Client Alert

September 11, 2015

Top Ten International Anti-Corruption Developments for August 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. Belying its reputation as a month for summer vacations, August was yet another busy month, with a potentially significant adverse ruling in a DOJ FCPA enforcement action, several negotiated FCPA resolutions, a busy civil docket, and important anti-corruption developments in India, Thailand, the UK, and China. Here is our August 2015 Top Ten list:

1. **DOJ Suffers Significant Setback in Alstom Individual Prosecution.** An August 13, 2015 ruling[1] by Connecticut U.S. District Judge Janet Arterton in *United States v. Lawrence Hoskins* dealt a potentially major blow to one of the central pillars of DOJ's FCPA enforcement program. In *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, DOJ stated that foreign nationals and companies "may . . . be liable for conspiring to violate the FCPA . . . even if they are not, or could not be, independently charged with a substantive FCPA violation."[2] Consistent with this position, Hoskins, a UK citizen assigned to an Alstom subsidiary in France, was charged with conspiring with Alstom's subsidiary in Connecticut and others to violate the FCPA by paying bribes to Indonesian officials in exchange for a lucrative power station project contract.[3] Judge Arterton ruled, however, that a nonresident foreign national who is not an agent of a domestic concern and commits no acts while physically present in the territory of the United States is excluded from FCPA substantive liability and, therefore, also cannot be charged with conspiring to violate the FCPA or with aiding and abetting an FCPA violation. This holding is essentially an extension of *United States v. Castle*,[4] in which the Fifth Circuit held that, because Congress had intentionally omitted foreign officials from substantive FCPA liability, they could not be charged with conspiring to violate the FCPA.

   Although the *Hoskins* ruling would not have affected DOJ's case against Alstom SA, which was an issuer at the time that the alleged FCPA conspiracy began, it could have affected earlier enforcement actions, such as the action against JGC Corporation, whose criminal liability was premised on allegations that it conspired with and aided and abetted a U.S. company and U.S. persons who violated the FCPA. On August 27, 2015, DOJ asked Judge Arterton to reconsider her ruling, arguing that "Congress did not intend the anomalous result of creating liability for foreign nationals low level enough to be controlled by

[1] *United States v. Hoskins*, No. 12-cr-238 (D. Conn. Aug. 13, 2015), ECF No. 270.

[2] DOJ *Resource Guide* at 34.

[3] Third Superseding Indictment, *United States v. Hoskins*, No. 12-cr-238 (D. Conn. April 15, 2015), ECF No. 209.

[4] 925 F.2d 831 (5th Cir. 1991).

U.S. companies and U.S. persons, but not for high level foreign nationals who caused, or acted through, U.S. companies and U.S. persons to violate the FCPA."[5] If unsuccessful, DOJ may seek relief from the Second Circuit via an interlocutory appeal or may instead choose to continue to trial on a more limited theory of liability preserved by the ruling, namely, that Hoskins was an "agent" of Alstom's U.S. subsidiary. Even if DOJ chooses the latter option, it will be important to see how DOJ, foreign companies and foreign nationals react to Judge Arterton's ruling, which is not binding on any other court. Even if DOJ does not back down from the position set forth in the *Resource Guide*, the *Hoskins* ruling may nevertheless increase the bargaining position of foreign companies and nationals attempting to resolve criminal FCPA matters, and may make it less likely that foreign companies will self-report potential foreign bribery to U.S. officials. DOJ has successfully defended a number of its legal positions regarding the FCPA, which serves to highlight the importance of this adverse decision and the enforcement principles at stake.

2. **DOJ and SEC Fare Better in Matters Involving Other Individuals.**

- **Former Sales Executive Resolves Panamanian Bribery Allegations with DOJ and SEC.** On August 12, 2015, Vincente Garcia, former head of Latin American sales for SAP International, Inc., a wholly owned U.S. subsidiary of Germany's SAP A.G., pleaded guilty in federal court in San Francisco to criminal FCPA violations. Garcia also settled civil FCPA charges brought by SEC in a rare simultaneous FCPA enforcement action against an individual. According to the charges, Garcia participated in a scheme to bribe Panamanian officials to secure government technology contracts for the company from 2009 to 2013. As with many foreign bribery schemes, the bribes were allegedly paid through sham contracts and false invoices to disguise their true nature. Sentencing is scheduled for December 16, 2015. Garcia was the sixth individual to be publicly charged with criminal FCPA violations, and the second individual to be charged with civil FCPA violations, this year. To date, neither DOJ nor SEC has expressly indicated whether they will bring a related corporate enforcement action against SAP, but SEC's decision to charge Garcia with circumventing SAP's internal controls suggests that it may have viewed Garcia as a "rogue employee" along the lines of former Morgan Stanley executive Garth Peterson and so may not seek to hold the company liable for his actions. For more analysis of the Garcia resolution, please see our client alert.

- **Russian Official Pleads Guilty to FCPA-Related Money Laundering Offense.** On August 31, 2015, Vadim Mikerin, the president of Maryland-based TENAM Corporation and a director of the Pan American Department of Moscow-based JSC Techsnabexport (TENEX), pleaded guilty in federal court in Maryland to conspiring to transfer money from the United States to various countries to promote an FCPA violation. Mikerin allegedly conspired with Daren Condrey, Boris Rubizhevsky, and others to wire money intended for Mikerin to offshore shell accounts to secure improper advantages for U.S. companies that did business with TENEX, which is a subsidiary of Russia's State Atomic Energy Corporation (ROSATOM) that acts as the sole supplier and exporter of Russian uranium and uranium enrichment services to nuclear power companies. The co-conspirators allegedly used consulting agreements and code words to conceal the true nature of the payments. Because Mikerin

[5] Gov't Mot. Recons. at 1-2, *United States v. Hoskins*, No. 12-cr-238 (D. Conn. Aug. 27, 2015), ECF No. 273.

was a foreign official, he could not be charged with violating, or conspiring to violate, the FCPA itself.[6] However, as it did here, DOJ has occasionally brought FCPA-related money laundering charges against such officials where their conduct sufficiently implicates U.S. interests.[7] Sentencing is scheduled for December 8, 2015. According to the DOJ press release, Condrey and Rubizhevsky pleaded guilty to related charges in June 2015 and are scheduled to be sentenced in November and October, respectively. Interestingly, the press release accompanying Mikerin's guilty plea was the first public announcement of Condrey's plea to an FCPA conspiracy charge.

- **Eleventh Circuit Denies Rehearing in Haitian Official's Appeal.** As we reported in our February 2015 Top Ten, the Eleventh Circuit affirmed the conviction of former Haiti Teleco executive Jean Rene Duperval on FCPA-related money laundering charges on February 9, 2015. On August 20, 2015, the Eleventh Circuit denied Duperval's petition to rehear his appeal en banc.[8]

3. **SEC Enters Into First FCPA Resolution in Connection With Financial Industry Sweeps.** Over the last several years, SEC has reportedly been conducting an industry sweep into hiring practices in the financial services industry, as well as an industry sweep regarding the business relationships between financial institutions and sovereign wealth funds. On August 18, 2015, U.S.-based Bank of New York Mellon (BNY) became the first financial institution to publicly resolve one of these investigations when it agreed to pay nearly $15 million to resolve SEC allegations that it had violated the FCPA's anti-bribery and internal controls provisions by providing internships to relatives of officials of an unnamed Middle Eastern country's sovereign wealth fund to win and retain contracts to manage the fund's assets. SEC alleged that fund officials had requested the internships for their relatives, who were not subjected to the same rigorous hiring criteria otherwise required by BNY's internship program. BNY had previously disclosed the SEC investigation in a January 2015 securities filing. There was no simultaneous DOJ resolution, suggesting that DOJ had either declined the matter or had not officially joined in the investigation, a not-uncommon occurrence when SEC conducts an industry sweep. We have helped a number of companies ensure their hiring practices meet enforcement agencies' expectations with practical advice and pragmatic approaches. Please contact us if you would like our insights and advice.

4. **SEC Declines FCPA Enforcement Action Against NCR Corporation.** In a July 31, 2015 securities filing, NCR reported that it had received a letter from SEC's enforcement staff stating that the staff did not intend to recommend an enforcement action related to allegations made by an anonymous whistleblower in 2012 regarding potential FCPA violations in China, the Middle East, and Africa. NCR did not report a similar declination from DOJ, but its filing seems to suggest that DOJ may have lost interest in the investigation. NCR previously resolved a shareholder derivative suit based on the same allegations.

[6] See the discussion of *United States v. Castle* in No. 1, above.

[7] See the discussion of the *Duperval* and *Siriwan* cases, below.

[8] Order, *United States v. Duperval*, No. 12-13009 (11th Cir. Aug. 20, 2015) (denying petition for rehearing and petition for rehearing en banc).

5. **Civil Litigation Roundup.** As we have discussed in previous Top Tens, civil lawsuits often follow public disclosures of potential corruption-related investigations and resolutions. August was particularly busy in this area:

   - **Wynn.** On August 3, 2015, in the Ninth Circuit, casino owner Steve Wynn filed his opening brief in his appeal of the dismissal of his slander suit against fund manager James Chanos, who made public comments regarding alleged FCPA violations in connection with Wynn's development of a casino in Macau. In his brief, Wynn argued that Northern District of California Judge William Orrick III improperly dismissed the case under California's anti-SLAPP law.[9]

   - **PetroChina.** As we discussed in that month's Top Ten, Jiang Jiemen, the former chair of the China National Petroleum Corporation (CNPC), the parent company of PetroChina Company Ltd., pleaded guilty to corruption charges in April 2015. On August 3, 2015, Southern District of New York Judge Edgardo Ramos dismissed a securities fraud claim against PetroChina based on the allegedly corrupt activities — including bribery, political corruption, and undisclosed related party transactions — of Jiang and others. According to the plaintiffs, PetroChina falsely claimed in its annual reports and elsewhere that it had adequate internal controls, was complying with applicable laws and regulations, and was maintaining high standards of corporate governance and ethics. The plaintiffs further claimed that the public disclosure of the PRC investigation into alleged corruption at PetroChina caused share value to drop. Judge Ramos ruled that the "primary defect" of the second amended complaint was its reliance "on allegations of bribery and corruption that postdate the time period covered by the 2011 and 2012 annual reports. Most of the [second amended complaint's] allegations involving PetroChina officials took place in 2014, months after the public statements at issue were made and after the class period ended." Judge Ramos identified additional deficiencies in the plaintiffs' allegations regarding PetroChina's statements about its internal controls and compliance practices, as well as other shortcomings.[10] On August 10, 2015, the shareholders filed a notice of appeal to the Second Circuit.[11]

   - **Avon.** On August 19, 2015, Avon Products Inc. moved for preliminary approval of a $62 million settlement to resolve alleged FCPA-related securities violations.[12] Southern District of New York Judge Paul Gardephe granted preliminary approval of the settlement two days later.[13] On August 24, 2015, in a separate suit also brought in the Southern District of New York, Avon and its employees agreed to nonbinding mediation in hopes of settling claims of alleged ERISA violations caused by Avon's alleged cover-up of the FCPA violations.[14]

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[9] *See* Appellants' Opening Br., *Wynn v. Chanos*, No. 15-15639 (9th Cir. Aug. 3, 2015), ECF No. 15-1.

[10] *See* Opinion and Order, *In re PetroChina Co. Ltd. Sec. Litig.*, No. 13-cv-6180 (S.D.N.Y. Aug. 3, 2015), ECF No. 53.

[11] *See* Not. of Appeal, *In re PetroChina Co. Ltd. Sec. Litig.*, No. 13-cv-6180 (S.D.N.Y. Aug. 10, 2015), ECF No. 55.

[12] *See* Mem. of Law in Supp. of Pls.' Unopposed Mot. for (i) Prelim. Approval of Settlement, (ii) Certification of a Settlement Class, and (iii) Approval of Not., *City of Brockton Ret. Sys. v. Avon Prods., Inc.*, No. 11-cv-4665 (S.D.N.Y. Aug. 19, 2015), ECF No. 76.

[13] *See* Order Prelim. Approving Settlement, Certifying Settlement Class, and Providing for Not. of Settlement, *City of Brockton Ret. Sys. v. Avon Prods., Inc.*, No. 11-cv-4665 (S.D.N.Y. Aug. 21, 2015), ECF No. 77.

[14] *See* Stip. and Order, *In re 2014 Avon Prods., Inc. ERISA Litig.*, No. 14-cv-10083 (S.D.N.Y. Aug. 24, 2015), ECF No. 47.

- **HP.** On July 13, 2015, Northern District of California Judge Beth Labson Freeman partially granted Hewlett-Packard Company's (HP) motion to dismiss RICO claims brought by Mexican state-owned oil company Petróleos Mexicanos (Pemex), ruling that Pemex had failed to sufficiently plead, among other things, a domestic pattern of racketeering activity or that the complaint was not barred by the statute of limitations.[15] On August 21, 2015, HP moved to dismiss Pemex's amended complaint, arguing that the amendments did not fix the problems identified in the court's prior ruling. HP also argued that Pemex's disclosure in a securities filing that it had investigated the conduct described in HP's April 2014 FCPA resolution with SEC and found "no improper payment" by HP to a Pemex official was a binding admission that doomed its claims.[16]

- **Petrobras.** On August 21, 2015, in the Southern District of New York, Brazilian state-owned oil company Petrobras moved to dismiss claims brought in several individual actions alleging that the company misled investors by failing to disclose that it was "the victim of a brazen antitrust conspiracy perpetrated by a cartel of construction companies and a handful of rogue Petrobas employees." Petrobras raised several arguments in support of its motion, including that the plaintiffs in 11 of the individual cases failed to allege that they were harmed by the company's behavior.[17]

- **Hyperdynamics.** On August 25, 2015, Southern District of Texas Judge Melinda Harmon dismissed a class action suit against Hyperdynamics Corporation, finding that "Plaintiffs' FCPA-related [securities] fraud claims are based on speculations of uncharged, unadjudicated FCPA violations [involving alleged bribery in Guinea] that are not plausibly material."[18]

- **Wal-Mart.** In late March 2015, Western District of Arkansas Judge Susan O. Hickey dismissed a shareholder derivative suit against Wal-Mart Stores Inc. (WMSI) and several of its directors for failing to adequately allege that a majority of WMSI's board knew about alleged bribery by the company's Mexican subsidiary and for failing to establish demand futility. On August 28, 2015, in a brief filed in the Eighth Circuit, the shareholders argued that the Delaware Supreme Court had already recognized the sufficiency of similar allegations in a separate suit based on the same alleged bribery scheme.[19]

6. **More Constitutional Challenges to SEC's Use of Administrative Proceedings.** As we have previously discussed, the SEC's increasing use of administrative proceedings since the passage of the Dodd-Frank Act has repeatedly been challenged by individuals charged in these proceedings. In August 2015, several such challenges met with mixed results. On August 12, 2015, Southern District of New York Judge Richard Berman preliminarily enjoined an SEC administrative proceeding, finding that SEC's

[15] *See* Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, *Petróleos Mexicanos v. Hewlett-Packard Co.*, No. 14-cv-5292 (N.D. Cal. July 13, 2015), ECF No. 60.

[16] *See* Mot. to Dismiss, *Petróleos Mexicanos v. Hewlett-Packard Co.*, No. 14-cv-5292 (N.D. Cal. Aug. 21, 2015), ECF No. 72.

[17] *See* Mem. of Law in Supp. of Mot. to Dismiss Individual Action Compls., *In re Petrobas Sec. Litig.*, No. 14-cv-9662 (S.D.N.Y. Aug. 21, 2015), ECF No.199.

[18] *See* Opinion and Order at 23, *Parker v. Hyperdynamics Corp.*, No. 12-cv-999 (S.D. Tex. Aug. 25, 2015), ECF No. 84.

[19] *See* Reply Br. of Appellants, *Cottrell v. Duke*, No. 15-1869 (8th Cir. Aug. 28, 2015); *see also Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW*, 95 A.3d 1264 (Del. 2014).

use of non-Commissioner-appointed judges was "likely unconstitutional."[20] SEC quickly filed a notice of appeal to the Second Circuit.[21] Less than two weeks later in a different case, however, the Seventh Circuit dismissed a similar constitutional challenge, finding that it did not have jurisdiction to hear the appeal until the SEC's internal appeals process was complete.[22] Earlier in the month, in the Eleventh Circuit, the SEC argued that Northern District of Georgia Judge Leigh Martin May had improperly enjoined administrative proceedings based on her finding that SEC judges are "not appropriately appointed pursuant to Article II, and their appointment is likely unconstitutional in violation of the Appointments Clause."[23] These challenges to SEC administrative proceedings remain an issue to watch, especially given the heavy use of these proceedings to resolve FCPA cases. Indeed, every SEC FCPA resolution so far this year — including the BNY and Garcia resolutions discussed above — has been brought as an administrative proceeding.

7. **International Ramifications of U.S. FCPA Enforcement Actions.**

- **Thai Official Charged for Allegedly Accepting Bribes from Convicted U.S. Film Executives.** On September 11, 2009, Los Angeles–area film executives Gerald and Patricia Green were found guilty after trial in the Central District of California of conspiring to violate the FCPA and to commit money laundering in connection with a scheme to bribe Juthamas Siriwan, the former governor of the Tourism Authority of Thailand, to obtain contracts related to Thailand's yearly film festival. The Greens were ultimately sentenced to six months' imprisonment, and the restitution order against them was affirmed on appeal in 2013.[24] Siriwan, who as a foreign official could not be charged with FCPA violations, was nevertheless indicted in January 2009 for conspiring to launder the bribes she received from the Greens. Thus far, Siriwan has successfully resisted extradition to the U.S. to face those charges. On August 7, 2015, Thai authorities reportedly announced that an investigative committee had recommended that Siriwan be indicted in Thailand for her role in the alleged bribery scheme. Thailand's decision to bring charges makes it unlikely that Siriwan will ever face the U.S. charges. Coincidentally, Gerald Green died at the age of 83 just a few weeks before the Thai announcement.

- **India Makes Arrests in Reaction to Allegations Made in the Louis Berger International (LBI) Deferred Prosecution Agreement (DPA).** As discussed in our July 2015 Top Ten, on July 17, 2015, LBI entered into a DPA with DOJ, admitting to FCPA violations involving government construction management contracts in several countries, including India. The fallout in India from the LBI allegations came quickly. Between July 27, 2015, and August 5, 2015, Indian authorities reportedly arrested four individuals — Anand Wachasundarr, Satyakam Mohanty, Churchill Alemao, and Raychand Soni — for their alleged involvement in the LBI bribery scheme. Although not arrested, the

[20] *See* Decision and Order Granting Preliminary Injunction, *Duka v. SEC*, No. 15-cv-357 (S.D.N.Y. Aug. 12, 2015), ECF No. 60.

[21] *See* Not. of Appeal, *Duka v. SEC*, No. 15-cv-357 (S.D.N.Y. Aug. 26, 2015), ECF No. 65.

[22] *See Bebo v. SEC*, No. 15-1511 (7th Cir. Aug. 24, 2015), ECF No. 28.

[23] *See* Br. for Appellant, *Hill v. SEC*, No. 15-12831 (11th Cir. Aug. 4, 2015); *see also* Order at 42, *Hill v. SEC*, No. 15-cv-1801 (N.D. Ga. June 8, 2015), ECF No. 28.

[24] *See United States v. Green,* 722 F.3d 1146 (9th Cir.), *cert. denied*, 134 S. Ct. 658 (2013).

former chief minister of Goa, Digambar Kamat, made an application for, and was reportedly granted, preliminary bail seeking protection from arrest in connection with allegations that he accepted bribes from LBI.

8. **The UK Serious Fraud Office (SFO) Secures First LIBOR Conviction.** On August 3, 2015, the SFO secured its first conviction in relation to the manipulation of the London interbank offered rate (LIBOR). Alleged "ringleader" Tom Hayes, former City trader for UBS and Citigroup, was sentenced to 14 years in jail after being convicted by a jury of eight counts of conspiracy to defraud. The sentence is among the harshest ever handed down in the UK for a financial crime. David Green, Director of the SFO, reportedly stated that the penalty is "part punishment, part deterrent" and pledged to file further criminal charges against other former bankers in connection with LIBOR-rigging, in addition to those against 11 individuals already awaiting trial in London. Although not bribery-related, the Hayes conviction is nevertheless significant because the SFO also enforces the UK Bribery Act and often works closely with DOJ and SEC in foreign bribery investigations. Moreover, while the SFO has suffered some setbacks over the last few years, it has also quietly won a number of white-collar criminal trials, including foreign bribery prosecutions, which, along with the Hayes case, should help quiet critics of its effectiveness.

9. **UK Forms New International Corruption Unit.** On August 9, 2015, the UK announced that it set up a new specialist unit to investigate "cases of international corruption affecting developing countries." The International Corruption Unit (ICU) will focus on corrupt practices by British individuals and companies taking place in developing countries, where there may not be sufficient resources to dedicate to an investigation. The ICU consolidates various specialist units from the Metropolitan Police Service, City of London Police, and the National Crime Agency (NCA), the latter of which is responsible for the ICU's management and operation. The new unit is funded by the Department for International Development, and has pledged to work "closely with other UK enforcement agencies and overseas partners."

10. **China Amends Criminal Law.** On August 29, 2015, the Standing Committee of the National People's Congress of the People's Republic of China (PRC) passed the Ninth Amendment to the PRC Criminal Law, which will take effect on November 1, 2015. The Ninth Amendment introduces new offenses to close loopholes in existing anti-corruption legislation and increases penalties for various graft-related offenses, including the possibility of strict life imprisonment without parole and the imposition of monetary fines on individuals, in addition to imprisonment. Among other things, the Ninth Amendment creates a new offense of offering bribes to close relatives of, or any person close to, state functionaries; makes it a criminal offense to bribe former state functionaries or their close relatives or any person close to them for the purpose of securing illegitimate benefits; provides for the imposition of monetary fines on individuals convicted of corruption-related offenses, in addition to imprisonment; and sets a higher standard for grants of leniency to bribe-givers who self-report. These amendments are consistent with the current, and sustained, anti-corruption campaign in the PRC, which includes the PetroChina investigation discussed above.

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