



The Foreign Corrupt Practices Act: 2014 Year-in-Review

I. INTRODUCTION

U.S. enforcement authorities continued vigorously to investigate and prosecute Foreign Corrupt Practices Act (FCPA) violations against both corporations and individuals over the past year. It initially appeared that 2014 would be a relatively slow year for corporate FCPA enforcement, until a string of additional large-scale corporate enforcement actions was announced in the final months of the year. Overall, 2014 FCPA enforcement was characterized by significant—and growing—corporate penalty amounts. As promised by former Department of Justice (DOJ) FCPA Unit Chief Charles Duross in November 2013, the agency announced a number of “very significant, top 10 quality cases” in 2014. Indeed, the year’s enforcement activity included two of the largest FCPA enforcement actions of all time, as well as two of the biggest FCPA disgorgements to the U.S. Securities and Exchange Commission (SEC). Ultimately, the year was the highest in terms of monetary penalties assessed since the record-breaking FCPA enforcement year of 2010. At the same time, the DOJ and SEC continued to emphasize the potential benefits of a company’s voluntary disclosure and cooperation, pointing to smaller monetary penalties assessed in certain enforcement actions. Individuals too were the target of FCPA enforcement efforts. Numerous persons were indicted or arrested on FCPA charges, and a number chose to enter guilty pleas during the year, rather than fight the charges in court.

Enforcement activity in 2014 further demonstrated that no industry is safe from FCPA scrutiny. As DOJ FCPA Unit Chief Patrick Stokes stated in October, DOJ is “opportunistic” with regard to its FCPA investigations—it will “follow the evidence” where it leads. This often results in enforcement activity concentrated in certain industry sectors, such as the technology/communications, energy, healthcare and aircraft industries. At the same time, both the DOJ and SEC broadened traditional horizons, bringing actions against companies from industries not traditionally associated with FCPA enforcement.

2014 saw continued growth in global cooperation among anti-corruption enforcement agencies, as well as increased foreign government enforcement of their own anti-bribery laws. Authorities in Brazil, China and the United Kingdom each pursued enforcement actions under their domestic legislation last year, while governments around the world worked together to gather evidence and provide assistance in ongoing anti-bribery investigations.

II. OVERVIEW OF FCPA ENFORCEMENT IN 2014

Corporate FCPA Enforcement

U.S. enforcement authorities aggressively pursued FCPA violations by corporations in 2014, bringing major enforcement actions against ten companies, with penalty amounts totaling more than \$1.5 billion. As noted, this total was buoyed by four major enforcement actions in the last month of the year. James Koukios, Senior Deputy Chief of DOJ's Criminal Division, Fraud Section, appeared to allude to these enforcement actions in October, when he stated that there were "a bunch" of FCPA cases in the pipeline, and that FCPA prosecutions would "remain vibrant, aggressive and appropriate."

Specifically, the following ten corporations (and/or their subsidiaries) reached FCPA resolutions with the DOJ and/or SEC in 2014: Alcoa Inc.; Marubeni Corporation; Hewlett-Packard Company; Smith & Wesson Holding Corporation; Bio-Rad Laboratories; Layne Christensen Company; Dallas Airmotive; Bruker Corporation; Alstom SA; and Avon Products Inc. Penalties paid by these companies were higher than in recent years, totaling approximately \$1.56 billion (rising from 2013's \$730 million in corporate penalties).

Notably, two of 2014's enforcement actions landed on the list of the ten largest FCPA enforcement actions. In the second biggest FCPA case to date, French energy and transport company Alstom SA pleaded guilty to a two-count criminal information in U.S. federal court in December and agreed to pay \$772 million in criminal penalties to settle the charges. The penalty constitutes the largest criminal fine ever levied for FCPA violations. DOJ stated that Alstom paid more than \$75 million in improper payments to secure \$4 billion in projects around the world, and U.S. Deputy Attorney General James Cole characterized Alstom's scheme as "astounding in its breadth, its brazenness and its worldwide consequences." Alstom did not voluntarily disclose the violations, despite its alleged knowledge about related misconduct at a U.S. subsidiary, likely contributing to the significance of the penalty assessed. With the addition of Alstom, the list of the top-ten FCPA enforcement actions now includes three French companies.

Earlier in the year, aluminum company Alcoa agreed to pay \$384 million to resolve FCPA charges, landing it the fifth spot on the list of top-ten FCPA enforcement actions at that time.¹ In January, an Alcoa unit agreed to plead guilty in the Western District of Pennsylvania to one count of violating the FCPA's anti-bribery provisions. Its corporate parent resolved civil charges through a disgorgement to the SEC² in an administrative action, representing an example of the SEC's increasing use of administrative proceedings to resolve FCPA actions (rather than traditional civil court actions, which are subject to judicial scrutiny). Like many FCPA violations, Alcoa's

¹ Alcoa's enforcement action dropped to the sixth largest with Alstom's December 2014 enforcement action.

² In addition to being the sixth-largest FCPA enforcement action overall, Alcoa's SEC disgorgement is the third-largest of all time.

charges related to its use of a third-party agent. To service one of its largest customers, Aluminum Bahrain B.S.C., Alcoa's subsidiaries reportedly hired a London-based middleman with ties to the Bahraini royal family as a sham sales agent and paid him a corrupt commission to conceal bribe payments.

In addition to these two top 10 enforcement actions, Avon's December settlement included the eighth-largest FCPA disgorgement to the SEC in history. Concluding the long-running and much-publicized investigation, Avon's Chinese subsidiary pleaded guilty in Manhattan federal court to conspiring to violate the FCPA, while Avon Products agreed to disgorge nearly \$53 million in profits to the SEC. U.S. enforcement authorities charged the Chinese subsidiary with making \$8 million in payments of cash, gifts, travel and entertainment to various Chinese officials in order to obtain approval for direct selling in China. After more than six years of investigation, and in addition to the significant monetary penalties, Avon entered into a three-year deferred prosecution agreement and appointed a compliance monitor. Cases like Avon have led U.S. enforcement authorities to acknowledge the need to increase the pace of FCPA investigations,³ potentially leading to more rapid resolutions of such investigations in the future.

Largely as a result of these huge penalties, the size of the average corporate fine nearly doubled in 2014—from \$80 million in 2013 to approximately \$157 million last year. Still, U.S. authorities emphasized the benefits to be obtained from a company's voluntary disclosure and cooperation. For example, in November, Kara Brockmeyer, Chief of the SEC Enforcement Division's FCPA Unit, pointed to Layne Christensen's \$5.1 million October settlement with the SEC, which included a civil penalty of only \$375,000, as an example of the tangible benefits of cooperation.

By contrast, Marubeni reportedly declined to cooperate with DOJ's investigation of its involvement in FCPA violations tied to an alleged seven-year scheme to bribe Indonesian officials for a power contract. The company's reported lack of cooperation ultimately resulted in an \$88 million fine. Principal Deputy Assistant Attorney General for DOJ's Criminal Division, Marshall L. Miller, later explained: "When the Criminal Division learned of [the] conduct and launched an investigation, Marubeni opted not to cooperate at all. What ensued was an extensive multi-tool investigation involving recordings, interviews, subpoenas, mutual legal assistance treaty requests, the use of cooperating witnesses, and more . . . Marubeni decided to roll the dice. I'm guessing they may have had some gambler's remorse when the dice came to rest."⁴

No slowing of FCPA enforcement is to be expected for the foreseeable future; according to the FCPA Blog, at least 107 companies are currently under investigation for potential violations.

³ See Remarks of FCPA Unit Chief Patrick Stokes (Mar. 6, 2014).

⁴ See Remarks by Principal Deputy Assistant Attorney General for the Criminal Division Marshall L. Miller at the Global Investigation Review Program (Sept. 17, 2014), available at <http://www.justice.gov/criminal/pr/speeches/2014/crm-speech-1409171.html>.

Individual FCPA Enforcement

U.S. enforcement authorities have made clear for years now that they intend to focus significant efforts on the prosecution of individuals' FCPA violations. For example, in March, DOJ FCPA Unit head Patrick Stokes stated that "prosecuting individuals as well as institutions is a significant focus for the FCPA unit, and it's a trend that's going to continue." Later in the year, Marshall L. Miller of DOJ's Criminal Division echoed Stokes' sentiment, explaining that the agency's analysis of a company's cooperation with an investigation will depend on its assistance in identifying specific employees who are responsible for corrupt payments. He stated: "If you want full cooperation credit, make your extensive efforts to secure evidence of individual culpability the first thing you talk about when you walk in the door to make your presentation. Make those efforts the last thing you talk about before you walk out. And most importantly, make securing evidence of individual culpability the focus of your investigative efforts so that you have a strong record on which to rely."⁵

In 2014, U.S. authorities lived up to their promise to focus on individuals, with at least six individuals being arrested or indicted on FCPA charges (or having indictments unsealed), and another six persons pleading guilty to such charges. For its part, the SEC charged two individuals with FCPA-related misconduct for the first time since early 2012. Two former employees of U.S.-based defense contractor FLIR were accused of FCPA violations related to a contract with the government of Saudi Arabia, and they agreed to pay \$50,000 and \$20,000 to settle the administrative enforcement actions.

FCPA charges against individuals frequently stem from previously settled enforcement actions against corporations. For example, Bernd Kowalewski, former executive of Bizjet International Sales and Support, Inc., was arrested in March and pleaded guilty in July for his participation in a bribery scheme involving improper payments to government officials in Mexico and Panama to obtain contracts for aircraft services. Kowalewski was the third and most senior BizJet executive to face charges in the United States.⁶ The corporation settled its own FCPA charges in 2012.

By contrast, in April, two additional executives of brokerage firm Direct Access Partners, Benito Chinae and Joseph DeMeneses, were charged in federal court for numerous FCPA violations associated with bribery of a Venezuelan state bank official. They pleaded guilty to the charges in December, and the SEC announced civil charges against them as well. In 2013, three other executives of the company pleaded guilty to similar charges. These charges represent an example in which U.S. authorities brought enforcement actions against the involved individuals, without charging the corporate entity itself.

⁵ *Id.*

⁶ The charges and sentences against two prior BizJet executives were discussed in our 2013 Year-in-Review article.

Significant Declinations

2014 also saw the announcement of several key declinations. Traditionally, it has been rare for the Government to announce that it has declined a prosecution, and even rarer for the Government to detail why it made such a decision. We continue to learn of declinations from the subject companies—via SEC filings, news releases and other materials. Such corporate announcements can provide clues as to the key considerations at play when determining whether or not to bring an enforcement action for potential FCPA violations.

The following key declinations were announced in 2014:

- *SBM Offshore*: In November, Dutch company SBM Offshore announced a \$240 million settlement with the Netherlands for making improper payments in Angola, Brazil and Equatorial Guinea. At the same time, the company announced that DOJ had closed its inquiry and would not be prosecuting. SBM Offshore noted that it voluntarily informed both the Dutch and U.S. authorities of its self-initiated internal investigation in 2012, and fully cooperated with both entities' investigations. It also unilaterally took remedial measures.
- *Layne Christensen Company*: After facing FCPA scrutiny for its conduct in Africa, Layne Christensen announced via press release in August that DOJ had closed its investigation and decided not to file charges. The company reported that, upon discovering potential improprieties when updating its FCPA policy in 2010, it enlisted outside counsel to conduct an internal investigation. The company's President and CEO stated that "based on conversations with the DOJ, we understand that our voluntary disclosure, cooperation and remediation efforts have been recognized and appreciated by the staff of the DOJ and that the resolution of the investigation reflects these matters."
- *Smith & Wesson*: In its June Form 10-K filed with the SEC, Smith & Wesson reported that "[f]ollowing extensive investigation and evaluation, the DOJ declined to pursue any FCPA charges against us and closed its investigation. The DOJ has noted our 'thorough cooperation' in correspondence to the company." The company announced that it made substantial changes in its foreign sales personnel, foreign representatives and sales processes—in some cases even ceasing sales in certain countries.
- *Dialogic*: Dialogic announced in its Form 10-Q in August that the SEC had concluded its investigation of potential improper payments made by VOiP company Veraz Networks, Inc., which Dialogic acquired in 2010, and did not intend to bring an enforcement action. In its disclosure, the company noted that while the SEC's investigation was not the result of a voluntary disclosure, the Board of Directors quickly appointed a committee to review the issues and appointed outside counsel to recommend remedial measures. The company reportedly fully cooperated with the investigation.

- *Baxter International*: In its February Form 10-K, Baxter reported that the DOJ and SEC had notified it that their investigations were closed, and that no further action would be taken. Baxter first disclosed in 2010 that it received inquiries from the agencies regarding business activities in “a number of countries” as part of an industry-wide FCPA investigation. In 2013, it announced that investigations of whistleblower complaints led the company to find improper expense payments to a China joint venture. As reported in the *Wall Street Journal*, the company subsequently “disciplined the venture’s leadership, conducted new trainings [and] enhanced its controls and monitoring of interactions with Chinese health-care professionals.”
- *Agilent Technologies*: In its Form 8-K filed with the SEC in September, Agilent announced that the DOJ and SEC terminated their FCPA investigations into the company. The investigations were prompted by a voluntary disclosure by Agilent of the results of an internal investigation, in which it discovered discrepancies related to certain sales through third-party intermediaries in China and FCPA compliance issues by employees in China. The DOJ letter stating that it would not take enforcement action reportedly cited the company’s voluntary disclosure and thorough investigation as factors in its decision not to take action.

Although helpful, there are limits to what one can glean about the government’s decision making processes from corporate disclosures. For example, only one month after Smith & Wesson announced that DOJ would take no action against the company, the SEC announced a settled action against the firearms manufacturer. Smith & Wesson agreed to pay \$2 million to resolve allegations that the U.S.-based parent company bribed military and police forces in Indonesia, Pakistan and other countries to win contracts for gun sales. Notably, many of the corrupt payments were unsuccessful in winning contracts for the company, highlighting that even bribes that do not achieve their purpose can violate the FCPA. In fact, Smith & Wesson’s total penalty far exceeded the approximately \$107,000 in profits that the company earned as a result of the corrupt payments.

DOJ and SEC officials continue to tout the benefits of voluntary disclosures and cooperation in speeches and releases. For example, Kara Brockmeyer, Chief of the SEC’s FCPA Unit, commented in October 2014 that corporate self-reporting is “worth it.” She further stated that a “disproportionate number of cases we decline” are because of corporate self-reporting, even if the agency does not report this to the public. Of course, self-disclosure alone does not guarantee a declination – many enforcement actions also result from actions voluntarily disclosed by companies.

III. INDUSTRIES OF FOCUS

It is well established that a wide variety of industries face FCPA exposure. 2014 further underscored this reality, with settlements in a variety of sectors—retail, technology, manufacturing, energy and consumer goods, to name a few. While the

government has frequently said that it does not conduct industry sweeps, historically, there are certain sectors that receive heightened FCPA scrutiny. In particular, the technology/communications, energy, healthcare and aircraft sectors have been FCPA targets, a trend that did not abate in 2014.

- *Technology/Communications*: 2014 saw Hewlett-Packard join the likes of Alcatel-Lucent, Siemens, Magyar Telekom and other companies operating in the technology/telecommunications space that have settled FCPA allegations. Hewlett-Packard agreed to pay more than \$108 million to settle allegations that its foreign subsidiaries in Russia, Mexico and Poland paid inflated commissions, provided improper benefits, or funneled money through shell companies to win foreign contracts. Also in 2014, the SEC continued its investigation into allegations that Qualcomm provided individuals associated with Chinese state-owned companies or agencies with special hiring considerations, gifts and other benefits. The SEC issued a Wells Notice, indicating that its staff made a preliminary determination to recommend an enforcement action against Qualcomm for violations of the anti-bribery, books and records and internal controls provisions of the FCPA.
- *Energy*: The government continued its pursuit of companies and individuals in the energy industry in 2014. Indeed, two particularly prominent FCPA enforcement actions brought against individuals stemmed from conduct in the energy space. Last year, DOJ announced FCPA and related charges against former executives of PetroTiger Ltd., a British Virgin Islands oil and gas company with operations in Colombia and offices in New Jersey, “for their alleged participation in a scheme to pay bribes to foreign government officials in violation of the FCPA, to defraud PetroTiger, and to launder proceeds of those crimes.” While one of the individuals pleaded guilty, the company’s former CEO, Joseph Siegelman, is contesting the charges. If the matter is not resolved, Mr. Siegelman will be the first individual to face a criminal FCPA trial in some time. For its part, the SEC settled FCPA books and records allegations with two executives of Noble Corporation a week before a scheduled trial. Mark Jackson, Noble’s former CEO, and William Ruehlen, head of Nobel’s Nigeria unit, were charged in February 2012 with bribing Nigerian officials in exchange for illegal import permits for drilling rigs. Both settled with the SEC without paying penalties or admitting wrongdoing.
- *Healthcare*: The healthcare and medical fields again proved to be fertile ground for FCPA investigations and enforcement last year. While a few previously disclosed investigations ended in declinations this year, *e.g.*, Baxter International Inc., others ended in settlements. Bio-Rad Laboratories settled allegations with the DOJ and SEC for violations related to its failure to detect \$7.5 million in bribes paid to foreign authorities by third-party intermediaries, agreeing to pay \$55 million. There were no allegations that the company had actual knowledge of the bribes, rather that it did not do enough to prevent the corrupt scheme and address red flags. Also, Bruker Corporation, a Massachusetts-based producer of

scientific instruments, paid \$2.4 million to settle SEC charges that it violated the FCPA by paying for sightseeing trips and shopping expenses for Chinese officials responsible for buying the company's products.

- *Aircraft*: Following the Bizjet corporate and individual enforcement actions discussed above and the NORDAM Group's 2012 FCPA settlement, Dallas Airmotive's 2014 deferred prosecution agreement represents the third FCPA enforcement action against an aircraft maintenance, repair and overhaul company in recent years. Dallas Airmotive agreed to pay \$14 million to settle allegations that it made improper payments to government officials in Brazil, Argentina and Peru to secure maintenance contracts for military planes. Given this string of enforcement actions and the frequent and close interaction between the aircraft industry and foreign governments generally, U.S. enforcement agencies may continue to focus their energies on this sector.

IV. OTHER ANTI-CORRUPTION TRENDS AND DEVELOPMENTS

FCPA Case Law – Eleventh Circuit Interprets “Instrumentality”

In *United States v. Esquenazi*, the Eleventh Circuit provided some clarity as to who qualifies as a “foreign official” under the FCPA. The court broadly defined an “instrumentality” of a foreign government as “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.” The Eleventh Circuit is the first appellate court to consider this definition under the FCPA. While the court largely adopted the definition that the DOJ and SEC previously employed, the decision settled some of the lingering questions regarding the reach of the FCPA.

The *Esquenazi* case involved allegations that Joel Esquenazi and Carlos Rodriguez, co-owners of a Florida telecommunications company, bribed foreign officials at Telecommunications D'Haiti between 2001 and 2005. Esquenazi and Rodriguez were convicted of violating the FCPA and committing money laundering and wire fraud. Esquenazi was sentenced to 15 years in prison, while Rodriguez received a 7-year sentence. On appeal, they argued that the definitions of “instrumentality” and “foreign official” in the district court's jury instructions were overly broad.

In affirming the convictions, the Eleventh Circuit clarified the definition of “instrumentality.” The Eleventh Circuit's definition is comprised of two elements: (1) whether an entity is *controlled* by the government of a foreign country; and (2) whether an entity *performs a function* the controlling government treats as its own. As to the first factor, the court indicated that the following factors should be considered when determining whether an entity is controlled by a foreign government:

- The foreign government's formal designation of that entity;
- Whether the foreign government has a majority interest in the entity;

- The foreign government’s ability to hire and fire the entity’s principals;
- The extent to which the entity’s profits, if any, go directly to the government fisc;
- The extent to which the foreign government funds the entity if it fails to break even; and
- The length of time these indicia have existed.

With regard to whether an entity performs a function the controlling government treats as its own, the Eleventh Circuit outlined the following factors:

- Whether the entity has a monopoly over the function it exists to carry out;
- Whether the foreign government subsidizes the costs associated with the entity providing services;
- Whether the entity provides services to the public at large in the foreign country; and
- Whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.

In addition to providing this list of non-exhaustive factors, the Eleventh Circuit also clarified that providing a commercial service does not automatically mean that an entity is not an instrumentality, nor is the term “instrumentality” limited to entities that perform “traditional, core government functions.”

DOJ FCPA Opinion Procedure Releases

1. 14-01 (March 2014)

The first DOJ Opinion Procedure Release of 2014 addressed the relationship between a U.S. company and a business partner who assumed a position with a foreign government. As with all opinion procedure releases, this release is not binding precedent. However, the release provides some guidance as to how DOJ may respond to scenarios where a company has a relationship with a foreign official.

The scenario involved a U.S. investment bank that acquired a majority interest in a foreign financial services company. The financial services company was founded by a foreign businessman who retained a minority interest after the acquisition, and also continued to serve as chairman and CEO of the company. However, the founder was entitled to a buyout in the event that he was appointed to a minister-level position, or higher, in the foreign government.

The founder was subsequently appointed to serve as a high-level official at the foreign country's central monetary and banking agency. Upon his appointment, the founder ceased to have any role or function at his financial services company, other than as a passive shareholder. In his role at the foreign agency, the founder recused himself from any decision concerning the award of business to his financial services company, the U.S. investment bank or any of their affiliates. The U.S. investment bank also arranged to purchase the founder's minority interest in the foreign financial services company. Due to the 2008 financial crisis and other factors, the investment bank and founder agreed to calculate share value using a different method than what the parties originally contemplated at the time of the acquisition. To determine the new share value, the parties retained an independent accounting firm.

In its opinion, DOJ noted that the FCPA does not *per se* prohibit business relationships with, or payments to, foreign officials. However, when such relationships exist, the DOJ stated that it considers the following factors:

- Whether there are any indicia of corrupt intent;
- Whether the arrangement is transparent to the foreign government and the general public;
- Whether the arrangement is in conformity with local law; and
- Whether there are safeguards to prevent the foreign official from improperly using his or her position to steer business to or otherwise assist the company.

After applying these factors to the scenario at issue, DOJ concluded that it would not pursue enforcement action. Of particular importance to DOJ appeared to be the pre-existing financial relationship between the U.S. investment bank and the founder, which began prior to the founder's appointment as a foreign official. DOJ also noted with approval the parties' decision to engage an accounting firm to calculate share value, and commented favorably that neither party requested a minimum or specific valuation from the accounting firm or otherwise attempted to influence the valuation. Finally, DOJ highlighted the safeguards the U.S. investment bank and the founder took, and pledged to continue to take, to ensure the founder does not assist the investment bank in obtaining or retaining business, including recusal by the founder and investment bank's notification to senior employees regarding the founder's recusal obligations.

2. 14-02 (November 2014)

The second and final DOJ Opinion Procedure Release of 2014 addressed the important issue of successor liability. The scenario outlined in the opinion involved a U.S. consumer products company that acquired a foreign consumer products company. The U.S. company conducted pre-acquisition due diligence, which revealed a number of potentially improper payments that the target had made to

foreign government officials. The U.S. company also found significant weaknesses in the target's accounting and recordkeeping procedures. After discovering these deficiencies, the U.S. company took several pre-closing steps to mitigate and remediate the foreign company's problems. The U.S. company also indicated its intent to integrate the target into its own compliance and reporting structure.

Based on the facts of this scenario, DOJ determined it would not take any enforcement action with respect to the pre-acquisition bribery of the foreign company. In reaching this conclusion, DOJ referred to its Resource Guide for the proposition that "successor liability does not, however, create liability where none existed before." In the present scenario, DOJ noted that none of the allegedly improper pre-acquisition payments was subject to the jurisdiction of the United States. Thus, DOJ said that it lacked jurisdiction under the FCPA to prosecute either the U.S. company or the foreign company for the pre-acquisition payments.

FCPA Whistleblowers

1. 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program (November 2014)

The SEC is required to submit an annual report to Congress detailing, among other things, the number of awards granted under the Dodd-Frank Whistleblower Program and the type of cases in which awards were granted. Over the past year, there was an increase in both the total number of whistleblower tips received under the program and the number of tips related to FCPA allegations. In 2014, the SEC received 3,620 whistleblower tips, compared to 3,238 tips in 2013. In 2014, 159 of these tips (over 4 percent of the total) related to potential FCPA violations. The number of FCPA tips received last year increased from those in 2013 (149) and 2012 (115). While the year-over-year increase in the number of FCPA tips was not as high in 2014 as in previous years, the number of FCPA tips received has never been larger and likely will only continue to increase in the coming years.

2. Second Circuit Limits Whistleblower Protection

In *Liu v. Siemens AG*, the Second Circuit limited the reach of the Dodd-Frank Act's anti-retaliation protections to domestic whistleblowers. The case involved a Taiwanese lawyer who was employed by a German corporation. The employee learned that the company was purportedly making improper payments to officials in North Korea and China in connection with the sale of medical equipment. The employee alleged that these payments were in violation of the FCPA and that the company terminated him after he sought to address the violations.

The Dodd-Frank Act prohibits employers from discharging or otherwise discriminating against whistleblowers. The defendant argued that this anti-retaliation provision did not apply extraterritorially because, under the "presumption against extraterritoriality," statutes apply outside the territorial jurisdiction of the United States only when they clearly indicate such extraterritoriality. The plaintiff argued that the anti-retaliation provision applied to employees generally and that other

provisions in the Dodd-Frank Act authorized extraterritorial jurisdiction for suits brought by the SEC or the United States.

The Second Circuit agreed with the defendant, holding that there was no clear evidence that the Dodd-Frank Act's anti-retaliation provision was meant to be applied outside the United States. As the plaintiff was a non-citizen employed abroad by a foreign company and all the allegedly improper payments occurred outside the United States, the Second Circuit affirmed the district court's dismissal of the plaintiff's anti-retaliation claim.

While it is important that the Second Circuit clearly affirmed that the anti-retaliation provision of the Dodd-Frank Act does not apply extraterritorially, these facts all occurred outside the United States, which made the Second Circuit's decision easier. The case law is not yet settled as to what level of contact with the United States is sufficient for the anti-retaliation provision to apply.

Turnover at DOJ

2014 saw significant turnover at the Criminal Division of DOJ and within that division's Fraud Section. The most notable departure was that of former Acting Assistant Attorney General, Mythili Raman, in March. Under her year-long leadership, the DOJ continued to focus on the prosecution of individuals, charging more than a dozen individuals with FCPA-related violations. She also oversaw the conclusion of three of the most significant FCPA enforcement actions in recent history—Alcoa, Total SA and Weatherford International. Like her predecessor Lanny A. Breuer, Ms. Raman is now in private practice. Ms. Raman was succeeded by Leslie R. Caldwell, who was confirmed as the Assistant Attorney General for the Criminal Division in May.

The Fraud Section, which is specifically tasked with FCPA investigations, also saw notable turnover. Jeffrey Knox, who served as the section Chief for over a year, left for private practice in September, and was succeeded by William J. Stellmach. Mr. Stellmach is a former prosecutor, and has been with the unit since 2010.

Continued Focus on China

As has been the case over the last few years, U.S. enforcement agencies continued to focus on China in 2014. Of the known, ongoing FCPA-related investigations, at least 40 involve potentially corrupt conduct in China,⁷ substantially more than any other country.

This year, the DOJ's and SEC's investigations into the hiring practices of firms in China, which began in August 2013 with the investigation of JPMorgan Chase, expanded considerably. In addition to JPMorgan, U.S. authorities are also looking into the hiring practices of several other banks, including Goldman Sachs, Credit Suisse, Morgan Stanley, Citigroup, UBS AG and Deutsche Bank. In letters to these firms, the SEC has

⁷ Data current as of January 7, 2015.

requested information about hiring based on referrals, and whether the firms had special programs for the hiring of relatives of Chinese government officials. The practices being scrutinized involve the hiring of the children of Chinese government officials in order to win business for the firm.

U.S. enforcement agencies have also been particularly interested in potentially corrupt conduct by pharmaceutical companies. As detailed below, GlaxoSmithKline's Chinese subsidiary was fined nearly \$500 million by Chinese authorities for a scheme involving payments of bribes to doctors to boost drug sales. An investigation by the DOJ and SEC into similar conduct is ongoing and could soon expand to include other pharmaceutical companies.

Apart from ongoing investigations, 2014 saw a limited number of concluded enforcement actions involving China. Perhaps the most significant enforcement action involving alleged violations in China was Avon's, discussed further above, in which the company's Chinese subsidiary pleaded guilty to providing gifts, cash, travel and entertainment to Chinese government officials in exchange for business benefits.

Similarly, the SEC charged Massachusetts-based Bruker Corporation, a scientific instruments manufacturer, with violating the FCPA by making improper payments and providing non-business-related travel to Chinese government officials. During the course of its investigation, the SEC found that Bruker lacked sufficient internal controls to prevent and detect improper payments from its China offices, which falsified its books and records to conceal the illicit payments. The company reportedly earned \$1.7 million in profits from sales contracts with state-owned entities whose officials received the improper payments. Bruker agreed to pay \$2.4 million to settle the charges.

V. GLOBAL EXPANSION OF ANTI-BRIBERY LEGISLATION AND ENFORCEMENT

Brazil's New Anti-Bribery Law

In early 2014, Brazil enacted its sweeping new anti-corruption law, the Clean Companies Act (CCA), which for the first time created liability for companies in Brazil that engage in bribery and related corrupt acts. Brazil's new anti-corruption law not only prohibits companies operating in Brazil from offering or providing an "improper advantage" to foreign or domestic public officials, but also prohibits the provision of facilitating payments. Under the CCA, companies operating in Brazil are strictly liable for the acts of both employees and agents, regardless of whether or not management was aware of the unlawful conduct. The law also imposes expansive joint and several liability on parent companies, subsidiaries, affiliated entities and other members of the same consortium.

In September, Brazilian authorities filed one of the first criminal actions under the new law, charging Embraer SA employees with bribing officials in the Dominican Republic in return for a \$92 million contract to supply planes to the country's armed forces. The complaint alleges that Embraer sales executives agreed to pay \$3.5 million to

a retired Dominican Republic Air Force colonel, who then used his influence to convince legislators to approve the deal. The DOJ and SEC, which are also investigating the company's dealings in the Dominican Republic, reportedly provided evidence to Brazilian authorities that ultimately helped the authorities file charges. The U.S. agencies' investigations, which reportedly began in 2011, are ongoing.

Conclusion of China's Investigation of GlaxoSmithKline PLC

In September, a court in China found GlaxoSmithKline's (GSK) Chinese subsidiary guilty of bribing hospitals and doctors to boost sales in China. The court found that the bribery scheme, which involved the payment of kickbacks through travel agencies and pharmaceutical industry associations, resulted in illegal revenue of more than \$150 million, and fined the company nearly \$500 million. The subsidiary's former top country executive, as well as four local managers, were convicted of bribery and sentenced to prison terms of up to four years, all of which were suspended.

Notably, Chinese police also accused GSK managers of bribing Chinese government officials. GSK has been under investigation by the DOJ and SEC since 2010 for possible violations of the FCPA. GSK is also under investigation by the U.K. Serious Fraud Office and Polish authorities, and the company is investigating additional allegations of corruption in Iraq, Jordan and Lebanon.

The United Kingdom Continues to Enforce Its Anti-Corruption Regime

U.K. authorities appear to be increasing their efforts to combat corrupt payments and practices under the U.K. Anti-Bribery Act and its predecessor legislation, as well as related anti-corruption laws. In the first half of 2014, Besso Limited, a general insurance broker, was fined £315,000 for failing to establish and maintain effective anti-corruption systems and controls. In particular, the U.K.'s Financial Conduct Authority found that Besso failed to establish sufficiently robust programs and controls to mitigate the risks involved in the sharing of commissions with third parties. Besso's failures included limited/inadequate anti-bribery and anti-corruption policies and procedures; failure to conduct adequate risk assessments and due diligence; inadequate monitoring of staff; and failure to maintain adequate records. Besso's agreement to settle early in the investigation resulted in a 30 percent reduction in its assessed penalty.

The former CEO and a former senior sales executive of Innospec Ltd., the British subsidiary of global specialty chemicals company Innospec Inc., were found guilty of conspiring to bribe Indonesian government officials to buy large quantities of a toxic fuel additive. According to the Serious Fraud Office (SFO), which brought the charges, the executives organized the bribes to ensure continued sales of a toxic chemical that had been banned in the United States and Europe. Two other senior Innospec officials earlier pleaded guilty to conspiring to bribe officials in Iraq and Indonesia, and the British subsidiary pleaded guilty to bribing officials in Iraq in 2010. Three executives were sentenced to prison with terms ranging from 18 months to four years, while the fourth received a suspended sentence. The SFO investigation was reportedly aided by U.S.

authorities; Innospec pleaded guilty to violations of the FCPA on the same day that the company pleaded guilty in the UK.

In July, the SFO instituted criminal proceedings against a U.K. subsidiary of Alstom to pursue allegations of corruption related to projects in India, Poland and Tunisia. Those proceedings are ongoing. That same month, the SFO also secured a 16-month sentence for the former CEO of Aluminium Bahrain B.S.C., Bruce Hall, in relation to his receipt of £2.9 million in corrupt payments from a member of the Bahraini royal family. In exchange for the payments, Mr. Hall agreed to allow corrupt arrangements put in place prior to his appointment to continue.

Finally, in December, the SFO secured convictions against Smith Ouzman Ltd., a printing firm, and two employees for corrupt payments made to public officials in Kenya and Mauritania in return for business contracts. The successful prosecution saw the SFO's first conviction of a corporate entity for offences involving bribing foreign officials.

VI. CONCLUSION

After an active year characterized by large corporate enforcement actions and huge penalty amounts, 2015 will likely be another busy year for FCPA enforcement. Robust enforcement activity is expected to continue in the corporate sphere—with settlements concluded for some of the more-than-100 companies currently under investigation, such as Embraer or perhaps even Wal-mart. Individuals as well will continue to face heightened FCPA scrutiny; indeed, DOJ has already landed its first indictment of the year against an individual on FCPA charges.⁸ We may also see the DOJ and SEC pursue charges against individuals involved in the several major corporate enforcement actions announced late last year.

We can also expect increased anti-corruption enforcement on a global scale in 2015, with foreign government agencies stepping up enforcement of their own anti-bribery laws, in some cases following U.S. enforcement involving the same conduct.

⁸ Dmitriy Harder, former owner and president of the Chestnut Consulting Group Inc., was indicted on January 6, 2015 for one count of conspiracy to violate the FCPA and five counts of violating the FCPA, as well as other charges, for bribing an official of an international development bank.