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Legal Update
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FCPA Update: Year-End 2013

As a follow-up to Mayer Brown's *FCPA Update: Mid-Year 2013*,[1] this report covers enforcement activity of the Foreign Corrupt Practices Act (FCPA) during the second half of 2013. By all metrics, those last six months were an extremely active period for FCPA enforcement. Indeed, after a short lull during the third quarter of 2013 (when no new cases were announced), the US Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) closed the year with a flurry of high-profile and noteworthy prosecutions and civil claims. Overall enforcement totals for 2013 nearly matched the record numbers of previous years, and the DOJ and SEC have both indicated that enforcement efforts are only likely to get even more aggressive as the agencies pour more resources into FCPA investigations.

The year also saw a dramatic increase in the average corporate fine, with some truly eye-popping settlement figures sure to make General Counsel and Risk Compliance personnel everywhere sit up and take notice. Below we discuss some of the significant FCPA trends and cases that took shape in 2013.

Huge FCPA Settlements for Long-Ago Conduct

The DOJ and SEC settled several large and noteworthy cases in the second half of 2013. While these cases span many countries and several industries, a few continuing trends are apparent.

First, the DOJ's long-vaunted promises of leniency in return for voluntary disclosures appear to have been honored to some extent—companies that self-reported FCPA violations in 2013 typically received fines well below the ranges established in the Federal Sentencing Guidelines.

Second, nearly all of the alleged misconduct in this year's major enforcement actions took place prior to 2009, and as long ago as 2002, demonstrating that time alone does not heal the wounds of FCPA exposure; if a potential violation from the distant past comes to light, companies should still determine their legal risks and evaluate what remedial actions might be necessary.

Third, and perhaps most significantly, the size of the settlements and fine payments has continued to grow significantly. A mere six years ago, the largest DOJ and SEC combined settlement in history totaled only $44 million. Today, that figure would fall at the far low end of the range. It is now common for combined civil and criminal FCPA penalties to reach into the hundreds of millions of dollars.

Taken together, these trends confirm the importance of swift and strategic action when a company discovers a potential FCPA concern.

The most important cases from the second half of 2013 include:

Archer Daniels Midland. Kickbacks to Ukrainian tax officials were the focus of a cluster of DOJ and SEC investigations that swept in

global food processor Archer Daniels Midland (ADM). ADM voluntarily disclosed that its Ukrainian subsidiary had paid Ukrainian government officials $22 million in kickbacks in exchange for their release of more than $100 million in value-added tax rebates from 2002 to 2008. ADM simultaneously self-reported information pertaining to other wholly unrelated conduct in Venezuela, cooperated extensively with the government's investigation, and implemented "early and extensive" remedial measures that included conducting a worldwide risk assessment and corresponding global internal investigation.

On December 20, 2013, the DOJ announced that it had entered into a non-prosecution agreement (NPA) with ADM and a plea agreement for its Ukrainian subsidiary on FCPA bribery provision charges. The subsidiary's plea included fines totaling $17.8 million (below the sentencing guidelines range of $27.3 to $54.6 million). Notably, the NPA did not require ADM to retain a monitor. The SEC also entered into a $36.5 million civil settlement with ADM for failing to prevent its subsidiary's illicit payments to government officials.

These favorable settlement terms—non-prosecution rather than deferred prosecution for the parent company, a lack of ongoing monitoring, and a below-guidelines fine—can be credited to ADM's timely disclosure and significant cooperation with government investigators. By going beyond simply reporting on its subsidiary's conduct in Ukraine and voluntarily disclosing information pertaining to its Venezuela operation, ADM demonstrated both the comprehensiveness of its internal review and its willingness to candidly disclose wrongdoing to the government. The DOJ's press release on this resolution acknowledged ADM's "timely, voluntary, and thorough" disclosures. Still, however, it must be noted that ADM's $53 million total fine is hardly a slap on the wrist, reinforcing yet again that companies must carefully weigh the benefits and risks of self-reporting violations.

Bilfinger SE. On December 9, 2013, the DOJ announced—without participation by the SEC—that it had reached a Deferred Prosecution Agreement (DPA) with Bilfinger SE, a German engineering and services company, regarding violations of the FCPA's anti-bribery provisions. From 2003 to 2005, Bilfinger is alleged to have bribed Nigerian officials in connection with the development of a utilities joint venture, Eastern Gas Gatherings System (EGGS). The alleged bribes totaled more than $6 million in cash payments to officials from Bilfinger's Nigerian subsidiary. The three-year DPA included fines totaling $32.3 million (from a Sentencing Guidelines' range of $28 to $56 million), and the installation of an independent corporate compliance monitor for at least 18 months.

Unlike several other FCPA settlements this year, the criminal fine imposed here was not below the Sentencing Guideline's range. One likely reason is that Bilfinger, unlike many other companies that settled with the government this year, did not self-report its violations. Instead, Bilfinger's prosecution arose out of an earlier voluntary disclosure by its joint venture partner, Willbros, in which Bilfinger did not participate.

Had Bilfinger not cooperated with the government in the wake of Willbros's disclosure, its penalties may have been worse. The DPA itself stated that a fine toward the lower end of the guidelines range was appropriate given the company's "cooperation and remediation in this matter."

Also of note is the fact that the alleged bribery conduct and conspiracy in question dated back to 2006, and Bilfinger's joint venture partner had resolved its cases, which included individual prosecution of four of its executives, with the government in 2008—showing that FCPA concerns may linger for years before they come to a head.

Weatherford. On November 26, 2013, the DOJ and SEC announced a joint resolution and a DPA of their FCPA cases against Weatherford, a Swiss oil company that was alleged to have made corrupt payments to government officials in six African and Middle Eastern countries between 2002 and 2011. Weatherford's DPA covers only one alleged violation of the internal controls provision, and requires Weatherford to retain an independent compliance monitor for at least 18 months. Three Weatherford subsidiaries, meanwhile, pleaded guilty to violating the FCPA's anti-bribery provisions. The SEC also settled civil charges against the parent company for alleged violations of the anti-bribery, books and records, and internal control provisions of the FCPA.

In total, Weatherford paid more than $152 million in fines. That amount included $87 million in criminal fines, $65 million in civil fines (including a $1.9 million penalty in part for its failure to cooperate in the early investigation) and an additional $100 million to settle the coordinated export sanctions action brought by the US Attorney for the Southern District of Texas. But those large payments barely bring Weatherford into the top ten settlements, as it represents the eighth largest FCPA settlement of all time, and again underscores the enormity of the stakes for corporations facing an FCPA enforcement action.

Diebold. On October 22, 2013, the DOJ and SEC announced a settlement and DPA against ATM manufacturer Diebold, Inc., for alleged violations of the FCPA's anti-bribery and books and records provisions, related to bribery and falsification of records by Diebold's subsidiaries in China, Indonesia, and Russia between 2005 and 2010. Diebold voluntarily disclosed that in China and Indonesia, its subsidiaries appeared to have bestowed over $1.8 million worth of "improper benefits" on employees of state-owned banks. The subsidiaries then disguised these payments by recording them as expenses for "training." In Russia, Diebold's subsidiary created false business relationships to cover up additional bribes that it made to obtain business with private banks.

The three-year DPA included $25.2 million in criminal fines to the DOJ (below the sentencing guideline's range of $36 to $72 million). Diebold also paid an additional $22.9 million in civil disgorgement and prejudgment interest to the SEC to resolve alleged civil violations of the anti-bribery, books and records, and internal controls provisions of the FCPA. Diebold further agreed to implement rigorous internal controls and to appoint an independent compliance monitor for a minimum of 18 months. The DOJ recognized Diebold's voluntary disclosure and extensive internal investigations and cooperation, which was credited as a factor supporting Diebold's below-guideline criminal fine.

While the monetary fines in this case are not extraordinary, the penalty is notable in that it imposes all punishment directly on Diebold, rather than on its foreign subsidiaries. Of course, parsing liability between parent companies and their subsidiaries in charging decisions can depend in large part on the information uncovered during the course of the investigation. But counsel's proper planning and representation can also have an important impact on this aspect of resolving a government investigation.

Stryker Corp. As part of its ongoing focus on the health care industry, the SEC announced on October 24, 2013, that it had reached settlement with Stryker Corporation regarding an alleged worldwide scheme to bribe doctors and administrators at government-controlled hospitals. Specifically, the SEC alleged that Stryker made $2.2 million in illegal payments to foreign officials in Argentina, Greece, Mexico, Poland and Romania, and incorrectly described the payments as legitimate expenses in the company's records.

In total, the agreement covers $7.5 million in disgorgement, $2.28 million in prejudgment

interest, and $3.5 million in penalties. The company originally disclosed its own internal investigation to the SEC in 2007, and the SEC acknowledged Stryker's cooperation and thorough internal investigation as evidence of its commitment to preventing further violations.

Steady Increase in FCPA Declinations.

In the continuation of another important trend, the second half of 2013 also saw a steady pace of declination announcements—that is, decisions by the DOJ or the SEC to close investigations into alleged FCPA violations without recommending enforcement action. The following are some of the noteworthy events in this area during the second half of the year:

Medtronic. In the fall of 2007, Medtronic and a number of other medical device companies received inquiries from the SEC and the DOJ requesting information about overseas sales of medical devices and related payments to government-employed doctors. Medtronic actively cooperated with the government's five-year, industry-wide investigation, during which several of Medtronic's industry competitors reached settlements with the government that included fines of up to $22 million. In June 2013, the SEC and the DOJ informed Medtronic that they would be closing their investigation without pursuing any enforcement action or charges. Many other companies caught in this sweep have since settled or received declinations, signaling a possible wind-down of the government's focus on the medical device industry.

Owens-Illinois. After voluntarily disclosing the results of its own internal investigation into possible FCPA violations to the SEC and DOJ in 2012, glassmaker Owens-Illinois revealed in its August 2013 SEC disclosures that it had received word confirming that DOJ had ended its criminal inquiry into the matter. But while the DOJ has declined to prosecute, the company noted that civil enforcement through the SEC is still a possibility. Without providing detail as to the nature or extent of the possible violations, Owens-Illinois also announced that it may face action by foreign governments. The company has joint ventures in Italy, China, Malaysia, and Vietnam, and does business in more than 80 other countries.

Oil Companies: Exxon Mobil Corporation, Marathon Oil Corporation, ConocoPhillips, Occidental Petroleum Corporation, Total SA and Eni S.p.A. Following a sweeping two-year investigation into at least seven oil companies' operations in Libya dating back to 2008, news reports indicate that six of the seven target oil companies have received notice that the SEC is closing its foreign bribery inquiries. Two of the targeted companies—Total SA and Eni S.p.A.—disclosed the declinations in recent SEC filings, and media reports indicate that the SEC has also extended declinations to Exxon Mobil Corporation, Marathon Oil Corporation, ConocoPhillips and Occidental Petroleum Corporation.

Increased Attention on Activities in China

A number of high-profile US investigations suggest an aggressive enforcement focus on business dealings in China. This US activity coincides with a surge of anti-corruption activity by the Chinese government.

Coming on the heels of its recently adopted domestic anti-bribery law, China's leaders announced in early 2013 that it was placing new attention on reducing corruption within the government. China's enforcement regime serves as a reminder that companies must remain mindful of their concurrent obligations under the FCPA and local anti-bribery laws. The following are a few publicly reported investigations that suggest a continuing enforcement focus on China.

GlaxoSmithKline. According to public reports, GlaxoSmithKline is currently under DOJ and SEC investigation for allegations that

the company engaged in a bribery scheme to induce doctors at state-owned Chinese hospitals to prescribe its drugs, beginning as early as 2004. Significantly, the Chinese authorities have also initiated their own investigation into the company's Chinese operations. In fact, according to media reports, the Chinese investigation has resulted in the detention of a number of Chinese GlaxoSmithKline executives as well as the placement of a travel ban on the company's vice president for finance in China, a British national.

The investigation into GlaxoSmithKline may be only the highest profile example of the Chinese government's industry-wide examination of drugmakers, with reports indicating that up to 60 other pharmaceutical companies are currently under the government's scrutiny. These developments serve as an urgent reminder of the challenges facing multinational companies operating in a country where potential business partners are widely government-owned or controlled, as well as the potential exposure arising under multiple jurisdictions' anti-corruption regimes.

JPMorgan. In its August 2013 quarterly filing to the SEC, JPMorgan disclosed that the SEC is investigating the alleged hiring of children of prominent Chinese officials as part of an alleged scheme to help the bank secure business with state-controlled companies. The investigation is a potent reminder of a commonly forgotten element of the FCPA: that the definition of bribery under the Act is broad and extends to "anything of value" given to a foreign official—not only cash payments—in exchange for obtaining business. While it remains to be seen whether enforcement actions will be brought or whether a credible case can be made that such an alleged hiring program, if proven, is in fact an FCPA violation, it is vital that companies continue to think comprehensively about the FCPA risks associated with particular business activities. More recent reports indicate that the DOJ has initiated a parallel investigation into JPMorgan's activities as a predicate to possible criminal charges. Notably, it has been reported that this investigation is the first step toward a larger industry-wide investigation into Wall Street firms' hiring practices in China.

Individual Prosecutions

The past year also saw the continuation of another long-standing trend: the insistence by the DOJ and SEC on holding individuals responsible for FCPA violations—not just their corporate employers. In 2013, 13 individuals pleaded guilty or were indicted in FCPA-related actions. Below are some noteworthy developments in this area from the second half of 2013.

Alain Riedo. On October 15, 2013, Swiss citizen Alain Riedo, the former general manager of a Swiss subsidiary of California-based Maxwell Technologies Inc., was indicted for bribing officials at state-owned companies in China in return for the award of energy storage and power delivery contracts to the Swiss subsidiary. He was charged in San Diego with nine counts of violating the FCPA, conspiracy, falsifying records, and evading Maxwell's internal controls. Riedo allegedly worked with Maxwell's third-party agents to accomplish the scheme. The DOJ also alleges that Riedo caused Maxwell's SEC filings and financial statements to falsely reflect the bribe payments as commissions, consulting fees, or sales expenses. Like the two BizJet executives discussed below, Riedo remains a fugitive from prosecution. Riedo's charges come nearly three years after the US parent of Riedo's former employer paid $14.3 million to resolve its FCPA charges.

BizJet Executives. In April 2013, the DOJ announced criminal charges against four former executives of Tulsa-based aircraft maintenance company BizJet International Sales and Support, Inc.—Peter DuBois, Jald Jensen, Bernd Kowalewski and Neal Uhl. (The company itself and its German parent had entered into DPAs with the DOJ a year earlier related to the

payment of bribes to officials in Mexico and Panama in an attempt to secure contracts to service government air fleets in those countries.) DuBois and Uhl have each pleaded guilty and received probationary sentences for their roles in the alleged scheme. Jensen (the former BizJet sales manager) and Kowalewski (the former CEO) are believed to be residing abroad, and have not appeared to face the charges.

BANDES Prosecutions. In May and June of 2013, the DOJ arrested three employees of New York-based broker-dealer Direct Access Partners LLC (DAP) and a senior minister of Venezuela's state economic development bank (BANDES) relating to allegations that the employees had paid the BANDES official more than $5 million over a three-year period in exchange for directing more than $66 million in business to DAP. The three DAP executives were former DAP senior vice president Tomas Alberto Clarke Bethancourt, former managing partner Ernesto Lujan, and former broker Jose Alejandro Hurtado. They pleaded guilty in New York federal court to conspiring to violate the FCPA, the Travel Act, and money laundering prohibitions. They also pleaded guilty to an additional charge of conspiring to violate the FCPA in connection with a similar scheme to bribe a foreign official employed by Banfoandes, another state economic development bank in Venezuela, and to conspiring to obstruct an examination by the SEC of the company where the executives had worked.

The three are scheduled to be sentenced in February and March of 2014. On November 18, the former Venezuelan official involved in the scheme pleaded guilty to taking bribes and kickbacks, and for conspiracy to violate the Travel Act and to commit money laundering. She was not charged with FCPA violations. This case underscores how a foreign official can be charged in the United States for criminal violations even if the alleged conduct does not itself subject the official to FCPA liability.

Recent DOJ Opinions

The only DOJ FCPA opinion released in 2013 highlights another avenue open to companies seeking to proactively assess potential FCPA exposure. Pursuant to federal regulation, a company or individual who is subject to the FCPA's provisions may request an opinion from the Department of Justice as to whether future contemplated action would be prosecuted under the statute.

In an opinion issued in December 2013, the DOJ advised that it would not prosecute a US lawyer wishing to pay for the medical expenses of a foreign official's family member. Over the course of representing the government of a foreign country for many years, the lawyer became personal friends with the foreign official who works in the country's attorney general's office. The foreign official was unable to pay for medical treatment for his seriously ill daughter, and the requesting lawyer sought to personally pay for her treatment. In issuing a clean opinion for the requestor, the DOJ noted that the statute does not prohibit such payments per se but that it will examine factors tending to demonstrate whether the intent to corrupt exists.

For more information about the topics raised in this update, please contact the practice group leaders below and/or any of our White Collar practitioners.

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Endnote

[1] Available at http://www.mayerbrown.com/FCPA-Update-Mid-Year-2013-08-12-2013/.