Client Alert

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Top Ten International Anti-Corruption Developments for May 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 country hosted a first-ever international anti-corruption summit? What new anti-corruption legislation has DOJ proposed? Which court dealt the SEC a serious setback when it comes to disgorgement, and what does the IRS have to say about the deductibility of disgorgement payments? What is the SFO up to these days? And who is the newest FCPA Unit Assistant Chief? The answers to these questions and more are here in our May 2016 Top Ten list:

1. **UK Hosts International Anti-Corruption Summit.** On May 12, 2016, David Cameron hosted an international anti-corruption summit in London to establish a united global response to corruption. The summit was attended by representatives from 40 countries, including 11 heads of state. A number of concrete developments arose out of the summit, including: (i) the creation of a global forum to step up international efforts to recover stolen assets held overseas; (ii) a commitment from the UK to obligate offshore shell companies and other entities that buy or already own UK property to declare their beneficial owners (this constituted a widening of the recent commitment by the UK to become the first G20 country to set up a publicly accessible register of beneficial owners of UK shell companies); (iii) streamlining of the Mutual Assistance framework through the creation of an International Anti-Corruption Co-Ordination Centre headquartered in London, which will work in partnership with experts within the crime agencies of the U.S., Canada, Australia, New Zealand, and Switzerland (as well as INTERPOL) to assist prosecutors in obtaining information; (iv) an agreement to make public procurement contracting open by default, with an obligation on governments that keep details secret to explain why; and (v) an agreement by 33 of the nations in attendance to embed their summit commitments within national action plans, which would be subject to independent monitoring every two years.

2. **U.S. Department of Justice Proposes Anti-Corruption Legislation.** On May 5, 2016, DOJ issued a press release outlining seven legislative proposals that it has transmitted to Congress designed to advance the agency's anti-corruption efforts. The first five proposals relate to illegal proceeds of transnational corruption. They include proposals to (i) expand foreign money-laundering predicates to include any violation of foreign law that would be a money-laundering predicate if committed in the United States; (ii) allow administrative subpoenas for money-laundering investigations; (iii) enhance law enforcement's authority to access foreign bank or business records by serving branches located in the U.S.; (iv) create a mechanism to use and protect classified information in civil asset recovery cases; and (v) extend the time period in which the U.S. can restrain property based on a request from a foreign country from 30 to 90 days,

and to extend the procedures to authenticate foreign business records in criminal cases to civil asset recovery cases. The final two proposals seek to amend the federal domestic bribery statute (18 U.S.C. § 666) to (vi) expressly criminalize the corrupt offer or acceptance of payments to "reward" official action (i.e., after-the-fact gratuities), as well as those intended to "influence" official action; and (vii) correct a drafting error regarding bona fide salary and lower the dollar threshold from $5,000 to $1,000.

3. **Federal Appellate Court Imposes Five-Year Time Limit on SEC's Ability to Seek Disgorgement.** Most SEC FCPA resolutions require a company to disgorge profits tied to the alleged FCPA violation. On May 26, 2016, in *SEC v. Graham,*[1] the United States Court of Appeals for the Eleventh Circuit issued a decision that could impact SEC's ability to collect disgorgement. The court held that disgorgement was a "forfeiture" for purposes of 28 U.S.C. § 2462, which establishes a five-year statute of limitations for suits brought by the government to enforce "any civil fine, penalty, or forfeiture." Because the SEC filed suit more than five years after the securities law violations alleged in *Graham*, the court affirmed the district court's dismissal of SEC's request for disgorgement, and certain other "backward-looking" relief, with prejudice.[2] SEC has previously taken the position, including in the *FCPA Resource Guide*, that disgorgement is an equitable remedy not subject to the five-year limitations period under Section 2462,[3] and two other appellate courts had previously agreed with SEC's position regarding disgorgement.[4] Despite this apparent circuit split, *Graham* may provide some leverage to companies negotiating the disgorgement component of an FCPA resolution with SEC. (For more on *Graham*, please see our client alert.)

4. **IRS Prohibits Disgorgement Payment Deduction in FCPA Case.** Also on the subject of disgorgement, on May 5, 2016, the IRS released a January 2016 memo from its Office of Chief Counsel explaining why an unnamed company was prohibited from deducting "an amount paid as disgorgement to the Securities and Exchange Commission for violating the U.S. Foreign Corrupt Practices Act." According to the memo, which was anonymized and redacted, the "Taxpayer" agreed to disgorge a certain amount representing the profits gained as a result of alleged FCPA accounting violations. The IRS rejected the Taxpayer's argument that the disgorgement payment at issue was intended "as a compensatory or remedial measure" (which may be deductible under Section 162(f) of the Tax Code) and opined that it was instead intended as a "penal[ty] or "punish[ment]" (which may not). Although not excluding the possibility that disgorgement could be compensatory or remedial in some cases, the IRS found that "there simply is nothing indicating that the purpose of the disgorgement payment [here] was to compensate the United States Government or some non-governmental party for its specific losses caused by the Taxpayer's violations of the FCPA. Consequently, we think the disgorgement payment is not deductible pursuant to section 162(f) because the payment was primarily punitive." Interestingly, especially when compared to *Graham*, the IRS opined that

[1] No. 14-13562 (11th Cir. May 26, 2016).

[2] The court reversed the dismissal of SEC's request for injunctive relief, which the court held to be a "forward-looking" remedy and therefore not a penalty within the meaning of Section 2462.

[3] SEC stated as follows in the *FCPA Resource Guide*: "The five-year limitations period applies to SEC actions seeking civil penalties, but it does not prevent SEC from seeking equitable remedies, such as an injunction or the disgorgement of ill-gotten gains, for conduct pre-dating the five-year period."

[4] *Riordan v. SEC*, 627 F.3d 1230 (D.C. Cir. 2011); *SEC v. Rind*, 991 F.2d 1486 (9th Cir. 1993).

"some cases that impose disgorgement as a discretionary equitable remedy can have similarities to some cases that impose forfeiture as required by statute."

5. **Former Bahamian Official Convicted of Receiving Bribes from Multinational Power Company.** On May 3, 2016, Fred Ramsey, a former member of the Bahama Electricity Corporation's (BEC) board, was convicted of bribery and conspiring to commit bribery in connection with allegations that he received several hundred thousands of dollars to steer contracts and other business advantages to French power company Alstom S.A. During the trial, an American middleman testified that he deposited bribes into a U.S. account held by Ramsey's company, Caribbean Business Supplies Limited, on Alstom's behalf. Although neither Ramsey nor the American middleman were expressly named in the Information that was filed as part of Alstom's December 2014 resolution with DOJ, they are presumably the individuals identified as "Official 8" (described as "a board member of BEC") and "Consultant I" (described as a U.S. citizen and "a close personal friend of Official 8" who was "retained for the purpose of paying bribes to a Bahamian government official to obtain or retain business in connection with [a] power project"). Along with the conviction of an Indonesian parliamentarian in connection with another Alstom-related bribery scheme, the Ramsey conviction demonstrates DOJ's continued commitment to address the "demand" side of foreign bribery by assisting other nations in prosecuting their corrupt officials.

6. **Head of Brazil's New Ministry of Transparency Resigns.** On May 12, 2016, Michel Temer became Brazil's interim president after the sitting president, Dilma Rousseff, was removed from office to stand trial for impeachment. That same day, Temer dissolved the Comptroller General of the Union (CGU), which had been the branch of the Brazilian government given primary authority over corporate violations of the Clean Companies Act. The CGU was also involved in negotiating resolutions with several companies implicated in Operation Car Wash, an investigation into alleged bribery involving Petrobras, Brazil's state-owned oil company. At the same time he dissolved the CGU, Temer replaced it with a new Ministry of Transparency, Monitoring and Control, headed by Fabiano Silveira. On May 30, 2016, less than three weeks after his appointment, Silveira resigned his position as Minister of Transparency after a secret recording was leaked in which he allegedly criticized the Car Wash prosecutors and advised Senate President Renan Calheiros on how to defend himself from the investigation. The recording was made, before Silveira took office, by a former Petrobras official, Sergio Machado, to obtain leniency from prosecutors. Operation Car Wash shows no signs of slowing down and, as the Silveira case demonstrates, continues to cause problems for leading Brazilian politicians and businesspeople.

7. **UK Serious Fraud Office Obtains Conviction of Former Manager of Banknote Manufacturer.** On May 11, 2016, the SFO announced that Peter Chapman, a former manager of polymer banknote manufacturer Securency PTY Ltd, had been convicted of four counts of making corrupt payments to a foreign official in violation of the Prevention of Corruption Act 1906 (POCA) after a five-week trial. The next day, the SFO announced that Chapman had been sentenced to concurrent terms of 30 months' imprisonment on each count. Chapman was acquitted on two additional counts. According to the SFO, Chapman allegedly paid approximately $205,000 in bribes to an agent of Nigerian Security Printing and Minting PLAC, which is majority-owned by the Nigerian government, in order to secure orders for the purchase of reams of polymer substrate from his company. The case was originally referred in May 2009 by Securency and the Reserve

Bank of Australia (RBA) to the Australian Federal Police, which then conducted a joint investigation with the SFO. At the time of the alleged conduct, the company was owned by RBA and a UK manufacturing firm. Chapman was extradited from Brazil to the UK in April 2015. The Chapman case is another example of increasing international cooperation in foreign bribery cases.

8. **More Personnel Changes in DOJ's FCPA Unit**. In mid-May 2016, DOJ's FCPA Unit named a new assistant chief, Albert "BJ" Stieglitz, who has been a prosecutor with the Fraud Section since 2008. Stieglitz received his bachelor's degree from Duke University in 2000 and his law degree from the University of Virginia in 2007. He joined the Fraud Section in 2008 through the prestigious Attorney General's Honors Program following a judicial clerkship in the Western District of Kentucky. Stieglitz had spent most of his Fraud Section career in the Securities and Financial Fraud (SFF) Unit investigating and prosecuting a wide variety of white-collar cases, which included two jury trials of individuals responsible for a $100 million, 800-victim fraud scheme involving the sale of investments in life settlements. Since 2012, Stieglitz has been an Assistant Chief in the SFF Unit. Although his focus has traditionally been on SFF cases, Stieglitz did lead an FCPA investigation into Sandals Resorts' conduct in the Turks and Caicos Islands (TCI) in conjunction with the TCI Special Investigation and Prosecution Team, which resulted in a $12 million settlement with TCI in 2012.

9. **AAG Caldwell Touts Increasing International Cooperation in Transnational Criminal Cases**. In a May 12, 2016 speech at a conference in San Francisco, Assistant Attorney General Leslie Caldwell spoke about DOJ building strong international coalitions of law enforcement partners. AAG Caldwell highlighted "a cross-border symposium with our U.K. counterparts" discussing matters such as discovery obligations and privilege issues and pointed to new collaboration on data privacy regulations, aimed at both overcoming obstacles and identifying companies that are making "invalid assertions about particular data privacy laws in an effort to shield themselves from [DOJ's] investigations." She also announced that the Criminal Division had recently placed prosecutors with Eurojust in The Hague and INTERPOL in France, and that the Criminal Division is "exploring the possibility of embedding prosecutors with other foreign law enforcement as well, including the U.K. Financial Conduct Authority and the U.K. Serious Fraud Office and they in turn are considering whether to embed a representative here in the U.S." On the issue of multiple regulators investigating the same conduct, AAG Caldwell acknowledged that there are "legitimate questions about fairness" and a risk of "regulatory 'piling on,'" though she said that DOJ was trying to address these concerns by considering "the totality of the penalties imposed on a defendant."

10. **"Fat Leonard" Scandal Continues to Grow**. Although not an FCPA case, DOJ's Fraud Section is working with the U.S. Attorney's Office for the Southern District of California on a wide-ranging international corruption investigation involving the U.S. Navy's Seventh Fleet. In late May 2016, the matter expanded once again with the indictment of three current and former U.S. Navy officers accused of secretly working on behalf of foreign defense contractor Leonard Glenn Francis, a Malaysian citizen residing in Singapore colorfully known as "Fat Leonard," to advance the interests of his company, Glenn Defense Marine Asia (GDMA), which provided port services to U.S. Navy ships in the Pacific Ocean. In return for their assistance, Francis allegedly plied the Navy officers with gifts, travel, and entertainment. For example, one highly influential captain allegedly allowed Francis to ghostwrite official Navy documents and

correspondence and submit them as his own after Francis plied the now-retired captain with prostitutes, luxury travel, a days-long party in a presidential suite and other gifts. In addition to the recent charges, 10 other individuals have been charged in connection with the scheme; of those, nine have pleaded guilty. The Fat Leonard scandal again illustrates that no country is immune from foreign bribery.

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