosure, cooperation and remediation when it announced that the company would pay $55 million to resolve its FCPA issues, which included only a $14 million fine.

With respect to the consequences of covering up misconduct or failing to timely and completely cooperate, Alstom received the largest criminal penalty ever based, in part, according to DOJ, on the company's failure to voluntarily disclose and cooperate with authorities in a timely fashion.

Finally, the second half of 2014 also saw continued efforts by foreign regulators to enforce their own anti-corruption laws.

DOJ/SEC Corporate Resolutions From Q3-Q4 2014

During the second half of 2014, the DOJ and SEC have resolved seven matters against corporations. We summarize each of these resolutions below.

The SEC's Broken Windows Policy: FCPA Violations, Big and Small

Shortly after taking over as chairwoman of the SEC, Mary Jo White announced that the commission would take a "broken windows" approach to enforcement of the securities laws, declaring that the SEC did not view any infraction as too small to be uncovered and punished. In public comments made in October 2013, Chairwoman White advocated in support of this policy, stating that "minor violations" that are overlooked or ignored "feed bigger ones, and, perhaps more importantly, can foster a culture where laws are increasingly treated as toothless guidelines." Accordingly, the SEC's stated policy is to "pursue even the smallest infractions." Two cases resolved in the second half of 2014 reflect the extension of this policy into the FCPA realm.

Smith & Wesson

On July 28, 2014, the SEC announced a settled administrative proceeding against Massachusetts-based gun maker Smith & Wesson. Smith & Wesson's international sales staff allegedly bribed government officials in Pakistan, Indonesia and other foreign countries in order to attempt to win contracts to supply firearm products to those countries' militaries and police forces.

According to the SEC's order instituting the administrative proceeding, Smith & Wesson profited

$100,000 from the one contract that resulted from the misconduct before it was identified and stopped. In that instance, Smith & Wesson hired a third-party agent in Pakistan to help the company sell guns to a local police department. Smith & Wesson authorized the agent to provide more than $11,000 worth of guns to Pakistani police officials as gifts, along with additional cash payments. Smith & Wesson ultimately won a contract to sell 548 pistols to the Pakistani police for a profit of $107,852. The order described similar conduct in Indonesia, Turkey, Nepal and Bangladesh, but noted that sales contracts were not secured there.

To settle the charges, Smith & Wesson agreed to pay $2 million and report to the SEC on its FCPA compliance efforts for two years. The payment represented $107,852 in disgorgement, $21,040 in prejudgment interest and a $1.906 million penalty. Smith & Wesson consented to the order without admitting or denying wrongdoing.

In announcing the charges, the chief of the SEC Enforcement Division's FCPA Unit stated, "When a company makes the strategic decision to sell its products overseas, it must ensure that the right internal controls are in place and operating." Given this warning — coupled with the small amount of the alleged improper payments and the benefit to Smith & Wesson, along with Smith & Wesson's immediate actions to stop the misconduct upon detection — the Smith & Wesson charges are seen as a prime example of the SEC's broken windows policy. The case provides a reminder that companies operating abroad need to have internal controls in place to root out corruption, regardless of the size or scope of the improper payments.

The SEC's press release highlighted Smith & Wesson's cooperation with the investigation, as well as the remedial acts taken after the conduct came to light.

Bruker Corporation

Providing a second example of the SEC's broken window's policy, on Dec. 15, 2014, the SEC announced a settlement against Massachusetts-based scientific instruments manufacturer Bruker Corporation for charges that it violated the FCPA by making unlawful payments to Chinese officials to win sales contracts worth $1.7 million in profit. The alleged unlawful payments involved primarily travel and entertainment benefits totaling approximately $230,000.

Here, again, the charges were resolved through an administrative cease-and-desist order, with Bruker neither admitting nor denying the charges. The company paid $2.4 million to the SEC, which included $1,714,852 in disgorgement, $310,117 in prejudgment interest and a $375,000 penalty. The SEC announced that Bruker received a decreased penalty in light of the fact that it self-reported and cooperated with the SEC investigation.

The Benefits of Cooperation: The Carrot

FCPA declinations and resolutions in the second half of 2014 continue to highlight the value the DOJ and SEC place on timely self-disclosure, full cooperation and remediation.

Image Sensing Systems

On Sept. 10, 2014, Image Sensing Systems, a Minnesota-based developer of traffic light camera systems, announced that the DOJ "closed its inquiry" into potential FCPA violations in Poland, citing the company's "voluntary disclosure, thorough investigation, cooperation and voluntary enhancements to

its compliance program." The company had earlier reported that the SEC had closed its investigation.

Layne Christensen Company

On Oct. 27, 2014, the SEC announced a settlement against Layne Christensen Company, a Texas-based water management, construction and drilling company. The settlement resolved allegations that Layne Christensen paid bribes in various African countries designed to reduce taxes and speed up customs inspections and work permits.

Under the administrative cease-and-desist order, the company agreed to pay more than $5 million, including $3.9 million in disgorgement, $859,000 in prejudgment interest and a $375,000 penalty. Layne Christensen must also report to the SEC on its FCPA compliance for two years.

According to the SEC, the penalty reflected the company's "self-reporting, remediation, and significant cooperation with the SEC's investigation." In 2012, Layne Christensen had initially brought the issue to the SEC after an internal investigation unearthed evidence of the improper payments. According to the SEC's press release, the company cooperated further by making foreign witnesses available, providing English-language translations of documents and providing real-time reports of its investigative findings. It also undertook extensive remediation efforts.

Earlier in the year, Layne Christensen reported in an SEC filing that the DOJ had declined criminal charges.

Bio-Rad Laboratories

On Nov. 3, 2014, the DOJ and SEC announced a settlement and nonprosecution agreement with Bio-Rad Laboratories, a California-based medical diagnostics and life sciences manufacturing and sales company. According to the SEC, Bio-Rad paid $7.5 million in bribes over a five-year period to foreign officials in Russia, Vietnam and Thailand in order to secure business resulting in $35 million in profit. The alleged improper payments included commissions to third-party intermediary companies associated with the Russian government for work never performed.

In total, Bio-Rad agreed to pay $55 million in fines. This included a $14.35 million criminal penalty to resolve DOJ allegations that French and Russian subsidiaries doctored records and failed to implement adequate internal controls in connection with sales it made in Russia. It also included a payment of $40.7 million to the SEC in disgorgement and prejudgment interest. Under the NPA, Bio-Rad also must report to DOJ on its FCPA compliance efforts for two years.

In its press release, the DOJ highlighted Bio-Rad's cooperation, stating it was "giv[ing] credit to companies, like Bio-Rad, who self-disclose, cooperate and remediate their violations of FCPA." Like Layne Christensen, Bio-Rad was rewarded for voluntarily making US and foreign employees available, producing overseas documents, and summarizing the findings of its internal investigation. Bio-Rad also enhanced its anti-corruption policies globally, improved its internal controls and conducted extensive anti-corruption training throughout the company.

The Failure to Fully Cooperate: The Stick

Alstom

The DOJ closed out the year with a large settlement with Paris-based Alstom SA, an energy generation and rail company. The conduct involved approximately $75 million in bribes between at least 2001 and 2011 to win $4 billion in power, grid and transportation projects in Indonesia, Egypt, Saudi Arabia and the Bahamas. Bribe recipients included a high-ranking member of the Indonesian Parliament, among other senior government officials, as well as high-ranking members of Perusahaan Listrik Negara, the state-owned electricity company in Indonesia, according to the DOJ.

Alstom SA and several related entities agreed to pay $772 million to resolve the charges. This is the largest criminal fine ever assessed for an FCPA violation, and is the second largest FCPA enforcement action overall, after the $800 million settlement with Siemens in 2008.

In pleading guilty, Alstom SA admitted that it violated the FCPA by falsifying its books and records and failing to implement adequate internal controls. In a separate plea agreement, a Swiss subsidiary pleaded guilty to conspiracy to violate the FCPA. In addition, two US subsidiaries entered into DPAs.

In explaining the size of the penalty, the DOJ noted, among other factors, Alstom's failure to voluntarily disclose the conduct even though it was aware of related misconduct at a US subsidiary that previously resolved corruption charges, and Alstom's refusal to fully cooperate with the DOJ's investigation for several years.

Alstom's British subsidiary and its employees still face charges brought by the U.K. Serious Fraud Office.

Avon

On Dec. 17, 2014, Avon and a Chinese subsidiary agreed to pay a total of $135 million to settle SEC charges, along with a parallel DOJ case. In the DOJ case, Avon agreed to enter into a three-year DPA and to the appointment of a compliance monitor. Avon's Chinese subsidiary pleaded guilty to one count of conspiring to violate the FCPA. The DOJ's press release alleged that, "in late 2005 Avon learned that Avon China was routinely providing things of value to Chinese government officials and failing to properly document them. Instead of ensuring the practice was halted, fixing the false books and records, disciplining the culpable individuals, and implementing appropriate controls to address this problem, the companies took steps to conceal the conduct." In announcing the Avon resolution, Assistant Attorney General Leslie Caldwell stated: "Public companies that discover bribes paid to foreign officials, fail to stop them, and cover them up do so at their own peril."

Other Corporate Resolutions

Dallas Airmotive

On Dec. 11, 2014, the DOJ entered into a DPA with Texas-based aircraft maintenance company Dallas Airmotive Inc. The DPA resolved allegations that Dallas Airmotive violated the FCPA's anti-bribery provision by making improper payments to Latin American officials to win government contracts for aircraft maintenance. In the DPA, Dallas Airmotive admitted that, between 2008 and 2012, it bribed officials of the Brazilian Air Force, Peruvian Air Force, the office of the governor of the Brazilian state of Roraima, and the office of the governor of San Juan Province in Argentina.

Under the DPA, Dallas Airmotive will pay a $14 million criminal penalty. Highlighting the increased coordination among countries in cross-border investigations, in its press release, the DOJ lauded the assistance received from its "law enforcement counterparts in Brazil."

DOJ/SEC Actions Against Individuals

Stephen Timms and Yasser Ramahi

On Nov. 17, 2014, the SEC announced that it had resolved charges against two former employees in the Dubai office of Oregon-based defense contractor FLIR Systemsrelated to their taking government officials in Saudi Arabia on a "world tour" to help secure business for the company and then subsequently creating phony records to hide their misconduct.

The matter was resolved through an administrative cease-and-desist order, with the executives neither admitting nor denying the charges. Timms agreed to pay $50,000 to settle the SEC's enforcement action and Ramahi paid $20,000. The SEC found that both violated the anti-bribery, internal controls and false records provisions of the FCPA.

Benito Chinea and Joseph DeMense

On Dec. 17, 2014, Benito Chinea, the former CEO of Direct Access Partners, and Joseph DeMeneses, a managing partner, pleaded guilty to paying at least $5 million in bribes to an official of a state-owned Venezuelan bank in exchange for bond trading business.

Supreme Court Declines to Hear Esquenazi Appeal

In May of 2014 the U.S. Court of Appeals for the Eleventh Circuit became the first federal appeals court to provide guidance on the meaning of the term "instrumentality" as it is used in the FCPA. It was perhaps the most significant legal development concerning the FCPA in 2014. On Oct. 6, 2014, the U.S. Supreme Court denied the defendants' petition for certiorari, meaning that the Eleventh Circuit's decision will stand.

DOJ Opinion Release No. 14-02: FCPA Liability for Pre-Acquisition Conduct

On Nov. 7, 2014, the DOJ issued guidance through its opinion procedure, confirming that the DOJ would not prosecute a company for the pre-acquisition conduct of its acquisition target that was outside the jurisdictional reach of the FCPA.

The requestor, a publicly traded U.S. consumer products company, sought to acquire a foreign consumer products company. During due diligence for the transaction, the requestor uncovered a number of improper payments, including payments to foreign officials related to obtaining permits and licenses, gifts and cash donations to foreign officials and payments to state-owned media to quiet negative publicity. The requestor also found significant accounting and recordkeeping weaknesses at the company. However, none of the payments had any discernible jurisdictional nexus to the United States. The requestor sought an opinion regarding whether DOJ would take action based on the information provided.

Quoting its 2012 guidance, "FCPA — A Resource Guide to the U.S. Foreign Corrupt Practices Act," the DOJ stated that the acquisition of a company does not "create liability where none existed before." Stated differently, the DOJ affirmed: If conduct was beyond the jurisdictional reach of the FCPA when it occurred, later acquisition by a US company does not retroactively create jurisdiction over that past conduct.

The DOJ declined to offer a view "as to the adequacy or reasonableness" of the post-acquisition integration approach proposed by the requestor. However, the DOJ noted that "the circumstances of each corporate merger or acquisition are unique and require specifically tailored due diligence and integration processes," and integration efforts should be completed "as quickly as practicable." Some commentators have noted that the opinion failed to mention the 2008 Opinion Release 08-02, known as theHalliburton opinion, which some have read as imposing stricter and less flexible requirements and deadlines for such post-acquisition efforts.

Increased Enforcement Activity by Foreign Regulators

China

It has been widely reported that the Chinese government is in the midst of a sweeping crackdown on corruption and graft within its own ranks. But, in 2014, the first foreign company, U.K. drugmaker GlaxoSmithKline, was punished as part of China's ramped-up anti-corruption enforcement efforts. On Sept. 19, 2014, GSK reported that a Chinese court found the drug maker's local subsidiary guilty of bribery and fined the company $491.5 million. Chinese authorities accused GSK of bribing hospitals and doctors to prescribe their drugs by channeling illicit kickbacks through travel agencies and pharmaceutical industry associations.

The ruling followed a one-day trial. This is the largest corporate fine ever in China. Five of the company's managers, including its former top China executive, were convicted of bribery-related charges and received suspended prison sentences.

Brazil

Throughout 2014, Brazil has been gripped by the scandals involving alleged widespread corruption and money laundering in its largest oil company, majority state-ownedPetrobras. According to prosecutors, Petrobras' director of refining from 2004 to 2012, Paulo Roberto Costa, granted projects to members of an alleged cartel of Brazilian construction companies that systematically inflated their costs by as much as 20 percent. The companies then kicked back up to 3 percent of a contract's total value in the form of bribes to Costa, Brazilian politicians and money launderers.

According to press reports, Costa is cooperating with prosecutors and has alleged that lawmakers from both major political parties received bribes, totaling millions. Two newspapers reported that between 25 and 50 deputies and senators have been named. According to press reports, Costa himself has confessed to taking a bribe of about $636,000 in connection with one of the transactions in question, Petrobras' 2006 purchase of a refinery in Texas.

In November, Brazil's national accounting agency released an audit finding that Petrobras may have overpaid by as much as $1.2 billion as part of transactions that are under investigation for possible kickbacks, including the refinery purchase.

A sweeping investigation is now underway. Most recently, prosecutors charged 36 suspects in December for allegedly overbilling Petrobras, including 23 executives from some of Brazil's largest construction companies. Charges include corruption, money laundering and organized crime. Costa himself was among those charged.

The U.S. media has reported that the SEC has opened an investigation into the scandal and is working in coordination with Brazilian prosecutors.

United Kingdom

The U.K. SFO has been increasing its enforcement activity of the 2010 U.K. Bribery Act. On Dec. 5, 2014, after a jury trial, the SFO won its first conviction under the Bribery Act against two businessmen, Gary West and Stuart Stone. The prosecution arose from the pair's giving and receiving bribes in connection with the selling and promotion of fraudulent investment products based on "green biofuel" plantations in Cambodia. At their sentencing, Stone received a six-year prison sentence and West received a four-year sentence.

Just days later, the SFO won its first convictions for offenses involving bribery of foreign public officials. On Dec. 22, 2014, a jury found that two executives of a British printing company paid public officials in Kenya, Ghana, Mauritania and Somaliland nearly $780,000 between 2006 and 2010 to win government contracts. The jury acquitted two other employees.

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