

# Client Alert

August 29, 2016

## Top Ten International Anti-Corruption Developments for July 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: Which companies reached resolutions with the Department of Justice (DOJ), the Securities and Exchange Commission (SEC), the Serious Fraud Office (SFO), and a host of Brazilian authorities? What aspect of Mexico's new anti-corruption regime was called a "game changer"? Which Asian country saw the release of a new set of anti-corruption compliance guidelines? The answers to these questions and more are here in our July 2016 Top Ten list:

- 1. South American Airline Resolves Argentina FCPA Accounting Provision Allegations.** In [February 2016](#), SEC announced that Ignacio Cueto Plaza, the CEO of South America-based LAN Airlines, had agreed to settle claims that he violated the FCPA's accounting provisions by authorizing payments to a third-party consultant in 2007 despite knowing that the consultant might pass money onto union officials in Argentina to help resolve a labor dispute. On July 25, 2016, [DOJ](#) and [SEC](#) announced that they had reached resolutions with the company for a combined penalty of approximately \$22.2 million based on the same allegations. There were some notable aspects of the corporate resolutions. Although neither agency alleged that the union officials were "foreign officials" under the FCPA, both agencies characterized the consultant as an "advisor" to Argentina's Ministry of Transportation. This suggests that they might have viewed the consultant as a person "acting in an official capacity for or on behalf of" the Ministry and, therefore, a "foreign official" under the FCPA.<sup>1</sup> Read this way, any money that the consultant kept for himself in exchange for intervening in a labor dispute within the scope of his Ministry could arguably be characterized as a bribe under the FCPA. However, the [SEC Order](#) notes that the consultant held an "ad-honorem" position given to him "pursuant to an unpublished Resolution." This further suggests that the agencies might not have been willing to test this "foreign official" theory, which they were able to avoid by bringing accounting charges instead.

In explaining its decision to bring a three-year DPA against the airline, to assess a penalty of 25% above the low end of the Sentencing Guidelines range, and to require an independent compliance monitor for a term of 27 months, DOJ [noted](#) that the company did not timely self-report the alleged conduct but instead began cooperating only after stories were run in the Argentine press four years later; the delay resulted in potentially relevant evidence being lost or destroyed; and the company failed to remediate adequately, "including significantly by failing to discipline in any way the employees responsible for the criminal conduct .

<sup>1</sup> 15 U.S.C. § 78dd-1(f)(1)(A).

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. . . including misconduct by at least one high-level Company executive,” presumably a reference to Cueto. Read in this light, DOJ’s resolution in this case is consistent with its decisions to pursue parallel enforcement actions against PTC Inc., Analogic Corporation/BK Medical ApS, and Vimpelcom Ltd.— all of which could not satisfy at least one of the three factors (self-disclosure, full cooperation, and remediation) required to receive what Criminal Division Assistant Attorney General Leslie Caldwell has described as “full mitigation credit”—while declining to bring parallel actions in nine other SEC-only corporate enforcement actions brought as of July 2016.

- 2. HVAC Systems Provider Resolves China FCPA Accounting Provision Allegations.** On July 11, 2016, SEC announced that Wisconsin-based Johnson Controls, Inc. (JCI) had agreed to pay more than \$13 million to resolve allegations that its wholly owned Chinese subsidiary (“China Marine”) used sham vendors to make improper payments of approximately \$4.9 million to employees of Chinese government-owned shipyards, ship-owners, and others, to secure business opportunities valued at approximately \$11.8 million. JCI acquired China Marine as part of its 2005 acquisition of York International while York was involved in an on-going investigation into FCPA violations in China and elsewhere (resulting in parallel DOJ and SEC resolutions in October 2007). Based on SEC’s order, it appears that JCI took several post-acquisition steps to remediate the issues in China Marine: “After acquiring York, JCI devoted additional resources to its compliance program, including hiring compliance personnel, conducting trainings, and implementing risk-based procedures and controls. . . . [;] terminated the individuals involved in the [prior] conduct and hired a new managing director of China Marine . . . [;] [and] limited the use of agents in its China Marine business model and required that all sales go through its internal sales team based in China.” SEC further alleged that China Marine’s new staff “circumvented and manipulated JCI’s internal and financial controls” to accomplish the bribery scheme, including by making payments to sham vendors rather than to agents and by keeping the payments small enough to fall below thresholds that would have triggered a higher level of scrutiny within the company. SEC also alleged that JCI self-reported the conduct after the company received two anonymous hotline reports about the sham vendors; “provided thorough, complete, and timely cooperation throughout the investigation;” and undertook remedial efforts. Nevertheless, SEC determined that JCI’s books and records and internal accounting controls were faulty and required JCI to disgorge \$11.8 million, pay a civil penalty of \$1.18 million, and report to SEC on its remediation efforts for a year. JCI fared better with DOJ, which informed the company on June 21, 2016, that, “consistent with the FCPA Pilot Program,” it had declined to bring charges. Among other factors supporting its decision, DOJ noted that JCI would be “disgorging to the SEC the full amount of disgorgement as determined by the SEC, as well as paying a civil penalty to the SEC.”
- 3. DOJ Seeks Forfeiture of \$1 Billion Related to Malaysian Sovereign Wealth Fund.** On July 20, 2016, DOJ announced the filing of several civil forfeiture complaints seeking the forfeiture and recovery of more than \$1 billion in assets allegedly associated with an international conspiracy to launder funds misappropriated from 1Malaysia Development Berhad (1MDB), a sovereign wealth fund created by the Malaysian government in 2009 to promote economic development in Malaysia through global partnerships and foreign direct investment and to improve the well-being of the Malaysian people. According to DOJ, from 2009 through 2015, 1MDB officials and their relatives and associates allegedly diverted and laundered over \$3.5 billion in 1MDB funds through a series of complex transactions and fraudulent shell companies

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with bank accounts located in Singapore, Switzerland, Luxembourg, and the United States and used the funds to, among other things, acquire an interest in the production of the 2013 film *The Wolf of Wall Street*. On July 21, 2016, it was reported that Singapore authorities seized \$177 million of assets in a related investigation. Several other jurisdictions, including Switzerland, Hong Kong, and Luxembourg, are also reportedly investigating suspected money laundering involving 1MDB. DOJ's forfeiture actions were brought as part of the Asset Forfeiture and Money Laundering Section's (AFMLS) Kleptocracy Asset Recovery Initiative. Sovereign wealth funds have been at the center of U.S. anti-corruption investigations for several years, but this one has a number of new twists and looks to be much bigger.

- 4. Individual Defendants in Louis Berger Case Sentenced.** In July 2015, DOJ announced that two former executives of New Jersey-based engineering, architecture, and construction management company Louis Berger International (LBI) had pleaded guilty to conspiracy and FCPA charges in connection with an alleged twelve-year scheme to funnel approximately \$3.9 million in bribe payments to foreign officials in India, Indonesia, Vietnam, and Kuwait to secure government construction management contracts. On July 8, 2016, DOJ announced that the former executives, Richard Hirsch (a Senior Vice President responsible for LBI's operations in Indonesia, Thailand, the Philippines, and Vietnam) and James McClung (a Senior Vice President responsible for LBI's operations in India and, later, in Vietnam), had been sentenced to two years' probation and one year and one days' imprisonment, respectively. Notably, in June 2016, the Louis Berger Group Inc. sued Hirsch in New Jersey state court for breach of fiduciary duties arising from the bribery scheme.<sup>2</sup> In the lawsuit, the company claims that Hirsch's criminal activity has cost the business more than \$17 million and caused reputational damage. In addition to the \$17.1 million penalty LBI paid pursuant to its July 2015 DPA with DOJ, in early 2015 the World Bank announced that it had debarred Louis Berger Group with a conditional release for one year, and Berger Group Holdings was subjected to a one-year conditional non-debarment. We previously reported on another collateral development when a Court of Federal Claims Judge ruled in March 2016 that the U.S. Navy was required to terminate a contract with a sister company, Louis Berger Aircraft Services (LBAS), because, in its bid submission, LBAS had allegedly failed to disclose, among other things, LBI's July 2015 DPA. In an update, the judge reversed his decision to disqualify the company, and the Navy has moved to re-award the contract to LBAS.<sup>3</sup>
- 5. DOJ Dismisses Charges Against Deceased Alstom Defendant.** On July 6, 2016, DOJ moved to dismiss charges against former Alstom Power Inc. executive William Pomponi, who died in May 2016 while pending sentencing. The district court granted the motion on July 18, 2016.<sup>4</sup> In July 2014, DOJ announced that Pomponi had pleaded guilty to conspiring to violate the FCPA in connection with the awarding of the Tarahan power project in Indonesia to a consortium that included Alstom. Pomponi had asked the court to delay his sentencing until after the trial of another former Alstom executive, Lawrence Hoskins, which suggests that the government might have considered calling Pomponi as a witness (which could have resulted in him receiving a reduced sentence). If so, Pomponi's death is another blow to DOJ's prosecution

<sup>2</sup> *The Louis Berger Group Inc. and Berger Group Holdings Inc. v. Richard J. Hirsch*, No. L-1293-16 (N.J. Superior Ct., Morris Cty.).

<sup>3</sup> See *Algese 2 s.c.a.r.l. v. United States*, No. 15-1279C (Fed. Cl.), ECF Nos. 79 (March 29, 2016) and 97 (June 1, 2016).

<sup>4</sup> See *United States v. Pomponi*, No. 12-cr-238-JBA (D. Conn.), ECF Nos. 350 (July 6, 2016) and 351 (July 19, 2016).

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of Hoskins, which has already been derailed by a district court ruling severely narrowing DOJ's ability to prove Hoskins' involvement in the charged FCPA violations (see our [August 2015](#) Top Ten for more discussion of the ruling). DOJ is currently appealing the district court's ruling.

- 6. UK Announces Second Ever DPA.** On July 8, 2016, the SFO [announced](#) that its second application for a DPA had been approved. According to the SFO, in 2012, "XYZ Limited," a small- to medium-sized enterprise that the SFO declined to name because of "ongoing, related legal proceedings," discovered, after its U.S. parent company implemented a global compliance program, that its employees and agents had procured 28 contracts through bribery in a number of foreign jurisdictions during an eight-year period. Four of the tainted contracts were procured after the enactment of the UK Bribery Act 2010 (UKBA). According to Lord Justice Leveson's judgment approving the DPA, XYZ concealed the bribe payments by paying "fixed," "special," or "additional" commissions to third-party agents. After it discovered the potential bribery, XYZ promptly self-reported, fully disclosed the results of its internal investigation, and cooperated with the SFO. Under the DPA, the charges against XYZ, which included failure to prevent bribery contrary to section 7 of the UKBA, will be suspended for a period of two-and-a-half to five years, and XYZ will disgorge approximately £6.2 million and pay a financial penalty of £352,000. According to the SFO and Lord Justice Leveson, the financial penalty was substantially reduced out of concern that a higher fine would render XYZ insolvent. Notably, in [November 2015](#), Lord Justice Leveson also approved the SFO's first DPA, which also involved allegations of failure to prevent bribery contrary to section 7 of the UKBA. With these two DPAs, the UK is moving closer to the United States in terms of the methods it uses to resolve foreign bribery cases, although, as demonstrated by a comparison of Lord Justice Leveson's judgment to the D.C. Circuit's [April 2016](#) decision in the *Fokker Services BV* case, DPAs are subject to far greater judicial scrutiny in the UK than in the United States.
- 7. UK Charges Logistics and Freight Operations Company with Angola Bribery.** Continuing a busy month for the SFO, the agency [announced](#) on July 13, 2016, that it had [charged](#) F.H. Bertling Ltd, a UK-based subsidiary of Germany's Bertling Group, and seven individuals with one count of making corrupt payments in violation of the Prevention of Corruption Act 1906. The SFO alleged that the defendants conspired to bribe an agent of Sonangol, Angola's state-owned oil company, to further the company's business opportunities in that country between January 2005 and December 2006. The case is pending before the Southwark Crown Court and will be one to watch.
- 8. Mexico Enacts National Anti-Corruption System.** On July 18, 2016, Mexican President Enrique Peña Nieto [signed](#) into law the implementing legislation for Mexico's National Anti-Corruption System (SNA). The constitutional amendment that created the SNA as a forum for coordination between all levels of government to fight corruption was published on May 27, 2015, and the Mexican legislature subsequently approved seven secondary legislative packages. Of note, one of the new laws, the General Law on Administrative Responsibilities (GLAR), requires public officials to declare their assets, conflicts of interest, and taxes and provides that companies may be able to mitigate the penalties assessed against them for corruption-related violations by implementing effective compliance programs and by self-reporting and cooperating with authorities. Also of note, the Amendments to the Organic Law of the Attorney General's Office creates the Special Prosecutor's Office for Combating Corruption as an autonomous body for

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investigating and prosecuting acts of corruption. The OECD's Secretary General, Angel Gurría, who was himself Mexico's Foreign Minister in the mid-to-late 1990's, welcomed the enactment of the SNA laws, noting that "[t]he promulgation of these laws substantially transforms the anti-corruption architecture of Mexico by putting in place measures that the OECD considers effective[.]" According to Secretary General Gurría "perhaps the most important game changer of the reforms is that they reach beyond the Federal level and include all levels of government. Indeed, the new legislation requires the Mexican States to follow suit with their own local anti-corruption systems, thereby tackling some of the strongest footholds of corruption in Mexico." The Secretary General continued, "this framework puts Mexico in line with OECD best practices, but we must now make it work." (Mexico is an OECD Member Country and a signatory to the OECD Anti-Bribery Convention.)

### 9. Dutch Offshore Oil Company Reaches Historic Coordinated Resolution with Brazilian Authorities.

On July 15, 2016, Brazilian authorities announced that they had entered into a \$340 million leniency agreement with SBM Offshore N.V. to resolve allegations that the company won contracts from Petrobras, Brazil's state-owned oil company, as a result of bribery. The leniency agreement was joined by four Brazilian entities—the Public Prosecutor's Office; the General Counsel for the Republic; the Ministry of Transparency, Oversight, and Control (which assumed the responsibilities of the former Comptroller General of the Union in May 2016); and Petrobras itself—and is the first such agreement in Brazil resolving both criminal and administrative charges. As we noted in this client alert, although it appears to have taken over a year to negotiate, the agreement is likely to be considered a positive step forward for companies implicated in the Petrobras scandal, as it provides the clearest evidence yet that the several agencies within Brazil that share jurisdiction over corruption-related offenses are able to work together to reach coordinated corporate resolutions. In December 2015, Brazilian authorities reportedly brought charges against a dozen individuals in connection with the SBM investigation.

### 10. Japan Bar Association Issues New Anti-Corruption Compliance Guidelines.

On July 15, 2016, the Japan Federation of Bar Associations (JFBA) issued new guidance for companies on complying with Japanese and other foreign anti-bribery laws (the "Guidance"). The Guidance comes on the heels of and supplements prior guidelines issued by the Japanese Ministry of Economy, Trade and Industry (METI) in July 2015, clarifying certain aspects of Japan's foreign anti-bribery laws, as well as guidance on foreign risk management issued by the Small and Medium Enterprise Agency (geared towards facilitating compliance by Japanese small and medium businesses). While earlier METI Guidelines contained suggestions regarding corporate compliance systems and interpretations of Japan's foreign anti-bribery law (for example, what constitutes a "foreign public official"), the Guidance is distinct in both the practicality and level of detail it provides to assist companies in crafting and implementing anti-corruption compliance policies, responding to potentially corrupt practices, and coping with anti-corruption risks in M&A transactions. As we noted in our June 2016 Top Ten, the OECD Working Group has been critical of Japan's relatively lax anti-corruption enforcement efforts, and the Guidance appears to be designed to address some of those criticisms. For more on the Guidance, please see our client alert.

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