FCPA Summer Review 2015

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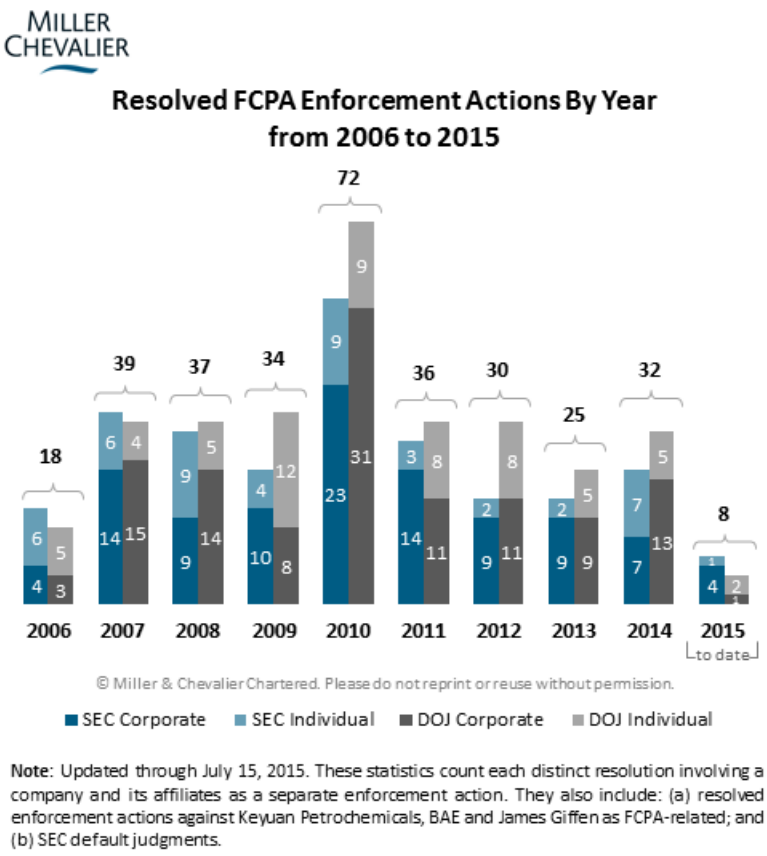
Introduction

The second quarter of 2015 saw relatively few resolved enforcement actions brought under the U.S. Foreign Corrupt Practices Act ("FCPA"), which followed a similarly slow first quarter of the year (*See* discussion in our FCPA Spring Review 2015). Including the five actions this quarter, U.S. enforcement authorities have brought eight resolved enforcement actions to date this year, the lowest mid-year total in a decade. As discussed below, this slow-down seems to be attributable in part to a greater emphasis on declinations by the U.S. enforcement agencies, particularly the U.S. Department of Justice ("DOJ"). However, coupled with this drop in resolved enforcement is also an apparent decline in newly disclosed FCPA investigations, which is discussed in greater detail below. Caution should be taken when making inferences about current enforcement levels though, as the statistics for any given quarter are not necessarily indicative of larger trends and the pace of enforcement frequently picks up as the year goes on. For example, in the fourth quarter of 2014, the FCPA enforcement agencies resolved 16 actions, which amounted to half of all the resolved actions that year. (*See* analysis in our FCPA Winter Review 2015).

The five resolved enforcement actions this quarter include two by the U.S. Securities and Exchange Commission ("SEC" or "Commission") and three by the DOJ, which come on the heels of the three enforcement actions resolved in the first quarter, all by the SEC.



Note: Updated through July 15, 2015. These statistics count each distinct resolution involving a company and its affiliates as a separate enforcement action. They also include: (a) resolved enforcement actions against Keyuan Petrochemicals, BAE and James Giffen as FCPA-related; and (b) SEC default judgments.

The actions resolved by the DOJ include a non-prosecution agreement ("NPA") with IAP Worldwide Services, Inc. ("IAP"), a guilty plea by a former IAP vice president implicated in the underlying bribery and the recent trial of PetroTiger Ltd.'s former co-CEO Joseph Sigelman, which concluded early after Sigelman pled guilty to a reduced charge of conspiring to violate the FCPA in connection with the company's bribery scandal in Colombia. Notably, these three actions by the DOJ -- two of them related -- are the only enforcement actions resolved by the DOJ so far this year; by contrast, the DOJ resolved five corporate actions along with two individual ones through the first six months of last year.

It appears that the enforcement numbers overall may be down in part because of a rise in the number of declinations -- or decisions not to pursue enforcement -- by the enforcement agencies. (*See* Declinations below.) The drop in resolved enforcement this year, particularly on the DOJ side, corresponds with a prominent increase in declinations over the same time period last year. The DOJ's decision not to bring parallel FCPA dispositions alongside several SEC enforcement actions this year appears to reflect a conscious DOJ strategy to more frequently decline enforcement, where appropriate. At the ABA's White Collar Crime Conference on March 6, 2015, Assistant Attorney General for the DOJ's Criminal Division, Leslie Caldwell, actually predicted that we would be seeing "an uptick in declinations for companies that actually come in and do everything that they are supposed to do." Whatever the explanation, unless the pace of FCPA enforcement picks up considerably (as it did last year), 2015 is on track to be the lowest year in terms of resolved dispositions since 2005.

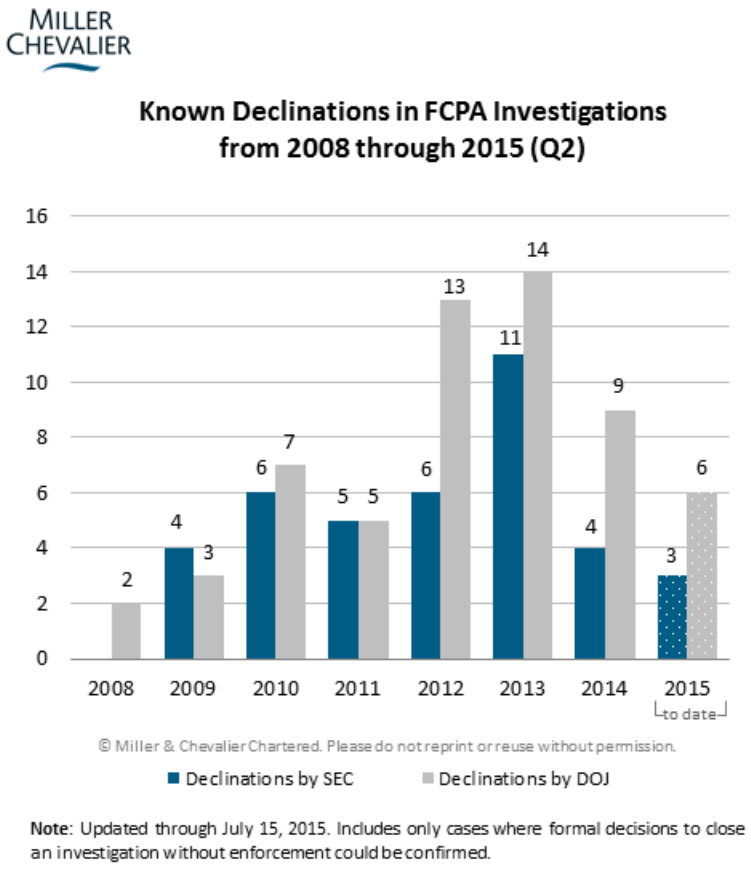
The DOJ's prosecution and trial of Joseph Sigelman deserves special notice, as it was the DOJ's first trial of an individual on FCPA charges since the January 2012 acquittal of John Joseph O'Shea. Sigelman's trial, discussed in more detail below, lasted nine days and ended with prosecutors entering into a negotiated guilty plea with Sigelman on only one of the six counts with which he was charged after a key government witness admitted to lying on the stand. Sigelman's sentence of probation with no imprisonment was

essentially a victory for Sigelman, and the judge was particularly critical of the government's key witness as well as its sentencing recommendation. The trial adds to a string of recent FCPA prosecutions involving individuals in which the government has failed to secure a conviction or its recommended sentence, highlighting the difficulties the DOJ has sometimes encountered when forced to bear its burden of proof in court.

Against this backdrop, it is worth noting that a federal district court has already twice continued the trial date of Dmitrij Harder, the former owner and president of Chestnut Consulting Group Inc., indicted on January 6, 2015 (*See* our FCPA Spring Review 2015), and Harder recently requested a third continuance to delay the trial currently set for September 24, 2015. In granting the defendant's prior requests to reschedule the trial, the court reasoned that the extensions were necessary due to the complexity of the case and breadth of discovery. Likewise, in the FCPA prosecution of Alstom executive Lawrence Hoskins, previously covered here and here, the court recently continued the trial to November 30, 2015, over the government's opposition, finding that the defendant needed additional time to prepare his defense at least in part because of a recently filed Third Superseding Indictment and ongoing discovery efforts. Although all indications are that both cases will proceed to trial, it will be interesting to see if the government will be put to its burden or if one or both of the defendants might secure favorable plea agreements, especially if the government's cases face any setbacks.

Declinations

As noted above, the low number of resolved enforcement actions over the last two quarters is partially counterbalanced by an increase in the number of known declinations by the SEC and DOJ relative to the same time period last year.



Note: Updated through July 15, 2015. Includes only cases where formal decisions to close an investigation without enforcement could be confirmed.

To date we have identified nine declinations in the first half of 2015, a tally that already approaches the total number of known declinations for 2014 and is on pace to match or exceed every other year on record except 2013. These numbers are likely to further increase given the typical lag time of several months or more that we encounter in identifying declinations, since companies generally announce the closure of investigations in their quarterly securities filings or annual reports (assuming they choose to disclose them at all). Note that, as in the past, we have tracked "declinations" based on a broad interpretation of the term, counting any instance in which the DOJ or SEC chose to close an FCPA investigation without pursuing enforcement regardless of the agency's reason for doing so (*See* Discussion of Declinations by Miller & Chevalier Counsel Marc Alain Bohn).

FCPA-related declinations we have identified since our Spring FCPA Review 2015 include:

- **Gold Fields Ltd**.: On June 22, 2015, South African mining company Gold Fields announced that the SEC had ended its investigation into whether the company bribed South African officials to obtain a mining license for the South Deep gold mine. The company did not disclose any rationale for the SEC's declination, but did advise that the SEC's notice was issued under federal guidelines stipulating that the notice "must in no way be construed as indicating the party has been exonerated or that no action may ultimately result...."

- **Net 1 UEPS Technologies, Inc**.: On June 8, 2015, South African payment processing company Net 1 UEPS Technologies ("Net 1") announced that it received a letter from the SEC advising the company that the Commission had declined to prosecute the company following an investigation into whether Net 1 made improper payments to win a contract with South Africa's Social Security Agency. According to Net 1, corresponding investigations by the DOJ and South African authorities remain open.

- **Hyperdynamics Corp**.: On May 22, 2015, Hyperdynamics Corp. released a letter it had received a day earlier from the DOJ, announcing the closing of its investigation of the Houston-based oil and gas company for possible FCPA violations. The letter to Hyperdynamics' counsel states, in part: "On behalf of your client, you have provided certain information to the Department and have described the results of the Company's internal investigation into this matter. As you know, the Department values cooperation with investigations, such as shown here."

- **BHP Billiton Ltd**.: On May 20, 2015, BHP Billiton announced the DOJ had closed its investigation into the company for potential FCPA violations without bringing an enforcement action. The investigation "related primarily to previously terminated minerals exploration and development efforts as well as hospitality provided by the Company at the 2008 Beijing Olympic Games." Although the company did not specify why the DOJ closed its investigation, the declination was announced in conjunction with the company's $25 million civil settlement with the SEC, discussed below, which related to the same hospitality allegations.

While the DOJ and SEC generally do not publicly acknowledge these declination decisions, we have noticed an increase in the number of companies disclosing such decisions that quote the DOJ as crediting their voluntary disclosures of potential FCPA violations, cooperation, internal investigations and/or remediation efforts. (*See* our FCPA Autumn Review 2014 for a prior discussion of this trend). Thus far in 2015, every company announcing a declination by the DOJ has cited the agency's consideration of at least one if not several of these factors. Interestingly, however, we do not typically see companies incorporating such references in the context of SEC declinations.

The DOJ's frequent inclusion of a rationale in the private correspondence it sends to companies informing them of its declination decisions appears to be part of a coordinated effort by the agency to highlight the benefits of self-reporting and cooperation in the face of possible FCPA violations. For example, at a New York University Law Conference on April 17, 2015, AAG Caldwell noted that the DOJ does not want companies to take its word that declinations are increasing, "[w]e want you to be able to see that there actually are more declinations." And at the *Compliance Week* Conference in Washington, DC, on May 19, 2015, Caldwell again

stated that "if a company chooses to cooperate with the government in its investigation -- particularly at an early stage -- the company likely will receive significant credit for such efforts when the government is contemplating what prosecutorial action to take." Caldwell further noted that, "[i]n conducting an investigation, determining whether to bring charges and negotiating plea or other agreements, federal prosecutors take into account, among other factors, the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents."

In contrast to this typical pattern of refraining from public comment on the status of FCPA investigations, on June 15, 2015, the DOJ publicly confirmed its 2014 decision not to bring an enforcement action against PetroTiger in connection with the Ecopetrol scandal (originally recorded in our FCPA Spring Review 2015). In a press release announcing the guilty plea of the company's former co-CEO, the DOJ stated that: "The case was brought to the attention of the department through a voluntary disclosure by PetroTiger, which fully cooperated with the department's investigation. Based on PetroTiger's voluntary disclosure, cooperation, and remediation, among other factors, the department declined to prosecute PetroTiger." PetroTiger's cooperation with the DOJ included its cooperation in the prosecution of PetroTiger's former co-CEO Joseph Sigelman.

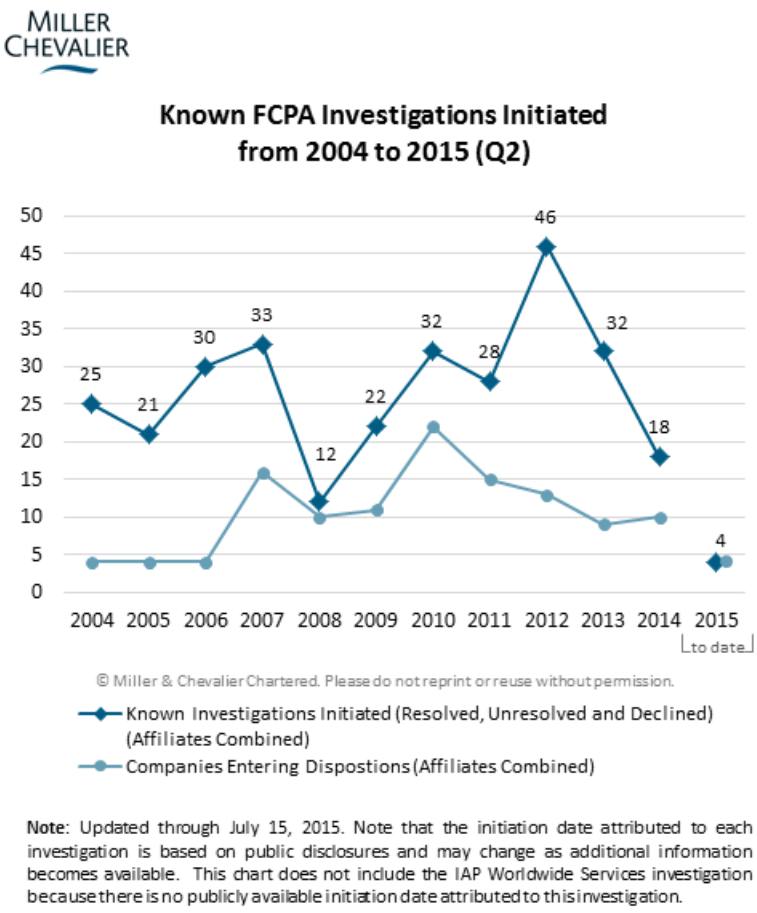
To our knowledge, the PetroTiger announcement represents only the third time the DOJ has publicly confirmed a declination. The other two announcements both took place in 2012: The DOJ announced in April 2012 that it declined to bring charges against Morgan Stanley in connection with the plea of Garth Peterson, the former managing director for Morgan Stanley's real estate business in China; and in August 2012, the DOJ announced that it was not going to pursue criminal enforcement against Pfizer, Inc. for the activity of Wyeth Pharmaceuticals, Inc. prior to its acquisition by Pfizer (*See* discussion in our FCPA Autumn Review 2012).

Similar to the PetroTiger matter, the Morgan Stanley declination also involved a company assisting in the individual prosecution of one or more of its employees in lieu of entering into a corporate disposition, which is in line with comments made by AAG Caldwell at the recent *Compliance Week* conference that "[t]o receive cooperation credit, a company must do more than comply with subpoenas or other compulsory process. Companies . . . affirmatively must identify responsible individuals (and provide evidence supporting their culpability), including corporate executives and officers -- and they must do so in a timely way." In pursuing such credit, a company should consider the risk of being sued by an employee or former employee in connection with its cooperation with a government-run investigation. For instance, the lawsuit being pursued against Shell Oil in Texas state court, discussed in detail below, suggests that a company could potentially be subject to a personal defamation action based on information it shares with the government, and the DOJ prosecutions of both Sigelman and Lawrence Hoskins resulted in litigation against their former employers seeking investigative documents the employers' shared with the government.

Known Investigations Initiated This Year

We have identified only one FCPA investigation initiated by the enforcement agencies this past quarter, bringing the total for the year to four. While these totals appear low when compared against known investigative activity from recent years, it is too early to tell whether they suggest a decline in investigations initiated on the part of the agencies. As we have explained in past Reviews, there is often a delay in identifying new investigations because public companies may wait months or even years to disclose the existence of an investigation in their public filings (with some choosing never to do so), while private companies often never disclose the existence of an investigation. The DOJ's NPA with IAP and its December 2014 deferred prosecution agreement ("DPA") with Dallas Airmotive, Inc. are but two recent examples of investigations that were not publicly disclosed until the companies' respective resolutions with the DOJ.

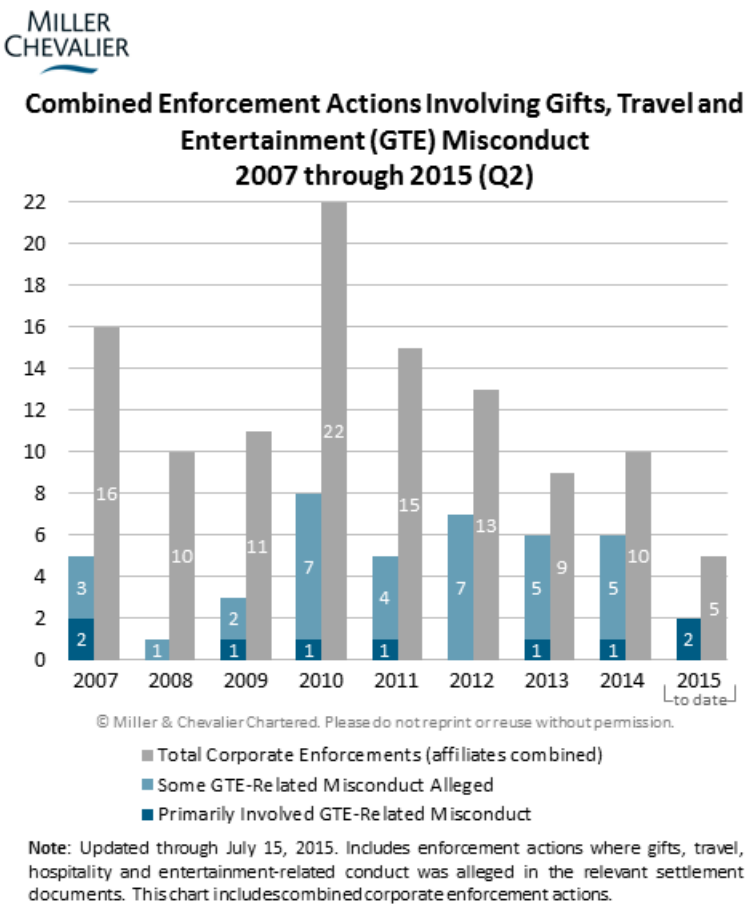
The low number of known investigations might suggest that many companies have implemented stronger compliance mechanisms. A more likely explanation is that companies are reluctant to disclose a government investigation if they do not have to, especially if they are conducting a confidential internal investigation and cooperating in an attempt to gain credit from the agencies. This reduction could also indicate that the agencies are simply initiating fewer cases than they have in years past, that companies are being more selective in what they choose to voluntarily disclose to U.S. enforcement authorities and/or that companies are taking a more narrow view of what types of investigations are material enough to warrant reporting in a securities filing.



Note: Updated through July 15, 2015. Note that the initiation date attributed to each investigation is based on public disclosures and may change as additional information becomes available. This chart does not include the IAP Worldwide Services investigation because there is no publicly available initiation date attributed to this investigation.

If the apparent decline in known investigations initiated holds up, it will significantly affect the enforcement landscape in the years to come, as today's investigations become tomorrow's enforcement actions. At approximately the same point last year, we knew of eight investigations, with the total number for 2014 reaching 18 since then.

Enforcement Actions Involving Gifts, Travel and Entertainment



Note: Updated through July 15, 2015. Includes enforcement actions where gifts, travel, hospitality and entertainment-related conduct was alleged in the relevant settlement documents. This chart includes combined corporate enforcement actions.

Two FCPA dispositions resolved by the SEC during the past quarter--FLIR Systems, Inc. ("FLIR") and BHP Billiton were almost exclusively focused on the provision of improper gifts, travel and entertainment ("GTE") to foreign officials. While the provision of improper GTE has long been a focus of the DOJ and SEC, the above chart indicates how uncommon it has been for the agencies to bring FCPA actions based *primarily* on such misconduct. Historically, companies have been prosecuted for the provision of improper GTE *alongside* other forms of bribery. BHP Billiton and FLIR, however, demonstrate that the agencies will pursue FCPA violations that are centered on the provision of improper GTE where the conduct is deemed egregious enough. Such actions, however, often only involve books-and-records and/or internal controls charges rather than antibribery charges, possibly because of the increased difficulty of establishing a quid pro quo when only GTE is involved.

The FLIR settlement is also notable for highlighting improper GTE risks in connection with legitimate business interactions. FLIR's FCPA violations mostly involved hospitality expenses related to a Factory Acceptance Tests ("FAT") in Massachusetts attended by Saudi officials; these tests were a condition of the underlying contract. In the context of the legitimate FAT, FLIR employees organized a three-week "world tour" for the foreign officials, only one of which was spent at FLIR's Boston-area facility for the FAT. The FLIR investigation and settlement demonstrates that even where some hospitality expenses for foreign officials have a legitimate business purpose, there is still a significant risk of FCPA exposure through inappropriate GTE spending.

Other Developments

In addition to the trends highlighted above, other notable developments this quarter involved a decision by a federal district court in a foreign bribery non-FCPA action in *United States v. Vassiliev*, finding that the indictment violated due process due to an

insufficient jurisdictional nexus with the United States. Although the indictment did not include any counts under the FCPA, the court's decision is notable for rejecting the government's broad interpretation of its jurisdiction over foreign bribery. Another notable case was the decision by the Texas Supreme Court in *Shell Oil Co. v. Writt*, noted above, dealing with the level of privilege afforded to the results of an internal investigation in a subsequent defamation action.

International Developments

Two major international developments this quarter involve the continuing explosion of the Petrobras investigation in Brazil, as well as the investigation of corruption within FIFA (Fédération Internationale de Football Association) by U.S. and Swiss Authorities and the corresponding indictment in the United States naming a number of high-ranking FIFA officials. Although the FIFA investigation involves no charges under the FCPA, at least so far, it is consistent with the DOJ's broad view of U.S. jurisdiction worldwide over foreign corruption. The investigation has significant potential worldwide effects not only in the sporting, but also in the political and foreign policy spheres (including a potential withdrawal of one or two World Cups from already announced host countries); and it has the potential of growing to involve additional indictments and potential FCPA enforcement actions. The FIFA investigation is also notable for close cooperation between U.S. and Swiss authorities during the initial investigation, which may have been facilitated by both countries' participation in the OECD Working Group on bribery and the countries' bilateral mutual legal assistance treaty ("MLAT"), which requires both countries to cooperate and exchange information in the course of trans-border criminal investigations.

Additional international developments include new anti-corruption laws and measures introduced in several countries worldwide, as well as several enforcement updates in the United Kingdom and France.

Actions Against Corporations

SEC Enters into Administrative Settlement with FLIR Systems, Inc.

On April 8, 2015, FLIR settled with the SEC in connection with GTE provided to Saudi Arabian government officials in violation of the FCPA's anti-bribery and accounting provisions. The SEC's Cease-and-Desist Order ("the SEC Order") requires FLIR to pay $9.5 million in penalties, including disgorgement of $7.5 million, interest of $970,584 and a penalty of $1 million. In its press release touting the SEC settlement, FLIR also announced that the DOJ had declined to pursue a case against the company. FLIR's settlement with the SEC is the result of a second enforcement action arising from the same set of events within the last year: On November 17, 2014, the SEC charged FLIR employees Stephen Timms and Yasser Ramahi with violating the anti-bribery and internal controls provisions of the FCPA. Timms and Ramahi agreed to settle those charges and pay $50,000 and $20,000, respectively, in penalties.

World Tour, Luxury Watches and Holiday Parties

The SEC Order recites many of the same facts as the Commission's earlier Cease-and-Desist order against Timms and Ramahi, covered in our FCPA Winter Review 2015.

FLIR, based in Oregon, is a NASDAQ-listed corporation that makes equipment that enhances human perception, such as infrared binoculars, night-vision goggles and thermal imaging cameras. According to FLIR's financial statements, in 2014 the company sold $1.5 billion worth of such equipment, earning $200 million in profit. Timms worked as the head of FLIR's Middle East office in Dubai during the relevant time period. Ramahi worked in business development under Timms. Both Timms and Ramahi are U.S. citizens.

According to both the SEC Order against FLIR and the earlier SEC order against Timms and Ramahi, FLIR entered into a contract to sell binoculars using infrared technology to the Saudi Ministry of Interior ("MOI") in 2008. The contract was worth $12.9 million, and FLIR anticipated additional contracts for at least 2009 and 2010. A key condition of the contract was a FAT, which

involved FLIR flying MOI officials to Massachusetts to test the binoculars before approving delivery.

The trip to Massachusetts in July 2009 turned into what Timms later referred to as a "world tour": In addition to spending a single five-hour day at FLIR's Boston facility for the equipment inspection and making three other brief visits there, the Saudi officials also visited Casablanca, Paris, Dubai, Beirut and New York on the way to and from Boston, for a total of 20 nights over the course of the trip. Timms and Ramahi arranged for FLIR to pay for the Saudi officials' airfare and luxury hotels for the entire trip. Besides the world tour, Timms and Ramahi used a third-party agent to purchase five watches for a total of about $7,000, which Timms presented to some of the same MOI officials at a meeting in Riyadh in March 2009.

Interestingly, the SEC Order against FLIR recites certain new facts. The SEC alleges that Ramahi also arranged for FLIR to pay for MOI officials to celebrate New Year's in Dubai in 2008 and 2009, including their airfare, hotel stays, dinners and drinks. In addition, FLIR helped reimburse an unnamed partner company that paid for nine officials from the Egyptian Ministry of Defense to travel to Paris and Sweden for 14 days, only four of which involved legitimate business activities, including a FAT at FLIR's Stockholm factory. The SEC Order notes that FLIR reimbursed its partner company "based upon cursory invoices . . . submitted without supporting documentation." It is not clear why the SEC Order against Timms and Ramahi omits these facts, given that Ramahi was involved in at least some of these activities.

After FLIR paid for the MOI officials' travel, watches and New Year's celebrations, the MOI approved the binoculars for delivery from Boston and placed another order for $1.2 million. The SEC alleges that FLIR earned $7.5 million in profits from the deals. The SEC Order implies that the world tour contributed to the MOI's decision to award the contract to FLIR, since the head of the MOI's technical committee and a senior engineer on the committee, who played a key role in the committee's decision, were among the officials treated to the tour. Moreover, the SEC Order notes that the same officials who went on the world tour were part of the New Year holiday trip, and two of them were among the recipients of the watches as well.

In November 2010, FLIR received a complaint from the third-party agent that Timms and Ramahi used to buy watches for the MOI officials, launched an internal investigation and learned about the "world tour" and the watches. FLIR self-reported to the SEC and cooperated with the subsequent investigation, which five years later resulted in the SEC Order.

FLIR's Policies and Internal Controls During the Relevant Period

The SEC Order acknowledges that FLIR had some FCPA-related policies and internal controls in place during the relevant period, which likely benefited the company in its negotiations with the government. For example, FLIR had a code of conduct and other policies requiring employees to record information "accurately and honestly" in FLIR's books and records, as well as a specific anti-bribery policy prohibiting FCPA violations. FLIR also provided FCPA training to its employees, although the SEC alleged in its Cease-and-Desist Order against Ramahi that he did not complete his training.

However, the SEC Order highlights many weaknesses in FLIR's FCPA-related policies and internal controls, which are at the heart of FLIR's violations of the internal controls and books and records provisions of the FCPA. Specifically, for both the travel and the watches, the company initially allowed the transactions to occur and only raised questions after the fact. When higher-ups in the company did raise questions, the SEC Order states that they accepted Timms's and Ramahi's unusual explanations and accepted fraudulent corroborating documentation -- ignoring red flags that should have merited further investigation.

In addition, the company did not have any policies or internal controls in place governing foreign travel: Timms and Ramahi worked directly with a foreign travel agency to arrange travel for the Saudi officials, and Timms was able to approve the transactions himself as an international manager. Timms's manager later did raise questions about the expense. But Timms and Ramahi were able to avoid any problems by saying that there had been a mistake -- namely that the MOI had used the same travel agency as FLIR, and the travel agency had accidentally charged FLIR instead of the MOI for the travel. The two employees then provided fraudulent documentation to FLIR's headquarters in Oregon, allowing them to charge the company for the officials' travel regardless. Managers at headquarters seem to have accepted both Timms's and Ramahi's explanations and fraudulent documents without

further questions.

Similarly, according to the SEC, FLIR had inadequate controls for gift-giving. Timms and Ramahi used a third-party agent to purchase the five watches, which Timms presented to MOI officials as gifts. Timms submitted a reimbursement report to the company's accounts payable department for "EXECUTIVE GIFT: 5 WATCHES" for the entire $7,000 -- which was approved. FLIR's finance department later questioned the watches in an unrelated expense review, but the SEC pleadings state that Timms and Ramahi again evaded responsibility. Timms used a false invoice to claim that he had expensed the watches at $7,000 as a mistake, instead of 7,000 Saudi Riyal (approx. $1,900). Again, managers at headquarters accepted both the unusual explanation and fraudulent documentation.

FLIR's Subsequent Remedial Efforts

The SEC did respond favorably to FLIR's "significant remedial efforts," which the SEC Order and FLIR's corresponding press release described as follows:

- FLIR terminated both Timms and Ramahi.

- The company reported itself to the SEC, cooperated, and engaged outside counsel and forensic accountants to review all of the company's travel and entertainment expense outside the United States.

- The company improved its FCPA training and procedures, including by translating its anti-bribery policy into the languages of all countries in which it has offices, improving training and procedures for its finance staff and enhancing its due diligence process for third parties and contracts.

- The company implemented a gift policy, which presumably would have prevented the gift of the watches.

- The company is in the process of reforming its travel approval system outside the United States.

Noteworthy Aspects

- **The SEC Will Bring an Enforcement Action for Improper GTE in the Context of a Legitimate Transaction or When Underlying Bribery Involves Only GTE**: As noted in the Introduction section, the FLIR settlement highlights the risk of improper GTE expenses in connection with otherwise legitimate transactions involving foreign officials. The SEC Order explicitly notes how much of the overall travel and other hospitality provided to representatives of FLIR's foreign government clients was directly related to FLIR's Boston and Stockholm FATs. In both cases, activities related to the FAT took up but a small portion of the travel time and expenses for which FLIR paid. The language of the SEC Order and the imposed penalties suggest that if a contract includes legitimate GTE spending on foreign officials related to a legitimate transaction, corporate compliance programs should nonetheless treat them as an FCPA risk area.

- **DOJ Declination, Despite Clear U.S. Nexus** : As FLIR noted in its press release announcing the SEC settlement, the DOJ declined to pursue an enforcement action against it. Certainly, the DOJ had jurisdiction to do so: Both Timms and Ramahi are U.S. citizens and employees of FLIR, which is a U.S. company; the improper world tour they organized for MOI officials included stops in Boston and New York; and documents related to the world tour and watches clearly establish improper behavior. Therefore, it appears that the DOJ declined to pursue an action against FLIR for other reasons such as FLIR's voluntary

disclosure, cooperation and remediation. This decision is consistent with our analysis of the latest DOJ declinations in the Introduction, above, which demonstrate the DOJ electing to not bring enforcement actions against companies that voluntarily self-reported FCPA violations to the U.S. enforcement authorities, performed an internal investigation and cooperated with the DOJ and SEC, and implemented strong remediation measures. As is evident from the SEC Order, FLIR satisfied each of these factors, which likely accounts for the DOJ's declination.

FLIR's cooperation with the government likely also influenced the relatively moderate nature of the SEC's sanctions. FLIR's $1 million fine on top of disgorgement and interest could reflect the SEC's position regarding cooperation, described by the director of the SEC's Enforcement Division Andrew Ceresney at a recent FCPA conference: "We recognize that it is important to provide benefits for cooperation to incentivize companies to cooperate. And we have been focused on making sure that people understand there will be such benefits."

- **Employees Misleading Headquarters**: Although they were inadequate, FLIR had some policies and controls in place to prevent bribery and keep track of expenses. Timms and Ramahi used third parties and misleading documentation to circumvent these policies and controls. These facts are similar to the recent Hewlett-Packard ("HP") settlements with the DOJ and SEC, discussed in our FCPA Summer Review 2014, in which employees at HP subsidiaries ignored policies and circumvented controls in paying officials in Russia, Poland and Mexico. The FLIR and HP settlements both show that the SEC will hold companies liable when employees mislead management while circumventing internal controls, if the SEC finds that the employees' behavior raises red flags that management should have investigated.

BHP Billiton Settles FCPA Accounting Violations with SEC Related to Olympics Hospitality

On May 20, 2015, the SEC announced charges against global mining company BHP Billiton for violating the internal controls and books and records provisions of the FCPA in connection with its hospitality program for the 2008 Summer Olympic Games in Beijing. Under the SEC's Cease-and-Desist Order ("SEC Order"), BHP Billiton agreed to pay $25 million in civil penalties for its failure to devise and maintain sufficient internal controls and accurate books and records relating to the hospitality packages that the company offered and provided for the Olympic Games. BHP Billiton, headquartered in Australia and England, is one of the world's leading producers of major commodities, including iron ore, coal, oil and gas, copper, aluminum, manganese, uranium, nickel and silver. BHP Billiton is listed on the New York Stock Exchange and is subject to the SEC's jurisdiction as an "issuer."

BHP Billiton was an official sponsor of the 2008 Beijing Olympics, and the company launched an Olympics hospitality program to develop relationships with its customers and clients. According to the SEC Order, as part of its larger Olympics program, BHP Billiton extended three- and four-day hospitality packages to more than 170 government officials and employees of state-owned enterprises, mainly from Asia and Africa, which allowed the officials to attend the Olympics at BHP Billiton's expense. The hospitality packages included event tickets, sightseeing excursions, luxury hotel accommodations, meals and business-class airfare for the officials and their guests, at a cost of approximately $12,000 to $16,000 per package. BHP Billiton internally explained to employees that the purpose of its Olympic sponsorship was to "strengthen relationships with key local and global stakeholders, *e.g.*: Government Ministers, Suppliers and Customers," and that the hospitality packages were "a primary vehicle to ensure this goal is achieved."

At the time BHP Billiton extended the Olympics hospitality packages, its compliance program was decentralized and followed a committee approach to compliance decisions. Each business division within BHP Billiton had a designated executive who was responsible for ensuring the division's compliance with the company's Guide to Business Conduct. While the company maintained an advisory Global Ethics Panel with internal and external membership to advise business leaders on general compliance with the company's Guide, BHP Billiton also created a separate Olympic Sponsorship Steering Committee to review compliance related to the hospitality packages. Although the company communicated that the applications for hospitality or travel would be approved by the Olympic Sponsorship Steering Committee and the Global Ethics Panel, in fact, neither committee reviewed nor approved invitations to a government official. According to the SEC, in spite of the fact that BHP Billiton's Guide to Business Conduct

prohibited the provision of things of value in violation of anti-corruption laws and the company made efforts to monitor the hospitality packages, BHP Billiton nevertheless invited government officials who were in a position to influence pending contract negotiations.

Several officials who received the hospitality packages were directly involved in or in a position to influence negotiations to obtain access rights, regulatory actions or business dealings. For example, in the Philippines, a BHP Billiton employee submitted an Olympics hospitality application for the Secretary of the Department of Environment and Resources but did not disclose the Secretary's role in mediating a dispute in which BHP Billiton was involved. In two other instances, BHP Billiton failed to update hospitality applications of high-level foreign officials -- Burundi's Minister of Mines and a regional Governor in the Democratic Republic of the Congo -- when those officials later came into positions that could influence pending negotiations on behalf of BHP Billiton.

Even though the company had established internal mechanisms to review compliance of the Olympics hospitality packages, the SEC charged the company for failure to properly implement sufficient internal controls. In the press release accompanying the SEC Order, Antonia Chion, Associate Director of the SEC's Division of Enforcement, stated that "the company failed to provide adequate training to its employees and did not implement procedures to ensure meaningful preparation, review, and approval of the invitations." The SEC found that BHP Billiton violated the books and records provisions because its books and records, "namely certain internal forms that employees prepared in order to invite a government official to the Olympics, did not, in reasonable detail, accurately and fairly reflect [BHP Billiton's] pending negotiations or business dealings with the government official at the time of the invitation."

Noteworthy Aspects

- **DOJ Declination, But Other Country Risks**: BHP Billiton is the fourth company this year (after Goodyear and PBSJ) to pay a civil penalty to the SEC for FCPA violations without an accompanying enforcement action by the DOJ. The DOJ's decision to not prosecute the company demonstrates, in part, the breadth of the accounting provisions as compared to the anti-bribery provisions of the FCPA. The conduct at issue did not appear to have a U.S. nexus sufficient for an anti-bribery violation.

  In addition to the SEC's action, the company may still face penalties in Australia. As of May 21, 2015, the Australian Federal Police confirmed that it was still investigating BHP Billiton over corruption allegations.

- **Remediation of Decentralized Compliance Program** : The SEC alleged that several of the company's violations stemmed from the decentralized nature of the compliance program, including that there was no independent review of the hospitality applications, that business people had not been trained how to evaluate whether an invitation complied with the company's Guide to Business Conduct, and that the company did not institute a process for updating hospitality applications. Like many large, non-U.S. based multinational companies, BHP Billiton adopted a committee approach to compliance, but the SEC appears to have concerns regarding its implementation.

  The FCPA Guide 2012, jointly published by the DOJ and SEC, recommends that individuals in compliance roles have appropriate authority and adequate autonomy from management; the Guide warns against compliance programs that are strong on paper, but in reality face significant conflicts of interests that prevent compliance officers from effectively doing their jobs. Moreover, section 8B2.1(b)(2)(C) of the U.S. Sentencing Guidelines -- which are advisory for the counts -- establishes Chief Compliance Officer (CCO) independence as a general criterion for an effective compliance program. In large part, BHP Billiton's remedial actions addressed the decentralized nature of its compliance program. The company created a compliance group within its legal department that is independent from the business units; implemented independent anti-corruption managers into its businesses; and enhanced its policies, procedures, and its financial and auditing controls.

- **Breadth of "Books and Records"**: Typically, violations of the books and records provisions involve inaccurately recording improper payments, but the SEC did not allege that any of the hospitality expenses here were improperly recorded. Rather, the SEC faulted the company for failing to ensure that its internal hospitality application forms accurately reflected pending business deals that could have been affected by invited officials. In several instances cited by the SEC, negotiations involving BHP Billiton did not come to pass until after the relevant officials were offered hospitality packages, though before the actual package payments occurred. The SEC's critique implies that companies are required under the relevant books and records standards to ensure their internal compliance forms are up-to-date and accurate. The SEC's scrutiny of hospitality forms in BHP Billiton is notable because it focuses not on accounting entries, or even on the financial aspects of supporting documentation for those entries, but rather on internal forms and documents used for compliance purposes.

- **Hospitality as Basis for FCPA Settlement**: BHP Billiton's resolution with the SEC is also unusual because it is based exclusively on the company's provision of gifts, travel and entertainment. FCPA settlements that center on hospitality are rare and usually involve a company's systematic use of GTE to gain improper business advantages. For example, Alcatel-Lucent's FCPA settlement in 2010 involved steady gifts and non-business travel to government officials in several countries from 2001 until 2006, which may have allowed the company to retain several major contracts, representing more than $28 million in profits. In contrast to the Alcatel-Lucent settlement, BHP Billiton's offers of hospitality were limited to one event (though an event involving many officials) that the company was officially sponsoring, and the SEC did not allege that the company received improper business benefits. In fact, the SEC noted that several officials declined to attend the event or rescinded their acceptance prior to the event. BHP Billiton's settlement seems to demonstrate a more aggressive approach by the agencies to GTE. In combination with the Weatherford resolution, which involved liability for a company-sponsored 2006 FIFA World Cup trip by two officials, the SEC's enforcement actions may dampen companies' appetite for sponsoring and using sporting events as opportunities for client and customer relationship development.

DOJ Enters into NPA with Logistics Firm IAP

On June 16, 2015, IAP, a privately-held, Florida-based defense contractor, entered into a three-year non-prosecution agreement with the DOJ to resolve violations of the anti-bribery provisions of the FCPA. IAP accepted responsibility for paying $1.78 million in bribes between September 2006 and March 2008 in an effort to secure contracts to install surveillance cameras for the Kuwaiti government. The NPA requires the company to pay a $7.1 million fine, establish a corporate compliance program and submit annual reports on the effectiveness of the compliance program for the duration of the NPA. On the same date, James M. Rama, a former IAP employee, also pled guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA, as discussed in a separate article below.

IAP's Bribery Scheme in Kuwait

The following description of the underlying events reflects information drawn from the NPA, supplemented by the Criminal Information, Plea Agreement and Statement of Facts in *United States v. Rama*, all filed on June 16, 2015.

In 2004, James M. Rama, a U.S. citizen, was working in Kuwait for a large American defense contractor unidentified in the filings. In August of that year, Rama met an individual identified in the filings as "Kuwaiti Consultant," who told him that the Kuwait Ministry of the Interior would soon hire companies to plan and implement the Kuwait Security Program ("KSP"). The KSP was a large-scale program to install closed-circuit surveillance cameras nationwide.

The Ministry divided the program into two phases: Phase I involved planning and feasibility analysis, while Phase II implemented the plans developed in Phase I. The profits anticipated from Phase II substantially exceeded those available from Phase I.

In August 2005, Rama joined IAP as Vice President of Special Projects and Programs, working at offices in Florida, Virginia and Kuwait. Rama began to pursue the Phase I contract for IAP with the understanding that if IAP could tailor its Phase I

recommendations to its own strengths, it would have an advantage in securing the Phase II contracts.

In November 2005, prior to the opening of the Phase I formal bidding process, Rama learned from an unnamed source that IAP would in fact receive the Phase I contract. In February 2006, the Kuwait Ministry of the Interior and the Kuwaiti Consultant directed Rama and unspecified others to set up a company to submit the bid for Phase I. This company, named Ramaco International Consulting, LLC ("Ramaco"), was incorporated in Delaware and headquartered in Maryland. Bidding on Phase I through Ramaco would allow IAP to obscure its conflict of interest in bidding on Phase II.

In early 2006, Ramaco agreed that half of the $4 million Phase I contract would be used to perform the actual Phase I work, while the other half would be passed onto the Kuwaiti Consultant to bribe Kuwaiti government officials. In June, Ramaco entered into a master services agreement with IAP. IAP ended up performing almost all of the Phase I work, thus receiving almost all of the contract funds not earmarked for bribes.

With regard to the bribes, Rama and IAP authorized transfers to the Kuwaiti Consultant totaling 509,625 Kuwaiti Dinars (US$1,783,688) between September 2006 and June 2008. IAP separately sub-contracted with an entity identified in the filings as "Kuwaiti Company," which submitted inflated invoices to IAP for work performed on Phase I and transmitted the surplus to the Kuwaiti Consultant. Kuwaiti Company was responsible for the transmission of over 212,000 Kuwaiti Dinars (US$745,500) from IAP to the Kuwaiti Consultant. The NPA provides no information on who eventually performed the Phase II work.

For unspecified reasons, Rama worked for IAP only as a consultant after March 2007. The filings do not shed light on the exact nature of his involvement with the company during this time. Media sources indicate that Rama has not worked for or with the company in over seven years.

NPA Requires IAP to Implement a Detailed and Evolving Compliance Program

Under the terms of its three-year NPA, IAP agreed to pay $7.1 million, implement a corporate compliance program, submit annual reports on the compliance program and refrain from making public statements contradicting its acceptance of responsibility. There is no indication of why the DOJ agreed to issue an NPA, beyond the NPA's recitations that the company had cooperated with the investigation, engaged in remediation and committed to a compliance program. There is no explicit indication that the company voluntary disclosed the violations.

The filings do not explain how the fine was calculated. The face value of the Phase I contract was $4 million, of which the company admits to passing $1.78 million to the Kuwaiti Consultant for the purposes of making bribes to Kuwaiti officials. There is no indication of whether bribes were actually made, their amounts, or for which officials they may have been destined. While the filings describe the Phase II work as "substantially" more lucrative than that of Phase I, they do not describe its size or what steps IAP took to secure Phase II contracts.

The NPA lays out detailed requirements, similar to those in other DOJ FCPA resolutions, for IAP's corporate compliance program and written compliance code. Directors and senior management must be visibly and explicitly involved in the program. It must be implemented by senior executives reporting directly to independent monitoring bodies within the company. Those responsible for implementation must act autonomously, and the company must allocate sufficient resources to maintain that autonomy. All IAP directors and officers must be trained periodically, as must any employees serving in positions that pose a corruption risk.

IAP's compliance code must apply not only internally but also to agents and business partners acting on behalf of the company in foreign jurisdictions. IAP must perform due diligence reviews and include anti-corruption provisions in its contracts with agents, business partners and entities it acquires or with which it merges. It must develop systems for advising all employees on compliance, including those working in foreign jurisdictions. The company must develop systems for internal and, so far as possible, confidential reporting of violations. It must establish procedures of incentives for compliance and discipline for non-compliance.

Finally, IAP must perform an annual review of its anti-corruption policies, "taking into account relevant developments in the field and evolving international and industry standards." Its policies must additionally be subject to periodic testing, whose frequency is left unspecified. IAP must submit confidential annual reports to the DOJ on the compliance program's continuing elaboration and effectiveness over the course of the NPA's three-year term.

Noteworthy Aspects

- **Did IAP Voluntarily Disclose?** The filings do not specify why the DOJ allowed IAP to enter into an NPA. IAP's NPA is notable in light of the complexity and extent of the bribery scheme; moreover, the fact that a new company, Ramaco, was created for the scheme, suggests a significant weakness in internal controls and possible complicity of key employees. The NPA does not say that IAP voluntarily disclosed the violations, which suggests that there was no such disclosure. Assuming there was no voluntary disclosure, the public papers suggest that IAP's cooperation with the DOJ's overall investigation and the enforcement action against Rama led to the use of an NPA for the corporate disposition. Our review of recent DOJ declinations and remarks by DOJ officials in the Introduction section supports this conjecture, since cooperation, particularly in the DOJ's investigation of responsible individuals, is a significant factor that the DOJ considers when deciding whether to bring an enforcement action.

- **IAP's Status under FAR**: Under the Federal Acquisition Regulation (FAR), government contractors -- such as IAP -- stand to be debarred from government contracting for the type of misconduct at issue here. The threat of disbarment should have provided ample additional impetus for IAP to self-report to the government, as disclosure to and cooperation with the government are mitigating factors (along with a full investigation and institution of remedial measures, among others) that a debarring official should consider before reaching a debarment decision. In addition, to the extent that securing an NPA avoided a conviction for IAP, it also put IAP in a more favorable position with regard to debarment than a conviction or a civil judgment would have under the relevant FAR provisions. (It is also possible, though not noted in any public papers, that IAP disclosed the matter to its contracting agencies, and those agencies in turn notified DOJ.)

- **Spacing Out Fine Payments**: The NPA allows IAP to pay its fine in four annual installments of $1.775 million. Paying the fine in installments could considerably soften the effects of the fine on IAP, which appears to be under financial hardship. Among the limited financial data available on IAP, which is a privately owned company, are its reported losses of $410,000 on $15.58 million in overall sales in 2014, and Standard & Poor's having downgraded its credit rating three times in 2012. The accommodation offered in the NPA appears to represent a willingness on the part of the government to negotiate settlement terms so as not to drive a company out of business.

Actions Against Individuals

Former Co-Chief Executive Officer of PetroTiger Pleads Guilty

On June 15, 2015, Joseph Sigelman, a former Co-Chief Executive Officer of PetroTiger Ltd., pled guilty to conspiring to commit an FCPA anti-bribery violation. Sigelman's plea followed the government agreeing to drop five of the six charges against him after the ninth day of his trial in the United States District Court for the District of New Jersey, even though the parties had previously expected the trial to continue into a third week. Following the plea, Judge Joseph Irenas sentenced Sigelman to three years of probation and ordered Sigelman to pay $100,000 in fines and $239,015.45 in restitution to the U.S. government.

As detailed in our FCPA Spring Review 2014, the DOJ charged Sigelman with conspiracy to commit wire fraud, violate FCPA anti-bribery provisions and launder money, in addition to other substantive FCPA violations. The DOJ alleged that Sigelman and other PetroTiger executives -- Knut Hammarskjold, another former Co-Chief Executive Officer, and former general counsel Gregory Weisman -- bribed an employee of Ecopetrol, a petroleum company majority-owned by the Colombian government, to secure a $45 million oil contract with Mansarovar Energy Colombia Ltd. ("Mansarovar Contract"). Ecopetrol was responsible for

approving contracts involving oil field work in Colombia, including the Mansarovar Contract. The PetroTiger executives allegedly attempted to cover their tracks by initially wiring payments to the official's wife and submitting invoices to PetroTiger for her purported consulting services. However, when the wire transfers to the official's wife failed, the executives wired the payments directly to the official.

In 2013, the DOJ also charged Weisman with conspiracy to violate the FCPA and the wire fraud statute for his role in the bribery scheme. Weisman ultimately pled guilty to both charges. Weisman cooperated with the government in its investigation of Sigelman, including wearing a wire during conversations with Sigelman , and ultimately testified against Sigelman at trial. Because of Weisman's cooperation, the government requested that Judge Irenas postpone his sentencing until after Sigelman's trial.

On June 11, 2015, the ninth day of Sigelman's trial, Weisman acknowledged that he had given false testimony under oath regarding his decision to stay on as General Counsel at Atlantic Gulf & Pacific Company, Inc., another company owned by Sigelman, during the Sigelman investigation. Initially, Weisman testified that a government official had instructed him to stay at Sigelman's company. However, when Sigelman's defense attorney asked Weisman whether this was true, Weisman said that he did not actually remember. Following a discussion with attorneys for both sides, Judge Irenas adjourned the trial until the following week.

On June 15 -- before the trial resumed -- the DOJ, the U.S. Attorney's Office for the District of New Jersey and Sigelman entered into a plea agreement. Under the agreement, Sigelman pled guilty to conspiracy to commit a violation of the FCPA -- only one of the six counts with which he was initially charged. Sigelman agreed to a maximum sentence of one year and one day of incarceration and restitution of $239,015.45.

At the sentencing hearing, the government urged Judge Irenas to impose a sentence of one year and a day incarceration. The government argued that Sigelman was the central figure in the bribing scheme, and that incarceration deters FCPA misconduct. The government acknowledged Weisman's troubled testimony, but pointed to Sigelman's own admissions as a basis for its proposed sentence.

Judge Irenas ultimately sentenced Sigelman to three years of probation and ordered him to pay $239,015.45 in restitution and $100,000 in fines. Judge Irenas criticized the government for "arguing vigorously" in its sentencing memorandum for a sentence of a year and a day in jail -- the maximum stipulated in the plea agreement that the parties negotiated only a day earlier -- and "pretty much implying" that anything less would, in the Judge's words, "not be a reasonable sentence." Judge Irenas reminded the government that by entering into the plea agreement, it had agreed that any sentence within the agreed-to range is reasonable. In steering away from sentencing Sigelman to incarceration, Judge Irenas observed that incarceration was not necessary to deter future misconduct in this case, and that for a senior executive such as Sigelman, pleading guilty to a felony may achieve the same end.

IAP's Former VP Pleads Guilty

On June 16, 2015, James M. Rama, former Vice President of Special Projects and Programs of IAP Worldwide Services, Inc., pled guilty to one count of conspiracy to violate the anti-bribery provision of the FCPA. On the same date, IAP entered into a three-year NPA with the DOJ. The conspiracy and the NPA are discussed at greater length in an article discussing IAP's settlement with the DOJ, above.

Rama began orchestrating the bribery scheme prior to his employment with IAP. A year before joining the company, Rama met the Kuwaiti consultant who would act as a conduit for the bribes. Rama subsequently formed a company, Ramaco International Consulting, to secure government contracts. Ramaco secured $4 million in government contracts, passing the work on to IAP. It funneled $1.78 million of that amount to the consultant, who was to use the funds to bribe unspecified Kuwaiti officials. Whether any bribes were actually made is not specified in the Plea Agreement.

Rama is scheduled for sentencing on September 11, 2015, before the United States District Court for the Eastern District of

Virginia. He faces a maximum of five years of imprisonment, a fine of the greater of $250,000 or twice the gross gain to the conspirators or loss to its victims, full restitution, a special assessment and three years of supervised release.

Related Litigation

District Court Dismisses Foreign Bribery Action for Lack of Jurisdictional Nexus with United States

On April 21, 2015, the United States District Court for the Northern District of California dismissed an indictment for bribery and related charges (non-FCPA) brought against three non-U.S. citizens based on allegations of conduct occurring entirely outside of the United States. At a hearing on a motion to dismiss by two of the defendants in *United States v. Vassiliev*, the court strongly criticized the prosecution for bringing the case, stating "I never in my life, in 50 years of criminal practice, seen a more misguided prosecution as the one that you've brought" and questioning the U.S. Attorney's Office's use of resources "to prosecute some foreign nationals involved in a foreign company, engaged in conduct which was foreign, on doing things that weren't directly related to the contribution of the United States to that entity."

The charges stemmed from allegations of improper payments made by Defendants Yuri Sidorenko and Alexander Vassiliev to Defendant Mauricio Siciliano, an executive at a United Nations agency called the International Civil Aviation Organization ("ICAO"). The five-count indictment, filed June 26, 2014, alleged conspiracy to commit honest services wire fraud (18 U.S.C. §§ 1349, 3238), honest services wire fraud (18 U.S.C. §§ 1343, 1346, 2, 3238), conspiracy to solicit and give bribes involving a federal program (18 U.S.C. §§ 371, 3238), soliciting bribes involving a federal program (18 U.S.C. §§ 666(a)(1)(B), 2, 3238) and giving bribes involving a federal program (18 U.S.C. §§ 666(a)(2), 2, 3238). None of these individuals were American citizens or resided in the United States.

The United States is an ICAO member and has provided support to ICAO through annual financial contributions, as well as other means. Siciliano worked in ICAO's Machine Readable Travel Documents Programme, which set standards for machine-readable passports. Vassiliev and Sidorenko were Chairmen of the Board and the Advisory Board, respectively, of the EDAPS Consortium ("EDAPS"). EDAPS is a Ukrainian conglomerate that manufactured and supplied a variety of identification and security products. EDAPS was seeking to expand its market presence, including in the United States, and was also looking to produce an e-passport for the International Criminal Police Organization ("INTERPOL"). The payments at the center of the case were allegedly made to Siciliano, for him to use his official position at ICAO to benefit EDAPS' passport project and to personally benefit Sidorenko and Vassiliev.

In his order dismissing the indictment, Judge Charles R. Breyer concluded that the offenses charged did not apply extraterritorially and that the charges violated due process because there was an insufficient domestic nexus to support the prosecution.

Relying on *Morrison v. National Australia Bank Ltd*., 561 U.S. 247 (2010), the court considered whether the bribery and honest services statutes contained a "clear" and "affirmative indication" that Congress intended the statute to apply extraterritorially. Relying on the language of the provisions at issue, the court noted that neither provision contained clear language on extraterritorial application and that, therefore, a presumption existed that the statutes did not apply extraterritorially. The government further contended that the general holding of *United States v. Bowman*, 260 U.S. 94 (1922), that "frauds of all kinds" do not have extraterritorial application, did not apply because of an exception for criminal statutes "enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated." The government claimed that the exception in *Bowman* permitted prosecution of an offense committed against ICAO, because the ICAO was partially funded by the United States. The court rejected that argument, countering that "[t]here is no allegation that even one dollar of the millions of dollars the United States presumably sent to ICAO was squandered," and emphasized that "[t]his case involves wholly foreign conduct and wholly foreign actors." The court thus concluded that under *Morrison* and *Bowman* neither statute applies extraterritorially.

The court also found that the indictment alleged crimes that did not have a nexus to the United States and it therefore violated due process. First, the court noted that "[t]here is nothing in the Indictment to support the proposition that any of the Defendants

knew that the conduct alleged even involved the United States." The court further stated that the government's "argument that any financial or security interest supports a domestic nexus proves too much," rendering meaningless the minimum contacts requirement. The court explained that "it is difficult to see how [the money that the United States sent to ICAO] results in adequate contacts with Siciliano . . . , let alone Sidorenko or Vassiliev, who did not even work for ICAO." The court also criticized the government for failing to explain "how much money the United States must send to a foreign employer (or the foreign employer of an individual one is bribing) to satisfy the minimum contacts requirement as to a foreign employee (or the individuals bribing him)." Thus, the court concluded that the United States' financial contributions to ICAO were insufficient to establish a nexus to the United States.

The decision signals both the U.S. government's expansive view of its jurisdiction to police bribery abroad, even where the actors are foreign and the conduct alleged is entirely extraterritorial, as well as at least one district court's unwillingness to accept it. Notably, the government did not bring charges under the FCPA, which expressly grants jurisdiction over certain bribery conduct occurring outside of the United States, but which also requires a jurisdictional nexus with the United States, which might have been missing here. That said, the government's broad interpretation of its jurisdiction under the FCPA has seldom been challenged, as many cases settle before indictment. Whether *Vassiliev* will impact FCPA prosecutions, therefore, is not yet clear.

On April 17, 2015, the government noticed its appeal in the Ninth Circuit.

Texas Supreme Court Protects Internal Investigations from Defamation Actions

On May 15, 2015, the Texas Supreme Court issued a decision in *Shell Oil Co. v. Writt*, holding that statements made in an internal FCPA investigation and later disclosed to enforcement authorities are "absolutely privileged" and therefore cannot form the basis for a civil action alleging defamation.

As reported in our FCPA Winter Review 2015, Robert Writt, a former Shell Oil Company ("Shell") employee, alleged that Shell defamed him by voluntarily submitting the results of an internal FCPA investigation to the DOJ. According to a Texas Court of Appeals ruling, Writt alleged that the report "'falsely accused him' of 'engaging in unethical conduct' in connection with the payment of 'bribes' and providing inconsistent statements during multiple interviews." The investigation eventually resulted in Shell's 2010 FCPA settlement with the U.S. government as reported in our FCPA Winter Review 2011.

The Texas Supreme Court's decision reversed a Texas Court of Appeals ruling that Shell's voluntary submissions to the DOJ were entitled to "qualified privilege," which does not protect statements made by an individual when he or she "knows the matter to be false or does not act for the purpose of protecting the interest for which the privilege exists." In its decision, the Court of Appeals reasoned that Shell's "voluntary" pre-prosecution internal FCPA investigation was not a "judicial proceeding" as required for absolute privilege.

The Texas Supreme Court, in contrast, reasoned that Shell was the target of a U.S. government investigation "at all relevant times," and that the investigation eventually resulted in a criminal settlement with Shell. As a result, Shell's statements satisfied the requirement "that the possibility of a proceeding must have been a serious consideration at the time the communication was made." The Texas Supreme Court supported its reasoning by summarizing the dramatic increase in FCPA enforcement prior to Shell's internal investigation and the "somewhat draconian penalties . . . ," that "compelled [Shell] to undertake its criminal investigation and report its findings to the DOJ."

Shell Oil Co. v. Writt is particularly instructive because it comes at a time when the DOJ and SEC are increasing their calls for companies to disclose evidence of potential individual culpability early in the investigation process (*See* FCPA Autumn Review 2014). As a result, this decision will provide certainty to companies located in Texas, as well as a guidepost and a strong argument for companies elsewhere, that good faith efforts to disclose individual wrongdoing will not (or likely will not) create liability in defamation actions.

U.S. Agency Developments

SEC Issues Guidance Regarding Administrative Proceedings

On May 8, 2015, the SEC issued guidance setting forth the criteria it uses to decide whether to bring a new enforcement action as a civil action in a federal district court or as an administrative proceeding before an SEC Administrative Law Judge ("ALJ").

The guidance comes on the heels of a trend we have previously highlighted in the FCPA context. As we noted in our FCPA Spring Review 2014 and FCPA Winter Review 2015, the SEC has continued to rely on expanded authority under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act to prosecute a significant portion of FCPA-related misconduct via administrative proceedings rather than through court-filed civil complaints.

The four-page guidance document, titled the Division of Enforcement Approach to Forum Selection in Contested Actions ("Guidance"), outlines four general areas that guide the Enforcement Division's forum decisions. The Guidance notes that the relevant considerations are not exhaustive and that the SEC has the discretion to decide which of the factors to consider. The four factors are:

> The availability of the desired claims, legal theories and forms of relief in each forum. The Guidance explains that certain claims, theories, and relief are only available in one forum. For example, charges of failure to supervise can only be pursued in the administrative forum. Conversely, federal district court is the proper forum in situations where there is a need for emergency proceedings or relief, such as where the alleged violative conduct is ongoing or there is a risk that proceeds of the alleged wrongdoing will be moved offshore or evidence will be destroyed.
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> Whether any charged party is a registered entity or an individual associated with a registered entity. The Guidance notes that although the SEC may bring actions against registered entities and associated persons in district court, certain charges and forms of relief applicable to registered entities and associated individuals, such as associational bars and suspensions, are available only in an administrative forum.
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> The cost-, resource- and time-effectiveness of litigation in each forum. The focus of this factor is the efficient and effective use of the Commission's limited resources. As the Guidance notes, in some circumstances this factor weighs in favor of choosing federal district court and, at other times, an ALJ. For example, hearings are generally held more quickly in contested administrative actions than in a federal district court, which may allow for a more effective use of the Commission's resources. However, balanced against this are the viability of seeking relief against multiple defendants in a single proceeding, the potential benefits of a motion for summary judgment or its administrative equivalent, and the availability and scope of pre-trial discovery in each forum.
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> Fair, consistent and effective resolution of securities law issues and matters. The Guidance notes that ALJs develop extensive knowledge and experience concerning the federal securities laws, as well as complex or technical securities industry practices or products. Thus, if a contested matter is likely to raise unsettled and complex legal issues under the federal securities laws, the Guidance notes that consideration should be given to whether, in light of the Commission's expertise, obtaining a Commission decision on such issues may facilitate development of the law. Similarly, where application of state law or other specialized areas of federal law is integral to the matter, a federal district court may be more appropriate.

The criminal-defense bar has expressed its disappointment with the Guidance, and the consensus thus far is that the Guidance sheds little light on how the forum decision will be made. A particular criticism is that while the Guidance might help explain how the agency decides where to bring a case, it does not address the concern that SEC enforcement officials might "forum shop" for their own benefit.

There is also heavy criticism with respect to the third criterion, which discusses resource, time and cost effectiveness. One argument against this criterion is that while administrative hearings can indeed progress more quickly than in federal court, an appeal of an administrative decision to federal court may take years for the court to review. Furthermore, a quick hearing gives the defense a short amount of time, sometimes a few months, to prepare its case, whereas the SEC has often had years to investigate and build its case.

Various groups have also pointed to statistics that show that the SEC has won a higher percentage of cases in administrative proceedings than in district court. For example, *The Wall Street Journal* reported that, since 2010, SEC has won 90% of its cases brought before its own ALJs but has won only 69% of its cases brought in federal court. However, when faced with similar questions at a recent panel at the New York City Bar Association's 4th Annual White Collar Crime Institute , one panelist, a former SEC ALJ explained that in one type of case in an administrative proceeding, the companies have not filed necessary forms with the SEC and so there are no factual disputes. In another type, a person has been convicted in district court; these are summary judgment cases for the ALJs because there are no factual disputes in those cases. Thus, he explained, it is important to look beyond the numbers, to focus on the specific types of cases the SEC files in an administrative forum versus the courts and the overall win rate for those kinds of cases, claiming that this explanation accounts for some of the statistical disparity.

Defendants accused of securities violations in administrative proceedings have increasingly tried to argue against the choice of forum. Some have argued that the use of ALJs hired by the SEC and the absence of the rights to discovery and a jury violate the Constitution. Federal district courts have thus far not made any definitive rulings on these issues. However, in a recent ruling in the United States District Court for the Northern District of Georgia, the court issued a preliminary injunction based on a finding that the appointment process for SEC ALJs is likely unconstitutional, casting doubt over the constitutionality of the SECs entire administrative hearing process. The SEC has appealed that decision to the 11th Circuit. More recently, in another case in the same court, an Atlanta-based investment firm moved for an emergency injunction against an administrative proceeding arguing that the appointment of an ALJ violated the Appointments Clause in Article II of the Constitution because it deprives the President of the United States the ability to hire and fire the ALJs.

International Developments

Petrobras Update

This quarter saw several notable developments in "Operation Car Wash," the Brazilian government's investigation into alleged corruption at Petroleo Brasileiro S.A. ("Petrobras"). These include the arrests of the Treasurer of the Partido dos Trabalhadores ("PT" or "Workers Party") and the heads of the two largest construction companies in Brazil, convictions of two former Petrobras executives, and the freezing of over $350 million of funds allegedly connected to the losses suffered by Petrobras as a result of the corruption. Background information about the Petrobras investigation can be found in our FCPA Winter Review 2015 and FCPA Spring Review 2015 publications, and we will continue to provide updates as the investigation continues. Note that many of the following updates are based on reports in U.S. and Brazilian news media.

On April 15, 2015, Brazilian federal police arrested João Vaccari Neto , the Treasurer of the Workers Party, currently the ruling party in Brazil. Mr. Neto has been charged with receiving irregular donations for the Workers Party from Petrobras suppliers, which were allegedly paid from the proceeds of their inflated contracts with Petrobras. Only a week earlier, Mr. Neto had denied in testimony before a congressional investigative committee that any donations to the party were illegal.

On April 22, 2015, Brazilian federal judge Sergio Moro sentenced Paulo Roberto Costa , the former director of supply of Petrobras and one of the whistleblowers in the corruption scandal, to seven and a half years in prison for money laundering and racketeering. Mr. Costa will, however, serve less than two years under house arrest, in addition to time already served, as a result of a plea bargain with the Brazilian authorities. On the same day, Judge Moro also sentenced currency dealer Alberto Youssef to nine years and two months of imprisonment for his role laundering bribe money as part of the same scheme. Youssef also entered into a plea deal with the prosecution and will serve only three years of his sentence.

On March 26, 2015, former director of Petrobras's international division, Nestor Cerveró, was sentenced to five years in prison and fined over 500,000 reais (over $150,000) for money laundering and passive corruption. According to *Reuters*, Judge Moro noted that there was ample evidence that Mr. Cerveró had set up a front company to launder money and had used illicit proceeds to purchase a luxury apartment in Rio de Janeiro, Brazil.

On May 21, 2015, Brazilian federal police arrested Milton Pascowitch, a businessman suspected of being the middleman between construction company Engevix and Petrobras. According to prosecutors, Mr. Pascowitch is suspected of paying bribes to former services director at Petrobras, Renato Duque, who has been in jail in connection with the Petrobras investigation since March 16, 2014.

In addition, between April 24 and May 29, 2015, the Public Prosecutor's Office successfully obtained several injunctions freezing approximately 1.1 billion reais (approx. $370 million) in bank accounts belonging to construction groups, Mendes Júnior, Engevix, OAS, Camargo Corrêa, Sanko and Galvão Engenharia. The prosecution requested these injunctions in a series of civil lawsuits filed on February 20, 2015, seeking compensation for losses reportedly suffered by Petrobras as a result of corruption, indemnification for moral damages, and civil fines. The total damages sought by the prosecution are 4.47 billion reais, which amounts to approximately $1.5 billion.

On June 19, 2015, news sources reported that morning raids had led to the arrests of additional executives allegedly involved in Petrobras-related corruption. Significantly, the executives include Marcelo Odebrecht and Otavio Marques Azevedo, the heads of Odebrecht and Andrade Gutierrez -- the largest and second-largest construction companies in Brazil, respectively. *Reuters* quotes one of the lead Brazilian prosecutors in the Petrobras investigation as stating that he has "no doubt" that Odebrecht and Andrade Gutierrez led a "cartel" that overcharged Petrobras for work and passed on the excess funds to executives and politicians. Notably, according to *Reuters*, Odebrecht has personal ties to former President of Brazil Luiz Inácio Lula de Silva, the predecessor to President Dilma Rousseff and one of the founders of the ruling Workers Party.

On July 2, 2015, Brazilian Federal Police arrested Jorge Zelada, who succeeded Mr. Cerveró as the director for Petrobras's international division in 2008 and served in that position until 2012. According to Brazilian Prosecutor Carlos Lima, Mr. Zelada was part of a group of four top former executives from Petrobras (also including Mr. Costa, Mr. Cerveró, and Mr. Duque), who allegedly took payments from Petrobras suppliers to inflate contracts and restrict competition.

Mexico Implements Constitutional Anti-Corruption Reforms

On May 27, 2015, Mexican President Enrique Peña Nieto signed more than a dozen constitutional reforms into law, paving the way for the creation of Mexico's National Anti-Corruption System. The reforms seek to prevent, investigate and punish acts of corruption.

The amendments were first approved by both houses of Congress (the Chamber of Deputies and the Senate, in February and April 2015, respectively) and then a majority of state legislatures (between April and June 2015), as is required for all changes to the Mexican constitution. Congress is expected to introduce secondary legislation that will allow the reforms to enter into force.

Key components of the reforms include revisions to, or the addition of, the following constitutional articles:

- **Article 79**, which expands the role of the Superior Audit Office of Mexico ("Auditoría Superior de la Federación" or "ASF"). The ASF now has broad authority to oversee the use of federal funds and carry out investigations of "irregular acts" throughout the fiscal year;

- **Article 108**, which requires public officials to disclose potential conflicts of interest. However, this article continues to significantly limit the liability that the President and other high-level officials may face while in office;

- **Article 109**, which creates additional penalties for private corporations that commit corrupt acts for economic gain at the expense of a federal, state or municipal entities. In addition to debarment and economic fines, private corporations may face suspension of activities, corporate intervention, and corporate dissolution. This article also includes a whistleblower provision that allows citizens to submit complaints to the Chamber of Deputies, although it does not specify if whistleblowers will be compensated;

- **Article 113**, which establishes the National Anti-Corruption System ("Sistema Nacional Anticorrupción" or "SNA"). The SNA is a coordinated effort among several branches of the federal government to prevent, detect and sanction breaches of administrative responsibilities, as well as corrupt acts. It also requires heightened oversight of public funds. A coordinating committee comprised of high-level government officials, including a special prosecutor for corruption and a group of five citizen representatives, will lead the SNA's implementation;

- **The Fifth Basis ("Base Quinta") of the Statute of Government of the Federal District** , which transforms the Federal Tribunal of Fiscal Justice and Administration into the new Federal Tribunal of Administrative Justice. The Federal Tribunal of Administrative Justice will have subject-matter jurisdiction over disputes regarding serious breaches of administrative duty and gross acts of corruption by government officials and private parties.

In a recent interview with *The Washington Post*, Matteson Ellis, a Member at Miller & Chevalier, discussed the impact that the reforms will have on foreign companies looking to invest in Mexico. He stated, "[t]his will be a highly significant development for the international business community. It gets directly at the issue of impunity. No longer is a U.S. company forced to tell its Mexican business partner, you've got to comply with this law in the U.S. Now they can say, you need to comply with your own laws."

Additional details surrounding the constitutional reforms and their practical implications will emerge when Mexico's Congress passes the implementing legislation.

United Kingdom Enforcement Update

Alstom Prosecution Expands

In April and May 2015, the U.K. Serious Fraud Office ("SFO") announced that it charged Alstom Network UK Ltd. ("Alstom Network"), a U.K. unit of French conglomerate Alstom SA) and two former employees of Alstom units with offenses under the United Kingdom's prior anti-corruption laws (which apply to conduct committed before the U.K. Bribery Act went into force on July 1, 2011). According to the SFO's press releases, the alleged offenses are related to the supply of trains to the Budapest Metro. Notably, the May press release states that one of the individual defendants previously served as Alstom Network's Senior Vice President Ethics & Compliance -- a function presumably responsible for preventing corruption. In December 2014, Alstom settled the second-largest FCPA action to date with U.S. authorities, and the SFO continues to prosecute Alstom Network and Alstom Power Ltd. (another U.K. unit of Alstom) for alleged bribery in India, Poland, Tunisia and Lithuania. The SFO has now charged a total of six individuals in its investigation of Alstom.

SFO Issues Invitations for Deferred Prosecution Agreements

On April 21, 2015, SFO official Ben Morgan stated in a speech that the SFO has issued its first letters inviting companies to enter negotiations for DPAs. As reported in our FCPA Summer Review 2013, newly enacted legislation authorized the SFO to enter into DPAs, and the SFO issued a DPA Code of Practice stating that the prosecutor may initiate a DPA negotiation, "by way of a formal letter of invitation" describing the parameters of the proposed discussion. Though the SFO's use of such letters is now

confirmed, the identity of the recipients and the success of any resulting negotiations remain to be seen.

Tesco Investigation Signals Possible SFO Cooperation Expectations

According to media reports, U.K. retailer Tesco Plc has sought to demonstrate cooperation with the SFO by avoiding in-person interviews with employees in its internal investigation into accounting irregularities. In particular, Tesco reportedly asked employees questions by mail, and cited SFO guidance as a reason for declining to meet with the employees in person. Media sources link the SFO's apparent opposition to in-person interviews by Tesco's lawyers to recent statements by SFO officials, in which they discourage companies from taking steps in internal investigations that may disturb evidence and complicate the SFO's investigations. As a result of avoiding interviews with employees (some of whom were terminated), Tesco reportedly may face claims that it violated employment law by denying the employees due process. In light of these reports, and considering that enforcement agencies in other jurisdictions encourage in-person interviews by company counsel to facilitate prompt information gathering and remediation, a company cooperating with the SFO may find itself in a difficult position where compliance with the SFO's expectations conflicts with other laws and expectations to which it is subject.

Acquittals in Nigerian Corruption Trial

On June 2, 2015, the SFO announced that three employees of Swift Technical Solutions Ltd ("Swift"), a manpower supplier to the oil and gas industry, were found not guilty of corruption offenses under the United Kingdom's prior corruption laws at Southwark Crown Court. The SFO alleged the defendants conspired to make corrupt payments related to the tax affairs of Swift's Nigerian subsidiary to officials of two Nigerian Boards of Internal Revenue in Rivers State and Lagos State. Notably, the SFO's press release states that Swift cooperated with the SFO by providing documents and making employees available for interview, and that Swift was not charged with any offense, suggesting that Swift received credit for the assistance it provided to the SFO. This setback for the SFO stands in contrast to a number of recent successful prosecutions of individuals under the United Kingdom's prior anti-bribery laws, as reported in our FCPA Autumn Review 2014 .

Amendments to Spain's Criminal Code Create Compliance Defense for Companies

Spain's new Organic Law ("Ley Orgánica") 1/2015, of March 30, 2015, introduces a number of amendments to Spain's Criminal Code. One of the more notable revisions allows legal entities to avoid corporate criminal liability if they have an adequate compliance program in place. This change should encourage companies doing business in Spain to adopt a rigorous compliance program. The new law entered into force on July 1, 2015.

Since the introduction of Organic Law 5/2010, dated June 22, 2010, a legal entity in Spain can be found criminally liable for criminal activities committed in its name or on its behalf by an employee if the entity failed to exercise "due control" over the individual, even if the individual cannot be identified. The law identified several mitigating circumstances, an adequate compliance program being one of them. Under the new law, however, a compliance program that meets the statutory requirements can serve to completely exempt a company from criminal liability. Mitigation may still apply if authorities determine that the legal entity's implementation of its compliance program meets some, but not all, of the necessary criteria.

Article 31 bis paragraph 5 of the amended Criminal Code establishes that an adequate compliance program must fulfill the following six requirements:

Identify company activities within the scope of which foreseeable criminal activities may occur;

Establish protocols or procedures that set forth the legal entity's decision-making, adoption and execution processes with respect to the activities identified above;

Institute management models for the monitoring of financial resources that adequately prevent the commission of foreseeable criminal activities;

Impose an obligation to report possible risks and breaches of the program to the body responsible for the supervision of the operation of and adherence to the compliance program;

Establish a disciplinary system that appropriately sanctions breaches of any measures imposed by the program; and

Conduct periodic testing of the program and of any modifications to it resulting from the occurrence of significant breaches of its provisions or when there are changes to the company's organization, control structure or commercial activities that require it.

The compliance program must be in effect before the offense is committed. In addition, the legal entity must disclose the criminal actions before Spanish authorities initiate judicial proceedings, collaborate with the authorities in the investigation to determine the extent of the criminal liability, take steps to mitigate the damage caused by the crime and undertake effective measures to prevent and detect future crimes before any criminal trial begins.

France Enforcement Update

The Effect of U.S. DPAs and NPAs on French Corruption Trials

According to recent press reports, an entity can avoid prosecution under existing French law if it has entered into a DPA or an NPA with foreign authorities, on the basis that a subsequent prosecution in France would constitute double jeopardy.

In recent years, the question of whether U.S. DPAs and NPAs constitute a "ruling" for double jeopardy purposes has been unclear in France, but two decisions by the French courts suggest that the answer may be yes. On June 18, 2015, the Paris Court of First Instance acquitted 14 companies of charges that they paid bribes in connection with the UN's oil-for-food program. Though the written decision is not yet public, reports indicate that four of the companies were acquitted on the basis that they had entered into a DPA or an NPA with U.S. enforcement authorities (at least one of which has since expired) and that trying the companies in France for the same conduct would violate the double jeopardy principle. Meanwhile, the case in France against Total, related to the alleged payment of bribes in Iran and discussed in our FCPA Summer Review 2013, was postponed until mid-2016, when the DPA the company entered into with U.S. enforcement authorities in May 2013 is due to expire, resulting in the action being dismissed by a U.S. court. The theory of the postponement is that the dismissal will constitute a formal judgment by the court, which provides a clear basis for the company to make a double jeopardy argument in France. A three-judge panel will then consider the argument. Thus, the courts in France appear to be taking the position that regardless of whether a DPA or NPA is itself a "ruling," a "ruling" does result upon expiration of the DPA or NPA, and does trigger a double-jeopardy argument.

The news received mixed reactions from anti-corruption experts. Some applauded the recognition that double-jeopardy concerns are legitimate, while others noted (or hinted) that this development belies an inclination for France to avoid vigorous enforcement of its own anti-corruption laws. The written decisions in the two matters in question should shed light on this debate once they are publicly available.

France Publishes Guidelines to Fighting Corruption in Commercial Transactions

On March 25, 2015, the French Central Service for the Prevention of Corruption ("SCPC") published Guidelines for the Reinforcement of Prevention of Corruption in Commercial Transactions ("Guidelines"). The SCPC promulgated these Guidelines in recognition that, while there is no legal requirement in France for businesses to adopt anti-corruption compliance programs,

many French companies are doing so and may benefit from recommendations on international best practices in developing such programs.

The Guidelines provide practical advice organized in the following six thematic areas:

Management Commitment at the Highest Level: This section recommends a "zero tolerance" approach to corruption by senior management that is effectively communicated throughout the organization.

Risk Assessment: The focus of this section is on carrying out and regularly updating risk assessments for the company.

Setting up an Anti-Corruption Compliance Program: This section recommends developing a key compliance document, designating a compliance officer, creating anti-corruption procedures and adopting a whistleblowing mechanism.

Control Mechanism: This section is focused on the creation of financial and accounting controls.

Communication, Training and Follow-up of the Anti-Corruption Compliance Program: This section recommends continuous training of employees and certain third parties and a regular review of the company's anti-corruption program.

Setting up a Sanctions Policy: This section provides recommendations related to the creation of disciplinary procedures for employees that have violated company policies and procedures.

New Ukrainian Government Adopts Anti-Corruption Measures

In an attempt to combat deeply rooted corruption, Ukraine's government adopted seven broad anti-corruption laws and regulations in 2014-2015. Ukraine has been undergoing dramatic changes since the so-called Euromaidan Revolution toppled the regime of President Yanukovych in February 2014, and the current government is still dealing with a military conflict in the east of the country, various humanitarian problems, a worsening economy and political uncertainties.

Many experts name pervasive corruption, aggravated during Yanukovych's presidency, as the main cause for the mass protests that started in 2013 and led to the former President leaving his post. According to the Global Corruption Barometer 2013, published by Transparency International ("TI"), 82% of respondents in Ukraine felt that public officials and civil servants were corrupt or extremely corrupt. TI ranked Ukraine 142 among 175 countries in 2014, which was the worst ranking among all the former Soviet countries.

Against this backdrop, two of the new measures establish extraordinary anti-corruption bodies, while the rest set a foundation for further extensive anti-corruption measures on regulatory and enforcement levels, as summarized below.

- *Law on the National Anti-Corruption Bureau in Ukraine* (entered into force on January 25, 2015) establishes an independent law-enforcement body to focus on the prevention, detection, apprehension, and investigation of corruption-related crimes. In particular, the Bureau is tasked with addressing serious corruption offenses committed by senior officials that represent a threat to national security.

- *Law on Prevention of Corruption* (entered into force on April 26, 2015) forms a special central executive branch body -- The National Agency for Combating Corruption -- to develop national anti-corruption policies and enforce them. The law introduces

a uniform national registry of individuals who commit corruption-related offenses. It also tasks the Agency with monitoring ethics and conflict of interest laws and regulations related to officials. Under the law, the Agency maintains a registry of income for all government officials to use in assessing the lifestyles and spending habits of officials.

- *Presidential Decree on the National Anti-Corruption Council* (entered into force on October 16, 2014) creates a presidential advisory body that is responsible for long-term strategic support of anti-corruption policies. The Council monitors and analyzes anti-corruption policies and their implementation, drafts laws, and advises the President on anti-corruption issues.

- *Law on the Framework of Anti-Corruption Policy in Ukraine (Anti-Corruption Strategy) for 2014-2017* (entered into force on October 26, 2014) names anti-corruption reforms as a governance priority. It sets out national anti-corruption efforts, including new legislative initiatives, such as anti-corruption programs in state-owned entities in central government bodies.

- *Resolution of Verkhovna Rada of Ukraine* (adopted on December 4, 2014) creates a Committee on Preventing and Combating Corruption. The Committee's scope of work includes, among other functions, anti-corruption audits of laws, rules of ethics in public service, regulation of the National Anti-Corruption Bureau and the National Agency for Combating Corruption, and state protection of whistleblowers who provide help in preventing and combating corruption.

- *Law on Prevention and Countering Legalization (Laundering) of Proceeds of Crime, Financing of Terrorism and Proliferation of Weapons of Mass Destruction* (entered into force on February 6, 2015) introduces the framework of financial monitoring procedures. The law distinguishes financial monitoring in relation to two groups of entities: so-called "first-level" entities including international legal entities, banks, insurance companies, etc., and "national-level" entities such as the National Bank of Ukraine, ministries, executive branch bodies, etc., and sets out financial reporting procedures on internal as well as on the broader national level to ensure compliance with relevant financial regulations.

- *Law on Amendments to Certain Legislative Acts of Ukraine Regarding Determination of Ultimate Beneficiaries of Legal Entities and Public Officials* (entered into force on March 04, 2015) is designed to fight the problem of illegal offshore companies and accounts, and requires all legal entities to file submissions identifying their ultimate beneficiaries.

It is too early to assess the effectiveness of the newly adopted laws and anti-corruption bodies, as only the Anti-Corruption Bureau has been formed and it is still going through the initial stage of recruiting personnel. Overall, the new anti-corruption measures appear to be an effective starting point for the government's campaign against extensive corruption. At the same time, the laws contain inconsistencies: For example, the competences of newly created anti-corruption bodies are not fully demarcated, and important legal concepts such as lobbying are not defined and require further attention. The success of the new measures fully depends on their rigorous implementation, the will and resources of the government, and positive changes in the public's attitude towards bribery and corruption.

Other Developments

DOJ Reveals Anti-Corruption Investigation of FIFA and Related Charges

On May 27, 2015, the DOJ surprised the world by unsealing a 47-count indictment charging 14 individuals, including senior officials of FIFA -- the international governing body for soccer -- with racketeering, wire fraud, money laundering and other offenses, in connection with corruption in international soccer. The guilty pleas of four individual defendants and two corporate defendants were also unsealed on the same day.

The unsealing of the indictment accompanied the arrest by the Swiss authorities, in cooperation with the Federal Bureau of

Investigation ("FBI") and the DOJ, of seven high-level FIFA officials gathered in a Zurich hotel for the annual FIFA Congress, which was scheduled to host the FIFA presidential elections for the 2015-2019 term. At the same time, the FBI executed a search warrant at the headquarters of the Confederation of North, Central American and Caribbean Association Football ("CONCACAF"), in Miami, Florida, and Swiss authorities seized electronic data and documents from FIFA headquarters in Zurich as part of a parallel investigation.

According to the indictment, the defendants have been involved in a 24-year scheme to enrich themselves through the corruption of international soccer. They are accused of taking bribes exceeding $150 million in exchange for awarding "lucrative media and marketing rights" to soccer tournaments, as well as for vote-rigging to send events to certain countries. The DOJ press release also states that most of the schemes alleged in the indictment concern the solicitation and receipt of bribes and kickbacks by soccer officials from sports marketing executives in connection with the commercialization of media and marketing rights for high-level soccer matches and tournaments, including FIFA World Cup Qualifiers, the CONCACAF Gold Cup, the Condfederacion Sudamericana de Futbol ("CONMEBOL") Copa Libertadores and several others. Additional schemes under investigation relate to alleged bribes and kickbacks in connection with the sponsorship of the Brazilian Football Confederation ("CBF") by a major U.S. sportswear company, the selection of South Africa as the host country for the 2010 World Cup and the 2011 FIFA presidential election.

The seven FIFA officials arrested in Zurich are: (i) Jeffrey Webb, FIFA vice president and executive committee member, who is also the president of CONCACAF and holds posts in other regional soccer bodies; (ii) Costas Takkas, a former General Secretary of the Cayman Islands Football Association and attaché to Jeffrey Webb; (iii) Eduardo Li, Costa Rica's national football chief; (iv) Eugenio Figueredo, president of the South American football governing body CONMEBOL; (v) Rafael Esquivel, Venezuelan Football Federation president; (vi) Jose Maria Marin, a former president of CBF and current member of FIFA's club committee; and (vii) FIFA development officer Julio Rocha. The two other indicted FIFA officials are Nicolás Leoz, former head of the CONMEBOL, who has been placed under house arrest in Paraguay, and Jack Warner, former FIFA and CONCACAF vice president, who turned himself in to authorities in Trinidad and Tobago within days of the issuance of the indictment and is now fighting extradition to the United States.

The guilty pleas unsealed by the DOJ in connection with the indictment include those of Daryl Warner, son of defendant Jack Warner and himself a former FIFA development officer, who was charged with wire fraud and the structuring of financial transactions, as well as José Hawilla, the owner of Brazilian sports marketing company Traffic. Mr. Hawilla's guilty plea included a forfeiture of $151 million.

In spite of the controversy engulfing FIFA and worldwide pressure on Mr. Blatter to resign, the FIFA presidential elections went ahead as scheduled, and on May 29, 2015, Mr. Blatter was elected to a fifth term. Three days after being re-elected, however, Mr. Blatter announced his intention to resign and stated that a special election would be held between December 2015 and March 2016 to name his successor.

Additionally, on June 15, 2015, Judge Raymond J. Dearie, of the United States District Court for the Eastern District of New York, unsealed the plea agreement of Charles ("Chuck") Blazer, a former CONCACAF General Secretary and a former member of FIFA's executive committee. Mr. Blazer, who started cooperating with the investigators in December 2011, agreed to plead guilty to 10 bribery and tax-related charges, to forfeit almost $2 million allegedly received from bribes, kickbacks and illegal sales of World Cup tickets, and to pay $11 million in taxes to the Internal Revenue Service, in exchange for a more lenient sentence.

As Mr. Blazer's guilty plea states, he agreed to "facilitate the acceptance of a bribe" in the selection process for the 1998 World Cup in France, agreed to accept bribes in the selection process for the 2010 World Cup in South Africa, and "agreed to accept bribes and kickbacks" for broadcast rights to the 1996, 1998, 2000, 2002 and 2003 Gold Cups.

In parallel with the U.S. probe, the Swiss Office of the Attorney General is conducting its own investigation, related to suspicions of bribes to members of the FIFA Executive Committee related to the award of the 2018 and 2022 World Cups to Russia and Qatar,

respectively. On June 17, 2015, the Swiss attorney general declared that he would have no qualms seeking the removal of the 2018 and 2022 World Cups from those countries should any evidence of wrongdoing appear during the course of the investigation.

Coincidentally, FIFA had itself conducted an internal investigation into alleged corruption related to the bidding process for the 2018 and 2022 World Cup hosting rights, as previously reported in our FCPA Winter Review 2015. Although FIFA announced that the investigation found that the bidding process was untainted, FIFA's chief ethic investigator Michael Garcia consequently resigned, claiming that FIFA was mischaracterizing the findings in his investigation report. The Swiss investigation will likely shed new light on the earlier claims of corruption, as well as Mr. Garcia's findings.

Notably, some press reports have mischaracterized the FIFA probe as an FCPA action. Although the charges listed in the indictment deal with international corruption, none are brought under the FCPA. As DOJ officials have indicated, FIFA officials are not "public officials" for the purposes of the FCPA. U.S. authorities may yet bring charges under the anti-bribery provisions of the FCPA if there is evidence that public officials were involved in the bribery scheme; for example, if any officers from national soccer federations are considered to be public officials of their countries. The FCPA accounting provisions may also apply if any "issuer" company involved in the scandal did not adequately maintain its books and records or lacked internal controls.

There could also be prosecutions under the U.S. Travel Act, which prohibits the use of travel or mail to distribute proceeds of any activity considered illegal under any federal or state law. Considering that the distribution of the proceeds of commercial bribery is an illegal practice in New York, the Travel Act may be another path the DOJ could pursue in connection with its investigation.

The U.S. government's investigation is ongoing and new developments are expected in the coming months. Notably, on July 1, 2015, the DOJ requested the extradition of the seven FIFA officials arrested in Switzerland to face the criminal charges in the United States.

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Upcoming Speaking Engagements

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