Client Alert

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Top Ten International Anti-Corruption Developments for November 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. What happened with the UK Serious Fraud Office's first deferred prosecution agreement? What was contained in the most recent annual SEC whistleblower report? Who is the Department of Justice's (DOJ) new Compliance Counsel? What countries had important legislative developments? It's all here and more in our November 2015 Top Ten list:

1. UK Serious Fraud Office (SFO) Brings First DPA. The month ended with perhaps the biggest news of all, when at a hearing on November 30, 2015, a UK court approved the SFO's first-ever deferred prosecution agreement (DPA). At the hearing, Lord Justice Leveson approved the DPA proposed by the SFO with London-based ICBC Standard Bank Plc, for allegedly failing to prevent bribery contrary to section 7 of the Bribery Act 2010 (UKBA). In entering into the DPA, Standard Bank agreed to pay penalties totaling $32.2 million and to an independent review of its anti-bribery policies. DPAs have been available for use by the SFO since February 2014, following their introduction in the Crime and Courts Act 2013, and the SFO signaled its intention to begin using DPAs by inviting companies to enter into DPA negotiations in May 2015. But this marks the first application by the SFO for approval of a DPA — as well as the first use of section 7 of UKBA.

In entering into the DPA, Standard Bank accepted responsibility for failing to prevent bribery in a 2012–2013 transaction involving the government of Tanzania and Standard Bank's former sister company, Stanbic Bank Tanzania (SBT). In a deal that raised $600 million for the Tanzanian government, payments amounting to $6 million were made to government officials by two senior executives at SBT and were presented as fees owed to a third-party consultancy firm, which had no ascertained involvement in the transaction. Notably, the offense occurred prior to the acquisition by Industrial and Commercial Bank of China of a controlling stake in Standard Bank Plc (which was the name of the London entity at the time of the offense), demonstrating that successor liability is alive under the UKBA. The $32.2 million total penalty included compensation and interest to the Tanzanian government of over $7 million, disgorgement of $8.4 million in profits, and a $16.8 million fine to the SFO. In agreeing to these financial penalties, the SFO took into account that Standard Bank had both reported itself to the SFO as soon as the wrongdoing was discovered and cooperated fully in the subsequent investigation. These factors played an important role in Lord Justice Leveson's determination that approval of a DPA was appropriate in this case. Also of note, Lord Justice Leveson, following precedent from the *Innospec* case, looked to the U.S. as a guidepost when preliminarily approving the DPA, writing that "the Department of Justice has confirmed that the financial penalty is comparable to the penalty that would have been imposed had the matter been dealt with in the United States[.]"

As this DPA demonstrates, the terms of DPAs in the UK are likely to be quite stringent, requiring acceptance of responsibility, payment of significant penalties, and acceptance of independent review of anti-bribery and corruption controls, policies, and procedures. It has been reported that the SFO is in negotiations with several other companies, and further developments in the area may be expected throughout 2016. (For more on the Standard Bank DPA, please see our client alert.)

2. SEC Releases Annual Whistleblower Report. On November 16, 2015, the U.S. Securities and Exchange Commission (SEC) released its 2015 Annual Report on the Dodd-Frank Whistleblower Program. According to the Report, in Fiscal Year 2015, SEC received nearly 4,000 whistleblower tips and paid over $37 million to whistleblowers who provided original information that led to a successful SEC enforcement action with monetary sanctions totaling over $1 million. The nearly 4,000 tips came from all 50 states, as well as the District of Columbia and two U.S. territories, and from 61 foreign countries, led by the UK, Canada, the People's Republic of China, India, and Australia. FCPA allegations were at the center of 186 tips, the highest number yet in the four-year history of the Whistleblower Program. The Report also details several initiatives taken by SEC's Office of the Whistleblower during FY 2015, including its focus on whether employers were using confidentiality, severance, and other kinds of agreements to restrict an individual's ability to report potential wrongdoing to the SEC (see our April 2015 Top Ten for a discussion of SEC's "pre-taliation" resolution with KBR) and its advocacy of a broad interpretation of Dodd-Frank's anti-retaliation provisions (see our October 2015 Top Ten for a discussion of how that advocacy affected an FCPA-related retaliation suit involving Bio-Rad's former general counsel). The Annual Report is always a good reminder of the U.S. government's efforts to encourage whistleblowing, and of the importance of having robust internal policies and procedures to effectively deal with whistleblower complaints.

3. SEC Enforcement Director: DPAs and NPAs Only Available to Companies That Self-Report. During his November 17, 2015 keynote address at ACI's 32nd FCPA Conference in Washington, D.C., SEC Enforcement Director Andrew Ceresney stated that "going forward, a company must self-report misconduct in order to be eligible for the [Enforcement] Division to recommend a DPA or NPA to the Commission in an FCPA case." Ceresney explained that this decision is meant to incentivize companies to self-report and to emphasize the benefits that come with self-reporting and cooperation. Ceresney cautioned, however, that self-reporting will not automatically lead to an NPA or DPA, as SEC will continue to evaluate all of the Seaboard factors in fashioning an appropriate resolution. Ceresney noted that DPAs and NPAs "have been a relatively limited part of Commission enforcement practice." Indeed, SEC has only ever entered into two DPAs and one NPA in FCPA-related cases. Many of the FCPA-related enforcement actions brought by SEC this year seemed to be good candidates for an NPA or DPA — according to SEC's press release, for example, Goodyear "self-report[ed] . . . and [provided] significant cooperation with the SEC's investigation" — but only the PBSJ matter ended in such a disposition. As a practical matter, Ceresney's pronouncement appears to reflect an already-existing, albeit previously unwritten, rule at SEC rather than a major policy shift.

4. SEC Declines to Bring Enforcement Action Against Brookfield Asset Management. In a November 13, 2015 securities filing, Toronto-based Brookfield Asset Management disclosed that the SEC enforcement staff had provided written notice that it did not intend to recommend an enforcement action based on allegations that a Brazilian subsidiary of Brookfield had paid bribes through third parties to municipal officials to obtain permits and other benefits. The alleged bribes related, at least in part, to a mall expansion project in São Paulo. According to the company, in 2012 and 2013, respectively, SEC and DOJ opened investigations into the allegations, which are also being investigated by Brazilian authorities.

5. U.S. Attorneys' Manual Revised in Wake of Yates Memo. During a November 16, 2015 speech, Deputy Attorney General (DAG) Sally Quillian Yates announced revisions to the United States Attorneys' Manual (USAM) designed to conform it to her September 2015 Memo on Individual Accountability for Corporate Wrongdoing (Yates Memo). The most important revision for companies is likely the incorporation of the Yates Memo's first "key step" into the Principles of Federal Prosecution of Business Organizations' (Principles) discussion of the "Value of Cooperation." The Principles now provide that, "[i]n order for a company to receive any consideration for cooperation under this section, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct." The Principles describe this as a "threshold requirement" for obtaining cooperation credit and provide that a company that fails to present this information will not be eligible for such credit. Although the language requiring full cooperation is new, whether it represents an actual change to DOJ policy and practice has been a matter of considerable debate within the white-collar defense bar. The revisions also provide, in accordance with the Yates Memo, that corporate cases should not be resolved "without a clear plan" to resolve related individual cases before the expiration of the statute of limitations and that, absent extraordinary circumstances, no corporate resolution should provide protection from criminal or civil liability for any individuals.

At least two of the USAM revisions were not fully foreshadowed by the Yates Memo. First, in apparent response to some critical commentary that followed the release of the Yates Memo, the revisions go to some length to assure companies that the new cooperation policy does not require them to waive the attorney-client privilege or work-product protections and that they will not be penalized for failing to produce evidence that they might not have access to or cannot legally disclose. (We voiced similar concerns here.) Second, the revisions separate the "voluntary disclosure" factor from the "cooperation" factor, recognizing a company's timely and voluntary disclosure as a related but distinct factor to be given independent consideration in charging decisions. This is likely a signal that DOJ will attempt to be more transparent in future enforcement actions as to the specific benefits flowing from a company's decision to self-report. Nevertheless, the revisions make clear that a voluntary disclosure will not necessarily lead to a declination in all cases. Given the substantial number of revisions to the Principles, commonly referred to as the "Filip Factors" after the last DAG to have amended them, it will be interesting to see whether practitioners begin to refer to the Principles as the "Yates Factors" (unless a more alliterative shorthand can be found). Finally, the revisions also created a new USAM Section (4-3.100) on pursuing claims against individuals in civil cases, which is a significant development that will provide greater transparency about how such decisions are made.

6. DOJ Compliance Counsel Comes Onboard. In November 2015, DOJ confirmed rumors from September 2015 that the Fraud Section had retained Hui Chen to fill the new role of in-house Compliance Counsel. Chen will report to Andrew Weissmann, the Chief of DOJ's Fraud Section, and Dan Braun, the Acting Chief of the Strategy, Policy, and Training Unit in the Fraud Section. Chen most recently served as Global Head for Anti-Bribery and Corruption at Standard Chartered Bank. Prior to her work at SCB, Chen served as Assistant General Counsel at Pfizer, Inc., in the Compliance Division, and held various in-house and compliance positions at Microsoft Corporation, including the role of Director of Legal Compliance for the Greater China Area. Although the precise contours of Chen's role will likely evolve over time, Leslie Caldwell, Assistant Attorney General of DOJ's Criminal Division, said during a November 17, 2015 speech that Chen would offer "insights on issues such as whether the compliance program truly is thoughtfully designed and sufficiently resourced to address the company's compliance risks and whether proposed remedial measures are realistic and sufficient. She also will be

interacting with the compliance community to seek input about ways we can work together to advance our mutual interest in strong corporate compliance programs." Weissmann and Chen also spoke about the new position and other compliance-related topics at a roundtable discussion at the NYU Program on Corporate Compliance and Enforcement on November 13, 2015.

7. DOJ Returns $1 Million in Forfeited Bribe Money to South Korea. On November 9, 2015, DOJ returned over $1.1 million in forfeited assets to the government of the Republic of Korea. In its press release, DOJ said that the forfeited assets were the profits of a public corruption scheme orchestrated by former Korean President Chun Doo Hwan in the 1990s. The assets, which were forfeited in two recent federal civil actions as part of DOJ's Kleptocracy Asset Recovery Initiative, had been laundered to the U.S. by Chun's family members and associates. In 1997, a criminal court in Korea convicted Chun of accepting more than $200 million in bribes from Korean corporations and ordered him to pay approximately $212 million in criminal penalties. In 2013, Korean prosecutors opened an investigation into potential money laundering of the bribery proceeds through the acquisition of U.S. real estate and opening of U.S. bank accounts. Prosecutors from DOJ's Kleptocracy Asset Recovery Initiative opened their own investigation, and in January 2014, FBI agents seized about $727,000 in a California escrow account, which was traced to the sale of real estate in Orange County bought by Chun's son in 2005. In February 2015, Kleptocracy prosecutors filed a second civil forfeiture action against a secured investment worth approximately $500,000 in a Pennsylvania company, which was also traced to Chun's corruption scheme. In March, DOJ settled the civil forfeiture actions for a total of roughly $1.1 million.

8. Rio Tinto RICO Suit Dismissed. On November 20, 2015, Southern District of New York Judge Richard Berman dismissed with prejudice a RICO suit by Rio Tinto PLC alleging that Vale SA conspired with BSG Resources (BSGR) and Israeli billionaire Beny Steinmetz to take Rio Tinto's mining concessions in West Africa.[1] Judge Berman found that the alleged misconduct was outside the four-year civil RICO statute of limitations, which started to run in 2008 when the Guinean government stripped Rio Tinto of half of Guinea's Simandou iron ore deposit and gave it to BSGR, a company affiliated with Steinmetz. BSGR subsequently sold 51 percent of the concession to Vale for $2.5 billion. Despite this victory, BSGR is reportedly still under investigation for potential FCPA violations related to its activities in Guinea. In 2014, BSGR associate Frederic Cilins pleaded guilty and was sentenced to two years' imprisonment for obstructing the investigation after he allegedly tried to pay Mamadie Toure, the fourth wife of deceased Guinean President Lansana Conte, to destroy documents related to allegations that BSGR paid bribes to obtain the Simandou mining concessions. An investigation by the Guinean government found that BSGR obtained the rights to the deposit through corruption and stripped them from the company, while finding no wrongdoing on Vale's part.

9. French Senate Rejects Anti-Corruption Bill. In March 2015, France's National Assembly passed a proposed law under which companies that failed to implement an effective anti-corruption compliance program (otherwise known as "reasonable vigilance measures") could face a civil fine of up to €10 million and be required to implement more robust compliance measures. On November 18, 2015, the French Senate rejected the bill on the grounds that it was vague and overly burdensome on businesses.

[1] *Rio Tinto PLC v. Vale S.A., et al.*, 1:14-cv-03042-RMB-AJP (Nov. 20, 2015), ECF No. 408.

10. Expanded German Commercial Bribery Law Enters Into Force. On November 26, 2015, Germany's new commercial bribery and anti-corruption law came into force. The new law expanded German Criminal Code section 299, which covers both active and passive commercial bribery in national and foreign trade, to include the offer or acceptance by an employee or agent of a bribe as consideration for an act in which the employee or agent breaches his or her obligations to the company, regardless of whether the breach leads to a distortion of competition. (For more on the new German law and other commercial bribery developments in Europe, please see our article on Commercial Bribery.)

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