Client Alert

June 9, 2015

Top Ten International Anti-Corruption Developments for May 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. This month some major anti-corruption cases, both Foreign Corrupt Practices Act (FCPA) and non-FCPA related, have dominated the headlines and are reflected in our coverage. In addition, a number of government officials on both sides of the Atlantic have been on the speaking circuit, and we have captured some of the highlights from their speeches. Here is our May 2015 Top Ten list:

1. **FIFA Officials and Sports Marketing Executives Indicted for Racketeering, Wire Fraud, and Corruption.** On May 27, 2015, the Department of Justice (DOJ) issued a press release and held a news conference to announce the unsealing of a 47-count criminal indictment ("Indictment") against fourteen defendants, including nine former and current officials of the Fédération Internationale de Football Association (FIFA). The charged offenses include racketeering, wire fraud, and money laundering conspiracies related to alleged corruption in the commercialization of media and marketing rights associated with various FIFA soccer matches and tournaments. DOJ announced at the same time the unsealing of related guilty pleas of six other defendants (four individuals and two corporations). The Indictment alleges a twenty-four year scheme, involving over $150 million in bribe payments and kickbacks paid by sports marketing executives in exchange for the "official support" of the indicted FIFA officials. The charges primarily focus on alleged corruption involving one of FIFA's six constituent continental confederations, the Confederation of North, Central American and Caribbean Association Football (CONCACAF). Other alleged schemes relate to the purported payment and receipt of bribes and kickbacks in connection with the selection of the host country for the 2010 World Cup and the alleged procurement of votes in favor of a high-ranking official of FIFA and the Asian Football Confederation in the 2011 FIFA presidential election. While FIFA—an international association that regulates and promotes soccer worldwide—is not a "public international organization" for purposes of the FCPA, and the defendants in this case were not charged with FCPA violations, the Indictment demonstrates DOJ's willingness to prosecute corruption-related offenses using other non-FCPA laws, including some with extraterritorial reach. The Indictment also demonstrates DOJ's coordinated efforts with international enforcement authorities: shortly before DOJ announced the unsealing of the Indictment, Swiss authorities, at the request of U.S. authorities, arrested seven of the indicted defendants, who now face extradition to the United States. Following those arrests, the Swiss Office of the Attorney General announced a separate criminal probe into the selection of Russia and Qatar as the hosts of the 2018 and 2022 World Cups, respectively. The following day, the Brazilian police also opened a formal inquiry into alleged bribes to obtain contracts from the Brazilian Soccer Federation, as we covered previously. U.S.

authorities have made clear that their investigation is ongoing as well. The progress of the criminal cases and pending probes is sure to garner high-profile press coverage during the coming weeks and months. The first legal battle will focus on extradition, which can often be a complicated and lengthy process. Notably, FIFA's President, Sepp Blatter, was not among those charged. Shortly after the arrests, on May 29, 2015, Mr. Blatter was re-elected as President for his fifth four-year term—only to announce his resignation three days later amid reports that he was a focus of an ongoing DOJ investigation.

2. **SEC Reaches $25 Million Settlement with BHP Billiton Relating to Alleged FCPA Accounting Violations Arising from the Provision of Hospitality to Foreign Officials.** On May 20, 2015, the Securities and Exchange Commission (SEC) announced that it had reached an agreement with BHP Billiton Ltd. and BHP Billiton Plc (collectively, "BHP Billiton"), an Anglo-Australian-headquartered multinational mining, metals, and petroleum company, to settle charges that the company had allegedly violated the FCPA's accounting provisions[1] by sponsoring the attendance of foreign government officials at the 2008 Summer Olympic Games in Beijing. BHP Billiton neither admitted nor denied the allegations. According to SEC's administrative Cease and Desist Order ("Order"), BHP Billiton invited 176 government officials and employees of state-owned enterprises and 102 spouses to the Olympics, most "from countries in Africa and Asia where there was a known risk of corruption." Ultimately, sixty officials and twenty-four spouses attended. Documents tied the hospitality directly to BHP Billiton's business objectives, including an "Olympic Leverage Plan" for a country in which the company sought access to mining regions and ports. Concluding an investigation that began in 2009, SEC alleged that BHP Billiton had failed to devise and maintain sufficient internal controls over its global hospitality program. Specifically, SEC alleged violations of Section 13(b)(2)(A) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78m(b)(2)(A)],[2] for failing to keep accurate books and records, including internal documentation for the program that did not reflect pending negotiations or business dealings between BHP Billiton and government officials invited to the Olympics, and Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)], for failing to maintain sufficient controls over its expenditures. Notably, the Order does not allege that BHP Billiton provided the travel and entertainment as part of a *quid pro quo* arrangement or allege a violation of the FCPA's anti-bribery provisions. The Order requires BHP Billiton to cease and desist from future violations, pay a $25 million civil penalty, and self-report on the operation of its compliance program for a one-year period. The $25 million penalty is reportedly the highest SEC civil penalty ever imposed in an FCPA enforcement action. In a press release issued on May 20, 2015, BHP Billiton announced that DOJ had completed its own investigation without taking any action.

3. **Ex-VP of Terra Wants New Trial Over Bribery Scheme.** In a motion dated May 11, 2015,[3] Carlos Rodriguez, a former Vice President of Terra Telecommunications Corp. ("Terra"), asked a federal court in

[1] As an "issuer" whose American Depositary Shares are registered with SEC and listed on the New York Stock Exchange, BHP Billiton is subject to the FCPA, including its books and records and internal controls provisions.

[2] SEC traditionally cites the Exchange Act to reference provisions of the FCPA, whereas DOJ cites the United States Code provisions of the FCPA.

[3] Motion for New Trial, *United States v. Rodriguez*, No. 1:09-cr-21010-JEM (S.D. Fla. May 18, 2015), ECF No. 897.

Florida for a new trial following his 2011 conviction for FCPA violations related to bribes paid in connection with telecommunications contracts in Haiti. As a basis for the motion, Mr. Rodriguez submitted an affidavit from Terra's former general counsel, which Mr. Rodriguez argues refutes the testimony of a key government witness who said he discussed the bribery scheme during a meeting attended by Mr. Rodriguez and the former general counsel in October 2001. As we reported previously, Mr. Rodriguez was convicted in 2011. His appeal then failed in 2014, and a Petition for Writ of Certiorari was denied by the Supreme Court (as mentioned in No. 4 of November 2014's Top Ten list) in the same year. The Court of Appeal's decision set forth a non-exhaustive, multi-factor test for when an entity will be deemed an "instrumentality" for purposes of the FCPA, which it then applied in a related case (as discussed in No. 2 of February 2015's Top Ten list). Joel Esquenazi, Mr. Rodriguez's co-defendant and the former president of Terra, was sentenced to fifteen years in prison, which was and still is the longest prison term handed down under the FCPA, while Mr. Rodriguez was sentenced to seven years, also one of the longest FCPA-related prison terms. The government's response to Mr. Rodriguez's motion is due August 17, 2015. As this Top Ten list went to print, Mr. Rodriguez filed a motion for post-conviction relief, arguing that both his trial and appellate counsel were ineffective.[4]

4. **Shell's Report to DOJ on Potential FCPA Violation Held as "Absolutely Privileged."** On May 15, 2015, the Texas Supreme Court held that a company's internal investigation report concerning possible FCPA violations, which was provided to DOJ on a confidential basis, was an "absolutely privileged" communication for purposes of Texas state law on defamation. As such, it could not serve as the basis for a defamation suit brought by a former employee named in the report. In assessing whether the FCPA investigation report was absolutely or conditionally privileged, the court considered the fact that, at all relevant times, the companies in question, Shell Oil Company and Shell International, E&P, Inc. (collectively, "Shell"), were targets of a DOJ investigation. The court also observed that, in the last decade, FCPA enforcement actions have increased dramatically, and because of the significant penalties at stake and the pressure to self-report and cooperate, Shell had been, "practically speaking, compelled" to initiate an investigation and report its findings to DOJ. The evidence was thus "conclusive" that, in providing the report, Shell had been acting "with serious contemplation of the possibility that it might be prosecuted." The court concluded that Shell's allegedly defamatory statements were made "preliminary to a proposed judicial proceeding," and, as such, were "absolutely privileged." The Shell decision should provide some comfort to companies that, if they respond to DOJ and SEC calls to identify wrongdoers, they may have some protection from follow-on defamation litigation from their former employees.

5. **Austrian Court Refuses to Extradite a Pro-Russian Ukrainian to the United States to Face FCPA and Related Charges, Finding the Charges Were Politically Motivated.** On April 30, 2015, an Austrian court concluded that U.S. charges against Dmitri V. Firtash, a Ukrainian billionaire, were politically motivated and refused to order extradition to the U.S. Mr. Firtash reportedly has ties to the ousted Ukrainian president, Viktor Yanukovych. In April 2014, DOJ issued a press release announcing the unsealing of a criminal indictment charging Mr. Firtash and five other defendants, including an Indian

[4] Motion to Vacate, Set Aside, or Correct Sentence, *United States v. Rodriguez*, No. 1:09-cr-21010-JEM (S.D. Fla. June 2, 2015), ECF No. 900.

government official, with one count each of racketeering conspiracy and money laundering conspiracy, and two counts of interstate travel in aid of racketeering, and charging all but the official with one count of conspiracy to violate the FCPA. DOJ alleged that the defendants had participated in an international conspiracy involving payment of at least $18.5 million in bribes to state and central government officials in India to allow the mining of titanium minerals. Mr. Firtash was arrested pursuant to a U.S. arrest warrant on March 12, 2014, in Vienna, Austria, and then was released from custody after posting €125 million (approximately $174 million) bail. Mr. Firtash pledged to remain in Austria until the end of extradition proceedings and hired a substantial legal team—described in the Austrian media as an "armada of lawyers"—which included such high-profile advisors as the former Austrian Justice Minister, Dieter Böhmdorfer. The *New York Times* reported that the defense team sought to portray the charges as "an effort to punish Mr. Firtash for his ties to Mr. Yanukovych and his support of Russia, and to sideline him from future political activity in Ukraine." In particular, the defense team sought to demonstrate a link between the timing of the revocation and subsequent reissuance of his arrest warrant and the revocation by Mr. Yanukovych of a promise to sign sweeping political and trade agreements with Europe. Ultimately, the Austrian government prosecutor acknowledged that there was insufficient evidence of a crime to justify extradition, and that the United States had failed to meet the requirements of the bilateral extradition treaty. At a hearing on April 30, 2015, Judge Christoph Bauer of the Straflandesgericht in Vienna ruled that there was insufficient evidence of a crime and that, in any event, the charges against Mr. Firtash were politically motivated, stating that: "America obviously saw Firtash as somebody who was threatening their economic interests."

On April 30, 2015, DOJ spokesman Peter Carr reportedly stated during a telephone interview that, "We are disappointed with the court's ruling and have filed an appeal." Indeed, although not unsealed until Mr. Firtash's arrest in April 2014, the indictment was returned by the Grand Jury in June 2013—before Russia invaded Crimea—and DOJ has staunchly maintained that the charges were not politically motivated. Moreover, the return of the indictment means that a quorum of grand jurors found probable cause to believe the crimes had been committed by the defendants, including Mr. Firtash. Nevertheless, the events in the Firtash case demonstrate one of the many obstacles that DOJ faces in its campaign to prosecute individuals for FCPA-related crimes.

6. **Recent Speeches by SEC's Director of Enforcement Highlight SEC's Litigation Efforts and Cooperation Program.** In recent speeches, SEC Director of Enforcement Andrew Ceresney discussed SEC's litigation program and enforcement actions (full text available here) and SEC's cooperation program (full text available here). As Mr. Ceresney's remarks make clear, SEC is continuing, and stepping up, its focus on resolving matters through litigation when necessary, but also making use of its formal cooperation program when possible.

   - **Focus on Litigation:** In his May 12, 2015 speech at the New York City Bar's 4th Annual White Collar Institute, Mr. Ceresney provided an overview of SEC's recent successes at trial, including what he characterized as 22 straight wins at trial since its last loss in June 2014.[5] Mr. Ceresney also

[5] The speech clarified that a trial was considered a "win" if SEC litigators prevailed on any claim against any defendant in the proceeding.

mentioned specific recent successes, including an action against BankAtlantic Bancorp Inc. and its CEO and Chairman for internal controls and books and records violations.

- **Forum Selection:** SEC enforcement actions, including corporate FCPA cases, can be brought either in federal court or in an administrative proceeding. Following up on recently issued public guidance on forum selection in contested actions, and in likely response to criticism that SEC is overusing its power to bring enforcement actions before captive administrative law judges (as we have previously covered), Mr. Ceresney discussed in his May 12 speech the number of enforcement actions brought in administrative proceedings. He noted that so far, in 2015, SEC has brought 60 percent of its litigated actions in federal court as opposed to administrative proceedings, and that about 75 percent of all pending litigated cases are in district court.

- **Cooperation:** Mr. Ceresney's May 13 speech at the University of Texas School of Law's Government Enforcement Institute described the factors that SEC considers in evaluating a company's cooperation. As an example, among others, of how those factors are applied, Mr. Ceresney discussed the recent FCPA action against Goodyear Tire & Rubber Company (as we previously covered) in which SEC cited the company's self-reporting, remediation, and internal disciplinary actions as contributing to a $16 million order of disgorgement and interest, but no penalty. Mr. Ceresney noted that the Goodyear matter and other cases demonstrate the value of cooperation as penalties in FCPA settlements are typically equal to the disgorgement amount. Despite these potential benefits, companies may understandably be circumspect about voluntarily disclosing discrete matters occurring in remote operations if the result of a voluntary disclosure results in not only SEC enforcement with a potentially significant negative reputational impact, but also civil penalties on top of disgorgement and prejudgment interest.

7. **UK SFO Official Encourages Early Self-Reporting and Urges Caution Regarding Internal Investigations, as First DPA Invitation Letters Are Issued.** A senior official at the UK's Serious Fraud Office (SFO) announced that the SFO had issued its first invitation letters giving companies the opportunity to enter into Deferred Prosecution Agreement (DPA)[6] negotiations and emphasized the importance of early engagement with the SFO when companies learn of possible corrupt activity. The message was delivered in a speech by Ben Morgan, Joint Head of Bribery and Corruption for the SFO, at the Global Anti-Corruption and Compliance in Mining Conference 2015. Mr. Morgan made clear that, in contrast to "other jurisdictions," the SFO does not require that companies carry out their own extensive investigations, but rather offer "genuine cooperation" with the SFO's own investigation, and "not duplication of it." The message reinforces section 2.9.3 of the DPA Code of Practice ("DPA Code"), which notes that the SFO will critically assess the failure to self-report and the conduct of any internal investigation. Mr. Morgan also warned that, as stipulated in the Code, a poorly conducted internal investigation may adversely impact a company's eligibility for a DPA. Indeed, Mr. Morgan seemingly expressed disapproval of traditional internal investigations, noting that the SFO "find[s] internal

[6] A DPA permits the SFO to charge a company with a criminal offense, but enables proceedings to be suspended pending the satisfactory performance of the DPA.

investigations that 'trample over the crime scene' to be unhelpful" and cautioning that companies should not "keep us in the dark while you carry out extensive private investigations and some months or even years later present us with a package of your findings." While some may interpret this statement to be inconsistent with the U.S. approach, we believe the U.S. and UK enforcement agencies' approaches may not be all that different. On both sides of the Atlantic, the agencies encourage companies to come in early enough to coordinate the companies' efforts with those separate, parallel efforts by the enforcement agencies. The work by U.S. and UK investigators will be undertaken to independently assess and corroborate information provided by the company (i.e., to "pressure test" the company's internal investigation, as AAG Caldwell has previously stated), as well as pursue different leads unavailable to companies, such as obtaining bank records and search warrants for personal email accounts. That said, Mr. Morgan's message is clear: the SFO does not expect and does not want companies presenting a "completed" internal investigation that amounts to a pure advocacy piece. Mr. Morgan's remarks, consistent with those made by Director David Green previously, underscore that the SFO is a prosecutorial authority, not a regulator, and it will not play a passive role in the investigative process.

8. **UK SFO Charges Former Alstom Compliance Officer.** As we covered last month, the SFO has continued to add charges against individuals and corporates in the long-running Alstom corruption investigation. On May 12, 2015, the SFO charged another former Alstom employee—this time the company's former compliance officer, a development that will not go unnoticed in the compliance community. Prior to his retirement, Jean-Daniel Lainé was Senior Vice President of Ethics & Compliance for Alstom S.A. and a director of Alstom International Limited, a UK subsidiary. Mr. Lainé, a French national, was charged with two offenses of corruption under the Prevention of Corruption Act 1906 and two offenses of conspiracy to corrupt under the Criminal Law Act 1977 in connection with a project in Hungary to supply trains to the Budapest Metro.

9. **Additional Suits Filed in the Wake of the Petrobras Scandal.**

   - **Petrobras Hit with Another Shareholder Lawsuit in Aftermath of Bribery Scandal.** AP1, a $30 billion pension fund and one of Sweden's largest investors, is reported to be taking legal action against Petrobras in the wake of "Lava Jato" (or "Operation Car Wash") in which Petrobras executives have been accused of taking bribes for awarding inflated contracts to suppliers. The filing was made in the U.S. District Court for the Southern District of New York, and listed AP1 as a plaintiff alongside six New York pension funds. This latest lawsuit is in addition to the number of class action lawsuits that have been filed against Petrobras since December last year, including one U.S. class action suit filed by investors who purchased $98 billion of Petrobras' securities. In March 2015, the claims were consolidated into one group class action, with the Universities Superannuation Scheme appointed lead plaintiff. Several institutional investors, including Dimensional Fund Advisors, a U.S. fund house, and six New York City pension funds, have reportedly opted out of the class action against Petrobras to commence their own lawsuits. It is reported that the R$50.8 billion write-down announced by Petrobras in its audited financial statement released on April 22, 2015 (R$6.19 billion of which was directly attributable to losses from the bribery scandal) could "provide fresh ammunition" for the class action suit. The plaintiffs allege that Petrobras' American Depositary Shares and bonds were

artificially inflated as a result of the misstatements made by the company in relation to the value of its assets and its anticorruption policies. Petrobras maintains that it "itself was the victim in this scandal, carried out by a criminal cartel of Brazil's largest construction and engineering companies," and has filed motions to dismiss the claims. This development highlights the multi-faceted challenges companies face in the wake of corruption scandals where follow-on or parallel civil actions have become typical.

- **Petrobras' Efforts to Sue Contractors to Recover Bribe Proceeds.** In a statement released on May 8, 2015, Petrobras revealed that it has filed two suits with Brazil's Federal Public Prosecutor's Office against contractors mentioned in the Operation Car Wash investigation for having a role in improperly inflating procurement costs and siphoning money from Petrobras' contracts. Petrobras' suits seek around R$452 million, plus "moral damages" in an amount to be quantified. In filing these lawsuits, Petrobras has taken the first step in attempting to recover some of the R$6.19 billion written off as overpayments in connection with the corruption scandal. These lawsuits follow the five federal suits filed by Brazilian prosecutors against six construction companies, as announced in February this year, for R$4.87 billion in damages. Additionally, Petrobras has stated its intention to file three additional lawsuits against other companies for a total of R$826 million (comprising material damages, moral damages, and a fine) in connection with the same scandal. Petrobras asserts that "the lawsuits are on top of a series of measures the company has adopted to guarantee full compensation for the losses it has suffered, including those related to its reputation."

10. **DOJ Revokes Non-Prosecution Agreement (NPA).** As we previously reported, Assistant Attorney General Leslie Caldwell publicly stated last month that DOJ would "not hesitate to tear up a DPA or NPA and file criminal charges" if a company breaches its agreement. AAG Caldwell's statement was likely intended to foreshadow DOJ's May 20, 2015 announcement that it had revoked an NPA with a corporate defendant, the first action of this kind since the revocation of a DPA with Aibel Group Limited in November 2008. In 2012, DOJ entered into an NPA with UBS AG in which DOJ declined to prosecute the bank for any crimes related to its submission of interest rates for LIBOR and other rate benchmarks. In return, the company was required to abide by several conditions during the pendency of the NPA, including the requirement that it "commit no United States crime whatsoever." DOJ revoked the NPA after (according to the factual statement attached to the guilty plea) the company "engaged in deceptive FX trading and sales practices." Although not an FCPA case, the revocation of the NPA in this case is relevant to FCPA enforcement because DOJ's Fraud Section, which has exclusive authority to bring criminal FCPA cases, was involved in the decision. There are a number of reasons to find this action unfair to companies where, as here, the company implemented an enhanced compliance program, and once it found issues, it brought them forward voluntarily to the Antitrust Division (indeed, qualifying for immunity under the Leniency Program). In other words, the company undertook an enhanced compliance program as it promised to do and then it brought the matter forward, as DOJ has repeatedly encouraged companies to do, only to be punished for it. DOJ's action, thus, presents a potential disincentive to well-meaning companies to report problems discovered as a product of the enhanced compliance program implemented in the wake of a DOJ resolution.

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