Client Alert

July 9, 2015

Top Ten International Anti-Corruption Developments for June 2015

By the MoFo FCPA and Global Anti-Corruption Team

In order to provide an overview for busy in-house counsel and compliance professionals, we summarize below some of the most important international anti-corruption developments in the past month with links to primary resources. It was another busy month with a rare FCPA trial ending in a mid-trial guilty plea on favorable terms to the defendant, DOJ's first corporate resolution of the year, a pair of SEC declinations, and a variety of other anti-corruption developments in the U.S. and abroad. Here is our June 2015 Top Ten list:

1. **Sigelman FCPA Trial Ends in Guilty Plea, Probation, and Corporate Declination.** The highly-anticipated and closely watched Joseph Sigelman trial on conspiracy, money laundering, and FCPA charges began in the District of New Jersey on June 2, 2015—and ended abruptly on June 15, 2015, when Sigelman agreed to plead guilty to one count of conspiring to violate the FCPA. The next day, Sigelman was sentenced to three years of probation and ordered to pay $339,000 in fines and restitution. Sigelman was arrested in the Philippines on January 3, 2014, pursuant to a sealed complaint, repatriated to the United States several days later, and indicted in May 2015 for FCPA, wire fraud, and money laundering offenses. The indictment alleged that Sigelman, the former co-CEO of PetroTiger Ltd., a BVI-based oil services company with operations in Colombia, agreed to pay bribes to an official at Colombia's national oil company, EcoPetrol, in exchange for that official's assistance in securing approval for an oil services contract. Sigelman and his co-conspirators allegedly tried to disguise the bribes as consulting payments to the official's wife but ultimately paid the bribes directly to the official. The indictment also alleged another, earlier scheme in which Sigelman himself received kickbacks in exchange for helping obtain more favorable terms for the sellers of a company that PetroTiger acquired. Two other former PetroTiger executives—former co-CEO Knut Hammarskjold and former General Counsel Gregory Weisman—pleaded guilty for conspiring to commit both schemes and agreed to cooperate against Sigelman.

   Weisman's inconsistent testimony about his cooperation ultimately led to the somewhat unusual mid-trial guilty plea. Weisman testified that, following an interview with the FBI in 2012, he agreed to cooperate with the government and secretly videotaped a conversation with Sigelman regarding the FCPA bribery scheme. During cross-examination, however, Weisman testified inconsistently as to whether the government had instructed him to continue working for another Sigelman-led company after he began cooperating. With Weisman's credibility severely damaged, but with several witnesses left who could have rehabilitated the government's case, the mid-trial plea agreement—in which the government agreed to seek dismissal of all but the FCPA object of the conspiracy count, and the parties agreed to a sentence between probation and one year and a day of imprisonment—appears to have been a reasonable resolution for both Sigelman and the government given the course of the trial and their respective

litigation risks. In terms of DOJ's future willingness to prosecute individuals for FCPA violations, not much can be read into the Sigelman plea, although this case does illustrate the litigation risk that DOJ faces whenever it goes to trial, whether that trial involves FCPA or other charges. Put simply, sometimes cooperators testify well, and sometimes, as in this case, they don't.

At the same time that it announced Sigelman's guilty plea, DOJ also announced that it had declined to prosecute PetroTiger "[b]ased on PetroTiger's voluntary disclosure, cooperation, and remediation, among other factors." Although DOJ has repeatedly declined to bring charges against cooperating companies,[1] this was only the second time that DOJ has publicly announced such a declination. The PetroTiger declination provides some evidence that DOJ is committed to backing up its promises to reward companies that self-report violations and cooperate against wrongdoers.

2. **IAP Worldwide Services and its Former Vice-President Agree to FCPA Resolutions with DOJ.** The day after the Sigelman plea, DOJ announced that it had reached agreements with another company and one of its high-ranking executives. Florida-based IAP Worldwide Services Inc. entered into a three-year non-prosecution agreement (NPA), and James Rama, a former IAP vice-president, agreed to plead guilty to one count of conspiracy, in connection with a scheme to bribe Kuwaiti officials through a third-party intermediary to obtain a government security contract. Somewhat unusually, the NPA allows IAP to pay the $7.1 million monetary penalty in installments over the term of the NPA, suggesting that IAP may have been able to demonstrate to DOJ that it was having financial difficulties. The IAP resolution was only the second enforcement action—and the first corporate resolution—of 2015 for DOJ. DOJ stated that it entered into the NPA with IAP "[b]ased on a variety of factors, including but not limited to IAP's cooperation." Notably, and in contrast with PetroTiger, IAP did not self-disclose the underlying conduct, which may, at least in part, help explain the different outcomes for the two companies. It remains to be seen what sentence Mr. Rama will receive in the wake of his guilty plea.

3. **Delays in Alstom's Corporate Sentencing and Former Alstom Executive's Trial.** Connecticut District Judge Janet Bond Arterton ordered that the trial of former Alstom executive Lawrence Hoskins on FCPA and related charges, set to begin on June 2, 2015, be postponed until November 30, 2015, with jury selection taking place on November 24, 2015."[2] Judge Arterton found that Hoskins needed additional time to prepare his defense in light of the third superseding indictment, which was returned on April 15, 2015,[3] and ongoing discovery efforts. Following the continuance, Hoskins wasted no time in filing a motion to dismiss the most recent iteration of the FCPA conspiracy count.[4] Echoing an earlier motion to dismiss, which Judge Arterton denied in December 2014, Hoskins's new motion essentially challenges the government's ability to use traditional conspiracy and aiding and abetting principles to hold foreign persons working for a foreign parent company outside the U.S. liable for FCPA violations. DOJ filed its

[1] *See, e.g.*, U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act, at 77-79 (Nov. 14, 2012) (six anonymized declinations).

[2] *See* Order Granting Motion for Extension of Time, *United States v. Hoskins*, No. 12-cr-238 (D. Conn. May 21, 2015), ECF No. 243.

[3] *See United States v. Hoskins*, No. 12-cr-238 (D. Conn. April 15, 2015), ECF No. 209.

[4] *See* Memorandum of Law in Support of Lawrence Hoskins's Motion to Dismiss Count One of the Third Superseding Indictment, *United States v. Hoskins*, No. 12-cr-238 (D. Conn. June 4, 2015), ECF No. 255.

opposition on June 25, 2015.[5] Judge Arterton also separately continued the sentencing for Alstom SA, originally set for June 23, 2015, until September 25, 2015.[6] In its motion to postpone the sentencing date, Alstom SA, which pleaded guilty to FCPA accounting charges in December 2014, explained that a pending "transaction"—referring to the sale of its power unit to General Electric Co.—was "unlikely" to close prior to August 2015. Alstom SA had previously explained that this transaction "will facilitate the ability of Alstom to pay the fine without impairing its working capital."[7] The Hoskins case and Alstom sentencing will be matters to watch closely in the coming months.

4. **DOJ Files Brief in Fokker Services B.V. Deferred Prosecution Agreement (DPA) Appeal.** As we previously reported, on February 5, 2015, D.C. District Judge Richard Leon rejected a DPA between Fokker Services B.V. and the D.C. U.S. Attorney's Office that would have resolved an investigation into whether the Dutch aerospace services provider violated U.S. sanctions laws. The judge called the terms of the DPA "grossly disproportionate to the gravity of Fokker Services' conduct in a post-9/11 world" and held that it was within his discretion, in addressing whether to exclude time under the Speedy Trial Act for the purpose of allowing Fokker to demonstrate its good conduct during the term of the agreement, to decline to approve the DPA in its current form. Both DOJ and Fokker appealed. On June 4, 2015, DOJ filed its appellate brief in which it argued that Judge Leon's decision "violates th[e] separation-of-powers principle by improperly interfering with the Executive Branch's exercise of prosecutorial discretion in a criminal case. Whether through appellate review under the collateral-order doctrine, or by issuing a writ of mandamus, this Court should reverse the district court's aggrandizement of its judicial role well beyond settled constitutional limits."[8] Although not an FCPA case, the *Fokker* appeal warrants close attention given the frequency with which DOJ uses DPAs to resolve criminal FCPA cases. The ultimate decision in *Fokker* may well impact how DOJ—and thus corporate defendants—approach resolving FCPA matters via DPAs.

5. **SEC Ends South African FCPA Investigations with Declinations.** 2015 has been a busy year for the Securities and Exchange Commission (SEC), which, up until June, had reached resolutions in four corporate FCPA investigations. In June, however, SEC made news for resolutions it did not bring. On June 8, 2015, Net1 UEPS Technologies Inc., a South African company listed on the Nasdaq Global Select Market, announced that it received a letter from SEC's FCPA Unit advising that SEC had concluded its investigation and did not intend to recommend an enforcement action against the company. (Net1 added, however, that it understood that DOJ's investigation remains open.) On June 22, 2015, Gold Fields Limited, a South African company listed on the NYSE, announced that it had received a similar letter from SEC's FCPA Unit.

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[5] *See* Memorandum in Opposition, *United States v. Hoskins*, No. 12-cr-238 (D. Conn. June 25, 2015), ECF No. 262.

[6] *See* Amended Sentencing Scheduling Order, *United States v. Alstom S.A.*, No. 14-cr-246 (D. Conn. June 3, 2015), ECF No. 20.

[7] *See* First Motion to Continue Sentencing Date, *United States v. Alstom S.A.*, No. 14-cr-246 (D. Conn. May 26, 2015), ECF No. 19.

[8] Brief of Appellant United States at 20, *United States v. Fokker Services B.V.*, Nos. 15-3016, 15-3017 (D.C. Cir. June 4, 2015).

6. **Archer-Daniels Midland Co. (ADM) Maintains Favorable Issuer Status with SEC Following FCPA Resolution.** In December 2013, ADM reached FCPA resolutions with DOJ and SEC. As part of the resolution with DOJ, ADM's Ukrainian subsidiary, Alfred C. Toepfer International Ukraine Ltd. (ACTI Ukraine), pleaded guilty to one count of conspiracy to violate the FCPA's anti-bribery provisions. One potential consequence of ACTI Ukraine's guilty plea was that ADM could have lost its well-known seasoned issuer (WKSI) status under Rule 405 of the Securities Act, which makes it easier for issuers to offer and sell securities. In a May 1, 2015, letter to SEC's Division of Corporate Finance, ADM articulated several reasons why it should be granted relief from being considered an "ineligible issuer" under Rule 405. Among other things, ADM pointed out that none of the conduct at issue in the FCPA resolution related to ADM's issuance of securities and that it had undertaken "considerable efforts . . . to remediate and enhance its anti-corruption training and compliance program and internal controls." Indeed, DOJ raised ADM's "early and extensive remedial efforts" as well as its voluntary disclosure and "extensive cooperation" as key factors underlying its decision not to prosecute the parent company. On June 3, 2015, SEC found that ADM had shown good cause as to why it should not be considered an ineligible issuer and granted the waiver. The order expressly noted that the waiver was granted upon the assumption that ACTI Ukraine complies with the terms of its plea agreement. SEC's decision to allow ADM to retain its WKSI status is an example of when a company's self-disclosure, cooperation, and remediation not only contribute to a more favorable resolution with the enforcement agencies but also help avoid collateral consequences by demonstrating that the company is a responsible and trustworthy corporate citizen, despite a prior incident.

7. **Bio-Rad's Former General Counsel Files Whistleblower Lawsuit.** In November 2014, Bio-Rad Laboratories Inc. reached a combined $55 million resolution with DOJ and SEC over bribery allegations in Russia, Vietnam, and Thailand. Now, Bio-Rad's former general counsel, Sanford Wadler, has sued the company in federal court in northern California, alleging that he was the victim of a "classic case of whistleblower retaliation" when he was fired in June 2013 after raising concerns about suspected kickbacks given by his employer to government officials in China.[9] In the wake of Dodd-Frank, the legal landscape continues to evolve—and so has the risk of not handling whistleblower complaints properly, particularly in such a litigious environment with significant regulatory oversight and SEC saber rattling, as demonstrated by SEC's "pre-taliation" resolution with KBR (which we discussed in No. 2 of our April 2015 Top Ten List) and its *amicus* brief in *Liu Meng-Lin v. Siemens AG*.[10]

8. **Bribery Prosecutions in the UK and France End in Acquittals.**

   - **Three UK Nationals Acquitted of Charges Brought Under the Predecessor to the UK Bribery Act (UKBA).** On June 2, 2015, the UK's Serious Fraud Office (SFO) announced that a jury found three employees of Swift Technical Solutions Ltd., a UK-based provider of manpower for the oil and gas industry, not guilty of corruption offenses related to allegations that they had conspired to bribe officials of two Nigerian Boards of Internal Revenue in order to avoid, reduce, or delay paying tax on behalf of workers placed by Swift. Because the allegedly corrupt payments pre-dated the enactment

[9] See Complaint, *Wadler v. Bio-Rad Laboratories, Inc., et al.*, 15-cv-2356 (N.D. Cal. May 27, 2015), ECF No. 1.

[10] 763 F.3d 175 (2d Cir. 2014).

of the UKBA in 2010, the defendants were charged under the Prevention of Corruption Act (POCA) 1906. Charges under POCA are generally regarded as being more difficult to prove than charges under the UKBA.

- **Fourteen Companies Acquitted in France for Alleged Oil-for-Food Violations.** In force between 1996 and 2003, the United Nations Oil-for-Food program was designed to allow Iraq to market its oil in exchange for food, medicine, and other humanitarian supplies during the embargo following the invasion of Kuwait. More than a dozen companies have reached resolutions with DOJ and SEC alleging that they had secretly inflated contracts approved by the UN under the program by up to 10 percent in order to pay kickbacks to the Iraqi government. French authorities have not been so successful. In July 2013, 18 defendants, including Total SA, were acquitted of Oil-for-Food-related corruption charges brought by French prosecutors. On June 18, 2015, a second Oil-for-Food trial in France ended in similar fashion with the acquittal of 14 companies. Notably, the court ruled that four of the companies could not be prosecuted in France because they had entered into DPAs, and had paid steep fines, in the United States in connection with the same conduct. The court also held that, because the kickback payments went to the Iraqi government rather than to individuals, the prosecution had failed to establish the essential element that someone was personally enriched by the kickback scheme. For similar reasons (i.e., lack of benefit to a foreign official personally), the Oil-for-Food cases brought in the United States were not prosecuted as FCPA cases but rather as wire fraud cases.

9. **Brazilian Prosecutors Reveal Collaboration with U.S. Prosecutors in Petrobras Investigation.** To date, U.S. authorities themselves have given no public indication as to whether they intend to join the investigation into alleged corruption at Petrobras, Brazil's national oil company. This is not surprising, and not much can be read into it, as it is DOJ and SEC policy not to disclose pending investigations. It would also not be surprising, given that Brazilian prosecutors are aggressively pursuing the case, if DOJ and SEC were to take a wait-and-see approach on much of the Petrobras-related conduct, monitoring the events in Brazil and surfacing when and if circumstances warranted. As evidence that DOJ might indeed be pursuing such a strategy, in June 2015, Brazilian prosecutors reportedly revealed that they had notified DOJ of evidence that some foreign companies allegedly paid bribes to win Petrobras contracts. According to the report, senior Brazilian prosecutor Carlos Lima stated that Brazilian prosecutors had met with DOJ in the United States and that DOJ is showing interest in the case because some of the companies that allegedly paid bribes to Petrobras officials could potentially be held accountable under the FCPA. Lima reportedly made similar comments regarding SEC's interest in Petrobras itself in late 2014 (he also reportedly stated that DOJ had not contacted his team at that point), and Petrobras disclosed in November 2014 that it had received an SEC subpoena concerning documents gathered during its internal investigation. Interestingly, in April 2015, Brazilian petrochemical company Braskem SA stated in a securities filing that it had self-reported to DOJ and SEC that it was investigating Petrobras-related bribery allegations but had not yet "received any notification of the filing of any proceeding or investigation by Brazilian or U.S. authorities." Although there is no certainty that all companies involved in the Petrobras scandal will be subject to the FCPA, or that DOJ and SEC will become involved even if they are, prudent companies with potential exposure in Brazil should carefully consider, and may wish to plan for, the eventual involvement of U.S. enforcement authorities as well.

10. **Canadian Extractive Sector Reporting Requirements Take Effect.** On June 1, 2015, Canada's Extractive Sector Transparency Measures Act (ESTMA) came into force. Approved in December 2014, but not in force until now, ESTMA requires companies in the extractive sector to report annually on certain payments made to any level of government—including payments made to employees of state-owned corporations—both in Canada and abroad. ESTMA's stated purpose is to enhance transparency in the resource extractive sector in order to deter and detect corruption, including corruption under Canada's Corruption of Foreign Public Officials Act. Given ESTMA's own penalty provisions and the heavy scrutiny given to the extractive sector by anti-corruption authorities worldwide, Canadian extractive companies and companies doing business in Canada that are involved in the extractive sector should pay close attention both to the requirements of ESTMA itself and to its potential impact on anti-corruption enforcement efforts. For more analysis of ESTMA's implications for companies subject to the FCPA, please see our client alert.

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