

Client Alert

July 29, 2016

Top Ten International Anti-Corruption Developments for June 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. This month we ask: Who was tapped as the permanent head of the Department of Justice's (DOJ's) FCPA Unit? Which companies received declinations and which ones didn't? Which country was the target of harsh words by the OECD for lack of enforcement? The answers to these questions and more are here in our June 2016 Top Ten list:

- 1. Permanent Head of DOJ's FCPA Unit Announced.** In [March 2016](#), Daniel Kahn was made acting chief of the FCPA Unit in the Fraud Section of the Criminal Division at DOJ. In June 2016, Kahn was made the permanent head of the FCPA Unit. Kahn leads a growing group of prosecutors as the Fraud Section continues to hire additional FCPA prosecutors, and he is supported by a strong group of Assistant Chiefs: Tarek Helou, Laura Perkins, Jennifer Saulino, Albert "B.J." Stieglitz, and Leo Tsao. One of the newly hired line prosecutors is Bruce Searby, who recently joined the FCPA Unit after a number of years in private practice. Searby was previously an Assistant United States Attorney in Los Angeles, and while there, he tried the [Green case](#), which involved bribes paid in Thailand to secure the rights to the Bangkok Film Festival. With Searby and other new hires, the FCPA Unit is now the largest it has ever been in history. For its part, the FCPA Unit at the Securities and Exchange Commission (SEC) has remained largely stable in terms of Unit leadership and size. Kara Brockmeyer continues to head SEC's FCPA Unit, alongside long-time deputy chief Charles Cain. They are supported by assistant directors across the country, including Ansu Banerjee (Los Angeles), Paul Block (Boston), Thierry Desmet (Miami), Tracy Price (D.C.), and Jonathan Scott (Dallas/Fort Worth).
- 2. SEC Reaches Non-Prosecution Agreements (NPAs) with Two Companies, While DOJ Publicly Declines Prosecution.** For only the second and third time ever, SEC resolved corporate FCPA investigations with an NPA. The first SEC FCPA NPA was announced over three years ago, in April 2013. In [November 2015](#), SEC Enforcement Director Andrew Ceresney stated that self-disclosure was necessary, but not sufficient, for a company to obtain an NPA. Although both companies discussed below did self-report, it is difficult to discern why they, and not the other self-reporting companies that resolved with SEC in 2016, obtained NPAs. In an almost equally rare occurrence, DOJ publicly announced that it had declined to bring resolutions against both companies. Unlike the last several public announcements, however, these declinations did not accompany charges against individual wrongdoers, perhaps reflecting promises by Criminal Division and Fraud Section leadership to increase and publicize declinations.

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- **Internet Services Provider Resolves China FCPA Allegations.** On June 7, 2016, SEC announced that it had entered into an NPA with Akamai Technologies in which the Massachusetts-based cloud service provider agreed to disgorge more than \$650,000 in profits connected to cash and improper gifts and entertainment that its wholly-owned Chinese subsidiary gave to Chinese officials, in violation of the FCPA's accounting provisions. According to SEC, over a two-year period, the Chinese subsidiary's channel partner provided the subsidiary's regional sales manager with funds used to pay employees of three customers—including \$38,500 in cash paid to employees of two Chinese state-owned enterprises—in exchange for their agreement to purchase “up to 100 times more network capacity from the Channel Partner than each company actually needed.”
 - **Building Products Manufacturer Resolves China FCPA Allegations.** Also on June 7, 2016, SEC announced that it had entered into an NPA with Nortek Inc. in which the Rhode Island-based company agreed to disgorge more than \$290,000 in profits connected to improper payments and other benefits provided by its indirect wholly-owned Chinese subsidiary to “local officials from multiple different governmental departments” “in order to receive preferential treatment, relaxed regulatory oversight, and/or reduced customs duties, taxes, and fees” over a five-year period.
 - **DOJ Publicly Declines Both Cases.** In letters dated June 6, 2016, and June 3, 2016, respectively, DOJ informed Akamai and Nortek that it had closed its own inquiries into the same alleged misconduct without bringing charges. Although both companies self-reported prior to the April 2016 announcement of the FCPA Pilot Program, DOJ stated in both letters that the declination decisions were “[c]onsistent with” that Program. Among several factors that led to the declination, DOJ specifically noted that both companies would be “disgorge to the SEC the full amount of disgorgement as determined by the SEC.” As we remarked in our April 2016 Top Ten, the Pilot Program's requirement that a company agree to disgorge profits in order to obtain a “declination” is a significant policy change.
- 3. Medical Technology Company and Its Foreign Subsidiary Resolve Russia FCPA Allegations with DOJ and SEC.** On June 21, 2016, SEC and DOJ announced parallel resolutions with Massachusetts-based Analogic Corporation and its Danish subsidiary, BK Medical ApS. Both resolutions alleged violations of the FCPA's accounting provisions. According to the resolutions, BK Medical's Russian distributor requested that BK Medical create inflated invoices for ultrasound equipment it sold to state-controlled hospitals and medical facilities and then directed BK Medical to refund the excess amounts it paid as a result of these invoices to third parties who had no apparent business connection to the deals. BK Medical allegedly engaged in similar schemes, though to a lesser degree, with its distributors in Ghana, Israel, Kazakhstan, Ukraine, and Vietnam. Analogic agreed to pay approximately \$11.5 million in disgorgement and prejudgment interest to SEC, which reached a simultaneous resolution with BK Medical's former CFO, Lars Frost, for allegedly circumventing the company's internal accounting controls by authorizing payments to the third parties outside of the accounts payable system. This is the third SEC corporate resolution this year that was accompanied by an action against an individual. BK Medical agreed to pay \$3.4 million as part of its three-year NPA with DOJ. According to DOJ, the company received an aggregate 30% discount off the bottom of the U.S. Sentencing Guideline Range for its voluntary self-disclosure and partial cooperation but did not receive full cooperation credit because it failed to disclose certain facts that it

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learned during the course of its internal investigation. DOJ's refusal to award full cooperation credit, and its decision to pursue an NPA against a subsidiary rather than declining in light of the SEC resolution, reflects the policies set out in the [Yates Memo](#) and the [FCPA Pilot Program](#) and is consistent with its decision earlier this year to enter into an NPA with [PTC Inc.'s](#) Chinese subsidiaries and to withhold self-disclosure credit after those companies failed to disclose all relevant facts known to the companies at the time of their initial disclosure.

- 4. DOJ Finds That Biomet Violated Terms of Its Deferred Prosecution Agreement.** In March 2012, Biomet, Inc. entered into a three-year deferred prosecution agreement (DPA) with DOJ to resolve FCPA related allegations. In [March 2015](#), following disclosures of new potential FCPA violations in Mexico and Brazil, DOJ extended the terms of Biomet's DPA for an additional year. In [March 2016](#), Biomet reported that its DPA had been extended for a second time. In a June 6, 2016, status report filed in U.S. District Court in Washington, D.C., DOJ informed the court that it "had determined that Biomet had breached the DPA based on the conduct in Mexico and Brazil and based on Biomet's failure to implement and maintain a compliance program as required by the DPA."¹ DOJ further stated that the parties were attempting to resolve the matter without a trial. The district court ordered DOJ to file a status report by September 9, 2016. The Biomet breach is the first breach of an FCPA DPA since November 2008 when Aibel Group Ltd. pleaded guilty to a superseding information after [admitting](#) that it had not complied with the terms of a February 2007 DPA alleging that the company had bribed Nigerian customs officials. Given the rarity of a DOJ finding that a DPA has been breached, this will be a case to follow closely.
- 5. Another FCPA Guilty Plea in Venezuela Bribery Case.** On June 16, 2016, DOJ [announced](#) that Roberto Rincon, the owner of several U.S.-based energy companies, pleaded guilty to foreign bribery and tax charges for his role in a scheme to corruptly secure energy contracts from Venezuela's national oil company, Petroleos de Venezuela S.A. (PDVSA). According to DOJ, beginning in 2009, Rincon and another conspirator, Abraham Shiera, agreed to bribe PDVSA purchasing analysts to ensure that their companies were placed on PDVSA bidding panels, which enabled the companies to win lucrative energy contracts with PDVSA. Rincon also bribed other PDVSA officials in order to ensure that his companies were placed on PDVSA-approved vendor lists and given payment priority so that they would get paid ahead of other PDVSA vendors with outstanding invoices. Rincon's sentencing is scheduled for September 30, 2016. Rincon is the sixth defendant to plead guilty in connection with the PDVSA bribery scheme. In [March 2016](#), DOJ announced that Shiera and four PDVSA officials had pleaded guilty for their roles in the same scheme. This case powerfully demonstrates the ability of DOJ and its law enforcement partners to detect, investigate, and prosecute wide-ranging bribery schemes through traditional law enforcement techniques without the assistance of companies. It is therefore somewhat surprising that this case has garnered little media attention in spite of the significance of the allegations and the fact that it reflects the FCPA Unit's proactive efforts to investigate and prosecute non-corporate cases that do not involve voluntary disclosures or cooperation.

¹ *USA v. Biomet Inc.*, No. 12-cr-80 (D.D.C. June 6, 2016), ECF No. 7.

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- 6. Unanimous Supreme Court Reverses Conviction of Former Virginia Governor, Holding Government’s Definition of “Official Act” Was Boundless.** In a significant blow to a major corruption conviction, the Supreme Court unanimously reversed the conviction of former Virginia Governor Bob McDonnell based on allegations that he and his wife accepted \$175,000 in loans, gifts, and other benefits from the CEO of a Virginia-based company in exchange for the Governor’s efforts to encourage Virginia public universities to perform research studies on the company’s tobacco-derived nutritional supplement. The Court held that the trial court’s jury instruction contained an overly broad definition of the term “official act.” According to the Court, the trial court should have instructed the jury that an official act is a “question, matter, cause, suit, proceeding or controversy” that involves the “formal exercise of governmental power,” is “specific and focused,” and is pending (or may be brought) before a public official and that the defendant must have “made a decision or took an action—or agreed to do so—on the identified ‘question, matter, cause, suit, proceeding or controversy[.]’” Importantly, the Court held that setting up a meeting, talking to another official, or organizing an event—without more—does not meet this definition of an “official act.” The Court’s narrowed definition of “official act” builds on its unanimous 1999 decision in *United States v. Sun-Diamond Growers of California* and exposes a continuing tension with DOJ’s efforts to pursue corruption cases. By limiting the definition of “official act,” *McDonnell* significantly limits the type of conduct that could support a domestic bribery charge. The potential impact of the *McDonnell* decision on the FCPA is unclear. While the FCPA and the federal domestic bribery statute share some similar language, the FCPA is arguably broader. For example, as a result of the 1998 amendments following the OECD Anti-Bribery Convention, the FCPA includes the phrase “securing any improper advantage,” which may be interpreted to include a greater range of conduct than the term “official act.” Andrew Weissmann, the head of DOJ’s Fraud Section, indicated shortly after the *McDonnell* case that the Section was reviewing the decision and assessing its import for FCPA enforcement.
- 7. Important Developments in DOJ and SEC Practice.** As reflected in several previous Top Tens, we have been closely following the developments in the *Fokker* case and in the cases challenging SEC’s use of Administrative Proceedings because of their potential impact on how DOJ and SEC resolve FCPA cases. In June 2016, there were significant developments on both fronts.
- **District Court Dismisses Fokker Charges—At DOJ’s Request.** In February 2015, District of Columbia District Judge Richard Leon rejected a DPA between DOJ and Fokker Services B.V., 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.” In April 2016, the D.C. Circuit vacated Judge Leon’s order and held that the Speedy Trial Act “confers no authority in a court to withhold exclusion of time pursuant to a DPA based on concerns that the government should bring different charges or should charge different defendants.” On June 9, 2016, the U.S. Attorney’s Office for the District of Columbia (USAO) moved to dismiss the charges against Fokker with prejudice.² According to the motion, the DPA provided that its 18-month term would commence upon filing of the Criminal Information, which occurred on June 5, 2014. “Consequently, the 18-month period of deferred prosecution ended on December 5, 2015.” Because Fokker complied with the terms of the DPA beginning on the date the

² *United States v. Fokker Services B.V.*, 14-CR-121-RJL (D.D.C. June 9, 2016), ECF No. 35.

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Information was filed, including by continuing its cooperation and remedial efforts, and because it paid the monetary portions of the DPAs after the D.C. Circuit's ruling, the USAO moved to dismiss the charges with prejudice. Judge Leon granted the motion without comment on June 10, 2016.³ As we remarked in this [article](#), because no court had ever rejected a DPA before, it was not a given that the USAO would consider the agreement effective as soon as the charges were filed. However, because Fokker complied with the DPA despite the uncertainty of the outcome, this was the fair result.

- **Appellate Courts Limit Ability to Challenge Constitutionality of SEC Administrative Proceedings in District Court.** As we noted in our [August 2015 Top Ten](#), several federal district court actions have been filed challenging the constitutionality of SEC's use of administrative proceedings. On June 1 and 17, 2016, the Second and Eleventh Circuits, respectively,⁴ joined the D.C. and Seventh Circuits in holding that district courts lack subject matter jurisdiction to consider such challenges. Instead, defendants (and potential defendants) to such proceedings must proceed through the administrative process and file any constitutional challenge with the appropriate federal appellate court. In the FCPA context, SEC has to date used administrative proceedings only with respect to resolved actions, but these challenges could affect SEC's ability to use the administrative process to pursue a contested FCPA action. Interestingly, although the Eleventh Circuit case did not involve the FCPA directly, the plaintiffs cited certain portions of the FCPA—specifically, 15 U.S.C. §§ 78dd-2(d) and 78dd-3(d), which authorize the Attorney General to pursue injunctive relief in federal district court with respect to FCPA violations involving non-issuers—to argue that Congress did not intend the detailed scheme for appellate court review of Commission orders set out in 15 U.S.C. § 78y to be exclusive. The court rejected the argument, finding that a statute granting the government the choice of forums does not imply that the government's chosen forum should not be exclusive.

8. **OECD Slams Japan—Again—for Limited Foreign Bribery Enforcement.** Since outlawing foreign bribery in February 1999, Japan has only prosecuted four cases of foreign bribery. As we noted in this May 2014 [client alert](#), Japan has been repeatedly criticized by the OECD Working Group on Bribery for this lack of enforcement. (The Working Group on Bribery is made up of the 34 OECD Member countries, which includes Japan, plus seven additional countries—Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia, and South Africa—that have joined the OECD Anti-Bribery Convention. The parties to the Convention are subject to a rigorous [peer review process](#).) On June 30, 2016, the Working Group released a [statement](#) harshly criticizing Japan's general lack of foreign bribery enforcement. In a rare event, on June 29-30, 2016, a high-level OECD mission arrived in Tokyo to discuss Japan's limited enforcement by pressing these issues with high-level Japanese representatives from the Ministry of Foreign Affairs, Ministry of Economy, Trade, and Industry, Ministry of Justice, National Police Agency, and National Tax Agency. Drago Kos, the Chair of the Working Group on Bribery, expressed the Working Group's concerns: "Japan should be aware that continued failure to fulfil the Working Group's crucial recommendations would not only increase the Group's concerns but—bearing in mind Japan's important role in the world economy—also negatively affect other countries' efforts in the global fight against foreign bribery. Therefore, we trust that the current positive

³ *Id.*, ECF No. 36 (June 10, 2016).

⁴ *Tilton v. SEC*, 15-2103 (June 1, 2016); *Hill v. SEC*, 15-12831 (June 17, 2016).

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spirit of cooperation will both result in the country quickly meeting our substantial concerns and also in Japan joining the list of countries more actively enforcing the OECD Anti-Bribery Convention.” The OECD’s pressure on Japan has had some impact on increased foreign bribery enforcement efforts, though it remains to be seen if this latest round of efforts will have a material impact on Japan’s enforcement of its foreign bribery law anytime soon.

9. More International Anti-Corruption Conferences Held, Planned.

- **France, UK, and World Bank Sponsor Major International Conference on Foreign Bribery.** In the wake of the UK’s first-ever international summit on corruption in [May 2016](#), France, the United Kingdom, and the World Bank sponsored another anti-corruption conference co-located at the OECD during the Working Group on Bribery’s plenary session from June 14-16, 2016. Unlike the high-level meeting in London, this three-day [conference](#) appeared geared more toward enforcement officials and brought together representatives from anti-corruption authorities worldwide responsible for investigating and prosecuting corruption. The conference sought to galvanize a global response to the challenges of international cooperation in the fight against corruption with discussions of transparency in public procurement, whistleblower protection, resolution through settlements and administrative sanctions, disclosure of beneficial ownership, asset recovery, and domestic and international cooperation tools and mechanisms.
- **China Pledges to Hold Anti-Corruption Conference with the OECD.** On June 8, 2016, China [pledged](#) to hold a roundtable conference on anti-corruption efforts with the OECD later this year and to join the United States in pushing for an anti-graft action plan at the G20 summit to be held in September 2016 in China. China also reiterated its intention to join the OECD’s Working Group on Bribery. China’s integration into the international anti-corruption effort could have a major impact on foreign bribery enforcement efforts worldwide and is a development to watch.

- 10. SFO Continues to Quietly Build a Serious Record in Foreign Bribery Enforcement.** The Director of the UK Serious Fraud Office (SFO), David Green, appeared at the aforementioned summit in Paris, delivered a keynote address at the Fraud Lawyer’s Association on June 17, 2016, and spoke at C5’s anti-corruption conference on June 20, 2016. From his public remarks, it is clear that the SFO is busy on a number of matters, and there will likely be a number of corporate resolutions in some high-profile foreign bribery investigations. Green, who [recently](#) extended his tenure as the SFO’s Director by two years, has amassed a number of convictions in foreign corruption and fraud cases during his tenure and, in the process, distanced himself from his predecessor’s record. It appears likely that there will be some significant matters resolved by the SFO before the close of the year.

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