

Client Alert

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Top Ten International Anti-Corruption Developments for March 2016

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 from the past month, with links to primary resources. March closed out an incredibly busy first quarter of FCPA and global anti-corruption enforcement. This month we ask: Who is the new leader of DOJ's FCPA Unit? What big judicial decisions were handed down in pending FCPA cases? Which big FCPA resolutions were announced? Which countries are considering making deferred prosecution agreements available in corporate cases? The answers to these questions and more are here in our March 2016 Top Ten list:

- 1. Leadership Change in DOJ's FCPA Unit.** On March 7, 2016, the Department of Justice (DOJ) announced that Daniel Kahn, a long-time FCPA prosecutor and current Assistant Chief in the FCPA Unit, had been named Acting Chief of the FCPA Unit. Kahn joined the Fraud Section in May 2010 and was promoted to Assistant Chief in December 2013. Kahn has been involved in a number of high-profile corporate FCPA cases, including Alstom, Bizjet International, Bridgestone, Diebold, Lufthansa Technik, Ralph Lauren, and Tyco. Kahn has also prosecuted a number of individual defendants related to those corporate matters, and he was one of the lead prosecutors, along with MoFo's James Koukios, in the trial of Haiti Teleco official Jean Rene Duperval that resulted in the first trial conviction of a foreign official for laundering the proceeds of an FCPA violation. For his role on the Duperval trial, Kahn was part of the team that received the Assistant Attorney General's Award for Distinguished Service for the Haiti Teleco case, which also included the separate trial convictions of Joel Esquenazi and Carlos Rodriguez and the seminal Eleventh Circuit decision on the meaning of the term "instrumentality" as used in the FCPA. In addition to managing the FCPA Unit, Kahn is embroiled in the Hoskins case, which is pending trial in Connecticut and facing an adverse ruling (see below). Kahn is well known and well respected at DOJ, by his counterparts at the Securities and Exchange Commission (SEC), by foreign counterparts, including the Serious Fraud Office (SFO), and by the defense bar. While he has only been named as the "acting" head of the FCPA Unit, Kahn is likely a leading contender for the permanent position, among many other applicants. Kahn replaces Patrick Stokes, who now holds a different position within the Fraud Section.
- 2. Philadelphia District Judge Rejects Defendant's Challenge to the FCPA's "Public International Organization" Provision.** In the first FCPA indictment of 2015, Dimitrij Harder, former owner and President of the Chestnut Group, was charged in the Eastern District of Pennsylvania with violating the FCPA and related offenses for bribing senior officials at the European Bank for Reconstruction and Development (EBRD) to secure millions of dollars of business in development projects in Eastern Europe.

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The EBRD is a “public international organization” under the FCPA,¹ and, in October 2015, Harder focused on problems he perceived with the FCPA’s use of that term in moving to dismiss the FCPA charges against him. On March 2, 2016, District Judge Paul S. Diamond denied Harder’s motion.² Judge Diamond first held that the FCPA “proscribes unlawful conduct in connection with a public international organization—itsself an association of foreign governments”—and found that the indictment contained sufficient facts for a jury to determine whether the EBRD fell within the FCPA’s ambit.³ Judge Diamond then rejected Harder’s arguments that Congress had unconstitutionally delegated its authority to the Executive by incorporating the “public international organization” designation into the FCPA and that the term “public international organization” as used in the FCPA was unconstitutionally vague. The *Harder* case is one of the few times that DOJ has pursued bribery of an official of a “public international organization,” and Judge Diamond’s opinion thus represents a significant addition to the relatively limited body of FCPA case law.

- 3. Connecticut District Judge Denies DOJ’s Motion for Reconsideration in *Hoskins*.** In a March 16, 2016, ruling that did not go the government’s way, District of Connecticut Judge Janet Arterton denied DOJ’s motion to reconsider her September 2015 ruling limiting accomplice and accessorial liability under the FCPA.⁴ DOJ alleged that Lawrence Hoskins, a UK citizen and former employee of an Alstom UK subsidiary working in France, conspired with, and aided and abetted, Alstom Power Inc., a Connecticut-based subsidiary of Alstom SA, when he helped select and pay consultants to funnel bribes to Indonesian officials in exchange for a lucrative power plant contract in Indonesia. Because he was not a U.S. citizen or employed by a U.S. company, and because he took no actions in furtherance of the bribery scheme while physically present in the United States, Judge Arterton held that Hoskins could not be charged with a substantive FCPA violation nor, by extension, with conspiring to violate the FCPA or aiding and abetting an FCPA violation, unless DOJ proved at trial that he was an “agent” of Alstom Power Inc. In denying the motion for reconsideration, Judge Arterton held that DOJ had failed to demonstrate that she had committed clear error in her earlier ruling. According to Judge Arterton, “[a]lthough the Government clearly disagrees with [this] Court’s interpretation of the FCPA and theories of secondary liability, disagreement does not provide a ground for reconsideration.” On April 1, 2016, DOJ filed a notice of appeal,⁵ which is not surprising given the potential ramifications of the ruling (as discussed in our September 2015 Top Ten).

¹ See 15 U.S.C. § 78dd-2(h)(2)(A).

² *United States v. Harder*, No. 15-cr-1 (E.D. Pa. March 2, 2016), ECF No. 84.

³ The indictment alleges that the first President Bush designated the EBRD a “public international organization” in a June 1991 Executive Order. In light of this, one might have assumed that the court would have simply taken judicial notice of the EBRD’s status. Instead, the court held that DOJ would have to prove this to the jury. DOJ presumably would have been able to do this simply by presenting the jury with a copy of the Executive Order, but it remains an open question as to whether Judge Diamond would have required the jury to consider all of the *Esquenazi* factors in making this determination. See *Harder*, ECF No. 84 at 8 (citing *Esquenazi* and *Duperval*).

⁴ *United States v. Hoskins*, No. 12-cr-238 (D. Conn. March 16, 2016), ECF No. 342.

⁵ *United States v. Hoskins*, No. 12-cr-238 (D. Conn. April 1, 2016), ECF No. 434.

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- 4. Executive and Three Foreign Officials Admit Participating in Venezuelan Bribery Scheme.** On March 22, 2016, the owner of multiple U.S.-based energy companies pleaded guilty to FCPA and fraud charges related to a bribery scheme involving Venezuela's state-owned and state-controlled energy company, Petroleos de Venezuela S.A. (PDVSA). In December 2015, Roberto Rincon and Abraham Shiera were charged with FCPA and related offenses for scheming to secure lucrative energy contracts with PDVSA and two of its purchasing and procurement subsidiaries by bribing officials at those companies. On March 22, 2016, Shiera pleaded guilty in the Southern District of Texas to one count of conspiring to violate the FCPA and to commit wire fraud and to one count of violating the FCPA in connection with this scheme. His sentencing is scheduled for July 8, 2016. At the same time that it announced Shiera's guilty plea, DOJ also announced that four other defendants, including three PDVSA officials, had previously been charged and pleaded guilty under seal in connection with the bribery scheme. The officials, who could not be charged with violating the FCPA,⁶ pleaded guilty to laundering bribes they received in exchange for taking certain actions to assist companies owned by Shiera and Rincon in winning PDVSA contracts. The charges against Rincon remain pending.
- 5. A Busy Month for Corporate FCPA Resolutions.** In March 2016, SEC reached FCPA resolutions with three companies, while DOJ reached an FCPA resolution with one company. As has become increasingly common, none of the four enforcement actions involved parallel resolutions by the two agencies.
- **SEC Reaches \$7.5 Million Settlement With Network Technology Company Relating to China Hiring Practices.** On March 1, 2016, SEC announced that San Diego-based network technology firm Qualcomm Incorporated agreed to pay \$7.5 million to resolve allegations that it offered full-time employment and paid internships to relatives of Chinese government officials responsible for deciding whether to select the company's mobile technology products for use at state-owned telecom companies. SEC also alleged that the company provided gifts, travel, and entertainment in order to influence government officials. SEC's order charged the company with violating the anti-bribery, internal controls, and books and records provisions of the FCPA. Without admitting or denying SEC's findings, the company agreed to pay a \$7.5 million penalty. According to the company, DOJ recently closed its investigation into the company without filing charges.
 - **Health Science Company and Former Employee Settle With SEC over Russian Bribery Scheme.** On March 3, 2016, SEC announced settlements with a Canadian health science company and former U.S. issuer, Nordion Inc., and its former employee, Mikhail Gourevitch. SEC charged Gourevitch with violating the FCPA's anti-bribery and books and records provisions when he arranged and concealed a scheme to funnel payments to Russian officials through a third-party agent in order to obtain approval to distribute a liver cancer treatment. Gourevitch also personally received \$100,000 in kickbacks from the third-party agent. Although not a U.S. citizen, SEC was able to exercise jurisdiction over Gourevitch based on his employer's issuer status and because he

⁶ In *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991), the court held that, because Congress had intentionally omitted foreign officials from substantive FCPA liability, they could not be charged with conspiring to violate the FCPA.

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communicated about the bribery scheme using U.S.-based email accounts, met with the agent in the United States, and routed funds used to pay bribes and kickbacks through U.S. bank accounts. Gourevitch agreed to pay \$100,000 in disgorgement, \$12,950 in prejudgment interest, and a \$66,000 penalty in order to settle the charges. Once it discovered Gourevitch's misconduct, Nordion immediately fired him, self-reported to and extensively cooperated with SEC, and took additional remedial actions. The company agreed to pay a \$375,000 penalty to settle with SEC for violations of the FCPA's books and records and internal accounting controls provisions. The Royal Canadian Mounted Police reportedly declined to bring charges against the company.

- **SEC Keeps Focus on Pharma in \$25 Million Settlement.** On March 23, 2016, SEC announced that Swiss pharmaceutical company Novartis AG had agreed to a \$25 million FCPA accounting provisions settlement arising from allegations that its China-based subsidiaries improperly recorded certain payments to health care professionals in China as travel and entertainment expenses, lecture fees, marketing events, and other types of legitimate expenses. The company neither admitted nor denied SEC's allegations.
- **Medical Device Company Agrees to Settle DOJ Bribery Charges for \$22.8 Million.** On March 1, 2016, DOJ announced that Miami-based Olympus Latin America Inc. was entering into a three-year deferred prosecution agreement (DPA) in connection with allegedly improper payments, including cash, money transfers, personal grants, personal travel, and free or discounted equipment made to health care officials in Central and South America in order to increase its medical equipment sales in the region. The DPA requires the company, which received a 20% reduction for cooperating with DOJ's investigation, to pay a \$22.8 million penalty.

6. **Biomet DPA Extended for a Second Time.** In March 2012, Biomet, Inc. paid \$22.7 million pursuant to agreements with DOJ and SEC to settle allegations of FCPA related offenses, and DOJ agreed to defer prosecution of the company for a period of three years. In March 2015, following disclosures of new potential improprieties involving the company's operations in Brazil and Mexico, DOJ extended the terms of Biomet's DPA for an additional year. In a March 25, 2016 8-K, Biomet reported that the company and DOJ "have agreed to continue to evaluate and discuss these matters during the second quarter of 2016 and, therefore, the matter is ongoing and will not conclude in its entirety on March 26, 2016." Although the filing did not state precisely how long the period of continued evaluation and discussion would last, the announcement reflects an unprecedented second extension of a corporate DPA by DOJ.

7. **Sister Company of Louis Berger International Loses Navy Contract in Part Because of Failure to Disclose FCPA Resolution.** In July 2015, Louis Berger International, Inc. (LBI), a subsidiary of Berger Group Holdings (BGH), entered into a DPA with DOJ regarding alleged FCPA violations in India, Indonesia, Vietnam, and Kuwait. On March 4, 2016, Court of Federal Claims Judge Thomas C. Wheeler ruled that the U.S. Navy was required to terminate a contract with another BGH subsidiary, Louis Berger Aircraft Services, Inc. (LBAS), because, in its bid submission, LBAS had failed to disclose LBI's July 2015 DPA and other criminal actions involving the BGH corporate family and BGH's former CEO.⁷ Judge

⁷ See *Algese 2 s.c.a.r.l. v. United States*, No. 15-1279 (Fed. Cl. March 14, 2016), ECF No. 71. The opinion was filed under seal on March 4,

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Wheeler found that LBAS had made a material, intentional misrepresentation and false certification in its proposal when it certified that neither it nor its principals were “presently indicted for, or otherwise criminally ... charged with,” *inter alia*, bribery, thereby disqualifying it from competing for the contract. Judge Wheeler set aside the Navy’s award to LBAS and issued a permanent injunction, requiring that the Navy terminate the contract. The issue was presented to the court in a post-award bid protest brought by LBAS’ competitor, Algeese 2 s.c.a.r.l., and illustrates the potential collateral consequences of FCPA allegations for U.S. government contractors.

- 8. Ministerial Meeting on the Anti-Bribery Convention.** On March 16, 2016, the Organisation for Economic Co-Operation and Development (OECD) hosted its first-ever Ministerial Meeting on the Anti-Bribery Convention at the OECD Conference Centre in Paris. Ministers from all 41 State Parties to the Anti-Bribery Convention and ministers from key partner countries participated, along with the heads of other international organizations and leaders from the private sector and civil society. For the United States, Attorney General Loretta Lynch led the delegation, which also included DOJ’s Fraud Section Chief Andrew Weissman, DOJ’s Acting FCPA Unit Chief Daniel Kahn, SEC’s FCPA Unit Chief Kara Brockmeyer, and the longest serving U.S. delegate, Kathryn Nickerson from the Commerce Department. The meeting was chaired by Andrea Orlando, Italian Minister of Justice, with Attorney General Lynch serving as Vice-Chair. In her brief [remarks](#), Attorney General Lynch highlighted the importance of the Convention, international partnerships in combating corruption, and the United States’ continued commitment to enforcement:

Today, thanks in part to the tireless efforts of the OECD’s Working Group on Bribery, the picture looks very different. When the convention took force in 1999, the United States was the only country with laws on the books that made it a crime to bribe foreign public officials. Today, there are 41 parties to the Anti-Bribery Convention and, as required, each of them has passed laws that both criminalize the bribery of foreign officials and ban tax deductions for such bribes. The convention has also affected nations beyond the ones represented here today: because of the new international norms created by this agreement and others like it, many countries that aren’t party to the convention have adopted anti-bribery laws and even more are in the process of doing so – proving that high expectations encourage all to extend their reach beyond their grasp and seek a better way.

I am proud to say that the United States is committed to doing our part. Since 2009, the U.S. Department of Justice has brought more than 60 criminal cases against individuals and more than 60 cases against corporations in connection with foreign bribery charges, resulting in the collection of more than \$4 billion in penalties. Over that same time period, our colleagues at the

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U.S. Securities and Exchange Commission, or SEC, have brought actions against more than 85 companies and approximately 35 individuals, resulting in fines, disgorgement and prejudgment interest of about \$2.5 billion.

In the last year, we've also created three new International Corruption Squads in our Federal Bureau of Investigation to work on FCPA and kleptocracy matters and we expanded our FCPA Unit from 19 prosecutors to 29, overseen by six supervisors. These specialized task forces work closely with foreign law enforcement and our U.S. Attorney's Offices throughout our country to investigate and prosecute cases related to kleptocracy and foreign bribery, helping to guarantee that the United States will continue to stand with our international partners at the forefront of the fight against corruption in all its forms.

The Ministerial Meeting was the first of its type in the history of the OECD Working Group on Bribery. The Meeting formally launched Phase 4 of the Working Group's rigorous peer review monitoring process, and encouraged key non-signatory countries (such as China and India) to join the Working Group and adhere to the Convention.

9. **Australia and France Considering Use of DPAs.** DPAs have been an important tool used by DOJ to resolve FCPA cases over the last decade. Having observed the U.S. practice, several other countries, including Australia and France, are now considering adding DPAs to their toolkits.
- **Australia.** On March 16, 2016, while at the OECD Anti-Bribery Ministerial Meeting, the Australian Minister of Justice announced that Australia was considering whether and how to introduce DPAs. That same day, Australia released a Public Consultation Paper titled "Improving enforcement options for serious corporate crime: Consideration of a Deferred Prosecution Agreements scheme in Australia" that seeks public views on the same topics. According to the paper, Australia is considering whether making DPAs available to companies will encourage self-reporting, improve enforcement agencies' ability to detect and pursue crimes, help avoid lengthy and costly investigations and prosecutions, provide greater certainty for companies seeking to resolve and report misconduct, and help compensate victims of corporate crime. In addition to these potential benefits, the paper also acknowledges potential criticisms and limitations regarding the use of DPAs and compares the key features of the DPA models used in the United States and the UK.
 - **France.** In late March 2016, French Finance Minister Michel Sapin announced new legislation designed, in part, to enhance France's ability to combat corruption. The new legislation—which is being called "Sapin II" in recognition of a 1993 anti-corruption initiative championed by Sapin and known as "Sapin I"—would, among other things, impose a legal obligation upon companies to prevent bribery by requiring the adoption of internal anti-corruption procedures; protect and encourage whistleblowers; and establish a new enforcement agency, the Agence Nationale de Prévention et de Détection de la Corruption, to replace the Service Central for the Prevention of Corruption. The initial proposal would have created the functional equivalent of a DPA (Convention de compensation

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d'intérêt public), but the French State Council did not include the DPA provision in the version presented for consideration by the French parliament. Nevertheless, that provision could be reintroduced later by amendment. The introduction of a DPA-like mechanism in the French criminal justice system could have a meaningful impact on France's approach to anti-corruption enforcement, and thus, this proposed legislation will be worth following.

10. Significant Anti-Corruption Developments in Brazil. As we have previously reported on several occasions, Brazil's Operation Car Wash investigation into alleged corruption at Petrobras, the country's state-owned oil company, shows no signs of slowing down. March demonstrated that the investigation continues to grow in scope and to have dramatic repercussions for Brazil politically, socially, and economically. On March 2, 2016, Brazil's Supreme Court for the first time accepted charges against a sitting politician, House Speaker Eduardo Cunha, in connection with the investigation. Two days later, Brazilian federal police detained former Brazilian President Luiz Inacio Lula da Silva for questioning in connection with the investigation. The following week, federal prosecutors filed charges against Lula, apparently prompting current Brazilian president (and Lula protégé) Dilma Rousseff to appoint him as her chief of staff, a cabinet post that would insulate him from being investigated and prosecuted by federal police and prosecutors. A Brazilian federal judge enjoined Lula from taking office and, on March 18, 2016, a Brazilian Supreme Court Justice suspended Lula's nomination, blocking him from taking office until the full court can take up the appeal of the injunction. On March 31, 2016, the full Supreme Court voted to take over the corruption case against Lula from Judge Sergio Moro, who presides over the Car Wash investigation. Earlier in March, Judge Moro convicted Marcelo Odebrecht, the former chief executive of Brazil's largest construction company, Odebrecht SA, on corruption and money laundering charges and sentenced him to more than 19 years in prison. While Mr. Odebrecht is expected to appeal, his company announced on March 24, 2016 that it would cooperate with prosecutors following additional police raids on the company and the arrest of 15 employees. As March came to a close, rumors swirled that Brazil's new Justice Minister, Eugenio Aragoa, planned to replace the head of the federal police, Leandro Daiello, over leaks of sensitive information about the Car Wash investigation. Mr. Aragoa announced he would replace Daiello—and any other staff found to have leaked information—within 30 days.

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