Client Alert

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Top Ten International Anti-Corruption Developments for April 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: What should we make of the Department of Justice's new FCPA Pilot Program? Who pleaded guilty to FCPA charges, and what FCPA corporate case was resolved? What did the D.C. Circuit say about how much oversight judges have when it comes to deferred prosecution agreements? What does the Canadian Supreme Court think of the World Bank's immunity argument? The answers to these questions and more are here in our April 2016 Top Ten list:

1. **DOJ Announces Pilot Program to Encourage FCPA Self-Reporting.** On April 5, 2016, Assistant Attorney General Leslie Caldwell announced a new "FCPA pilot program" intended to motivate companies to voluntarily self-disclose FCPA-related misconduct. In making the announcement, AAG Caldwell disclosed a newly released policy document authored by Fraud Section Chief Andrew Weissmann titled "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance." According to the Guidance, during a one-year pilot period effective April 5, 2016, companies that voluntarily disclose improper conduct to the Fraud Section's FCPA Unit, fully cooperate in accordance with the Principles of Federal Prosecution of Business Organizations and the Yates Memo, appropriately remediate, and otherwise pass muster under the "stringent requirements" of the pilot program *may* receive up to a 50% reduction off the bottom of the U.S. Sentencing Guidelines fine range and *generally* will not be required to retain an independent compliance monitor. Companies that do not voluntarily disclose improper conduct, but that do "fully cooperate[] and timely and appropriately remediate[]," will be accorded "at most a 25% reduction off the bottom of the Sentencing Guidelines fine range." As we discussed in much more detail in our client alert, DOJ deserves credit for recognizing that the lack of clarity and certainty in the self-disclosure process can disincentivize even the most ethical companies from self-reporting potential misconduct. However, while bright-line rules provide certainty, they are not always consistent with DOJ's understandable need to resolve each case based on its own facts and circumstances. The tension between these two competing policies—certainty and flexibility—resulted in a policy that looks very much like existing practice and will likely only have a marginal impact on any given company's overall approach to voluntary disclosure. On the other hand, the Guidance's new "disgorgement" policy may reduce any potential benefit from the policy and may further discourage self-disclosure. Interestingly, it appears that a bolder version of the Pilot Program was initially considered but ultimately rejected as being overly favorable to companies.

2. **Executive Pleads Guilty to FCPA Offenses for Bribing Multilateral Development Bank Official.** As we reported last month, Dimitrij Harder, former owner and President of the Chestnut Group, lost his bid to dismiss FCPA charges brought in the Eastern District of Pennsylvania based on allegations that he made payments intended as bribes to an official of the European Bank for Reconstruction and Development (EBRD), a "public international organization" within the meaning of the FCPA. In the wake of losing this and several other motions (including an effort to revisit an issue involving the crime-fraud exception that he had previously lost at the district court level and on appeal to the Third Circuit), Harder pleaded guilty to two counts of violating the FCPA on April 20, 2016. Harder was the first individual publicly charged with criminal FCPA offenses in 2015. His sentencing is scheduled for July 21, 2016.

3. **Casino Operator Resolves FCPA Accounting Charges Involving China and Macao.** On April 7, 2016, the Securities and Exchange Commission (SEC) announced that Las Vegas Sands Corp. (LVS) had agreed to pay a $9 million penalty, and to retain an independent compliance consultant for two years, to settle FCPA accounting charges involving China and Macao. According to SEC, the company allegedly paid an Asia-based consultant who claimed to be a former Chinese government official over $62 million to act as a "beard" to obscure the company's involvement in the purchases of a building from a Chinese state-owned entity and of a Chinese Basketball Association team. SEC alleged that the company failed to devise and maintain a reasonable system of internal accounting controls in China and Macao to prevent the payments to the consultant, as well as issues relating to gifts, travel, and entertainment. According to its SEC filings, the company, which neither admitted nor denied the allegations, first received a subpoena from SEC in February 2011. Although the company also reported DOJ interest in the investigation, it appears from the lack of a parallel resolution that DOJ has declined prosecution.

4. **SEC Settles Venezuelan Kickback Case.** On April 8, 2016, SEC announced that Southern District of New York Judge Jesse M. Furman had entered final judgments against seven defendants involved in a scheme to pay kickbacks to a Venezuelan development bank official in exchange for her authorizing the execution of foreign sovereign debt trades through a New York-based broker-dealer. Because the broker-dealer, Direct Access Partners (DAP), was not an issuer, SEC did not have jurisdiction to bring FCPA charges against the defendants. Instead, the judgments permanently enjoin all seven defendants from committing securities fraud offenses in violation of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. Five of the defendants—Benito Chinea, Tomas Alberto Clarke Bethancourt, Joseph DeMeneses, Jose Alejandro Hurtado, and Ernesto Lujan—were ordered to pay approximately $42.5 million in disgorgement and prejudgment interest. The same five defendants, all of whom were former officers or employees of DAP, also pleaded guilty to FCPA and related charges in the Southern District of New York and were sentenced to terms of imprisonment of two to four years. The disgorgement and prejudgment interest were deemed satisfied by the forfeiture orders that were also entered in connection with the criminal charges. SEC alleged that the two remaining defendants, Iuri Rodolfo Bethancourt and Haydee Leticia Pabon, helped funnel the kickback payments to the Venezuelan official, but they were not charged criminally. The official, Maria Gonzalez, pleaded guilty to criminal charges and was sentenced to 17 months' imprisonment.

5. **D.C. Circuit Holds That District Courts Play a Very Limited Role in Reviewing and Approving DPAs.** In February 2015, District of Columbia District Judge Richard Leon rejected a deferred prosecution agreement (DPA) between DOJ and Fokker Services BV, 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." DOJ and Fokker both appealed, and the D.C. Circuit heard oral argument in September 2015. Despite appearing somewhat skeptical of DOJ's position at oral argument, on April 5, 2016, the D.C. Circuit ultimately agreed with the government, vacating Judge Leon's order and holding 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."[1]

   Although careful to note that it had not reviewed Judge Leon's concerns on the merits, the D.C. Circuit held that the government's charging decisions "are for the Executive—not the courts—to make." Thus, "a district court lacks authority to disapprove a DPA under [the Speedy Trial Act] on the ground that the prosecution has been too lenient in its exercise of charging discretion." The district court's sole inquiry when considering whether to exclude time under the Speedy Trial Act is "to assure that the DPA in fact is geared to enabling the defendant to demonstrate compliance with the law, and is not instead a pretext intended merely to evade the Speedy Trial Act's time constraints." In the *Fokker* case, the district court "significantly overstepped its authority" in denying the exclusion "based on a belief that the prosecution had been unduly lenient in its charging decisions and in the conditions agreed to in the DPA[.]" Because there was no indication that Fokker and DOJ had entered into the DPA "to evade speedy trial limits rather than to enable Fokker to demonstrate its good conduct and compliance with the law," the order denying the exclusion of time was vacated.

   Notably, and in contrast to a ruling by former Eastern District of New York Judge John Gleeson, the D.C. Circuit also held that "the court plays no role in monitoring the defendant's compliance with the DPA's conditions." Instead, "the prosecution—and the prosecution alone—monitors a defendant's compliance with the agreement's conditions and determines whether the defendant's conduct warrants dismissal of the pending charges." The defendant in the EDNY case wasted little time in citing the *Fokker* opinion as a further reason why the Second Circuit should grant an interlocutory appeal of Judge Gleeson's order requiring the public disclosure of a monitor report, which he had ordered filed with the court so that he could monitor the defendant's compliance with the DPA. Although *Fokker* did not involve FCPA charges, the D.C. Circuit's opinion is significant because it is the only appellate court decision to squarely address the standard of review for one of the key tools used to resolve corporate FCPA cases.

6. **Release of "Panama Papers" Sparks Criminal Investigations Worldwide.** On April 3, 2016, a group of media outlets published articles based on 11.5 million leaked confidential documents from a global law firm in Panama. The so-called Panama Papers identify prominent politicians, business leaders, and others who used the services of the firm, Mossack Fonseca, to create over 200,000 offshore entities. The data, which includes emails, financial spreadsheets, and corporate records that span a nearly 40-year

[1] *United States v. Fokker Services B.V.*, No. 15-3016 (Apr. 5, 2016).

period, was reportedly provided by an unknown source to German newspaper *Süddeutsche Zeitung* over one year ago. *Süddeutsche Zeitung* coordinated the investigation together with the International Consortium of Investigative Journalists (ICIJ) and shared the data with over 100 other media partners. According to ICIJ, the Panama Papers show offshore holdings by 140 public officials around the world, including 12 current and former world leaders—among them the (now) former prime minister of Iceland, the prime minister of Pakistan, the presidents of Argentina and Ukraine, and the king of Saudi Arabia. Although offshore entities and accounts can be used for legitimate purposes, numerous countries, including France, Germany, Austria, and South Korea, have announced investigations into potential wrongdoing, including money laundering and tax evasion, exposed by the Panama Papers. In the United States, the U.S. Attorney's Office for the Southern District of New York has opened an investigation into potential tax evasion schemes revealed by the Panama Papers and, although not confirmed publicly, DOJ's FCPA Unit will likely scour the Panama Papers for evidence of foreign bribery.

7. **Scotland Obtains Its Second Bribery Act Settlement.** On April 4, 2016, Scotland's Crown Office & Procurator Fiscal Service (COPFS) announced that Glasgow-based logistics company Braid Group (Holdings) Limited had agreed to a civil recovery settlement of £2.2 million for allegedly failing to prevent bribery, in violation of Sections 1 and 7 of the UK Bribery Act 2010 (UKBA). According to COPFS, the company self-reported that employees of one of its subsidiaries, Braid Logistics (UK) Limited, had provided cash, gifts, travel, and entertainment to the employee of one of its customers and had entered into a profit sharing agreement with the director of another in order to secure freight forwarding contracts in 2012. The £2.2 million represented the gross profit from these two contracts. COPFS indicated that it was continuing to criminally investigate individuals involved in the misconduct. In September 2015, Scotland secured the first UKBA Section 7 corporate resolution. The UK's Serious Fraud Office (SFO), which covers England, Wales, and Northern Ireland, but not Scotland, followed with its first two UKBA Section 7 corporate resolutions in November and December 2015.

8. **Canadian Supreme Court Preserves Immunities and Privileges of World Bank Investigation.** On April 29, 2016, the Canadian Supreme Court overturned a December 2014 trial court ruling that threatened to undermine the World Bank Group's willingness to cooperate with national law enforcement authorities in anti-corruption investigations. In 2010, the World Bank Group's Integrity Vice Presidency (INT) received information that SNC-Lavalin Inc. employees might have bribed Bangladeshi officials in connection with a multibillion-dollar contract to build the Padma Multipurpose Bridge. INT investigated the allegations, ultimately leading to the 2013 debarment of the company and its affiliates from World Bank Group projects for 10 years. INT also shared investigative reports and other documents with Canadian authorities who, in 2012 and 2013, brought charges against three former employees of the company and a representative of an allegedly corrupt Bangladeshi official for violating Canada's Corruption of Foreign Public Officials Act (CFPOA).

   In connection with a motion challenging a wiretap obtained by the Royal Canadian Mounted Police (RCMP), the defendants applied for an order compelling INT investigators to produce documents related to their investigation. The trial court granted the defendants' application, holding that the World Bank Group had implicitly waived the immunities and privileges that would otherwise protect such documents from compulsion when INT provided information to the RCMP. The World Bank Group, supported by numerous multilateral development banks (MDBs), appealed the decision, and the Canadian Supreme Court granted the appellate application in July 2015. During the pendency of the appeal, the World Bank began limiting the information it was willing to share with national authorities.

In its April 2016 decision, the Supreme Court held that the World Bank could not waive immunity over its "archives," which included documents requested by defendants, and that any waiver of its personnel's immunity must be express, not implied or constructive. In so holding, the Supreme Court noted that "exposing the World Bank Group to forms of implied or constructive waiver could have a chilling effect on collaboration with domestic law enforcement. Such an effect would be harmful, since multilateral banks including the World Bank Group are particularly well placed to investigate corruption and to serve at the frontlines of international anti-corruption efforts."[2] Indeed, the Supreme Court's opening paragraph stressed the importance of these efforts:

> Corruption is a significant obstacle to international development. It undermines confidence in public institutions, diverts funds from those who are in great need of financial support, and violates business integrity. Corruption often transcends borders. In order to tackle this global problem, worldwide cooperation is needed. When international financial organizations, such as the appellant World Bank Group, share information gathered from informants across the world with the law enforcement agencies of member states, they help achieve what neither could do on their own.

9. **World Bank Releases Report on Suspension and Debarment.** On April 15, 2016, the World Bank's Office of Suspension and Debarment (OSD), headed by Pascale Hélène Dubois, released the second edition of its report on its "Functions, Data and Lessons Learned." According to the report, "OSD was designed as a check and balance in the sanctions process, impartially reviewing the sufficiency of the evidence in the sanctions cases selected, investigated and submitted by the Integrity Vice Presidency [INT]." The report reflects that in FY2015, OSD temporarily suspended 54 firms and individuals and debarred or otherwise sanctioned 73 firms and individuals. From FY2007/2008 through FY2015, 359 firms and individuals were temporarily suspended, and 368 were debarred or otherwise sanctioned. The vast majority of incidents involved claims of fraud (83%), followed by corruption (18%) and collusion (8%). The report highlights one of the potentially significant collateral consequences of investigations by national law enforcement authorities and MDBs, that is, potential suspension and debarment of companies in the wake of a resolution. Given the cross-debarment agreement, debarment by one MDB means debarment by all MDBs. The impact of such cross-debarment could be substantial depending on the number of projects a company may be working on that are financed by MDBs.

10. **Technology Company Faces Shareholder Suit, Chinese Investigation in Wake of Resolutions with DOJ and SEC.** In February 2016, Massachusetts-based issuer PTC Inc. and two of its Chinese subsidiaries entered into agreements with DOJ and SEC to resolve allegations that PTC China provided

[2] The Supreme Court, siding with the Crown, also overturned the trial court's finding that the documents requested by the defendants were relevant to their wiretap challenge.

travel to employees of Chinese state-owned entities in order to obtain and retain contracts with their employers. In an April 20, 2016 securities filing, the company disclosed that the China Administration for Industry and Commerce (AIC) had initiated an investigation of the same conduct and that a putative shareholder class action had been filed in the District of Massachusetts alleging, among other things, that the company and certain of its executive officers issued false and misleading statements, or failed to disclose, that the company had not disclosed to SEC and DOJ the full results of its investigation into the China conduct, that the company was not fully cooperating with SEC and DOJ, and that the company's books and records and internal accounting controls were deficient. As we have discussed in previous Top Tens and in our client alert regarding the FCPA Pilot Program, resolving an FCPA matter with DOJ or SEC is often just the beginning, not the end, of the ordeal. Shareholder suits, debarment and similar proceedings, and foreign follow-on investigations are becoming increasingly common, and PTC is just one more example of this phenomenon.

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