Client Alert

October 15, 2015

Top Ten International Anti-Corruption Developments for September 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. September saw a big (or not so big, depending on who you ask) policy announcement from DOJ, a couple of SEC-only FCPA corporate enforcement actions as the fiscal year ended for the agency, a surprise guilty plea by a former Siemens executive nearly four years after indictment, and numerous other developments including the media reporting that the DOJ selected a compliance expert to evaluate compliance programs for the Fraud Section. It is all here in our September 2015 Top Ten list:

1. DOJ Issues "Yates Memo" on Individual Accountability for Corporate Wrongdoing.

As we reported earlier, during a September 10, 2015 conference at New York University, Deputy Attorney General (DAG) Sally Quillian Yates announced a new Department of Justice policy memo regarding "Individual Accountability for Corporate Wrongdoing." The so-called Yates Memo sets forth "six key steps" designed to ensure that federal prosecutors most effectively hold individuals accountable for illegal corporate conduct: (1) To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct; (2) Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) Criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals; (5) Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires, and declinations as to individuals in such cases must be memorialized; and (6) Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond the individual's ability to pay. According to the Memo, many of these steps are "best practices that are already employed by many federal prosecutors." In announcing the policy, however, Yates described the first step as an "all or nothing" approach and "a substantial shift from our prior practice." Whether this is actually a substantial shift from prior practice has been the subject of considerable debate within the white collar defense bar. Apparently weighing in on the side of "no" is Criminal Division AAG Leslie Caldwell who, in a September 22, 2015 speech discussing the Yates Memo, stated that experienced defense attorneys "may not ultimately see the new policy guidance as anything radical." Time will, of course, tell just how "substantial" or "radical" the new policy will turn out to be, and we expect that DOJ and the defense bar will quickly reach equilibrium on the new ground rules.

2. Siemens Argentina CFO Pleads Guilty to 2011 Charges.

On September 30, 2015, **Andres Truppel**, the former chief financial officer for Siemens Argentina, pleaded guilty in Manhattan federal court to conspiring to pay $100 million in bribes to senior Argentine government officials to secure, implement, and enforce a $1 billion contract between Siemens and the Argentine government to produce national identity cards. Truppel, of Buenos Aires, Argentina, pleaded guilty to a single conspiracy count, which capped his prison exposure to a maximum sentence of five years and three years of supervised release. This is the first guilty plea by an individual to charges stemming from a December 2011 indictment against eight former Siemens executives and others (Truppel, Uriel Sharef, Herbert Steffen, Ulrich Bock, Eberhard Reichert, Stephan Signer, Carlos Sergi, and Miguel Czysch). Nearly seven years earlier, on December 15, 2008, Siemens AG and Siemens Argentina entered guilty pleas to criminal violations of the FCPA, including the Argentine bribery scheme. As part of the plea agreement, Siemens AG and Siemens Argentina agreed to pay criminal fines of $448.5 million and $500,000, respectively. Truppel had previously resolved a parallel civil case with SEC in February 2014, agreeing to pay a civil penalty of $80,000.[1] Indeed, SEC has settled or secured judgments in all pending civil charges in its parallel civil case with the other defendants, and the case was ordered closed in early 2015.[2] Meanwhile, the other seven defendants in DOJ's criminal case appear to remain fugitives.

3. PetroTiger Cooperators Sentenced to Probation.

On September 10, 2015, the two remaining defendants in the PetroTiger case, **Gregory Weisman** (former General Counsel) and **Jan Hammarskjold** (former Co-CEO), were sentenced in federal court in New Jersey for their part in a bribery scheme in Colombia involving the state-owned oil company Ecopetrol. Weisman was sentenced to two years of probation and ordered to pay a $30,000 fine and Hammarskjold was sentenced to two years of probation and ordered to pay a $15,000 fine, along with about $106,000 in restitution related to an embezzlement scheme.[3] As we previously reported, in June 2015, **Joseph Sigelman** was sentenced to serve three years of probation and pay a $100,000 fine, along with $239,015 in restitution, following a mid-trial guilty plea, which was very favorable to Sigelman, after Weisman imploded on the witness stand as one of DOJ's main cooperating defendants.

4. SEC Resolves Two FCPA Accounting Charge Cases.

This year's trend of SEC entering into corporate resolutions without a parallel DOJ enforcement action continued in September; we're calling it the "Great Divide." As of the end of September 2015, there had been eight SEC-only FCPA resolutions, many of which, including the two cases in September, allege only violations of the FCPA's accounting provisions.

5. Continuing Coverage of Procedural Developments That Could Affect FCPA Practice.

- **SEC Proposes Administrative Proceedings Rule Changes.** As we have noted previously, following the Dodd-Frank Act, SEC administrative proceedings have been the forum of choice for bringing settled FCPA resolutions. Indeed, all but one of this year's eight corporate SEC FCPA resolutions (as of the end

[1] Final Judgment, *U.S. Sec. & Exch. Comm'n v. Truppel*, No. 11-cv-09073 (S.D.N.Y. Feb. 3, 2014), ECF No. 48.

[2] Order, *U.S. Sec. & Exch. Comm'n v. Sharef,* et al., No. 11-cv-09073 (S.D.N.Y. March 10, 2015), ECF No. 51.

[3] Judgment, *United States v. Weisman*, No. 13-cr-00730 (D. N.J. Sept. 14, 2015), ECF No. 24; Judgment, *United States v. Hammarskjold*, No. 13-cr-00730 (D. N.J. Sept. 14, 2015), ECF No. 49.

of September) have been brought as an administrative proceeding. The use of administrative proceedings in contested cases, on the other hand, has been controversial and, according to some judges, potentially unconstitutional.[4] Perhaps in partial response to these criticisms, the SEC announced on September 24, 2015 that it had voted to propose amendments to the rules governing its administrative proceedings that would, among other things, (a) adjust the timing of administrative proceedings, including by extending the time before a hearing occurs in certain cases; and (b) permit parties to take witness depositions as part of discovery. According to SEC, the proposed amendments would also simplify the requirements for seeking Commission review of an initial decision and provide enhanced transparency into the timing of the Commission's decisions in such appeals. The proposed rules will now enter the public comment phase.

- **Oral Argument in *Fokker* DPA Appeal.** On September 11, 2015, the D.C. Circuit Court of Appeals heard oral argument in the *Fokker Services BV* matter on appeal from U.S. District Court Judge Richard Leon's rejection of the Deferred Prosecution Agreement (DPA) between DOJ and Fokker. As we previously reported, in March 2015, Judge Leon rejected the DPA, stating that he would not "serve as a rubber stamp" and calling the DPA "grossly disproportionate to the gravity of Fokker Services' conduct in a post-9/11 world." DOJ and Fokker both appealed, and DOJ argued in its appellate brief that Judge Leon's decision violated the "separation-of-powers principle." A threshold matter of procedure occupied a significant portion of the oral argument, that is, whether the appeal was a proper interlocutory appeal or appropriate use of the writ of mandamus. The panel appeared skeptical of DOJ's and Fokker's position regarding the limitations on Judge Leon's review of the DPA. Whatever the D.C. Circuit decides to do, it will be the first time such an issue will be addressed by a federal court of appeals, and thus could have an outsized impact on DOJ's approach to DPAs.

6. Net1 Class Action Dismissed.

On September 16, 2015, Southern District of New York Judge Edgardo Ramos dismissed a securities fraud complaint against Net1 UEPS Technologies (Net1) and its CEO and CFO alleging that the defendants had failed to disclose that the company faced a high risk of losing a key contract, awarded pursuant to a public tender by South Africa's Social Security Agency, because, among other things, it allegedly won the contract through conflicts of interest and bribery.[5] Judge Ramos found that the plaintiffs had failed to sufficiently plead that the defendants had the requisite scienter or that they had made actionable misstatements or omissions, but gave the plaintiffs until mid-October 2015 to amend their complaint. As we previously reported, in June 2015, Net1 announced that SEC had declined to bring an FCPA enforcement action against the company based on the same basic allegations.

7. DOJ's Fraud Section Reportedly Selects In-House Compliance Expert.

Earlier this year, Fraud Section Chief **Andrew Weissmann** announced that the Fraud Section was in the process of hiring a compliance expert to help evaluate companies' compliance programs. In September, it was widely reported that that person is going to be **Hui Chen**, though DOJ has not yet confirmed she has been hired. Some

[4] *See, e.g.*, Order, *Duka v. U.S. Sec. & Exch. Comm'n*. No. 15-cv-00357 (S.D.N.Y Aug. 8, 2015), ECF No. 60; Order, *Hill v. U.S. Sec. & Exch. Comm'n*, No. 15-CV-1801 (N.D. Ga. June 8, 2015), ECF No. 28.

[5] Opinion and Order, *Lipow v. Net1 UEPS Techs., Inc., et al.*, No. 1:13-cv-09100-ER (S.D.N.Y. Sept. 16, 2015), ECF No. 36.

commentators have embraced this new position as innovative and helpful to companies who have worked in good faith to establish effective compliance programs. Others have questioned the exact role to be played by such a compliance expert and see the position as a mere marketing effort by DOJ. In response to some critics of the new position, a DOJ spokeperson said: "There is a misconception that this person will help determine who to charge and who not to charge. That isn't the role. Instead, the person will be assessing the company's claims about their compliance program – that is, if a company seeks to claim that it deserves credit for implementing a state of the art compliance program, which is a metric under the Sentencing Guidelines for a break on a fine. The counsel will help subject that to a rigorous analysis, something that a federal prosecutor does not have a lot of expertise in carrying out." Ms. Chen is experienced in both corporate compliance and law enforcement. She was most recently at Standard Chartered as its global head of anti-bribery and corruption, and before that she was in-house at Pfizer and Microsoft. Before her time in private practice, Ms. Chen was a federal prosecutor in Washington, D.C. and Brooklyn for 6 years. During her time at the U.S. Attorney's Office in Brooklyn, Ms. Chen worked with Mr. Weissmann.

8. Additional Charges Brought in India in Wake of Louis Berger International FCPA Resolution.

Last month, we reported that several individuals in India had been arrested following the Louis Berger International (LBI) resolution. In September 2015, it was reported that Indian authorities had also filed charges against LBI and former Senior Vice President James McClung. As we reported in July 2015, McClung, who was responsible for LBI's operations in India, pleaded guilty to conspiracy and FCPA charges in connection with bribery schemes in India and elsewhere.

9. UK Update.

- **UK Abandons Effort to Lower Corporate Criminal Liability Standard.** On September 28, 2015, the UK Government quietly announced that it had abandoned plans to reform the rules governing corporate criminal liability in the UK, which the Serious Fraud Office (SFO) had been advocating. The brief statement issued by the Ministry of Justice said:

> The UK has corporate criminal liability and commercial organisations can be, and are, prosecuted for wrongdoing. The UK Anti-Corruption Plan tasked the Ministry of Justice to examine the case for a new offence of a corporate failure to prevent economic crime and the rules on establishing corporate criminal liability more widely. Ministers have decided not to carry out further work at this stage as there have been no prosecutions under the model Bribery Act offence and there is little evidence of corporate economic wrongdoing going unpunished.

  The SFO-led effort was designed to expand the use of the corporate criminal liability standard found in the UK Bribery Act (i.e., failure to prevent) to other economic criminal offenses and away from the current standard (i.e., controlling mind), which is much more difficult for prosecutors to meet and much more limited than the U.S. standard of *respondeat superior*.[6]

- **Scotland Secures First UKBA Corporate Settlement.** As we reported in a separate client alert, on September 25, 2015, prosecutors in Scotland announced the first disposal of a corporate offense of

[6] See New York Central & Hudson River Railroad Co. v. United States, 212 U.S. 481, 494-95 (1909).

failing to prevent bribery under Section 7 of the Bribery Act 2010. As a result of self-reporting and extensive cooperation by the defendant **Brand-Rex Limited** (Brand-Rex) with the Scottish Crown Office and Procurator Fiscal Service (the Crown Office), the case was settled with a civil recovery order under the Proceeds of Crime Act 2002 for £212,800 (approximately US$323,600), which was based on its gross profit related to the misuse of the incentive scheme. Brand-Rex Limited develops and supplies cabling systems for network infrastructure and industrial uses. It operated an incentive scheme known as "Brand Breaks" for UK distributors and installers, which in return for meeting or exceeding sales targets, resulted in certain rewards, such as foreign vacation trips. After being rewarded with travel tickets through the "Brand Breaks" incentive plan, an independent installer of Brand-Rex products offered his tickets to a decision-maker at a private customer. This went beyond the intended terms of the incentive efforts and was intended to exert improper influence over the targeted decision-maker. Upon becoming aware of the misconduct, Brand-Rex engaged external counsel and accountants to conduct a thorough investigation, and following the internal investigation, the company made a report to the Crown Office detailing the circumstances and accepting that it had committed an offense in failing to prevent an associated person carrying out an act of bribery. Brand-Rex did not assert the defense that it had adequate procedures in place to prevent bribery. The test for a Section 7 offense was met because the independent installer was deemed to have been performing services for or on behalf of Brand-Rex and offered the incentive to induce the decision-maker to act improperly in preferring Brand-Rex products.

10. PRC Update.

- **China Continues to Focus on Reforming State-Owned Enterprises (SOEs).** On September 13, 2015, China reportedly issued a guideline to "deepen the reforms" of SOEs. According to the reports, China's SOEs will be divided into market-based for-profit entities in the commercial sector and public welfare entities focused on improving quality of life and providing public goods and services. The guideline reportedly encourages both mixed-ownership of SOEs and SOEs to go public. Moreover, the guideline provides for even more intense supervision of SOEs to prevent corruption, embezzlement, and other means by which state-owned assets are eroded. In this respect, the new guideline can be viewed as part of China's ongoing campaign against corruption in its SOEs. (For more, see No. 8 of our April 2015 Top Ten.)

- **Kenyan Anti-Corruption Authorities Arrest Chinese SOE Managers for Bribery.** A Chinese SOE made news for supply-side bribery in September 2015 when Kenya's Ethics and Anti-Corruption Commission (EACC) reportedly arrested two senior managers of the Chinese state-owned China Road and Bridge Corporation for offering bribes to Kenyan highway officials in order to avoid charges for overloaded trucks that were bringing supplies to a railway construction project. The Company is reportedly cooperating with the EACC, which, in late July 2015, published a report detailing allegations of corruption in Chinese-backed infrastructure projects in Kenya.

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