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2014 FCPA Year in Review

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2014 FCPA YEAR IN REVIEW[1]

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INTRODUCTION

2014 was a mixed year for enforcement of the US Foreign Corrupt Practices Act (FCPA). Although the 26 individual and corporate enforcement actions brought in 2014 by the US Department of Justice (DoJ) and the Securities and Exchange Commission (SEC) fell well below the authorities' five-year enforcement average of 41 cases per year, total corporate penalties, disgorgement, and pre-judgment interest totaled $1.56 billion, the second highest in history. The penalties were bolstered by a $772 million settlement by the French company Alstom, the largest criminal fine ever imposed under the FCPA, and the resolution of several long-running cases.

Numbers aside, FCPA enforcement actions in 2014 demonstrated a continued commitment to vigorous enforcement, and evidenced a number of important legal and policy developments as well as a continuation of previous enforcement themes. Several long-standing investigations, including of Alstom and of beauty products company Avon, were concluded in December 2014, ending the year with a bang. The DoJ and SEC continued to tout the benefits of voluntary disclosure and cooperation, and companies slow to do so (Alstom and Marubeni, the Japanese trading company) failed to receive a discount off the US Sentencing Guidelines range, a benefit afforded to most other companies. The US Court of Appeals for the Eleventh Circuit issued an opinion on the FCPA's definition of "instrumentality," which largely affirmed the enforcement authorities' interpretation of the term and which the Supreme Court declined to review. The DoJ and SEC were hampered by some apparent missteps, however, including the SEC's resolution of charges against two Noble Corporation executives, Jackson and Ruehlen, on the eve of trial without any monetary sanction, leading many to conclude that the SEC's case had fatal flaws. Even though the DoJ and SEC at times struggle when put to their burden at trial, most corporate and individual defendants continue to settle charges without trial, a trend that continued in 2014.

The collateral effects of robust FCPA enforcement also continued to affect companies and individuals significantly in 2014. Numerous new shareholder derivative actions and other suits were filed, compounding the risk picture for companies when conducting internal investigations or cooperating with US enforcement authorities. The SEC's Dodd-Frank whistleblower program, in its fourth year of existence, continued to receive record numbers of whistleblower tips and produced a record whistleblower bounty of $30 million.

The trend of global anti-corruption law enforcement continued to gain momentum in 2014. China announced its first ever corruption settlement with a multinational company, GlaxoSmithKline, for almost half a billion dollars. UK enforcement authorities won a conviction in the first-ever trial under the UK Bribery Act, though faced difficulties in other bribery prosecutions. Canada imposed its first term of imprisonment for a violation of Canada's revised

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and strengthened transnational bribery law. Germany concluded several anti-bribery investigations with monetary settlements in the tens of millions of dollars. The EU revised its standards for debarment from public contracting based on bribery and related offenses. Enforcement activity by the World Bank and other multilateral lending institutions remained strong. And an OECD report covering trends in bribery enforcement actions since 1999 counts 390 ongoing bribery cases in twenty-four member countries. While the enforcement picture worldwide is far from uniform, all of this suggests that investigative and enforcement efforts will remain strong in 2015.

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I. FCPA ENFORCEMENT STATISTICS FOR 2014

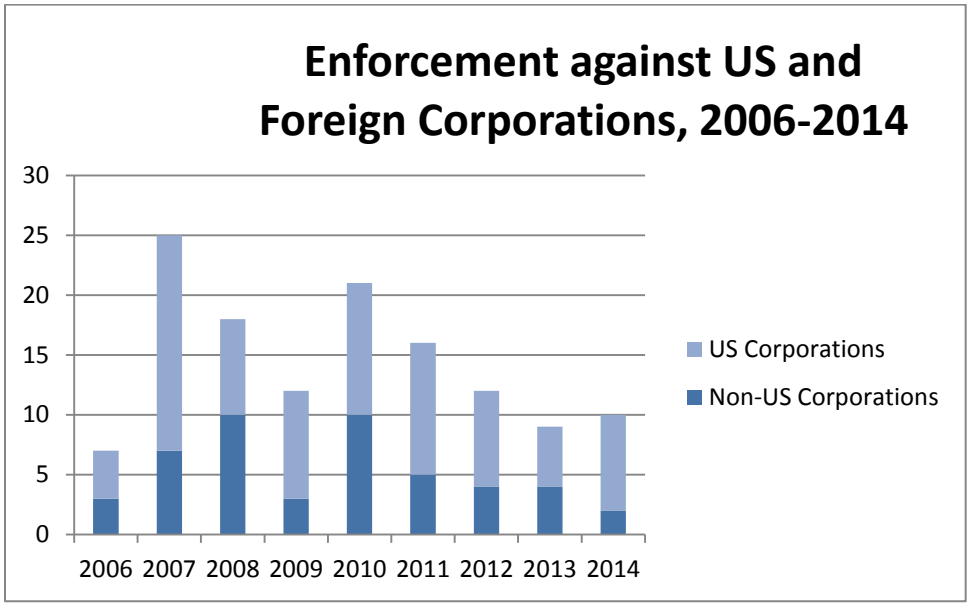
A. Number of Enforcement Actions

The DoJ and SEC brought a total of twenty-six enforcement actions against companies and individuals in 2014: seventeen by the DoJ and nine by the SEC. This represents a slight decrease from the combined 27 enforcement actions brought by the DoJ and SEC in 2013, an increase from the twenty-three enforcement actions brought by these authorities on a combined basis in 2012, and a decrease from the authorities' five-year average of forty-one enforcement actions per year (from 2009 through 2013).[3]

Ten separate companies faced charges from one or both of the US enforcement agencies out of the twenty-six total enforcement actions brought. This was a slight increase from the nine separate companies facing charges in 2013. Eight of those companies were US-based (or had a US-based parent), and two were based outside the US. The DoJ charged ten individuals in three criminal prosecutions, while the SEC brought enforcement actions against two individuals related to a single matter. To date, no charges have been brought against most of the companies involved in these individual prosecutions. Several ongoing enforcement actions against individuals were resolved this year, including injunction-only settlements with Noble Corp. executives Mark

[3] Note that this average includes an "artificial" spike that occurred in 2009 as a result of the 22 individuals indicted in the "SHOT show" matter.

Jackson and James Ruehlen,[4] and judgments against three of the five remaining Siemens defendants Ulrich Bock, Stephan Signer, and Andres Truppel.[5]

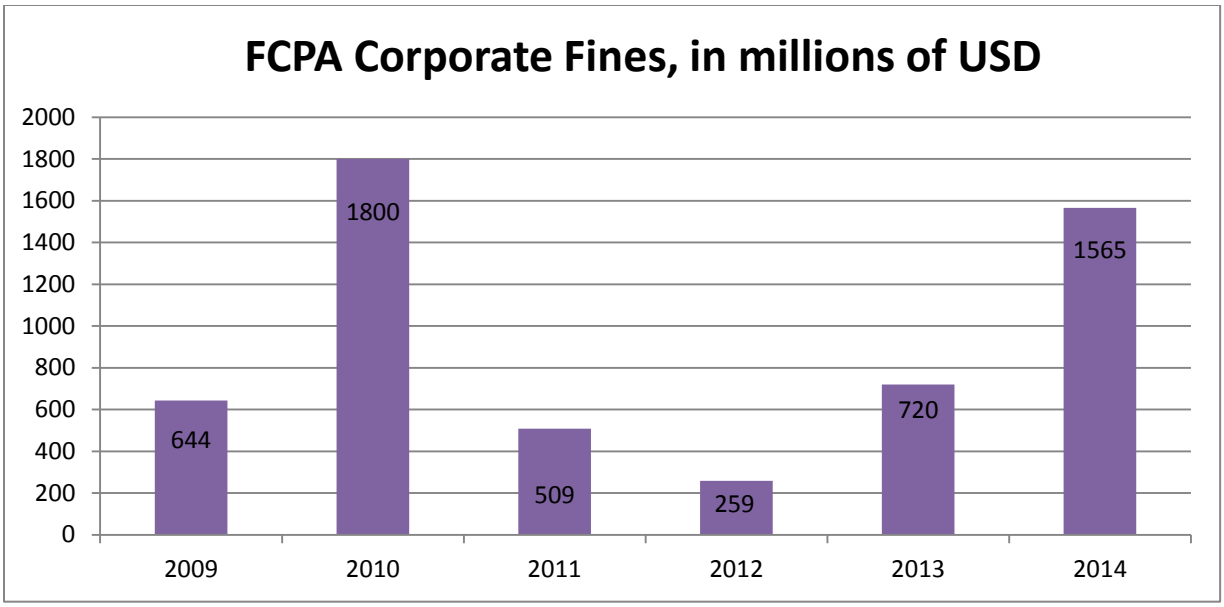


B. Monetary Sanctions

The ten companies paid a total of $1.56 billion in criminal and civil penalties, disgorgement, and pre-judgment interest, more than doubling the monetary sanctions levied by the US government in FCPA matters in 2013 and approaching the $1.8 billion in sanctions levied in 2010.

[4] *SEC v. Jackson*, 4:12-cv-563 (S.D. Tex. filed Feb. 24, 2012); SEC Litigation Release No. 23038, *SEC Settles Pending Civil Action Against Nobel Executives Mark A. Jackson and James J. Ruehlen* (Jul. 7, 2014), http://www.sec.gov/litigation/litreleases/2014/lr23038.htm.

[5] SEC v. Sharef, 11-cv-09073 (S.D.N.Y. filed Dec. 13, 2010); SEC Litigation Release No. 22923, SEC Concludes Its Case Against Former Siemens Executives Charged with Bribery in Argentina, Obtaining Judgments over $1.8 Million (Feb. 10, 2014), http://www.sec.gov/litigation/litreleases/2014/lr22923.htm.

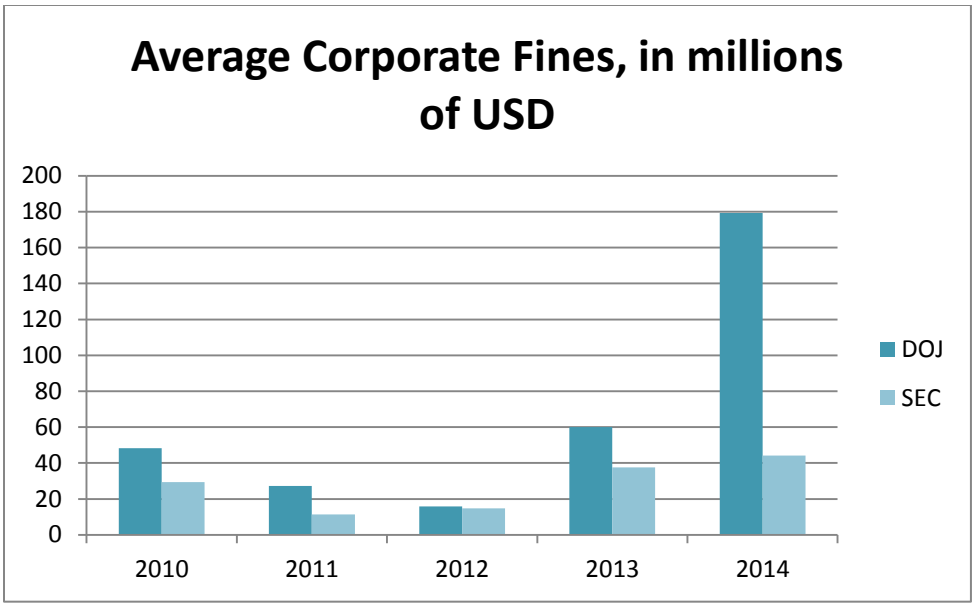


These elevated overall corporate sanctions in 2014 were driven by particularly high sanctions levied in a small number of notable cases. The largest all-time FCPA-related DoJ-imposed monetary sanction, resulting in a penalty just under those of all other 2014 sanctions combined, was a $772 million penalty against French company Alstom S.A. and its related entities for conduct relating to payments made to officials in Indonesia, Saudi Arabia, Egypt, Bahamas, and Taiwan. The large penalties resulting from the Alstom case have continued the trend of levying heavy sanctions against foreign companies.[6] The smallest DoJ-related monetary sanction was $14 million levied against Dallas Airmotive Inc. under its Deferred Prosecution Agreement (DPA) relating to improper payments to government officials to secure contracts in Latin America.

SEC monetary sanctions in 2014 fell below those imposed by the DoJ. The largest SEC-levied sanction in 2014 was $161 million in disgorgement against Alcoa Inc. relating to improper payments to government officials in Bahrain. The smallest SEC sanction was $2 million in disgorgement, prejudgment interest, and penalties against Smith & Wesson Holding Corporation related to improper payments to foreign officials to obtain firearms supply contracts in Pakistan, Indonesia, Turkey, Nepal, and Bangladesh.

The mean DoJ and SEC sanctions were $179.43 million and $44.1 million respectively, or—excluding the Alstom sanctions—$69 million and $44.1 million respectively. This represents a significant increase from the 2013 means of $60 million (DoJ) and 37.6 million (SEC). However, as FCPA investigations typically take several years to resolve and year-on-year data can be significantly affected by one or two large settlements (as was the case with Alstom in 2014), one should not read too much into the year-to-year averages.

[6] Currently, only two US-based companies have a place on the list of the ten cases with the highest monetary sanctions.



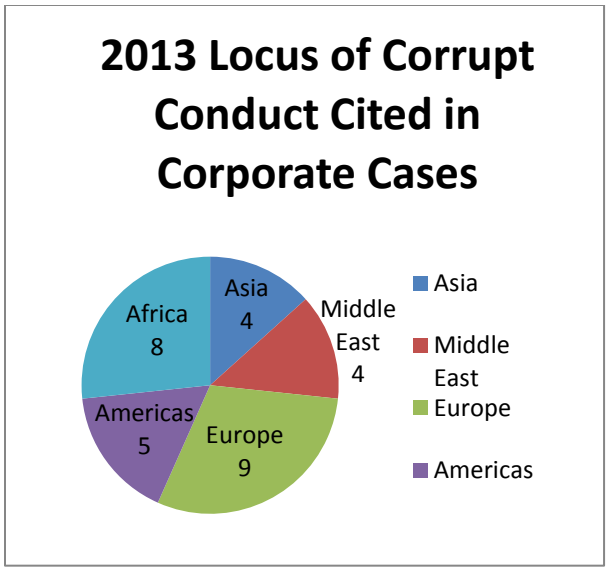
C. Geography and Industries Affected

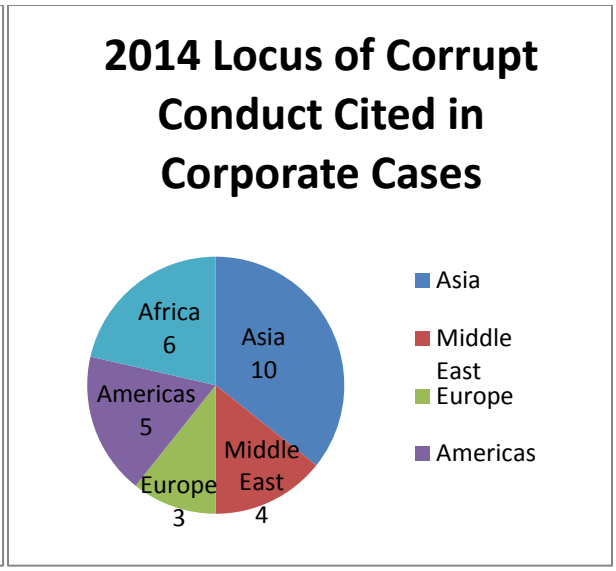
As in 2013, 2014 saw FCPA-related settlements involving conduct with a wide geographic spread, including twenty-four countries and all regions, with several cases involving multi-country and multi-regional conduct. Conduct in Asia accounted for more enforcement actions than any other region, with conduct on that continent cited ten times in six of the ten corporate cases.[7] Activity was spread fairly evenly across the remaining regions. Enforcement for conduct in Europe (including Russia) fell dramatically from 2013 levels, accounting for three instances of conduct cited in two of the ten corporate cases. Conduct in Africa (including Egypt) was also cited less frequently than in 2013, with six instances cited in two of the ten corporate cases.

2014 saw enforcement activity in industries that have been the subject of significant enforcement actions in years past, such as the medical device and energy sectors. A number of additional industries were affected, however, that had not previously been the targets of enforcement actions.

This year, Bio-Rad Laboratories, Inc. and Bruker Corporation were added to the long list of enforcement actions against medical device and scientific instrument companies. Power and energy companies also came under scrutiny in the Marubeni and Alstom settlements. Enforcement agencies branched out to some relatively untouched industries through their investigations of Avon Products, the beauty products distributor, and Smith & Wesson, the firearms manufacturer.

[7] Some countries appear in more than one enforcement action. For the purposes of these figures, each appearance is counted separately as an enforcement action in the specific region.





II. KEY DEVELOPMENTS AND TRENDS IN FCPA ENFORCEMENT

A. Cooperation and Voluntary Disclosure Remain Important Drivers of Final Penalty Amounts

Again this year, the extent of a company's cooperation and disclosure, or lack thereof, with DoJ and SEC investigations has had a measurable effect on the severity of the sanctions levied.[8] The headline-grabbing example is Alstom's $772 million criminal penalty, the largest FCPA fine in the statute's history, which was around the middle of the US Sentencing Guidelines' (USSG) range, as a result of Alstom's failure to voluntarily disclose its conduct and to cooperate fully throughout the government investigation, among other factors. (Alstom did not begin cooperating until after the DoJ publicly charged four of its executives.) Similarly, Marubeni was assessed an $88 million criminal fine (not to mention the significant collateral consequences that may stem from the parent company's guilty plea), which is approximately $25 million above the low end of the USSG range, due in part to the company's lack of cooperation and voluntary disclosure in relation to the same Indonesia project targeted in the Alstom case (it was a consortium partner).

In contrast, Avon Products' $67 million fine represented a discount of approximately twenty percent off the low end of the USSG range; Dallas Airmotive also received a twenty percent discount off the low end; and HP's fine was a roughly thirty percent reduction from the low end of the USSG range. All of these companies were credited with disclosure and/or cooperation, among other factors such as an effective compliance program and remediation. Interestingly, Alcoa received a fifty-three percent reduction off the low end of the USSG range with its $209 million fine (which does not include the $161 million in disgorgement or $14 million forfeiture) even though the government's investigation was spurred by a civil complaint filed against Alcoa by the state-owned company alleged to have been involved in the bribery scheme. The government's decision to reduce the fine even in the absence of a voluntary disclosure is likely

[8] *See* Steptoe's 2013 Year in Review for its comparison of the Ralph Lauren NPA with the Weatherford settlements.

the result of Alcoa's prompt disclosure following filing of the civil complaint, along with its extensive cooperation during the investigation, as well as other factors.

B. Third Parties and "Grand Corruption" Continue to Reign Supreme

All of the corporate cases in 2014 involved fairly typical "grand corruption" scenarios in which companies funneled bribes through third parties in order to win major government contracts, with the exception of Avon Products and Layne Christensen (in which the corrupt aim was regulatory benefits, including market access) and Bruker (which involved no third parties). These cases provide a few additional examples of the government's broad interpretation of the "obtain or retain business" element of the FCPA's anti-bribery provisions. For instance, Avon Products allegedly bribed officials to secure direct sales rights, but also to avoid penalties and suppress negative news articles. In Layne Christensen, the government claimed the corrupt scheme was aimed at reducing the company's tax liabilities and penalties, expediting the clearance of its goods through customs, securing border entry rights and work permits, and avoiding penalties for noncompliance with local immigration and labor laws.

C. Excessive Travel and Hospitality Benefits Feature Frequently

While there were no standalone cases of improper gifts, meals, entertainment or travel in 2014, several cases involved such conduct as an add-on to other allegations, as has become a common feature of FCPA enforcement. Enforcement authorities reiterated their position in the Avon Products case, for example, that they will consider not only large-value gifts, but also small-dollar "pattern and practice" benefits that in the aggregate are significant. In addition to large trips and expensive gifts, the charging documents state that Avon China provided approximately $1.65 million in meals and entertainment to officials, with the majority of the meals under $200 each. The government noted gaps in the information the company kept about attendees and business purpose for these events, underscoring their expectations about the detailed recording of such expenditures.

D. International Cooperation Expands

Cooperation among international law enforcement and investigative agencies continues to rise, not only among OECD Convention parties, but more broadly. This year US enforcement agencies acknowledged assistance provided by foreign counterparts in every case except a handful (Smith & Wesson, Layne Christensen, Bruker, Avon Products and Direct Access Partners). The majority of cases cited international law enforcement cooperation, from a growing number of countries and agencies. In the Alstom case, DoJ acknowledged the assistance of law enforcement counterparts in Indonesia, Switzerland, the UK, Germany, Italy, Singapore, Saudi Arabia, Cyprus and Taiwan. For Alcoa, the SEC thanked the Australian Federal Police, Ontario Securities Commission, Guernsey Financial Services Commission, Liechtenstein Financial Market Authority, Norwegian ØKOKRIM, United Kingdom Financial Control Authority, and Office of the Attorney General of Switzerland. In Marubeni, DoJ recognized the cooperation of the Indonesian Komisi Pemberantasan Korupsi (Corruption Eradication Commission), the Office of the Attorney General of Switzerland and the Serious Fraud Office (SFO) in the United Kingdom. For the Bio-Rad case, the SEC thanked the Bank of Lithuania, Financial and Capital Market Commission of Latvia, and British Virgin Islands Financial Services Commission, and in the FLIR

Systems cases (Timms and Ramahi), it mentioned the United Arab Emirates Securities and Commodities Authority. In the case of former Bechtel executive Elgawhary, DoJ obtained cooperation from Switzerland, Germany, Italy, Saudi Arabia and Cyprus, and for the PetroTiger executives it worked with agencies in Colombia, the Philippines and Panama. In the Firtash case, DoJ noted that it received significant assistance from its law enforcement counterparts in Austria, as well as the Hungarian National Police, and in Dallas Airmotive, DoJ acknowledged the assistance of law enforcement counterparts in Brazil. Finally, in the HP case, the SEC thanked the Public Prosecutor's Office in Dresden, Germany, while DoJ recognized the Polish Anti-Corruption Bureau (CBA), the Polish Appellate Prosecutor's Office, and "the contribution of our law enforcement partners in other countries involved in this matter."

Perhaps as interesting as the foregoing list is the absence from the list of many countries in which, according to the charging papers, alleged misconduct took place. It is not surprising that countries with which the United States does not have good diplomatic relationships would not cooperate, such as Venezuela (Direct Access Partners). Also notably absent from the recognition lists are China (Bruker and Avon Products), Russia (HP and Bio-Rad) and Egypt (Alstom and Elgawhary). South Asian countries were another common location for corrupt conspiracies charged in 2014 (e.g., Smith & Wesson in Pakistan, Nepal and Bangladesh, and Firtash in India), but none of those countries received any recognition for law enforcement cooperation. Nor did any of the African countries alleged to have been involved in the Layne Christensen case. Mexico (HP) and Peru and Argentina (Dallas Airmotive) were also conspicuously omitted. Other countries had a mixed record in this regard, such as Indonesia (acknowledged in the Alstom and Marubeni cases, but not in Smith & Wesson) and Saudi Arabia (acknowledged in Alstom and Elgawhary, but not in the FLIR cases). Though Bahrain was not acknowledged for law enforcement assistance in the Alcoa case, that government's role in the case is complex, not least because the state-owned company alleged to have been at the center of the conspiracy initially brought the case into the public spotlight by filing a civil complaint against Alcoa. In addition, US authorities did not note any cooperation from Vietnam or Thailand in the Bio-Rad matter or from Turkey in Smith & Wesson.

Beyond mutual assistance, there have been a number of parallel actions pursued by foreign counterparts against companies that resolved US cases in 2014. For instance, the UK SFO pursued two separate cases against British subsidiaries of Alstom and their employees for alleged corruption in Lithuania, India, Poland, and Tunisia. It also prosecuted the agent allegedly used by Alcoa in its decades-long bribery scheme, Victor Dahdaleh, although the SFO was forced to abandon that case after one key witness changed his testimony and two others refused to testify. Furthermore, there was a parallel German enforcement action against HP, and the company also reported that it was cooperating with German and Polish authorities in their investigations of its employees.

E. Monitorships Decline

This year was also notable for the decline in the use of corporate monitorships. Whereas such arrangements were imposed in one-third of the cases resolved in 2013, this year a monitor was required only in the Avon Products case. This was a "hybrid" monitorship, in which an independent monitor serves for eighteen months, and upon successful completion of that initial period, the requirement converts to an 18-month self-reporting obligation. Notably, despite the

high fines imposed, the Alstom settlement did not require a separate DoJ monitorship, relying instead on the monitoring requirements on the company pursuant to its 2012 World Bank resolution. Only if the company fails to satisfy the monitoring requirements contained in the World Bank resolution will Alstom be required to retain an independent compliance monitor. Self-reporting, in contrast, remains a more common feature of DoJ and SEC enforcement actions.[9]

F. SEC's Use of Administrative Proceedings Increases

In 2014, the SEC continued to use its enhanced authorities in administrative proceedings, secured in the Dodd-Frank legislation, to settle FCPA actions. Out of the seven corporate settlements brought by the SEC, six were settled through administrative proceedings (including Alcoa, HP, Bio-Rad, Layne-Christensen, Bruker, and Smith & Wesson). Interestingly, the SEC settled charges with two individuals, Timms and Ramahi, through administrative proceedings as well. Although the Dodd-Frank Act expanded the SEC's authority to impose monetary sanctions through the use of administrative proceedings, the increased use of administrative proceedings has spurred criticism regarding the avoidance of judicial scrutiny in these matters. In light of the challenges respondents face in enjoining the SEC from using administrative proceedings in particular cases, this trend is likely to continue.[10]

G. Resolution of Investigations without Charges

Several companies reported that the DoJ and/or SEC had resolved investigations without charges in 2014: ten with respect to the DOJ, and four with respect to the SEC. [11] There appears to be an increase in the number of announcements of resolutions without charges. However, because this data is dependent on the number of public disclosures of investigations, it is difficult to conclude whether the percentage of investigations resolved without charges has changed.

III. SIGNIFICANT JUDICIAL DEVELOPMENTS

A. Haiti Telco—Definition of "Instrumentality"

On May 16, 2014, the US Court of Appeals for the Eleventh Circuit became the first federal appeals court to decide whether a state-owned enterprise (SOE) is an "instrumentality" of a foreign government, such that its employees and officers are "foreign officials" for the purposes of

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[9] For example, companies were required to issue follow-up reports to the SEC in the *Layne Christensen, HP, Bio-Rad, and Smith & Wesson* matters. Companies were required to issue follow-up reports to the DoJ in *Dallas Airmotive* and *Bio-Rad.*

[10] A recent decision, *Chau v. SEC*, highlights the challenges with succeeding in such cases. In that case, Respondents Chau and Harding Advisory LLC filed a motion for a preliminary injunction alleging violations of the due process and equal protection clauses of the Constitution after their motions for adjournment for time to prepare and to have the Federal Rules apply to the proceeding were denied. The court dismissed on narrower grounds for lack of subject matter jurisdiction. No. 14-cv-1903 LAK, 2014 WL 6984236, at *1 (S.D.N.Y. Dec. 11, 2014).

[11] The four SEC-related companies are: Dialogic Inc., Agilent Technologies, Baxter International, and Image Sensing Systems; while the ten DoJ-related companies are: Agilent, SL Industries Inc., Merck, Baxter International, LyondellBasel Industries NV, Dyncorp, Smith & Wesson, Layne Christensen, SBM Offshore, and Image Sensing Systems.

the FCPA. In *United States v. Esquenazi*, the court unanimously rejected defendant-appellants' narrow definition of the term "instrumentality" to include only those entities or operations which form an "actual part of the government" in question.[12] The court instead adopted a two-prong test based upon (1) whether the government in question controls the SOE in question, and (2) whether the functions that the SOE performs are ones that the foreign government has "made its own."[13]

Although the court noted that Teleco, the Haitian telecommunications company involved in the case, most likely would have qualified as an instrumentality of the Haitian government "under most any definition [the court] could craft," it nonetheless enumerated a variety of non-exhaustive factors in determining whether the government controls the SOE and whether the entity performs a function that the foreign government "treats as its own" under prongs one and two of the above-mentioned test.[14] The court emphasized that these are "fact-bound questions" that must be reviewed from the perspective of the host country government. In *Esquenazi*, the assessment under this test was relatively clear: Teleco had strong ties to the Haitian government, had received monopoly status and tax advantages under Haitian law, was ninety-seven percent owned by the Haitian national bank, and had its Director General and board members appointed by the Haitian President.

How these factors will come into play in less-clear-cut cases remains unclear. Given the challenges of fact-gathering on the factors highlighted by the court, particularly for companies with far-flung businesses involving dealings with many potential instrumentalities, it seems likely that legal and compliance personnel will adopt a conservative and more "bright-line" approach as to what entities qualify as an "instrumentality" of a foreign government for FCPA purposes.[15]

In August, 2014, the defendants filed a petition for *certiorari*. The Supreme Court declined to hear the case, rendering the Eleventh Circuit's decision final.[16]

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[12] 752 F.3d 912 (11th Cir. 2014)
[13] Id.
[14] With respect to whether the foreign government "controls" the entity in question, factors include: the foreign government's formal designation of that entity; whether the foreign government has a majority interest in the entity; the government's ability to hire and fire the entity's principals; the extent to which the entity's profits, if any, go directly in the governmental fisc, and, by the same token, the extent to which the government funds the entity if it fails to break even; and the length of time these indicia have existed. With respect to whether the entity performs a function that the foreign government "treats as its own," factors include: whether the entity has a monopoly over the function it exists to carry out; whether the 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. *Id.* at 296.
[15] For additional background on the Esquenazi case, see Steptoe's advisory, Eleventh Circuit Issues Long-Awaited Decision in Haiti Teleco Case: Eschews Bright-Line Test for FCPA "Instrumentalities", (May 27, 2014), http://www.steptoe.com/publications-9610.html.
[16] Zach Warren, *Supreme Court declines hearing key FCPA case Esquenazi*, INSIDE COUNSEL (Oct. 7, 2014), http://www.insidecounsel.com/2014/10/07/supreme-court-declines-hearing-key-fcpa-case-iesqu.

IV. 2014 CORPORATE SETTLEMENTS

The preceding section describes trends that cut across FCPA corporate enforcement actions in 2014. Below we summarize each settlement, in descending order by penalty amount, noting significant features of the individual cases.

A. Alstom

On December 22, 2014, French power and transportation company, Alstom S.A. (Alstom) pleaded guilty to charges that the company violated the FCPA's books and records and internal controls provisions. Alstom's Swiss subsidiary, Alstom Network Schweiz AG, formerly Alstom Prom (Alstom Prom), also pleaded guilty to charges that it conspired to violate the anti-bribery provisions of the FCPA. In addition, two of Alstom's US subsidiaries, Connecticut-based Alstom Power Inc. (Alstom Power) and New Jersey-based Alstom Grid Inc. (Alstom Grid), entered into three-year deferred prosecution agreements with the DoJ, admitting that they conspired to violate the FCPA's anti-bribery provisions. These developments come after more than six years of investigations into Alstom and its subsidiaries by law enforcement authorities in the United States, Switzerland, and Indonesia.

According to the companies' admissions, Alstom, Alstom Prom, Alstom Power, and Alstom Grid, from at least 2000 through at least 2011 and mostly through third-party consultants, paid bribes to government officials in connection with power, grid, and transportation projects for state-owned entities around the world, including in Indonesia, Egypt, Saudi Arabia, the Bahamas, and Taiwan. The settlement documents highlight how Alstom entities referred to the consultants by code names, completed little to no due diligence on the consultants despite the presence of red flags (such as lack of relevant experience, location outside the project country, designation of off-shore bank accounts, and the like), knew or knowingly avoided taking action to discover that the consultants were paying bribes, retained multiple consultants to purportedly perform the same services, paid consultants based on vague invoices supported by inadequate back-up documentation, assisted consultants in preparing false documentation, and failed to conduct audits or testing of consultant payments. The companies also circumvented corporate compliance policies on consultant agreements and payments, and submitted false certifications to the US Agency for International Development (USAID) concerning the use and payment of consultants on projects funded in part by USAID. Bribe payments were falsely characterized in Alstom's books and records as "commissions" and "consultancy fees." Alstom entities also provided cash, gifts, entertainment, and travel directly to government officials, hired family members of officials, and donated to a charity associated with an official in exchange for the officials' assistance in retaining and obtaining business. In total, the Alstom entities paid more than $75 million to secure $4 billion in projects, with a profit to Alstom of approximately $300 million.

To resolve the charges, Alstom agreed to pay a $772.29 million criminal penalty—the biggest criminal fine ever levied for an FCPA offense. In reaching this amount, which falls near the middle of the calculated advisory sentencing guidelines range, the DoJ cited a number of negative factors, including the breadth of Alstom's misconduct, lack of an effective compliance program, prior misconduct (settled with the World Bank and other non-US authorities), and refusal to voluntarily disclose its conduct or to fully cooperate with the DoJ's investigation for several years. Alstom did not begin cooperating with the DoJ until after the DoJ publicly charged four

executives of Alstom and its subsidiaries, three of whom have since pleaded guilty. In response to criticism that the DoJ has become too reliant on cooperation from companies, the head of the DoJ's Criminal Division announced: "One important message of this case is this: While we hope that companies that find themselves in these situations will cooperate with the Department of Justice, we do not wait for or depend on that cooperation."[17] DoJ also acknowledged the assistance of law enforcement counterparts in Indonesia, Switzerland, the UK, Germany, Italy, Singapore, Saudi Arabia, Cyprus and Taiwan.

The parent charges at first blush seem odd, since they are FCPA accounting charges against an entity that has not been an issuer since 2004. The settlement documents, which do not charge Alstom with conspiracy, do not specify how DoJ charged conduct that appears to be outside the statute of limitations. From a collateral consequences and particularly a debarment risk perspective, one can imagine that such a resolution, which places the parent responsibility well in the past, could be attractive to the company.

In addition to the monetary penalty, the Alstom entities agreed to annual self-reporting to DoJ on the companies' remediation and compliance program during a three-year period. In the event the entities fail to satisfy the monitoring requirements imposed in a separate World Bank resolution, however, they will be required to appoint an independent compliance monitor. The independent compliance monitor would be a French national with relevant expertise and qualifications, subject to DoJ's approval.

Also on December 22, 2014, the UK Serious Fraud Office (SFO) charged a British subsidiary of Alstom, Alstom Power Ltd., and two of its employees with bribing employees at a state-owned Lithuanian energy company in an effort to sell power plant equipment. In July 2014, the SFO had previously charged another British subsidiary, Alstom Network UK, for separate corruption and conspiracy offenses, involving $8.5 million in bribe payments between 2000 and 2006 for work on infrastructure projects in India, Poland, and Tunisia.

B. Alcoa

On January 9, 2014, global aluminum producer Alcoa Inc. (Alcoa) and its US-based subsidiary Alcoa World Alumina LLC (AWA) entered into a $384 million settlement with the DoJ and SEC for violations of the FCPA, as a result of more than $110 million in corrupt payments made to government officials in Bahrain over the course of twenty years. The government investigation arose from a civil complaint filed against Alcoa in February 2008 by Aluminum Bahrain B.S.C. (Alba), an aluminum smelter that is majority owned by the Bahraini government.[18] After the lawsuit was filed, Alcoa disclosed the matter to the DoJ and SEC in February 2008, although only the SEC credited Alcoa with having made a voluntary disclosure in the final resolution. The civil litigation between Alcoa and Alba was subsequently stayed pending the

[17] Remarks for Assistant Attorney General Leslie R. Caldwell Press Conference Regarding Alstom Bribery Plea, US DEP'T OF JUSTICE (Dec. 22, 2014), http://www.justice.gov/opa/speech/remarks-assistant-attorney-general-leslie-r-caldwell-press-conference-regarding-alstom.

[18] *Aluminum Bahrain B.S.C. v. Alcoa Inc.*, No. 2:08-cv-0299 (W.D. Pa. filed Feb. 27, 2008).

government investigations, and was settled in October 2012.[19] Other proceedings relating to these matters also received significant attention, in particular the prosecution by the UK Serious Fraud Office of the alleged third party who acted as a conduit for the payments, British-Canadian-Jordanian businessman Victor Dahdaleh, which the SFO eventually abandoned.

In settling with the DoJ, AWA pled guilty to one count of violating the anti-bribery provisions of the FCPA, and agreed to pay a criminal fine of $209 million and to administratively forfeit $14 million to the Internal Revenue Service (IRS). Alcoa agreed to maintain and implement an enhanced global anti-corruption program, but it was not required to appoint a compliance monitor or provide periodic self-monitoring reports to the DoJ.

The SEC settled the matter using an administrative cease-and-desist order, and Alcoa agreed to pay an additional $175 million in disgorgement of profits, with $14 million of that amount deemed satisfied by the $14 million forfeiture to the IRS. The SEC charged Alcoa with violations of the anti-bribery, books and records and internal controls provisions of the FCPA. The basis on which the SEC held Alcoa Inc. liable is noteworthy. The SEC Order makes clear that it "ma[de] no findings that any officer, director or employee of [parent] Alcoa knowingly engaged in bribery." Rather, Alcoa Inc.'s liability was based on the theory that its subsidiaries acted as agents of Alcoa Inc., and pointed to a number of factors to support that Alcoa Inc. exercised control over its subsidiaries. While the SEC has rarely set out the factors leading to parent responsibility in detail, its approach in Alcoa is consistent with that set forth in the 2012 *FCPA Resource Guide* regarding how it evaluates control: it will examine the parent's knowledge and direction of the subsidiary's actions, both generally and in the context of the specific transaction.

C. Avon

On December 17, 2014, after one of the longest running and costliest investigations publicly reported, cosmetics company Avon Products Inc. (Avon) entered into a DPA with the DoJ[20] and a settled complaint with the SEC[21] related to alleged improper payments of $8 million made over the course of four years to obtain licenses, avoid penalties, and suppress negative news articles in China. Its Chinese subsidiary, Avon Products (China) Co. Ltd (Avon China) pleaded guilty[22] to conspiracy to violate the FCPA's books and records provisions. Avon paid a total of $135 million: $67,648,000 in criminal penalties, $52,850,000 in disgorgement, and $14,515,000 in

[19] News Release, ALCOA INC., *Alcoa and Alba Resolve Civil Litigation* (Oct. 9, 2012) http://www.alcoa.com/global/en/news/news_detail.asp?pageID=20121009006367en&newsYear=2012.
[20] Deferred Prosecution Agreement, United States v. Avon Prods. Inc., No. 1:14-cr-00828-GBD (S.D.N.Y. Dec. 17, 2014) [hereinafter Avon DPA]; DoJ Press Release, Avon China Pleads Guilty to Violating the FCPA by Concealing More Than $8 Million in Gifts to Chinese Officials (Dec. 17, 2014), http://www.justice.gov/opa/pr/avon-china-pleads-guilty-violating-fcpa-concealing-more-8-million-gifts-chinese-officials.
[21] Complaint, *SEC v. Avon Prods. Inc.*, 14-CV-9956 (S.D.N.Y. Dec. 17, 2014) [hereinafter Avon Complaint]; SEC Press Release, *SEC Charges Avon With FCPA Violations* (Dec. 17, 2014), http://www.sec.gov/news/pressrelease/2014-285.html#.VLg2VkfF98E.
[22] Plea Agreement, *United States v. Avon Prods. (China) Co.*, No. 1:14-cr-00828-GBD (S.D.N.Y. Dec. 17, 2014) [hereinafter Avon China Plea Agreement].

prejudgment interest.[23] Avon also is required to have a monitor for eighteen months, followed by eighteen months of self-reporting to the DoJ and SEC.

The charging documents detail a panoply of payments made by Avon China over the course of four years to receive China's first "test" license for direct sales and later to obtain direct sales licenses throughout China's provinces. Avon China provided gifts to Chinese Ministry of Commerce (MOFCOM) and Administration for Industry and Commerce (AIC) licensing officials, including Louis Vuitton products, Gucci handbags, watches, and Tiffany pens, many of which were recorded as "samples" or "public relations business entertainment."[24] Avon China also sponsored travel for officials that had little business content, including an eighteen-day, all-expenses paid trip to the United States that included only a half-day visit to an Avon site.[25] Avon China provided approximately $1.65 million in meals and entertainment expenses to officials. While the majority of the meals were under $200 per occurrence,[26] the attendees and business purpose information was missing, underscoring that the SEC and DoJ will also prosecute "pattern and practice" cases involving repeated, smaller-dollar entertainments or gifts in addition to large-scale travel expenses, and that detailed recording of such expenditures is required.

In addition to gifts, entertainment, and travel, Avon China employees submitted false business expense reimbursement requests to fund cash payments to officials to avoid fines.[27] To avoid negative press, Avon China sponsored a contest run by a state-owned newspaper at the request of its editor (who, according to DoJ charging papers, may have received a commission on sponsorships). According to the SEC, Avon China also paid for ads in various media, but the Complaint was not clear as to the benefit offered or provided to individual government officials in relation to this allegation.[28] Avon also employed a consultant, without any due diligence and without having FCPA safeguards in the contract; the consultant allegedly provided no legitimate services for the company.[29]

The charging documents also detail internal control failures, including company executives' handling of an internal audit report from 2005.[30] The audit identified possible concerns regarding the provision of high-value gifts, meals, and entertainment to Chinese officials, the lack of supporting documentation for the expenditures, and the payments of substantial sums of money to a consultant for vague services. Avon China and Avon executives asked that the internal audit report remove all references to officials, in part over concerns that the officials would stop

[23] Interestingly, Avon announced that it had reached a settlement in principle for $135 million in May 2014; the reasons for the delay of over six months between that announcement and the finalization of the resolution is unclear. *See also* Avon Products Inc., *Form 10-Q*, May 1, 2014.
[24] Avon Complaint ¶ 41; Avon DPA, Statement of Facts ¶¶ 37–38; Avon China Plea Agreement, Statement of Facts ¶¶ 30–31.
[25] Avon Complaint ¶ 42; Avon DPA, Statement of Facts ¶ 45; Avon China Plea Agreement, Statement of Facts ¶ 37.
[26] Avon Complaint ¶ 40.
[27] Avon DPA, Statement of Facts ¶ 47; Avon China Plea Agreement, Statement of Facts ¶ 40.
[28] Avon Complaint ¶ 46–47; Avon DPA, Statement of Facts ¶ 50(g); Avon China Plea Agreement, Statement of Facts ¶ 43(g).
[29] Avon DPA, Statement of Facts ¶¶ 52–53; Avon China Plea Agreement, Statement of Facts ¶¶ 45–46.
[30] Avon Complaint ¶¶ 19–25; Avon DPA, Statement of Facts ¶¶ 57–69; Avon China Plea Agreement, Statement of Facts ¶¶ 50–62.

giving business to Avon if named. Additionally, internal audit personnel were instructed to delete all copies of the report. Follow-up work was conducted offline, and without mentioning the term FCPA; two handwritten pages of audit findings were hand-carried to the United States. Audit recommendations, including to record names and amounts of government officials entertained (albeit in an off-book record) and use contracts with FCPA safeguards, were never followed.

The Avon investigation, which was first disclosed to regulators in 2008, reportedly has cost the company approximately $344 million in legal fees and other related investigation costs.[31] Notably, enforcement authorities publicly criticized aspects of Avon's worldwide review: while recognizing the compliance and internal control improvements Avon gained through its company-wide review, the DoJ DPA also noted that these efforts were undertaken "without Department request or guidance, and at times caused unintended delays in the progress of the Department's narrower investigations . . . ."[32] This underscores the need for thoughtful investigation plans that prioritize areas of inquiry, and signals the authorities' willingness to accept approaches that do not involve comprehensive worldwide investigations to identify root causes. Given the scope of Avon's investigation, it is notable that the enforcement actions only cover China.

D. Hewlett-Packard

On April 9, 2014, Hewlett-Packard Company (HP) and three of its wholly-owned non-US subsidiaries agreed to pay a combined total of $108 million to settle DoJ and SEC charges concerning bribes paid to obtain technology contracts with government authorities in Russia, Poland, and Mexico.[33]

To obtain a technology contract with Russia's Public Prosecutor's Office, ZAO Hewlett-Packard A.O. (HP Russia) used third-party intermediaries with ties to government officials to pay bribes laundered through layers of shell entities and offshore bank accounts. HP Russia managers made off-the-books agreements with intermediaries and created two sets of project pricing records- one encrypted, password-protected, spreadsheet tracking bribe payment amounts and recipients, and a second, sanitized, version shared with approval officers in Europe. To create a slush fund for the payments, managers sold HP equipment to a channel partner and re-purchased it from an intermediary at a mark-up. When questioned by approval personnel in Europe, HP Russia managers misrepresented the intermediaries' roles and payment terms. Corporate books and records inaccurately characterized the bribes as consulting fees,

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[31] Tom Schoenberg et al., *Avon Bribe-Probe Clean-Up Neared $500 Million as Sales Fell*, GLOBAL ASSOCIATION OF RISK PROFESSIONALS (May 2, 2014), http://www.garp.org/risk-news-and-resources/risk-headlines/story.aspx?newsId=109802

[32] Avon DPA ¶ 4.

[33] SEC Press Release, *SEC Charges Hewlett-Packard With FCPA Violations* (April 9, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541453075#.VLf1DlUo5C8; DoJ Press Release, *Hewlett-Packard Russia Agrees to Plead Guilty to Foreign Bribery* (April 9, 2014), http://www.justice.gov/opa/pr/hewlett-packard-russia-agrees-plead-guilty-foreign-bribery; Information and Plea Agreement, *United States v. Zao Hewlett-Packard A.O.*, No. 5:14-cr-201 (N.D. Cal. Apr. 9, 2014); Information and DPA, *United States v. Hewlett-Packard Polska, SP. ZO.O.*, No. 5:14-cr-202 (N.D. Cal. Apr. 9, 2014); Order Instituting Cease and Desist Proceedings, *In re Hewlett-Packard Co.*, Release No. 71916 (Apr. 9, 2014).

commissions, costs of goods and services, and other legitimate expenses. HP Russia pleaded guilty to conspiring to violate the FCPA, violating the FCPA's anti-bribery provisions, knowingly falsifying an issuer's (HP's) books and records, and knowingly circumventing and failing to implement HP's internal accounting controls. As US jurisdictional links, the Criminal Information cited a meeting in the United States, email routed through US servers, and false Sarbanes-Oxley certifications transmitted to HP's US headquarters.

To secure and maintain technology contracts with the Polish National Police, Hewlett-Packard Polska, Sp. z. o.o. (HP Poland) provided meals, entertainment, travel (including to a conference in San Francisco and side trip to Las Vegas), sightseeing (including a private tour flight over the Grand Canyon), gifts (including personal electronic equipment), bags of cash from off-the-books accounts, and a percentage of contract revenues to an official of the Polish National Police and Interior Ministry. HP Poland managers used anonymous email accounts and pre-paid mobile phones to conceal communications concerning upcoming tenders and bribe amounts. HP Poland agreed to a three-year DPA to resolve charges that it knowingly falsified books and records and circumvented HP's internal controls.

To win a contract with Pemex, Mexico's state-owned petroleum company, Hewlett-Packard Mexico, S. de R.L. de C.V. (HP Mexico) paid bribes through a consulting company with ties to Pemex officials. Because the consultant was not a pre-approved HP channel partner, HP Mexico retained a separate, pre-approved intermediary to serve as an additional conduit for the improper payments. HP records inaccurately characterized the payments as "commissions," and transferred payments through a US correspondent bank account. HP Mexico entered a three-year NPA with DoJ in relation to this conduct.

The rationale for the differing forms of resolutions with each of the three subsidiaries (Russian plea, Polish DPA, and Mexican NPA) is not transparent in the settlement documents, but appears to relate in part to the relative seriousness and pervasiveness of the conduct by each entity. For its turn, the parent company HP resolved SEC charges relating to the same conduct through a settled administrative proceeding. Despite the existence of HP policies and procedures prohibiting the conduct at issue and efforts by employees of HP's subsidiaries to circumvent HP policies and conceal their misconduct, the SEC charged HP with failing to implement internal controls adequate to prevent and detect the improper payments, as well as for inaccurate books and records.

In total, HP's subsidiaries agreed to pay $76 million in criminal fines and forfeiture, while HP paid $31.47 million in disgorgement, prejudgment interest, and civil penalties. The criminal fine represented a discount off an agreed USSG range of $106–212.6 million, in recognition of a fine Germany would impose on HP in a parallel matter and the companies' "extraordinary" cooperation and "extensive" remediation. HP also agreed to report annually to DoJ on its compliance and remediation efforts for a three-year period. HP has reported that it also is cooperating with German and Polish authorities in their investigations of certain individual employees.[34]

[34] Hewlett-Packard Company, *Form 10-K*, (Dec. 18, 2014), *available at* http://www.sec.gov/Archives/edgar/data/47217/000104746914009977/a2222365z10-k.htm.

E. Marubeni

On March 19, 2014, Tokyo-based trading company Marubeni Corp. (Marubeni) pled guilty to an eight-count criminal information, charging Marubeni with one count of conspiracy to violate the anti-bribery provisions of the FCPA and seven counts of violating the FCPA, in connection with the same power project in Indonesia involved in the *Alstom* case (*see* IV.A. *supra).*[35]

Marubeni pled guilty to paying bribes to government officials in Indonesia, including Members of Parliament and officials in Indonesia's state-owned and controlled electricity company, Perusahaan Listrik Negara (PLN), to secure their influence in winning a contract to build a major power plant in Indonesia (the "Tehran project").[36] In 2002, Marubeni partnered with Alstom to bid on the $118 million contract. Marubeni and Alstom hired two consultants to bribe Indonesian government officials in exchange for their assistance to secure the contract.[37] The second consultant was hired only after Marubeni and Alstom determined that the initial consultant was not effectively bribing PLN officials. Marubeni and Alstom were awarded the contract for the Tehran project in 2005. According to court documents, Marubeni and its partner transferred a total of $1.4 million, over a four-year period, to the consultants' bank accounts for the purposes of bribing Indonesian government officials.[38] The criminal information cites the fact that some of these payments were transferred through US bank accounts, as well as meetings that Marubeni employees attended in the US in connection with the Tehran project, to establish jurisdiction.

Notably, this is the second enforcement action brought against Marubeni for alleged violations of the FCPA. Marubeni was operating under a DPA between January 2012 and February 2014, just before it pled guilty in the above described matter, for its involvement in the Bonny Island bribery scheme in Nigeria as an agent of the consortium partners.

The 2014 plea agreement cites Marubeni's lack of cooperation with the investigation, and failure to voluntarily disclose its conduct, as well as the company's lack of an effective compliance program and remediation of the issues underlying the improper payments, as factors that contributed to the settlement amount.[39] The $88 million Marubeni agreed to pay in criminal fines was approximately $25 million above the average low end of the USSG range.[40] Further, and perhaps more significantly, Marubeni could face significant collateral consequences, such as suspension and debarment, due to the guilty plea it entered at the parent level.

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[35] DoJ Press Release, *Marubeni Corporation Agrees to Plead Guilty to Foreign Bribery Charges and to Pay an $88 Million Fine* (Mar. 19, 2014), http://www.justice.gov/opa/pr/2014/March/14-crm-290.html; Criminal Information, *United States v. Marubeni Corp*., No. 3:14-cr-052 (D. Conn. Mar. 19, 2014) [hereinafter Marubeni Criminal Information]. Marubeni is not an "issuer" within the meaning of the FCPA, and there was no parallel enforcement action brought by the SEC.
[36] Plea Agreement, *id.* [hereinafter Marubeni Plea Agreement].
[37] *See supra* Section IV.A for a discussion of the Alstom settlement that also involves this project.
[38] Marubeni Criminal Information ¶¶ 85–95.
[39] Marubeni Plea Agreement ¶ 17
[40] Marubeni Plea Agreement ¶¶ 16–17

F. Bio-Rad

On November 3, 2014, Bio-Rad Laboratories, Inc. (Bio-Rad), a California medical device company, entered into a $55 million settlement for violations of the FCPA related to commissions paid by a subsidiary to third-party distributors in Russia, Vietnam, and Thailand.[41] Bio-Rad agreed to pay a $14.35 million criminal penalty to settle charges brought by DoJ for violations of the FCPA in Russia, and $40.7 million in disgorgement and prejudgment interest to the SEC for anti-bribery, books-and-records and internal controls violations of the FCPA related to business in Russia, Vietnam, and Thailand.[42]

While the settlement involved significant monetary sanctions, two features of the resolutions stand out. First, the SEC did not allege evidence of bribery in Russia. Instead, its charges were based on two Bio-Rad managers having ignored numerous red flags, including that the agent was not equipped to render the services it was engaged to provide, the commissions paid were made to banks in two Baltic nations, a subordinate employee was directed to "talk with codes" when referring to the payments to the agents, and commission payments were structured so as to avoid review by more senior managers.

Another noteworthy aspect of the matter is the terms on which Bio-Rad will conclude its two-year self-monitoring period under its NPA with DoJ. Bio-Rad committed to periodically report to the DoJ for that period concerning its continued compliance efforts, and in particular report any potential improper payments or related accounting misconduct to the DoJ.[43] Notably, however, the DoJ NPA is the first to require that executives of the settling company certify before the agreement terminates, subject to penalties under 18 U.S.C. § 1001, that the company has met its disclosure obligations thereunder.

G. Dallas Airmotive

On December 10, 2014, Texas-based aircraft engine maintenance, repair, and overhaul (MRO) service provider, Dallas Airmotive Inc. (Dallas Airmotive) entered into a deferred prosecution agreement with the DoJ to settle one count of violating the anti-bribery provisions of the FCPA and one count of conspiracy. According to the DPA, from 2008 through 2012, Dallas Airmotive, with the assistance of its Brazilian affiliate, Dallas Airmotive do Brasil, bribed officials of the Brazilian Air Force, the Peruvian Air Force, the Office of the Governor of the Brazilian State of Roraima, and the Office of the Governor of the San Juan Province in Argentina in order to obtain and retain engine MRO service business. The company used a variety of methods to convey the bribe payments, ranging from $3,000 to $20,000 in value, including by entering into agreements with front companies tied to foreign officials, making payments to third parties with the understanding that funds would to directed to foreign officials, and directly providing gifts to foreign officials, including a paid vacation for a foreign official and his spouse.

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[41] SEC Press Release, *SEC Charges California-Based Bio-Rad Laboratories with FCPA Violations* (Nov. 3, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543347364#.VMFExkejNcY.
[42] *Id.*
[43] Id.

To settle the allegations, Dallas Airmotive agreed to pay a $14 million criminal penalty, which was less than the Sentencing Guidelines fine range of $17.5 million to $35 million.[44] This downward departure was attributed to the company's cooperation in the matter, the nature and scope of the offense, and the company's improved compliance efforts.[45] DoJ also acknowledged the assistance of law enforcement counterparts in Brazil. Dallas Airmotive is the latest in a string of aircraft companies to resolve FCPA enforcement actions with the DoJ, preceded by Oklahoma-based BizJet International Sales and Support, Inc. (BizJet) and The NORDAM Group, Inc. (NORDAM), which both settled with the DoJ in 2012. Another aircraft company, the Brazilian firm Embraer, has a pending investigation.

H. Layne Christensen

On October 27, 2014, Layne Christensen Company (Layne) agreed to pay a fine of $5.1 million to resolve SEC administrative charges relating to books and records, internal controls, and civil anti-bribery violations in Africa and to cease and desist from future FCPA violations.[46] (Earlier, Layne had announced that the DoJ had declined to bring a criminal case against the company.) The administrative order cited conduct by Layne's wholly-owned subsidiaries in five countries in sub-Saharan Africa—Mali, Guinea, the Democratic Republic of the Congo (DRC), Burkina Faso, and Tanzania—and included improper payments made (primarily through third parties) to reduce tax liabilities and penalties, in connection with the customs clearance process, and relating to various immigration matters.

The order alleges payments to third parties in Mali (a "local agent"), Guinea (local lawyers, hired at the suggestion of local authorities), and the DRC (a local lawyer) related to reducing assessed tax liabilities by local tax authorities and avoiding/lowering applicable tax penalties.[47] In the DRC, Layne received a multi-million dollar tax assessment, but after engaging the local lawyer as an agent and paying $57,200, the next day Layne received a substantially reduced tax assessment.[48]

The order also alleges improper payments made through customs brokers in Burkina Faso and the DRC to expedite imports and exports.[49] In particular, Layne hired a customs broker that had ties to a DRC-national official, and later hired the nephew of the official as an office manager "in order to facilitate a good relationship" with the official.[50] Layne also allegedly made $23,000 in cash payments in Burkina Faso, Guinea, Tanzania, and the DRC to police, border patrol, immigration, and labor inspectors to secure border entry and work permits for its expatriates, and

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[44] Deferred Prosecution Agreement at 6, *United States v. Dallas Airmotive, Inc.*, No. 14-cr-483 (N.D. Tex. Dec. 10, 2014), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/dallas-air/dai-dpa-final.pdf.
[45] Id.
[46] Order Instituting Cease-And-Desist Proceedings, *In re Layne Christensen Co.*, Release No. 73437 (Oct. 27, 2014) [hereinafter Layne Order], *available at* https://www.sec.gov/litigation/admin/2014/34-73437.pdf; SEC Press Release, *SEC Charges Texas-Based Layne Christensen Company With FCPA Violations* (Oct. 27, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543291857#.VLg2mUfF98E.
[47] Layne Order at 4–7.
[48] Layne Order at 6–7.
[49] Layne Order at 7–9.
[50] Layne Order at 8.

to avoid penalties for noncompliance with local immigration and labor laws.[51] This resolution illustrates SEC's continued broad interpretation of the "obtain or retain business" element of the FCPA's anti-bribery provisions.

Layne agreed to pay the SEC a total of $5.1 million, consisting of approximately $3.89 million in disgorgement, $858,720 in prejudgment interest, and civil penalties of $375,000. Layne's voluntary disclosure and extensive cooperation with the SEC (including providing "real-time" reports of the investigation, translations, and foreign witnesses) were cited as mitigating factors with respect to the monetary sanctions levied. The cease-and-desist order from the SEC requires Layne to engage in self-monitoring for two years, providing an initial report and two follow-up reports to the SEC during that period.

I. Bruker

On December 15, 2014, the SEC charged Bruker Corporation (Bruker), a Massachusetts-based global manufacturer of scientific instruments, with violations of the FCPA's books and records and internal controls provisions for providing non-business-related travel and improper payments to various Chinese government officials in an effort to win business.[52]

The SEC investigation found that Bruker's China offices paid approximately $119,710 to fund 17 trips, many of these leisure trips to the United States and Europe, for various government officials of Chinese state-owned enterprises (SOEs) between 2005 and 2011. Bruker made a profit of approximately $1,131,740 from sales made to SOEs whose officials participated on these trips and authorized the purchase of Bruker products. Additionally, from 2008 to 2011 one Bruker China office paid Chinese government officials approximately $111,228 under the guise of twelve collaboration or research agreements with no legitimate business purpose. These agreements—some of which were entered with SOEs and others directly with government officials—did not specify the required work product and no work product was submitted to Bruker. Government officials who signed or obtained payments under these agreements were often involved in purchasing products from the Bruker China office. Bruker made a profit of approximately $538,112 from sales made to SOEs whose officials received payments under these suspect agreements.

The SEC also found that Bruker failed to implement adequate controls to address the potential FCPA problems in its China offices. In particular, the SEC noted that Bruker did not translate its FCPA training materials into local languages, and also failed to adequately monitor and supervise its senior executives in China.

Bruker self-disclosed these violations to the SEC, DoJ, and Hong Kong authorities, and undertook significant remedial measures including terminating the senior staff of Bruker China offices, terminating certain agents, and enhancing its compliance protocols and policies. Pursuant to a settled administrative proceeding, and without admitting or denying the SEC's findings,

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[51] Layne Order at 9.

[52] Order Instituting Cease-And-Desist Proceedings, *In re Bruker Corp.*, Release No. 73835 (Dec. 15, 2014), *available at* http://www.sec.gov/litigation/admin/2014/34-73835.pdf; SEC Press Release, *SEC Charges Massachusetts-Based Scientific Instruments Manufacturer with FCPA Violations* (Dec. 15, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543708934#.VMLCYVUo6DZ.

Bruker agreed to pay $1,714,852 in disgorgement, $310,117 in prejudgment interest, and a $375,000 penalty.

J. Smith & Wesson

On July 28, 2014, Massachusetts-based gun maker Smith & Wesson Holding Corporation (Smith & Wesson) agreed to settle SEC allegations that it violated the anti-bribery, internal controls, and books and records provisions of the FCPA. The SEC alleged that, from 2007 to early 2010, the company paid bribes in Pakistan, Indonesia, and other countries as part of an effort to attract new gun sale business with military and police forces. The one contract that was actually completed before the conduct of concern was identified involved a gift of roughly $11,000 in guns to Pakistani officials through a third-party agent to secure the contract and a profit of just $107,852 for Smith & Wesson.[53]

As part of its settlement, Smith & Wesson agreed to pay the SEC $107,852 in disgorgement, $21,040 in prejudgment interest, and a $1.906 million penalty. The company also must report to the SEC on its FCPA compliance efforts for two years. The chief of the SEC Enforcement Division's FCPA unit described the settlement as "a wake-up call for small and medium-size businesses that want to enter into high-risk markets and expand international sales."[54]

V. INDIVIDUAL PROSECUTIONS AND ENFORCEMENT

US enforcement authorities continued their policy of targeting individuals[55] in 2014 in an effort to "have the largest deterrent impact" on foreign bribery.[56] Such actions can present unique challenges, particularly in the gathering of evidence admissible at trial, and enforcement authorities have underscored the importance of establishing strong partnerships with their foreign counterparts.[57] Nonetheless, in addition to filing new charges in several matters, several ongoing matters were resolved in 2014 through guilty pleas or settled civil enforcement actions prior to trial. These matters illustrate the continued use of non-FCPA charges—including conspiracy, racketeering, money laundering, wire fraud, honest services fraud, securities fraud, Travel Act violations, and others—in addition to substantive violations of the FCPA when prosecuting foreign bribery schemes. Notably, the companies allegedly involved in several of these matters have not been prosecuted to date.

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[53] Order Instituting Cease-And-Desist Proceedings at 7, *In re Smith & Wesson Holding Corp.*, Release No. 72678 (July 28, 2014), *available at* http://www.sec.gov/litigation/admin/2014/34-72678.pdf.
[54] SEC Press Release, *SEC Charges Smith & Wesson With FCPA Violations* (July 28, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542384677#.VLaunSvF-So.
[55] DoJ Press Release, *CEO and Managing Director of U.S. Broker-Dealer Plead Guilty to Massive International Bribery Scheme* (Dec. 17, 2014), http://www.justice.gov/opa/pr/ceo-and-managing-director-us-broker-dealer-plead-guilty-massive-international-bribery-scheme.
[56] Speech of Andrew Ceresney, Director, Div. of Enforcement, SEC, *Remarks at 31st International Conference on the Foreign Corrupt Practices Act* (Nov. 14, 2014), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370543493598#.VJnCmV4AKA.
[57] Id.

A. New Matters

1. Group DF (Firtash)

On April 2, 2014, the US District Court for the Northern District of Illinois unsealed a five-count indictment charging six foreign nationals with racketeering conspiracy, money laundering conspiracy, and interstate travel in aid of racketeering. Five of the defendants were also charged with conspiracy to violate the FCPA. According to the indictment, the leader of the criminal enterprise was Ukranian businessman Dmitry Firtash. The remaining defendants are Andras Knopp, a Hungarian businessman; Suren Gevorgyan, of Ukraine; Gajendra Lal, an Indian national and permanent resident of the United States; Periyasamy Sunderalingam, of Sri Lanka; and K.V.P. Ramachandra Rao, a Member of the Indian Parliament. [58] Although Mr. Rao, a foreign official, was not charged under the FCPA, DoJ has asked India to arrest him on the money laundering and racketeering-related charges.[59]

The charges stem from an alleged scheme to pay $18.5 million in bribes to public officials in India to obtain licenses to mine titanium. The mining project was expected to generate multi-million dollar sales of titanium products to an unnamed company headquartered in Chicago, among others. The defendants allegedly used US financial institutions to transmit millions of dollars internationally, to be used for bribes, and Mr. Gevorgyan allegedly traveled to Seattle, Washington to meet with representatives of the unnamed company.[60]

The US charges led to the arrest of Mr. Firtash by Austrian authorities in March 2014, based on a provisional arrest request. He was released from jail after posting $172 million in bail.[61] As of late November 2014, he remained in Austria awaiting the outcome of extradition hearings,[62] and the remaining five defendants were still at large. There have been no publicly reported developments in the case since the unsealing of the indictment. Further, as of this writing, we are not aware of any company being charged in relation to this matter.

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[58] DoJ Press Release, *Six Defendants Indicted in Alleged Conspiracy to Bribe Government Officials in India to Mine Titanium Minerals* (Apr. 2, 2014), http://www.justice.gov/opa/pr/six-defendants-indicted-alleged-conspiracy-bribe-government-officials-india-mine-titanium.

[59] Richard L. Cassin, *U.S. Seeks Arrest of India MP for Mining Bribe Plot*, THE FCPA BLOG (Apr. 23, 2014), http://www.fcpablog.com/blog/2014/4/23/us-seeks-arrest-of-india-mp-for-mining-bribe-plot.html.

[60] DoJ Press Release, *Six Defendants Indicted in Alleged Conspiracy to Bribe Government Officials in India to Mine Titanium Minerals* (Apr. 2, 2014), http://www.justice.gov/opa/pr/six-defendants-indicted-alleged-conspiracy-bribe-government-officials-india-mine-titanium

[61] *Id.*; Alexander Weber, *Firtash Released from Vienna Custody on Record Bail Bond*, BLOOMBERG (Mar. 21, 2014), http://www.bloomberg.com/news/2014-03-21/firtash-released-from-vienna-custody-on-record-bail-bond.html.

[62] Stephen Grey and Tom Bergin, *Putin's Allies Channeled Billions to Ukraine Oligarch*, BLOOMBERG (Nov. 26, 2014), http://www.reuters.com/article/2014/11/26/russia-capitalism-gas-special-report-pix-idUSL3N0TF4QD20141126.

2. FLIR Personnel

On November 17, 2014, the SEC sanctioned Stephen Timms and Yasser Ramahi, former employees of US-based defense contractor FLIR Systems, with violating the FCPA by providing gifts in the form of luxury watches to Saudi Arabian government officials and taking some of them on a three-week "world tour" to help secure contracts for FLIR, then falsifying records to hide their misconduct when the company's finance department flagged the expenses. Mr. Timms was the head of FLIR's Middle East office in Dubai and Mr. Ramahi was his subordinate. Together, they were the primary sales employees for the contracts with the Saudi Government.[63]

Messrs. Timms and Ramahi consented to the entry of an order finding that they violated the FCPA's anti-bribery provisions, knowingly falsified records and circumvented internal controls, and caused FLIR to violate the FCPA's books and records provisions. The respondents, who neither admitted nor denied the findings, also agreed to pay financial penalties in the amounts of $50,000 and $20,000, respectively.[64] Although FLIR is listed as a relevant entity in the SEC's order—which states that the company profited from the sales at issue—at present it has not been charged with wrongdoing. The investigation is ongoing.[65]

To date, FLIR has not been charged in this matter.

3. Former Bechtel Executive (Elgawhary)

In December 2014, Asem Elgawhary, a former Principal Vice President of Bechtel Corporation, pled guilty in connection with a $5.2 million kickback scheme designed to manipulate the competitive bidding process for state-run power contracts in Egypt.[66] In his plea agreement, Elgawhary admitted that from 1996 to 2011 he was seconded by Bechtel, a US corporation engaged in engineering, construction, and project management, to be the general manager of a joint venture between Bechtel and Egypt's state-owned and state-controlled electricity company. The joint venture assisted the Egyptian electricity company in identifying and awarding contracts to subcontractors to perform power projects for the company. Elgawhary admitted to accepting a total of $5.2 million from three power companies in exchange for his assistance in securing an unfair advantage in the bidding process. Elgawhary attempted to conceal the kickback scheme by routing the payments through off-shore bank accounts and making false statements to Bechtel executives certifying that he had no knowledge of any fraud at the joint venture. Elgawhary pled guilty to mail fraud, conspiracy to commit money laundering, and obstruction and interference with the administration of tax laws. Sentencing is scheduled for March 23, 2015.

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[63] SEC Press Release, *SEC Sanctions Two Former Defense Contractor Employees for FCPA Violations* (Nov. 17, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543472839#.VJh4b14AKA.

[64] *Id*.

[65] Order Instituting Cease-and-Desist Proceedings, *In re Stephen Timms*, Release No. 73616 (Nov. 17, 2014), *available at* http://www.sec.gov/litigation/admin/2014/34-73616.pdf.

[66] DoJ Press Release, *Former Bechtel Executive Pleads Guilty in Connection with a $5.2 Million Kickback Scheme* (Dec. 4, 2014), http://www.justice.gov/opa/pr/former-bechtel-executive-pleads-guilty-connection-52-million-kickback-scheme.

While Elgawhary's alleged concealment from and misrepresentation of the scheme to Bechtel suggest his former employer may not be charged, the charges against Alstom (*See* discussion in Section IV.A., *supra*) included, among others, "payments to Egyptian officials, including Asem Elgawhary who oversaw the bidding process and who has been charged separately."[67] This statement suggests that the DoJ views Elgawhary as a "foreign official" under the FCPA based on his role as the general manager of a joint venture between Bechtel and Egypt's state-owned electricity company, potentially due to the joint venture's role in handling bidding processes on behalf of the state-owned company.

B. Developments in Ongoing Matters

1. Direct Access Partners Executives

On December 17, 2014, two more executives of Direct Access Partners (DAP), an SEC-registered broker-dealer, pleaded guilty in the US District Court for the Southern District of New York in connection with a scheme to pay $5 million in bribes to María de los Ángeles González de Hernández, a senior official at a Venezuelan state-owned development bank, Banco de Desarrollo Económico y Social de Venezuela (BANDES). Ms. González directed BANDES's financial trading business to DAP and, in return, DAP's agents and employees split the revenue from this trading business with Ms. González. The two executives, co-founder and Chief Executive Officer Benito Chinea and managing director Joseph DeMeneses, each pleaded guilty to one count of conspiracy to violate the FCPA and the Travel Act. They also agreed to forfeit $3,636,432 and $2,670,612, representing their respective earnings from the bribery scheme. They are scheduled for sentencing on March 27, 2015.[68] DAP filed for bankruptcy after the charges against it were first unveiled in May 2013.[69]

In May 2013, the SEC filed a related action in federal court in Manhattan.[70] Though the case has been stayed since August 2013 pending the outcome of the criminal proceedings, the SEC sought and obtained leave in April 2014 to file a second amended complaint, bringing Chinea and DeMeneses as defendants in the action.[71]

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[67] Alstom Information ¶ 78.

[68] DoJ Press Release, *CEO and Managing Director of U.S. Broker-Dealer Plead Guilty to Massive International Bribery Scheme* (Dec. 17, 2014), http://www.justice.gov/opa/pr/ceo-and-managing-director-us-broker-dealer-plead-guilty-massive-international-bribery-scheme.

[69] Nate Raymond, *Two U.S. Traders Please Guilty in Venezuelan Bank Bribery Case*, REUTERS (Aug. 29, 2013), http://www.reuters.com/article/2013/08/29/bribery-arrest-directaccess-idUSL2N0GU1WU20130829.

[70] SEC Press Release, *SEC Announces More Charges in Massive Kickback Scheme to Secure Business of Venezuelan Bank* (June 12, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171574826#.VKa9RydX9Rk.

[71] SEC Press Release, *SEC Charges Brokerage Firm Executives in Kickback Scheme to Secure Business of Venezuelan Bank* (Apr. 14, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541487258#.VJhzPl4AKA.

José Alejandro Hurtado, a DAP vice president and one of the original defendants, pleaded guilty in August 2013 and was scheduled for sentencing in March 2014. His sentencing has since been adjourned to March 3, 2015.

As discussed in our 2013 Year in Review, the case arose out of a routine broker-dealer inspection of the firm by the SEC.[72]

2. PetroTiger Executives

On November 8, 2013, DoJ filed sealed criminal complaints against executives of PetroTiger Ltd., a British Virgin Islands oil services company with operations in Colombia and offices in New Jersey. The complaints were unsealed on January 6, 2014,[73] and contain charges arising from the alleged payment of approximately $267,000 in bribes to a Colombian official in exchange for the official's assistance in securing a $39 million contract from Colombia's state-owned oil company. Among those charged were general counsel Gregory Weisman, who pleaded guilty to one count of conspiracy to violate the FCPA, and co-CEOs Joseph Sigelman and Knut Hammarskjold, who were charged with conspiracy to violate the FCPA, conspiracy to launder money, and substantive violations of the FCPA.[74] The defendants also were charged with conspiracy to commit wire fraud based on an alleged kickback scheme unrelated to the Colombia bribery scheme. Mr. Weisman, the only defendant arrested outside the United States, was arrested in the Philippines.

In its press release announcing the charges, DoJ acknowledged the cooperation of its law enforcement counterparts in Colombia and the Philippines. Mr. Weisman pleaded guilty to one count of conspiracy to violate the FCPA and to commit wire fraud on November 8, 2013. Mr. Hammarskjold pleaded guilty to the same charges on February 18, 2014.[75] Both their sentencing hearings have been adjourned until after completion of Mr. Sigelman's trial.

Mr. Sigelman seeks dismissal of the FCPA charges, arguing (in a now familiar refrain) that DoJ's definition of "foreign official" is so vague as to render the statute unconstitutional, and that employees of state-owned enterprises are not "foreign officials" thereunder.[76] Mr. Sigelman also

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[72] DoJ Press Release, Three Former Broker-Dealer Employees Plead Guilty in Manhattan Federal Court to Bribery of Foreign Officials, Money Laundering and Conspiracy to Obstruct Justice (Aug. 30, 2013), http://www.justice.gov/opa/pr/three-former-broker-dealer-employees-plead-guilty-manhattan-federal-court-bribery-foreign.

[73] DoJ Press Release, *Foreign Bribery Charges Unsealed Against Former Chief Executive Officers of Oil Services Company* (Jan. 6, 2014), http://www.justice.gov/opa/pr/2014/January/14-crm-007.html.

[74] *Id.*

[75] *Id.*; David Voreacos, *PetroTiger Ex-CEO Hammarskjorld Pleads Guilty in Bribe Case*, BLOOMBERG (Feb. 18, 2014), http://www.bloomberg.com/news/2014-02-19/petrotiger-ex-ceo-hammarskjold-pleadsguilty-in-bribe-case-1-.html.

[76] Richard L. Cassin, *Why FCPA history matters: 'Congress was distraught'*, THE FCPA BLOG (Dec. 5, 2014), http://www.fcpablog.com/blog/2014/12/5/why-fcpa-history-matters-congress-was-distraught.html#sthash.HJIp4Joe.dpuf; Richard L. Cassin, *PetroTiger defendant brings latest 'foreign official' challenge*, THE FCPA BLOG (Nov. 21, 2014),

seeks dismissal of two honest services fraud charges based on allegations that he accepted kickbacks from a company in Colombia he was acquiring on behalf of his oil and gas services firm, registered in the British Virgin Islands, and two Colombian investors. Mr. Sigelman asserts that he cannot be charged with honest services fraud because the investors he allegedly defrauded are not US citizens.[77]

3. Alstom Executives

To date, four Alstom executives have been charged with offenses relating to the alleged bribery of a member of the Indonesian Parliament and officials of Indonesia's state-owned power company, in order to win a $118 million contract for Alstom. (*See* discussion of Alstom resolution at Section IV.A., *supra*) One of the executives is William Pomponi, former vice president of sales for Alstom USA, who was charged with conspiring to violate the FCPA and to launder money, as well as substantive FCPA and money laundering offenses. Mr. Pomponi pleaded guilty on July 17, 2014 and his sentencing was recently continued with no set date.[78] Lawrence Hoskins, Alstom's former senior vice president for the Asia region, was charged in a second superseding indictment in July 2013; his trial has been scheduled for June 2015.

4. China Valves Executives

On September 29, 2014, the SEC filed a civil injunctive action against China Valves Technology, Inc., its chairman and former CEO, Siping Fang, its former CEO, Jianbao Wang, and its CFO, Renrui Tang. The SEC charged all defendants with violating the anti-fraud provisions of the federal securities laws; China Valves with related violations of Exchange Act's reporting provisions and the FCPA's books and records and internal controls provisions; and Messrs. Fang, Wang, and Tang with falsely certifying that China Valves's filings contained no material misstatements, as well as aiding and abetting China Valves's violations of the reporting and books and records provisions. Among other things, the SEC alleges that defendants intentionally misled investors about the true size and nature of the company's acquisition in 2010 of Watts Valve Changsha Co., Ltd., in an effort to mask the subsidiary's prior investigation of violations of the

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http://www.fcpablog.com/blog/2014/11/21/petrotiger-defendant-brings-latest-foreign-official-challeng.html#sthash.bttj70GE.dpuf.

[77] Josh Kovensky, *Ex-Petro Tiger CEO Gets Honest Services Argument Wrong, Justice Department Argues*, MAIN JUSTICE (Nov. 25, 2014), http://www.mainjustice.com/justanticorruption/2014/11/25/ex-petrotiger-ceo-gets-honest-services-argument-wrong-justice-department-argues/.

[78] DoJ Press Release, *Former Executive of French Power Company Subsidiary Pleads Guilty in Connection with Foreign Bribery Scheme* (July 17, 2014), http://www.justice.gov/opa/pr/former-executive-french-power-company-subsidiary-pleads-guilty-connection-foreign-bribery; DoJ Press Release, *Alstom Pleads Guilty and Agrees to Pay $772 Million in Criminal Penalty to Resolve Foreign Bribery Charges* (Dec. 22, 2014), http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery.

FCPA, and with mischaracterizing and materially overstating income related to the purchase and reverse engineering of a competitor's product.[79]

The SEC suspended trading of China Valves's securities for a period of ten days ending on October 10, 2014. The SEC and China Valves submitted a Joint Motion to Stay in January 2015, stating that they had agreed in principle to a settlement that would resolve the proceeding.[80]

This case, the only M&A-related FCPA case of 2014, is being handled by the SEC's Cross-Border Working Group, which focuses on companies that have substantial foreign operations and are publicly traded in the United States. China Valves is a Nevada corporation with operations only in China, which became a US issuer through a reverse merger.[81]

5. BizJet Executives

In July 2014, Bernd Kowalewski, the former president and CEO of BizJet International Sales and Support, Inc. became the third and most senior BizJet executive to plead guilty to conspiracy to violate and violation of the FCPA in connection with a scheme to pay bribes to Mexican and Panamanian officials in exchange for assistance in securing contracts for BizJet, an Oklahoma-based subsidiary of Lufthansa Technik AG, to perform aircraft MRO services.[82] At the time the indictment against four BizJet executives was unsealed in April 2013, Kowalewski was believed to be living abroad.[83] He was arrested in Amsterdam in March 2014. He waived extradition in June 2014.

Peter DuBois and Neal Uhl, former vice presidents at BizJet, pleaded guilty to FCPA-related charges in 2012. The two were sentenced to probation and eight months' home detention due to their cooperation. The fourth executive, Jald Jensen, the former sales manager, is believed to be residing abroad. He has been indicted on conspiracy and substantive FCPA charges as well as money laundering. The indictments against the four executives followed an $11.8 million corporate settlement as well as BizJet and Lufthansa's entry into deferred prosecution agreements in March 2012.[84]

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[79] SEC Press Release, *SEC Charges China Valves Technology, Inc. and Three Senior Officers with Fraud* (Sept. 29, 2014), http://www.sec.gov/litigation/litreleases/2014/lr23096.htm.
[80] Order, *In re China Valves Tech., Inc.*, Release No. 2226 (Jan. 16, 2015), *available at* http://www.sec.gov/alj/aljorders/2015/ap-2226.pdf.
[81] Mike Koehler, *An M&A Case Study*, THE FCPA PROFESSOR (Oct. 13, 2014), http://www.fcpaprofessor.com/category/china-valves.
[82] DoJ Press Release, *Former Chief Executive Officer of Lufthansa Subsidiary BizJet Pleads Guilty to Foreign Bribery Charges* (July 24, 2014), http://www.justice.gov/opa/pr/former-chief-executive-officer-lufthansa-subsidiary-bizjet-pleads-guilty-foreign-bribery.
[83] DoJ Press Release, *Four Former Executives of Lufthansa Subsidiary BizJet Charged with Foreign Bribery* (Apr. 5, 2013), http://www.justice.gov/opa/pr/four-former-executives-lufthansa-subsidiary-bizjet-charged-foreign-bribery
[84] DoJ Press Release, BizJet International Sales and Support Inc., Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $11.8 Million Criminal Penalty (Mar. 14, 2012), http://www.justice.gov/opa/pr/bizjet-international-sales-and-support-inc-resolves-foreign-corrupt-practices-act.

6. American Bank Note Holographics Executives

After fifteen years of cooperating with the government and thirteen years since his guilty plea, Joshua Cantor, former president and director of American Bank Note Holographics, Inc., (ABNH), was sentenced to time served followed by no supervised release in May 2014.[85] The case docket, most of which is sealed, indicates that Cantor was charged with conspiracy to defraud the United States, submitting false books and records, and making false statements to auditors in connection with an initial public offering of ABNH stock.[86] Additionally, Cantor was charged with conspiracy to violate the FCPA in connection with causing ABNH to pay $239,000 to Saudi Arabian officials in 1998 with the purpose of assisting ABNH to obtain or retain business with the Saudi Arabian government. At the sentencing hearing, the court recognized Cantor's "extraordinary cooperation with the government," which started before the charges were brought, and included over forty meetings with the government, assisting the government in re-constructing case documents lost in the 9/11 attacks, and testifying at the trial of Morris Weissman, former chairman and CEO of ABNH, with whom Cantor had direct contact during the conspiracy. The court, therefore, granted the government's motion for downward departure, imposing a time-served sentence.

7. BSG Executives

In July 2014, Frederic Cilins was sentenced to 24 months' imprisonment for obstructing a federal criminal investigation into whether BSG Resources Ltd., a mining company for which Cilins acted as an intermediary, paid bribes to obtain iron ore mining concessions in the Republic of Guinea.[87] After his arrest in Florida in 2013, the 51-year-old French citizen pled guilty to a one-count superseding information in March 2014. According to court documents, Cilins obstructed an ongoing criminal investigation into potential FCPA and money-laundering violations by agreeing to pay a witness to the alleged bribery scheme to leave the United States to avoid being questioned by the FBI and to give documents requested by the FBI as part of the investigation to Cilins for destruction. Cilins also asked the witness to sign an affidavit containing false statements regarding matters under investigation. The witness was the former wife of a Guinean official whose position allowed him to influence the award of mining concessions. In addition to his sentence, Cilins was ordered to pay a $75,000 fine and forfeit $20,000. On January

[85] Judgment in a Criminal Case, *United States v. Cantor*, 1:01-cr-00687 (S.D.N.Y. Apr. 30, 2014); Transcript of Proceedings as to Joshua C. Cantor re: Sentence held on 4/30/14 before Judge Loretta A. Preska, *Cantor* (S.D.N.Y. May 29, 2014).

[86] *See also* Draft Complaint, *SEC v. Cantor*, *available at* http://www.sec.gov/litigation/complaints/comp18081.htm. In July 2001, the SEC filed two settled actions against ABNH. *See* SEC Press Release, *SEC Settles Fraud Charges with ABN and ABNH* (July 18, 2001), http://www.sec.gov/litigation/litreleases/lr17068a.htm. Without admitting or denying the allegations in the Commission's complaint, ABNH consented to pay a $75,000 civil penalty for its fraud, bribery, accounting, and related violations of the securities laws (Section 17(a) of the Securities Act, Sections 10(b), 13(a), 13(b)(2)(A) and (B), and 30A of the Exchange Act, and Exchange Act Rules 10b-5, 12b-20, and 13a-13).

[87] DoJ Press Release, *French Citizen Sentenced for Obstructing a Criminal Investigation into Alleged Bribes Paid to Win Mining Rights in Guinea* (July 24, 2014), http://www.justice.gov/opa/pr/french-citizen-pleads-guilty-obstructing-criminal-investigation-alleged-bribes-paid-win.

9, 2015, Cilins was released from prison for good behavior after serving 21 months of his 24-month sentence, and has since been deported to France.[88] Corporate investigations in various jurisdictions are pending.

8. Noble Executives

In July 2014, former Noble Corporation CEO Mark A. Jackson and former Director and Division Manager of Noble's Nigeria subsidiary James J. Ruehlen agreed to settle the SEC's civil action against them.[89] These settlements represent some of the last pending enforcement actions arising from the US government's enforcement efforts against Panalpina World Transport (Holding) Ltd. and certain of its customers relating to payments made through customs brokers to government officials in Nigeria and other countries to secure temporary importation permits and extensions necessary to allow their drilling rigs and other equipment to operate in Nigeria. Noble agreed in November 2010 to pay approximately $8.2 million in total monetary sanctions to resolve the matter with the DoJ and SEC.[90]

To settle the individual SEC actions, Jackson consented to the entry of final judgment enjoining him from violating the FCPA's books and records provisions as a control person pursuant to Section 20(a) of the Exchange Act. Ruehlen agreed to the entry of final judgment enjoining him from aiding and abetting any violation of the FCPA's books and records provisions. The settlement terms did not require any admissions of wrongdoing or monetary sanctions. Because the settlements were reached on the eve of trial, important issues that were poised to be litigated at trial for the first time—including the scope of the FCPA's facilitating payments exception and the individual scienter requirement—remain uncertain. *See* further discussion of the settlements here.

9. Former Siemens Executives

In February 2014, the US District Court for the Southern District of New York entered final judgments against three former Siemens executives in connection with their roles in a bribery scheme at Siemens and its regional company in Argentina, imposing the highest civil penalties ever assessed in an FCPA case against individuals and concluding the SEC's case.[91] The judgments resolved the SEC's civil action filed in 2011 charging Andres Truppel, a former CFO of Siemens Argentina, Ulrich Bock, and Stephan Signer, both former heads of Projects at Siemens

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[88] Josh Kovensky, *Steinmetz Associate Frederic Cilins Released from* Prison, MAIN JUSTICE (Jan. 15, 2015), http://www.mainjustice.com/justanticorruption/2015/01/15/steinmetz-associate-frederic-cilins-released-from-prison/; Tom Burgis, *US Deports Man Linked to BSGR Probe*, FINANCIAL TIMES (Feb. 10, 2015), http://www.ft.com/cms/s/0/3dd2904e-b165-11e4-a830-00144feab7de.html#axzz3S1mavztN.

[89] SEC Press Release, *SEC Settles Pending Civil Action Against Noble Executives Mark A. Jackson and James J. Ruehlen* (July 7, 2014), http://www.sec.gov/litigation/litreleases/2014/lr23038.htm.

[90] SEC Press Release, *SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials* (Nov. 4, 2010), http://www.sec.gov/news/press/2010/2010-214.htm.

[91] SEC Press Release, SEC Concludes Its Case Against Former Siemens Executives Charged with Bribery in Argentina, Obtaining Judgments over $1.8 Million (Feb. 10, 2014), http://www.sec.gov/litigation/litreleases/2014/lr22923.htm.

AG, with violations of the anti-bribery, books and records, and internal controls provisions of the FCPA. The SEC alleged that the defendants, along with four other executives charged in the same action, paid bribes to senior officials in Argentina, including two Argentine presidents and cabinet ministers in two presidential administrations, to retain a $1 billion contract for the production of national identity cards for Argentine citizens between 2001 and 2007. The payments were made in an effort to revive the contract canceled by the government.

The final judgments enjoined the defendants from violating the FCPA's anti-bribery provisions and falsifying records, and from aiding and abetting Siemens' violations of the FCPA's books and records and internal controls provisions. The judgment also ordered Bock and Signer to pay a civil penalty of $524,000 each. Truppel, who settled the charges without admitting or denying the allegations in the complaint, was ordered to pay an $80,000 civil penalty. Bock was also ordered to pay disgorgement of $316,452, plus interest.

Uriel Sharef, a former officer and board member of Siemens charged in the same action, settled the charges against him in 2013. He was ordered to pay a $275,000 civil penalty. Berndt Regendantz settled when the action was filed. The allegations against Herbert Steffen and Carlos Sergi were dismissed.

VI. INVESTIGATIONS

Announcements in 2014 indicate a strong continuing pipeline of investigations into allegations of wrongdoing under the FCPA. The announcements included both internal investigations that companies disclosed to enforcement authorities, as well as investigations that resulted from an official government inquiry. The investigations cover a broad swath of industries. Financial services sector companies received additional attention from regulatory authorities for their hiring practices and foreign investments. The health care industry disclosed an unprecedented number of ongoing investigations through their SEC filings, with the majority of companies reporting ongoing cooperation with enforcement authorities. To a lesser, but still significant, degree, announcements involved companies in the manufacturing, technology, and energy and oil services sectors. Companies operating abroad in these sectors should carefully review their practices; consider conducting, or updating, risk assessments of their anti-corruption programs; and ensure that they are enforcing comprehensive compliance programs.

A. Financial Services Sector

Building on the DoJ's $48 million settlement with financial services equipment company Diebold, government enforcement authorities continued their sweep of the financial services sector in 2014. In March 2014, the SEC sent letters to a group of financial services firms, including Credit Suisse Group, Goldman Sachs Group, Morgan Stanley, Citigroup , and UBS, inquiring into their hiring practices in Asia.[92] This was the second letter the SEC issued to banks inquiring into employment practices (the SEC issued the first in 2013), indicating that the government intends to deepen its review of potentially corrupt hiring practices in the financial

[92] Enda Curran, *Regulators Step Up Probe Into Bank Hiring Overseas*, WALL ST. J. (May 6, 2014), http://www.wsj.com/articles/SB10001424052702303417104579546190553220338.

services sector. Although the SEC has led the majority of these investigations, the DoJ has been involved in several of the more significant probes—including JP Morgan Chase.[93]

Investigations of financial services firms involved in financing and investing in Libya prior to the 2011 revolution also intensified in 2014. The SEC initiated a civil probe into the matter in 2011, focusing on Goldman Sachs. In 2014, the DoJ reportedly opened a criminal investigation – adding Credit Suisse Group, J.P. Morgan Chase, Société Générale, Blackstone Group, and Och-Ziff Capital Management Group, to the list of banks, private-equity firms, and hedge funds whose practices they are investigating for potential FCPA violations. Specifically, enforcement authorities are reviewing whether these firms made corrupt payments to officials in Libya's government-run investment funds, through third parties known as "fixers," to facilitate their investments in Libya's developing markets during the Gadaffi regime.[94]

The investigations represent a cautionary note for firms in the financial services sector, particularly as enforcement authorities become more sophisticated in identifying potential FCPA violations in complex financing arrangements. Firms in the financial sector must strike a delicate balance between protecting themselves from allegations of improper hiring practices and respecting the local privacy and employment protections afforded to employees under local law, including potential restrictions on requiring employees to declare government affiliations among family members and how such information about the employee is recorded and maintained.

B. Health Care

The healthcare industry, a focus of significant enforcement activity in recent years, saw the announcement of additional investigations into alleged FCPA violations in 2014. Unlike the probes in the financial services sector, the majority of the investigations in the healthcare industry are internal reviews that the companies voluntarily disclosed to the government. These include investigations being conducted by outside counsel for Fresenius Medical Care AG. KGaA, Grifols, Sanofi, and Cubist Pharmaceuticals.[95] Cubist's disclosure follows its March 2013 announcement that its CEO and chief compliance officer resigned after a year-long internal investigation uncovered potential violations of the FCPA.[96] Two of the 2014 investigations target healthcare companies, Biomet Inc. and Orthofix International; both are currently operating under DPAs or settlement agreements.[97] Orthopedic manufacturer Biomet Inc. received a subpoena from the SEC requiring the production of documents related to the company's Brazilian and

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[93] Emily Glazer, *J.P. Morgan Knew of China Hiring Concerns Before Probe*, WALL ST. J.(Oct. 23, 2014), http://www.wsj.com/articles/j-p-morgan-was-aware-of-overseas-hiring-concerns-before-u-s-probe-1413998056

[94] Joe Palazzolo et al., *Probe Widens Into Dealings Between Finance Firms, Libya*, WALL ST. J. (Feb. 3, 2014), http://www.wsj.com/news/articles/SB10001424052702303743604579355162160100456.

[95] *Sanofi Probing Alleged Bribery in Africa, Middle East,* MEDICAL XPRESS (Oct. 7, 2014), http://medicalxpress.com/news/2014-10-sanofi-probing-alleged-bribery-africa.html; Cubist Pharmaceuticals, Inc., *Annual Report (Form 10-K)* (Dec. 31, 2014); Fresenius Medical Care AG & Co., *Form 20-F* (Dec. 31, 2014); Grifols, S.A., *Form 20-F* (Dec. 31, 2014).

[96] Cubist Pharmaceuticals, Inc., *Annual Report (Form 10-Q)*, (Sept. 30, 2014), *available at* http://www.secinfo.com/dRqPx.n9.1p.htm.

[97] Rachel Louise Ensign, *Orthofix Received More Allegations of Improper Payments in Brazil*, WALL ST. J., Mar. 31, 2014, http://www.wsj.com/articles/SB10001424052702304157204579473224026378520 .

Mexican operations.[98] Also in 2014, GSK opened internal investigations into allegations made by anonymous whistleblowers of bribery at its offices in Iraq, Syria, and the UAE,[99] expanding on GSK's investigation of hiring practices in China.

C. Manufacturing

Several manufacturing companies also disclosed internal investigations in their SEC filings this year. Delphi Automotive and Johnson Controls both disclosed their cooperation with enforcement agencies in investigating potential improper payments in China.[100] General Cable Corporation announced in its SEC filing that it was investigating commission payments made in Angola, Thailand, and India.[101] Infant-formula maker Mead Johnson Nutrition Company reported that the SEC had requested documents concerning payments made through its China offices. Mead Johnson's competitors, including Danone and Nestle, are also under investigation by Chinese enforcement authorities.[102]

D. Energy

The announcement in 2014 of several new investigations in the energy sector, a longstanding focus of enforcement activity, confirm that this sector continues to present substantial corruption risk. Houston-based Key Energy announced that it had voluntarily disclosed allegations involving improper payments in Mexico to the SEC, and that the agency is investigating potential violations involving its Russian business.[103] In March 2014, the SEC notified Quanta Services Inc., a specialty services contractor, that it is conducting an inquiry into conduct in South Africa and the UAE.[104] Also in March 2014, the SEC opened an investigation into allegations that Petrobras accepted bribes in exchange for equipment supply and drilling contracts.[105] Especially after Petrobras's former director admitted to accepting improper

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[98] Samuel Rubenfeld, *SEC Subpoenas Biomet in Potential Violation of FCPA Settlement*, WALL ST. J. (July 3, 2014), http://blogs.wsj.com/riskandcompliance/2014/07/03/sec-subpoenas-biomet-in-potential-violation-of-fcpa-settlement/.

[99] Christopher Matthews, *Glaxo Investigates Bribery Accusations in the Mideast*, WALL ST. J. (Apr. 6, 2014), http://www.wsj.com/articles/SB10001424052702303532704579476862300832806.

[100] Delphi Automotive PLC, *Quarterly Report (Form 10-Q)* (April 24, 2014), *available at* http://services.corporate-ir.net/SEC.Enhanced/SecCapsule.aspx?c=245477&fid=9410528.

[101] Joel Schectman, *General Cable Probes FCPA in Four Countries*, WALL ST. J. (Sept. 23, 2014), http://blogs.wsj.com/riskandcompliance/2014/09/23/general-cable-probes-fcpa-in-four-countries/ .

[102] Beth Winegarner, *SEC Investigating Enfamil Maker Mead Johnson's China Unit*, LAW360 (Oct. 24, 2013), http://www.law360.com/articles/483164/sec-investigating-enfamil-maker-mead-johnson-s-china-unit.

[103] Anne Pallivatchuckal, *Key Energy Probing Possible Corruption Involving Mexico Unit*, WALL ST. J. (June 4, 2014), http://www.wsj.com/articles/key-energy-probing-possible-corruption-involving-mexico-unit-1401919552

[104] Rachel Louise Ensign, *SEC Asks Quanta Services to Preserve FCPA Documents*, WALL ST. J. (May 9, 2014), http://blogs.wsj.com/riskandcompliance/2014/05/09/sec-asks-quanta-services-to-preserve-fcpa-documents/.

[105] *See* discussion of Brazil developments *infra* in Section X.D.

payments in September 2014, companies involved in doing business with the Brazilian state-run oil company should be aware of enforcement authorities' likely increased scrutiny .

E. Technology

In a February 20, 2014 SEC Form 10-Q, technology seller Cisco Systems announced that it launched an internal investigation, at the request of the SEC and DoJ, into allegations that it violated the FCPA through its business activities in Russia.[106]

F. Ongoing Investigations

Several FCPA investigations that were announced prior to 2014 remained unresolved by the end of the year. Notably, Wal-Mart is facing its fourth full year of investigation into alleged corrupt activity. Since the story broke in *The New York Times* in 2011, the company reportedly has lost several high-level executives, spent nearly half a billion dollars investigating the bribery allegations, and re-vamped its internal compliance program.[107] The investigation into whether BSG Resources bribed the wife of a Guinean government official to secure iron-ore rights, which began in 2013 and saw the revocation of BSG's mining license in Guinea after the Guinean government concluded that BSG obtained mining rights through corrupt practices, also continues into 2015.[108] The US government's investigations of multiple pharmaceutical companies, including AstraZeneca PLC, Bristol-Myers Squibb Company, Merck & Co. Inc.,[109] and Sciclone Pharmaceuticals Inc., all of which have been under investigation for FCPA wrongdoing since before 2011, will also run into 2015.[110]

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[106] Cisco Systems, Inc., Quarterly Report *(Form 10-Q)* (Feb. 20, 2014), *available at* http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=9800147-928-478718&type=sect&TabIndex=2&dcn=0000858877-14-000009&nav=1&src=Yahoo.

[107] Samuel Rubenfeld, *Wal-Mart FCPA Probe Focuses On Mexico Amid Report Of Cover-Up*, WALL ST. J. Apr. 23, 2012), http://blogs.wsj.com/corruption-currents/2012/04/23/wal-mart-fcpa-probe-focuses-on-mexico-amid-report-of-cover-up/; Jaclyn Jaeger, *Wal-Mart Costs for FCPA Probe Hit $439 Million and Counting*, COMPLIANCE WEEK (Mar. 26, 2014), http://www.complianceweek.com/blogs/boards-governance/walmart-costs-for-fcpa-probe-hit-439-million-and-counting#.VMUrZq0tHxM; Elizabeth A. Harris, *After Bribery Scandal, High Level Departures at Wal-Mart*, N.Y. TIMES (June 4, 2014), http://www.nytimes.com/2014/06/05/business/after-walmart-bribery-scandals-a-pattern-of-quiet-departures.html?_r=0.

[108] Alexis Flynn, *Guinea Mining Probe Recommends Stripping BSG Resources, Vale of Simandou Licenses*, WALL ST. J. (Apr. 9, 2014), http://www.wsj.com/articles/SB10001424052702303603904579491061291340156.

[109] While Merck disclosed in a 10-K filing that the DoJ closed its inquiry into the FCPA investigation, the disclosure did not mention the status of the SEC's investigation—indicating that it still remains open. Merck & Co., Inc., Annual Report (Form 10-K) (Feb. 27, 2014), *available at* http://www.sec.gov/Archives/edgar/data/310158/000119312513084618/d438975d10k.htm

[110] Michael Rothfeld, *Drug Firms Face Bribery Probe*, WALL ST. J. (Oct. 5, 2010), http://www.wsj.com/articles/SB10001424052748704847104575532091781199092; Astrazeneca PLC., *Form 20-F* (Dec. 31, 2014); Bristol-Meyers Squibb Company, *Annual Report (Form 10-K)* (Dec. 31, 2014); Eli Lilly and Company, *Annual Report (Form 10-K)* (Dec. 31, 2014); Merck & Co., Inc., *Annual*

VII. DOJ OPINIONS

Under the Opinion Procedure,[111] the DoJ is required to provide requestors, who must be US issuers or domestic concerns, with a written opinion of its enforcement intentions regarding a specific (and not hypothetical) set of conduct the requestor is considering undertaking. The DoJ issued releases regarding two such opinions (OPRs) in 2014. One of those releases, OPR 14-02, did not break new legal ground and largely restated (and indeed quoted from) a passage from the DoJ and SEC's 2012 *Resource Guide* regarding successor liability. The other, OPR 14-01, joins a line of OPRs addressing the conditions under which companies may enter into substantial transactions with foreign officials without DoJ bringing an enforcement action.

A. OPR 14-01

In 14-01, issued on March 17, 2014, DoJ opined that it did not intend to take enforcement action against a financial institution that was a US issuer in connection with its agreement to purchase a substantial minority stake in a foreign company held by an investor who had been appointed to a high-level position in foreign government's monetary and banking authority. The US financial institution and the investor had concluded an agreement for the US institution to purchase the investor's stake in the company before the investor was appointed to the senior government post. That agreement included a valuation formula to value the investor's shares when and if the issuer's buyout was to proceed. When applied, however, the formula, as a result of the effects of the 2008–2009 global financial crisis, returned a negative value for the shares that was not consistent with the parties' commercial intent.

The DoJ cited a number of factors in explaining its decision not to prosecute:

- The reasonableness of deciding not to use the pre-agreed valuation formula, in light of the unintended results it returned;
- The purpose of the arrangement, which was to terminate the parties' business relationship, which had initially been agreed before the official had taken up his appointment;
- The use of an independent and well-respected accounting firm to develop a new valuation, designed to reflect the true market value of the shares (and, therefore, not represent any additional, unwarranted value transferred to the official);
- The disclosure by both the issuer and the newly appointed official of their business relationship to US and host country regulators, respectively;
- The confirmation, by local counsel, that the transaction in question did not violate local law;
- Written assurance that the investor would recuse himself from any matter before his government agency involving the divested business that began before or at the time of payment for his interest; and
- The termination of any financial incentives for the investor to assist the requestor once the divestment closed.

Report (Form 10-K) (Dec. 31, 2014); Sciclone Pharmaceuticals, Inc., *Quarterly Report (Form 10-Q)* (Dec. 31, 2014).

[111] 28 C.F.R. pt. 80.

These conditions, in particular those relating to securing an opinion of counsel that the transaction was consistent with local law, and the disclosure of the business arrangements to governmental authorities, are measures that the DoJ has viewed favorably in past OPRs as evidence of a lack of corrupt intent behind the transaction and of the propriety of the benefits provided to the official.[112]

Perhaps the most notable aspect of OPR 14-01, however, may be that it highlights the limitations of the Opinion Procedure process for prospective requestors. Despite the fact that the DoJ's regulations require it to issue an opinion within thirty days of receiving a request, the DoJ made several clarifying information requests (thereby resetting the thirty-day deadline) resulting in the total time from initial request on July 8, 2013 to the issuance of the final opinion on February 13, 2014 taking over eight months. Needless to say, the commercial reality of most transactions does not allow for such a long delay in most instances.

B. OPR 14-02

On November 7, 2014, the DoJ issued OPR 14-02, indicating that it did not intend to take enforcement action against a US company that planned to acquire a foreign consumer products company and its wholly-owned subsidiary for payments made by the acquisition target, where those payments took place entirely pre-acquisition and had no jurisdictional nexus to the United States. This OPR confirmed a well-established principle of corporate law: that there will be no "springing" liability under the FCPA for the pre-acquisition conduct of a newly-acquired subsidiary, where that subsidiary itself was not yet controlled by the acquirer, and was not subject to the FCPA. This principle was squarely addressed by the DoJ and SEC in the 2012 *Resource Guide*.[113]

VIII. WHISTLEBLOWER ACTIVITY/DEVELOPMENT OF SEC PROGRAM

The SEC's whistleblower program saw substantial activity in 2014, including nine whistleblower awards—although still none to date in an FCPA case. Significant litigation over the scope of the Dodd-Frank Act's anti-retaliation provisions, calling into question whether some of the incentives provided for in the regulations can be used in practice, continues. Irrespective of the outcome of that litigation, however, the trend of increased whistleblower reports relating to FCPA matters continued, with significant implications for companies' compliance programs.

[112] *See* OPR 01-02 (July 18, 2001), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2001/0102.pdf. (DoJ opined it did not intend to take enforcement action with respect to a transaction involving the purchase by a US company of a company owned in part by a senior foreign official where, in part, the parties disclosed their interests in the transaction to local authorities and secured ensured consistency with local law).
[113] *See A Resource Guide to the US Foreign Corrupt Practices Act*, at 28, DoJ and SEC (Nov. 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guidance/.

A. SEC 2014 Annual Report

The SEC published its annual report in November 2014, indicating it received 3,620 whistleblower tips, a modest increase over 2013 reports (3,238).[114] FCPA-related tips continued to represent a small share of this total, with 159 reports (or 4.4% of the total) classified by reporters as FCPA-related, versus 149 (4.6%) in 2013. The SEC received whistleblower reports from sixty countries, totaling 448 non-US-originated reports. The greatest number of reports originated from the United Kingdom (70), followed by India (69) and Canada (58).[115]

B. Recent Dodd-Frank Whistleblower Awards

The SEC has made fourteen awards to whistleblowers since the inception of the whistleblower program under Dodd-Frank, with nine of the awards occurring in 2014. Notably, four awards have been made to whistleblowers living in foreign countries. A record $30 million was awarded to one whistleblower. Additionally, an in-house compliance professional received an award of $300,000, while a person who reported misconduct to the SEC after the company failed to address the issue internally was awarded $400,000. The SEC also provided information about the population of whistleblowers generally, noting that sixty percent were employees, former employees, contractors, or consultants of the companies reported. Additionally, of those insiders, eighty-percent reported internally before reporting to the SEC after their company failed to take action to stop the misconduct. This statistic belies fears expressed during the promulgation of implementing regulations that the program would vitiate internal reporting mechanisms. It also underscores the need for companies to respond promptly and seriously to internal reports.

At the same time it rewarded qualifying whistleblowers, the SEC also demonstrated that it would take measures against at least the worst abusers of the whistleblower program, barring one claimant who had filed for awards in almost 200 actions from receiving any future award.

C. Litigation over Scope of Dodd-Frank Anti-Retaliation Protections

Litigation over the scope of the Dodd-Frank anti-retaliation provisions for whistleblowers continued in 2014, and the SEC has indicated the anti-retaliation provisions are as important as the bounty provisions. The SEC filed its first action alleging violations of the anti-retaliation provisions against a hedge fund that demoted an internal reporter; the hedge fund was ultimately fined $2.2 million.[116] Sean McKessey, head of the SEC whistleblower office, has also identified retaliation cases as "a priority" for the SEC.[117]

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[114] *Annual Report on the Dodd-Frank Whistleblower Program for Fiscal Year 2013*, SEC (Nov. 2014), *available at* http://www.sec.gov/about/offices/owb/annual-report-2014.pdf.
[115] This reflects some year-to-year changes; in 2013, the most frequent source countries were: United Kingdom (66), followed by Canada (62), and China (52).
[116] Order Instituting Cease-And-Desist Proceedings, *In re Paradigm Cap. Mgm't, Inc.*, Release No. 72393 (June 16, 2014), *available at* http://www.sec.gov/litigation/admin/2014/34-72393.pdf
[117] Stephanie Russell-Kraft, *SEC Whistleblower Head to Punish Cos. That Silence Tipsters*, LAW360 (Oct. 17, 2014), http://www.law360.com/articles/587847/sec-whistleblower-head-to-punish-cos-that-silence-tipsters

Litigation has continued to focus on two key issues as to whether whistleblowers are afforded anti-retaliation protections: whether the whistleblower must report to the SEC to gain protections or whether internal reporters are also protected; and whether foreign reporters are protected. Regarding the first issue, the SEC has filed amicus briefs discouraging other courts from adopting the Fifth Circuit's holding in *Asadi v. G.E. Energy (USA), LLC* that whistleblowers must report directly to the SEC to be protected by Dodd-Frank's anti-retaliation provisions.[118] The SEC argued in those cases that the *Asadi* decision was unduly narrow and that individuals need not report to the SEC to gain anti-retaliation protection.[119] Additionally, while no other federal appellate court has decided the issue to date, district courts around the country have reached conflicting conclusions.[120] Courts also have been hostile to foreign whistleblowers: in August 2014, the Second Circuit held that Dodd-Frank's anti-retaliation provisions do not apply extraterritorially and foreign whistleblowers are therefore not protected.[121]

IX. COLLATERAL LITIGATION

As in recent years, FCPA investigations continued to trigger the filing in 2014 of collateral litigation. These suits included shareholder derivative actions, requests to inspect corporate books and records, RICO actions, and other civil claims.

A. Derivative Litigation

2014 saw an increase in the number of shareholder derivative suits being filed. Many of these took the form of class actions that were filed after the announcement of FCPA investigations or resolutions.[122] Two derivative suits were resolved in 2014, with one being settled and the other dismissed by the court on the face of the complaint.

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[118] *Asadi v. G.E. Energy (USA), LLC*, No. 12-20522 (5th Cir. July 17, 2013), *available at* http://www.ca5.uscourts.gov/opinions/pub/12/12-20522-CV0.wpd.pdf.

[119] Amicus Brief of the Securities and Exchange Commission in Support of the Appellant, *Safarian v. Am. DG Energy Inc.*, No. 14-2734, (3rd Cir. filed Dec. 11, 2014), *available at* https://www.sec.gov/litigation/briefs/2014/safarian-americandg.pdf; Amicus Brief of the Securities and Exchange Commission in Support of the Appellant, *Liu v. Siemens AG*, No. 13-4385, (2nd Cir. filed Feb. 20, 2014), *available at* https://www.sec.gov/litigation/briefs/2014/liu-siemens-0214.pdf.

[120] See *Banko v. Apple Inc.*, 20 F. Supp. 3d 749 (N.D. Cal. 2013) (siding with Asadi); *but see Kramer v. Trans-Lux Corp.*, No. 3:11-cv-1424, 2012 U.S. Dist. LEXIS 136939 (D. Conn. Sept. 25, 2012); *Connolly v. Wolfgang Remkes*, 5:14-cv-1344, 2014 U.S. Dist. LEXIS 153439 (N.D. Cal. Oct. 28, 2014) (siding with "a large majority of district courts before and after Asadi" in deferring to the SEC's reasonable interpretation of the act as protecting internal reporters).

[121] *Meng-Lin v. Siemens A.G.*, 763 F.3d 175 (2d Cir. 2014).

[122] Shareholder Derivative Complaint for Breach of Fiduciary Duty, Waste of Corporate Assets, and Unjust Enrichment, *Gusinsky v. Woertz*, No. 2014-ch-00953 (Il. Cir. Ct. Jan. 16, 2014) (Archer Daniels Midland); Complaint, *St. Lucie Cnty. Fire Dist. Firefighters' Pension Trust Fund v. Bryant*, No. 4:14-cv-03428 (S.D. Tex. Nov. 30, 2014) (Cobalt Int'l Energy, Inc.); Complaint, *Copeland v. Apotheker*, No. 14-cv-00622 (N.D. Cal. Feb. 10, 2014) (Hewlett-Packard Co.); Class Action Complaint, *Gerami v. Hyperdynamics Corp.*, No. 4:14-cv-641 (S.D. Tex. Mar. 13, 2014); Class Action Complaint, *Stahelin v. Hyperdynamics Corp.*, No. 4:14-cv-649 (S.D. Tex. Mar. 14, 2014); Class Action Complaint, *Cady v. Key Energy Servs., Inc.*, No. 4:14-cv-02368 (S.D. Tex. Aug. 15, 2014); Class Action Complaint, *Davidson v. Key Energy Servs., Inc.*, No. 4:14-cv-02403 (S.D. Tex. Aug. 21, 2014); Order Consolidating Cases, *Cady v. Key Energy Servs., Inc.*,

- Avon Products, Inc. (Avon): On September 29, 2014, the Southern District of New York dismissed a shareholder class action lawsuit against Avon and two former executives.[123] The suit alleged the defendants issued materially false and misleading statements concerning Avon's FCPA compliance in its China operations and its business success.[124] The suit followed initial disclosures of potential FCPA violation in October 2008, upon which Avon reached a $135 million settlement with DoJ and SEC on December 17, 2014.[125] The court, dismissing the action, found that Avon's statements in its ethics codes did not constitute fraud and the shareholders failed to plead sufficient facts showing intent to deceive.[126] The plaintiffs filed an amended complaint on October 24, 2014.[127]

- NCR Corp. (NCR): On April 8, 2014, a shareholder lawsuit against NCR was dismissed in response to a no-fault settlement in which NCR agreed to make a number of enhancements to its corporate compliance program.[128] The shareholder had alleged that NCR's directors had breached their fiduciary duties by willfully violating the FCPA by making illegal bribes to government officials in the Middle East and China.[129]

B. Books and Records Requests

Although no shareholder derivative litigation was successful in 2014, there was an important decision in *Wal-Mart Stores, Inc. v. Indiana Electrical Workers Pension Trust Fund IBEW* granting a shareholder's request for access to the books and records of a corporation's FCPA internal investigation, including privileged documents.

- Wal-Mart Stores, Inc. (Wal-Mart): On July 23, 2014, the Delaware Supreme Court affirmed a decision ordering Wal-Mart to turn over privileged documents relating to the handling of an internal FCPA investigation in response to a shareholder's Section 220 demand for documents. This court held that the *Garner* doctrine's fiduciary exception to attorney-client privilege should be applied in plenary stockholder/corporation proceedings as well as Section 220

No. 4:14-cv-02368 (S.D. Tex. Dec. 4, 2014); Verified Shareholder Derivative Complaint, *Sokolowski v. Adelson*, No. 2:14-cv-00111-JCM-NJK (D.N.V. Jan. 23, 2014) (Las Vegas Sands); Complaint, *Menaldi v. Och-Ziff Capital Mgmt. Grp. LLC*, No. 1:14-cv-03251 (S.D.N.Y. May 5, 2014); Verified Shareholder Derivative Complaint, *Stokes v. Och*, No. 651663/2014 (N.Y. Sup. Ct. May 30, 2014).

[123] Memorandum Opinion & Order, *City of Brockton Ret. Sys. v. Avon Prods., Inc.*, No. 1:11-cv-4665 (PGG) (S.D.N.Y. Sept. 29, 2014).

[124] Memorandum Opinion & Order, *City of Brockton Ret. Sys. v. Avon Prods., Inc.*, No. 1:11-cv-4665 (PGG) (S.D.N.Y. Sept. 29, 2014).

[125] *See* previous discussion of the Avon Products, Inc. settlement *supra* in Section IV. *See also* SEC Press Release, *SEC Charges Avon with FCPA Violations* (Dec. 17, 2014), http://www.sec.gov/news/pressrelease/2014-285.html#.VKFrGaBTAA.

[126] Khadijah M. Britton, *Avon Shareholders' FCPA China Bribe Class Action Tossed*, LAW360, (Sept. 29, 2014), http://www.law360.com/articles/581981/avon-shareholders-fcpa-china-bribe-class-action-tossed.

[127] Second Amended Complaint, *Brockton* (Oct. 24, 2014).

[128] Final Judgment and Order of Dismissal with Prejudice, *Williams v. Nuti*, No. 1:13-cv-01400-SCJ (N.D. Ga. Apr. 8, 2014); Memorandum in Support of Plaintiff's Motion for Final Approval of Derivative Settlement, *Williams v. Nuti*, (N.D. Ga. Mar. 18, 2014).

[129] Notice of Removal with Complaint, *id.* (April 26, 2013).

actions.[130] The shareholder's demand for documents followed a 2012 *New York Times* article that described bribery payments made to Mexican officials by Wal-Mart's Mexican subsidiary.[131] In a derivative suit brought in the Western District of Arkansas relating to the same allegations, the court denied Wal-Mart's motion to dismiss on September 26, 2014, finding that the case was ripe for adjudication.[132]

- Parker Drilling Company (Parker Drilling): On July 31, 2014, a Parker Drilling stockholder filed a complaint in the Delaware Chancery Court seeking to inspect the company's books and records.[133] The complaint follows Parker Drilling's 2013 settlement with the DoJ and SEC for nearly $16 million over allegations of bribery in Nigeria and a three-year Deferred Prosecution Agreement.[134] The complaint alleges that Parker Drilling may have committed corporate wrongdoing and mismanagement related to the FCPA violations and investigations.

C. RICO Litigation

Several new RICO cases were filed in relation to FCPA allegations in 2014, as well as a proposed settlement in the Alcoa litigation.

- Hewlett-Packard Co.: On December 2, 2014, Mexico's national oil company, Petroleos Mexicanos, and affiliate, Pemex Exploracíon, filed suit against HP in the Northern District of California, alleging HP violated RICO through its pattern of bribery to Pemex officials to secure lucrative contracts, among other things.[135] The complaint also alleges unfair competition, fraudulent concealment, and tortious interference. The suit followed HP's $108 million FCPA settlement in April 2014.[136]

- Alcoa: On April 28, 2014, the Western District of Pennsylvania granted Alcoa agent Victor Dahdaleh's motion to dismiss and compel arbitration in a RICO suit. The suit, filed in 2008, was originally brought against both Alcoa and Dahdaleh by the Kingdom of Bahrain's state-owned Aluminum Bahrain BSC (Alba), but Alcoa settled in 2012. The suit alleged Alcoa and its agents made payments to Alba officials to persuade them to pay inflated prices for Alcoa products.[137] It spurred the DoJ and SEC investigations into Alcoa's activities, which

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[130] For more information on privilege concerns relating to internal investigations, *see United States ex rel. Barko v. Halliburton Co.*, No. 1:05-CV-1276, 2014 WL 1016784 (D.D.C. Mar. 6, 2014). *See also* Steptoe Client Advisory, *Don't Let Barko Bite Your Company's Attorney-Client Privilege and Work Product Protection* (Jun. 4, 2014), http://www.steptoe.com/publications-9633.html.
[131] *See* previous discussion of Wal-Mart *supra* in Section VI. *See also Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Trust Fund IBEW*, No. 614 (Del. Sup. Ct. July 23, 2014).
[132] Order, City of Pontiac Gen. Emps. Ret. Sys. v. Wal-Mart Stores, Inc., No. 5:12-cv-5162 (W.D. Ark. Sept. 26, 2014).
[133] Verified Complaint, *Fuchs Family Trust v. Parker Drilling Co*., No. 9986-VCN (Del. Ch. Ct. July 31, 2014).
[134] Matt Chiappardi, *Investor Demands Parker Drilling Execs' Names in FCPA Case*, LAW360 (Aug. 1, 2014), http://www.law360.com/articles/563335/investor-demands-parker-drilling-execs-names-in-fcpa-case.
[135] Complaint, *Petroleos Mexicanos v. Hewlett-Packard Co*., No. 14-cv-05292 (N.D. Cal. Dec. 2, 2014).
[136] See previous discussion of the HP settlement *supra* in Section IV.
[137] Complaint, *Aluminum Bahrain B.S.C. v. Alcoa, Inc*., No. 2:08-cv-00299 (W.D. Pa. Feb. 27, 2008).

resulted in a $384 million settlement in January 2014.[138] The court dismissed the action against Dahdaleh, finding he was entitled to enforce an arbitration agreement between Alba and Alcoa.[139] An appeal of that decision is currently pending before the Third Circuit. On October 22, 2014, after preliminary court approval, Alcoa provided notice of pendency and proposed settlement of one federal and two state shareholder derivative actions related to the same matter.[140] In the proposed settlement, Alcoa outlines corporate governance reforms and agrees to pay $3.75 million to plaintiffs' counsel. The settlement hearing took place on January 20, 2015, and the Court granted final approval of the Stipulation and Settlement.[141]

- Oil for Food: On September 18, 2014, the Second Circuit affirmed the dismissal of the RICO case brought by the Republic of Iraq against various companies for their part in the Oil for Food program. The Second Circuit also affirmed that there was no private right of action under the FCPA.[142]

- Vale S.A. (Vale) & BSG Resources Ltd. (BSGR): On April 30, 2014, Rio Tinto PLC filed a complaint against Vale, BSGR, BSGR owner Beny Steinmetz, and others, including Frederic Cilins, former advisor to BSGR, in the Southern District of New York.[143] The suit alleges conspiracy to use stolen trade secrets to corruptly procure valuable mining concessions in Guinea in violation of RICO. It follows the Guinea government's finding of corruption, an ongoing DoJ investigation, and Cilins' guilty plea on March 10, 2014 to FCPA-related obstruction of justice charges.[144] On December 17, 2014, the court rejected defendants' jurisdictional arguments, allowing the case to proceed.[145]

D. Civil Litigation Against Auditors

Other civil litigation related to FCPA allegations included a complaint filed against an auditing firm for failing to detect signs of FCPA violations.

- Direct Access Partners LLC (DAP): On March 27, 2014, DAP filed suit against its former auditing firm in New Jersey state court, alleging it repeatedly failed to detect red flags of FCPA

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[138] See previous discussion of the Alcoa settlement *supra* in Section IV. *See also* SEC Press Release, *SEC Charges Alcoa with FCPA Violations* (Jan. 9, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936#.VKGUxaBTAA .
[139] Opinion. and Order of Court, *Aluminum Bahrain B.S.C. v. Dahdaleh*, No. 2:08-cv-00299 (W.D. Pa. April 28, 2014).
[140] Notice of Pendency & Proposed Settlement of Stockholder Derivative Actions, *Rubery v. Kleinfeld*, No. 2:12-cv-00844-DWA (W.D. Pa. Oct. 22, 2014) (outlining proposed settlement for three actions: *Rubery v. Kleinfeld*, No. 2:12-cv-00844-DWA (W.D. Pa. filed June 20, 2012); *Philadelphia Gas Works Ret. Fund v. Alcoa, Inc.*, No. GD-09-018679 (Ct. Com. Pl. Philadelphia Cnty., Pa., filed Mar. 6, 2009); *Teamsters Local #500 Severance Fund* v. *Belda*, No. GD-08-014664 (Ct. Com. Pl. Allegheny Cnty., Pa. filed July 21, 2008)); *see also* Alcoa Inc., Quarterly Report (Form 10-Q) (Oct. 23, 2014).
[141] Judgment and Final Order of Dismissal with Prejudice, *Rubery v. Kleinfeld*, No. 2:12-cv-00844-DWA (W.D. Pa. Jan. 20, 2015).
[142] *Republic of Iraq v. ABB AG*, 768 F.3d 145 (2d Cir. 2014).
[143] Complaint, *Rio Tinto PLC v. Vale, S.A.*, No. 1:14-cv-03042 (S.D.N.Y. April 30, 2014).
[144] See previous discussion of the Cilins prosecution *supra* in Section V.
[145] Decision & Order, *Rio Tinto PLC v. Vale, S.A.*, No. 1:14-cv-03042 (S.D.N.Y. Dec. 17, 2014).

violations.[146] The suit follows the guilty plea of several DAP officers to FCPA violations and other counts involving bribes to Venezuelan officials in exchange for help securing bond-trading business and other benefits. DAP itself went out of business amid the ongoing SEC probe into the violations.[147]

X. NON-US LEGAL AND ENFORCEMENT ANTI-CORRUPTION DEVELOPMENTS

A. OECD Enforcement Report

On December 2, 2014, the Organization for Economic Cooperation and Development (OECD) published a comprehensive report analyzing the 427 bribery enforcement actions concluded between February 15, 1999 and June 1, 2014.[148] The report is a rich source of data concerning OECD member country enforcement efforts since the entry into force of the OECD Anti-Bribery Convention, and the characteristics of the bribery involved in those cases. Settled cases represented sixty-nine percent of the cases, and thirty-one percent were the result of convictions. The United States led enforcement efforts with nearly thirty percent of the concluded cases (128), followed by Germany (28), Korea (11), and Italy, the UK, and Switzerland (6 each).

According to the OECD, enforcement peaked globally in 2011 when seventy-eight enforcement actions were concluded. The number of concluded cases has fallen since that time to roughly forty per year. The OECD notes, however, that the recent decline in the number of cases may be attributable to an increase in the average time taken to conclude them, and counts 390 ongoing bribery cases in twenty-four member countries. This suggests that investigative and enforcement efforts remain substantial, at least in some countries.

Thirty-one percent of bribery cases were brought to the attention of law enforcement through voluntary disclosures. Companies most often detected the issue through an internal audit or due diligence in connection with a merger or acquisition. The OECD also reports that whistleblowers brought issues directly to authorities in only two percent of cases, while notifying the corporate hierarchy in seventeen percent of cases. It is possible that these figures—compiled over fifteen years—mask a recent increase in the incidence of whistleblower reporting, at least in the United States, since the adoption of Dodd-Frank's whistleblower provisions in 2010. One might expect a higher percentage of whistleblower-instigated investigations in the most recent years of the OECD's review period.

At least sixty percent of the enforcement actions involved companies with over 250 employees. Significantly, in over half the cases, the individual found to have paid, authorized, or known of a bribe was management or the President/CEO of the company. The OECD emphasized the need this highlights for a strong "tone at the top" in corporate compliance programs. Non-management accounted for bribes in twenty-two percent of the cases. An intermediary was involved in a bribe in seventy-one percent of the cases, whether an agent (including sales agents,

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[146] Complaint, *Direct Access Partners, LLC v. Rothstein Kass & Co*., No. L-002107-12 (N.J. Super. Ct. Mar. 27, 2014).
[147] Dan Ivers, *Defunct Broker DAP Sues Auditor For Missing $66M Fraud*, LAW360 (Apr. 7, 2014), http://www.law360.com/articles/525682/defunct-broker-dap-sues-auditor-for-missing-66m-fraud.
[148] The report is *available at* http://www.keepeek.com/Digital-Asset-Management/oecd/governance/oecd-foreign-bribery-report_9789264226616-en#page13.

distributors, and brokers) (in forty-one percent of cases), corporate vehicle (such as a subsidiary or local consulting firm) (in thirty-five percent of cases), or otherwise. The OECD noted the need this highlights for effective due diligence and monitoring.

Of those being bribed, the OECD found that officials of state-owned enterprises were bribed in twenty-seven percent of cases. Significantly, those bribes accounted for over eighty percent of the total value of bribes promised, offered, or received. The OECD also found that two-thirds of bribery cases occurred in only four sectors: extractive, construction, transportation and storage, and information and communication. On average, the extractive sector paid twenty-one percent of the transaction value in bribes, transportation and storage paid sixteen percent, information and communication paid five percent, and construction paid four percent. The OECD noted, however, that bribes of less than five percent of the transaction value accounted for over half the total value of bribes paid. Bribes most frequently were paid to obtain government contracts (fifty-seven percent), customs clearance (twelve percent), favorable tax treatment (six percent), other preferential treatment (seven percent), licenses/authorizations (six percent), confidential information (four percent), and travel visas (one percent). Nearly half the bribes occurred in countries that are "high" or "very high" on the UN's Human Development Index, contrary to perceptions of bribery occurring only in the least developed countries.

B. United Kingdom

At the very end of 2014, the UK Serious Fraud Office (SFO) finally succeeded in bringing its first successful prosecution of a company for foreign corruption of public officials. Furthermore, over the course of 2014, the SFO has had its first successful prosecution against individuals under the Bribery Act 2010 (Bribery Act), as well as its first successfully contested foreign bribery trial. 2014 also saw the introduction of Deferred Prosecution Agreements (DPAs) into UK law, along with a Code of Practice for prosecutors and sentencing guidance for individuals and corporate offenders. These developments, along with the UK's recently issued "Anti-Corruption Plan" signify a stepping up of the UK's enforcement tools and strategy, which may foreshadow enhanced enforcement over the years to come.

1. UK Legal Developments

a. Deferred Prosecution Agreements

On February 24, 2014, DPAs entered into force in the UK. DPAs are only available to organizations (not individuals), for cases of economic crime (including offenses arising under Sections 1, 2, 6 and 7 of the Bribery Act), prosecuted by either the SFO or the Crown Prosecution Service.

As discussed in our 2013 Year in Review, this is a significant development, aligning the UK more closely with the US approach and facilitating the resolution of multi-jurisdictional cases. Notably, UK DPAs differ from their US counterpart substantially in terms of the amount of judicial oversight that they are to receive. A judge can approve a DPA only where: (a) it is in the interests of justice; and (b) the terms of the DPA are fair, reasonable, and proportionate. In addition, UK courts will be required to become involved in cases to be resolved via DPAs much earlier in an enforcement action, and will be more involved in determining when, if at all, a breach of the DPA has occurred.

For further information on UK DPAs, see our prior advisory here.[149]

b. Sentencing Council Guidelines

On October 1, 2014, the Sentencing Council's Definitive Guidelines on 'Fraud, Bribery and Money Laundering Offences' (the Sentencing Council Guidelines) entered into force. In addition to being utilized for the sentencing of convicted offending companies (regardless of the date of the offense), the Sentencing Council Guidelines may also be used to inform judges and prosecutors of the calculation of a financial penalty in a DPA. The Sentencing Council Guidelines provide for a significant increase in financial penalties in cases that are considered most serious, in addition to discounts of up to one third for co-operation with the authorities.

For further information on the Sentencing Council Guidelines, see our prior advisory here.[150]

c. The UK's Anti-Corruption Plan

On December 18, 2014, the UK Government published its Anti-Corruption Plan (the Plan), which largely follows the Government's Serious and Organised Crime Strategy in seeking to apply the four 'p's to bribery and corruption: namely, to "pursue" offenders; to "prevent" people from being engaged in corruption; to "protect" against corruption through risk assessments and transparency; and to "prepare" in reducing the impact of corruption where it takes place, by assisting whistle-blowers and raising global standards. The over-arching themes of the Plan include raising the awareness of anti-corruption on a global scale, national and international co-operation and ensuring that civil society and business work together with the various Governmental departments in tackling corruption.

The Plan contains sixty-six "action points", of which the most notable include:

- the establishment of a national multi-agency intelligence team by the UK's National Crime Agency (NCA), focusing on domestic and international corruption;
- the creation of a new central bribery and corruption unit comprising of resources primarily from the NCA and the Department for International Development;
- the Ministry of Justice to consider whether a new criminal offense for "failure to prevent economic crime" should be introduced in the Bribery Act;
- the development of a single reporting mechanism for reporting corruption and supporting whistle-blowers;
- the introduction of a publicly accessible central register detailing the beneficial ownership of UK companies.[151]

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[149] Steptoe client advisory, *Deferred Prosecution Agreements Now in Force in the UK, Potentially Promoting Self-Reporting and Cross-Border Settlements* (Mar. 5, 2014), http://www.steptoe.com/publications-9396.html.

[150] Steptoe client advisory, *Financial crime update: New Sentencing Council Guidelines for fraud, bribery and money laundering corporate offenders* (Mar. 17, 2014), http://www.steptoe.com/publications-9439.html.

[151] Steptoe client advisory, *The UK Anti-Corruption Plan: Co-operation, Transparency and Hard Graft* (Jan. 14, 2015), http://www.steptoe.com/publications-10113.html.

2. Enforcement Efforts

In 2014, the SFO continued its investigations into Rolls Royce and into the capital raising between Barclays and Qatar. The SFO also launched a number of significant fraud and corruption investigations, against: GlaxoSmithKline plc and its subsidiaries; the Sweett Group; supermarket chain Tesco; an investigation into fraud in the foreign exchange markets; and against multiple individuals in connection with LIBOR manipulation. Furthermore, a money-laundering investigation arising from suspicions of corruption in Ukraine was opened in April 2014. Despite the SFO's focus on channeling the agency's resources into the most serious cases, the SFO is yet to produce a foreign bribery-related civil settlement or criminal conviction against a corporation under the Bribery Act.

a. Enforcement Against Companies

The SFO reached no corporate civil settlements in 2014, which is consistent with Director Green's assertion that the SFO is primarily an investigative and prosecutorial agency. However, the SFO has continued to prosecute corporations. In July 2014, charges were brought against Alstom's UK subsidiary, Alstom Network UK Ltd., under Section 1 of the Prevention of Corruption Act 1906 (the UK's pre-Bribery Act legislation) and under the Criminal Law Act 1977, with offenses of corruptly agreeing to make payments totaling more than €6 million to government officials in India, Poland and Tunisia between June 2000 and November 2006 to allegedly secure transportation contracts. Furthermore, charges have been brought against Robert Hallett, the former Managing Director of Alstom Transport India, who is accused of bribing officials of the Delhi Metro Rail Corporation with over €3 million to secure contracts.

Furthermore, in December 2014 charges were brought against a second UK subsidiary of Alstom, Alstom Power Ltd., for corruption and bribery offenses in respect of a power station in Lithuania. Charges have also been brought against two former Alstom Power employees, Nicholas Reynolds and Johanes Venskus, for conspiring to bribe an agent and offering a bribe between February 2002 and March 2010, so as to secure a contract for the supply of burners to the Lithuanian power plant.

In December 2014, the SFO secured its first conviction of a company for offenses involving bribery of foreign public officials against the printing firm, Smith & Ouzman Ltd. Smith & Ouzman Ltd. and two of its former directors were convicted under the UK's pre-Bribery Act legislation (Section 1 of the Prevention of Corruption Act 1906) with offenses of corruptly agreeing to make payments of over £400,000 to government officials in Ghana, Kenya, Mauritania and Somaliland between November 2006 and December 2010, to allegedly influence the award of business contracts to the company. The sentencing hearing was scheduled for February 2015.

In December 2014, International Tubular Services (ITS), an Aberdeen-based oil and gas services provider, was fined £170,000 by the Scottish Civil Recovery Unit after admitting that a former Kazakhstan-based employee paid bribes to a customer in Central Asia to secure additional contractual work. The fine (which is said to be the total profit that ITS made under the contract) comes after ITS self-reported to the Crown Office in November 2013, following Parker Drilling Company's acquisition of the company in April 2013.

b. Enforcement Against Individuals

The trial of former Innospec Ltd. CEO Dennis Kerrison and former sales director Miltiades Papachristos commenced in March 2014, with judgment handed down in June 2014. Both men were convicted of one count of conspiracy to corrupt, *i.e.*, that they gave or agreed to give corrupt payments to public officials or other agents of the Indonesian Government as inducements to secure, or as rewards for having secured, contracts from the Indonesian Government for the supply of Tetraethyl Lead manufactured by Innospec. This was the SFO's first successfully contested foreign bribery trial. On August 4, 2014, Mr Papachristos was sentenced to eighteen months' imprisonment and Mr Kerrison was sentenced to four years' imprisonment. Both men subsequently appealed their sentences. In September 2014, the Court of Appeal reduced Mr. Kerrison's sentence to three years, but did not reduce Mr. Papachristos' sentence.[152]

In June 2014, following an eight-month trial, five individuals (four ex-journalists and one private investigator) were convicted of conspiring to unlawfully intercept voicemails in the NewsCorp case. Andy Coulson, the former News of the World editor, was sentenced to eighteen months' imprisonment, though he was subsequently released from prison under 'home detention curfew' arrangements in November 2014. In regards to the two bribery counts that Mr. Coulson was originally charged with, the jury failed to reach a decision on the verdict. Therefore, Mr. Coulson and Clive Goodman (the former Royal editor at the News of the World) are to be re-tried in 2015 for two counts of bribery each. The pair are alleged to have paid police officers for Royal telephone directory entries.

Following the SFO's charges in August 2013 against four individuals connected to Sustainable AgroEnergy Plc, relating to the promotion and selling of "bio fuel" investment products to UK investors, two individuals were convicted in December 2014. The former director of Sustainable AgroEnergy, Gary West, and the director of SJ Stone Ltd, Stuart Stone, were found guilty of bribery offenses under Sections 1 and 2 of the Bribery Act. Their convictions were the first successful convictions for the SFO under the Bribery Act after its entry into force in July 2011. Mr West was sentenced to six years' imprisonment for offering a bribe of £189,000 to Mr Stone. Mr Stone was sentenced to four years' imprisonment for receiving the bribe. These sentences, the first under the new Sentencing Council Guidelines, indicate the tough approach taken by the UK courts to bribery and corruption.

c. Civil Cases Dealing with Bribery

In October 2014, the High Court in the case of *Al-Gaood v. Innospec Ltd.* confirmed that claims for damages can be brought where a tender is lost as a result of corruption, by establishing the tort of conspiracy to injury through unlawful means. Although the Court found there was criminal wrongdoing on the part of the defendants, the claimants were not successful in their claim for damages because they had not established causation, *i.e.*, 'but for' the defendants' corruption, the claimants would have been awarded the business.[153]

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[152] See Steptoe's *2012 FCPA Year in Review* at 41, http://www.steptoe.com/publications-newsletter-716.html. *See also* Steptoe's *FCPA Year in Review 2010*, http://www.steptoe.com/publications-newsletter-129.html.

[153] *Al-Gaood v Innospec Ltd.*, [2014] EWHC (Comm) 3147 (Oct. 8, 2014).

In July 2014, the UK Supreme Court made a landmark ruling enabling the recovery of profits from bribes and secret commissions in the case of *FHR European Ventures LLP v. Cedar Capital Partners LLC*. The Supreme Court held that benefits received by an agent through bribes or secrets commissions (in this case €10 million), which breach the agent's fiduciary duty to his principal, are held in trust for the principal. In this case, the principal was entitled to recoup the secret commission of €10 million.[154]

d. Financial Conduct Authority

Although the Financial Conduct Authority (FCA) is not *per se* an anti-corruption enforcement agency, it has been active in prosecuting failures of financial institutions falling within its jurisdiction in areas related to corruption and money laundering.

January 2014 saw the FCA's first case focusing on anti-money laundering (AML) enforcement in the commercial banking sector, in addition to the first application of the FCA's revised five-step "DEPP" penalty regime, in the Standard Bank PLC matter. Standard Bank PLC was fined £7.6 million for failing to comply with AML regulations, in particular in respect to politically exposed persons, during the period December 2007 and July 2011. In terms of the financial penalty imposed, even though Standard Bank PLC had co-operated in the FCA's investigation and taken steps to remediate the issues identified, the FCA viewed it as an aggravating feature that Standard Bank PLC had failed to take notice of previous actions that had been brought by the FCA against a number of firms for AML deficiencies and applied a five percent increase in the penalty to reflect this.

In March 2014, the FCA fined insurance broker Besso Limited £315,000 for inadequate anti-bribery and corruption controls. It is notable that no suspicious payments were identified during the FCA's investigation. Therefore, the financial penalty was imposed based on the absence of adequate controls. Although the financial penalty may appear to be low, the fine was decided under the FCA's old DEPP regime, and would have been significantly higher had it been decided under the revised regime.

In November 2014, the FCA published new thematic reviews, focusing on two particular sectors; the first addresses managing bribery and corruption risk in commercial insurance broking, whilst the second addresses how small banks manage money laundering and sanctions risk. Both thematic reviews include several recommendations for "good practice" in respect of managing financial crime risk. Although the thematic reviews are currently limited to commercial insurance brokers and small banks, the FCA intends to use these examples to update its Financial Crime Guidance (which is expected to be published in early 2015). The "good practice" recommendations will therefore be relevant to all firms regulated by the FCA.

e. NCA

As discussed in our 2013 Year in Review, the National Crime Agency (NCA) was launched in October 2013, with an Economic Crime Command (ECC) dedicated to combatting economic crime and bribery. Over the past year, the NCA has had a number of prosecutorial

[154] FHR European Ventures LLP v Cedar Capital Partners LLC, [2014] UKSC 45 (July 16, 2014).

successes, including: the conviction in June 2014 of three individuals for conspiracy to commit bribery in respect of football match fixing (the individuals received prison sentences totaling eleven years), following an investigation referral from the British newspaper, the Daily Telegraph. Furthermore, in September 2014, the NCA recovered approximately US$7.2 million under a Proceeds of Crime Act Recovery Order from an alleged international fraudster and money-launderer, Hakki Yaman Namli. Mr. Namli is said to have defrauded investors between 1996 and 2002, with the fraudulent funds held in two UK bank accounts.

Nonetheless, the NCA is still a work-in-progress after its first year in operation, and it continues to face major budgetary constraints. These budgetary constraints are evident from its recent poor prosecutorial performance in a multimillion-pound fraud case, which ultimately led to its collapse.[155] It therefore remains to be seen when or indeed whether, the NCA will be successful in prosecuting sophisticated and organized economic crime, without more government resources. Given that the NCA will be pivotal in the creation of the both the multi-agency intelligence team and the central bribery and corruption unit in close co-operation with Department for International Development, both of which are aimed at tackling economic crime domestically and internationally, its effectiveness assumes increased importance.

C. China

As has been widely reported, the People's Republic of China saw an extensive anti-corruption campaign in 2014 targeting an unprecedented number of senior officials as well as a large number of working-level officials. According to the Supreme People's Procuratorate (SPC), for the period from January through September, a total of 35,633 officials in 27,235 cases were investigated by the procuratorates for bribery and embezzlement crimes, an increase of 5.6% from the same period last year. Senior officials at the ministerial or provincial level were targeted in twenty of the SPC cases, representing the highest number ever in China's history.[156] In addition to "beating the tigers" and "catching the flies," China initiated a campaign coded "Operation Fox Hunt 2014" in July to bring back corrupt officials and other economic fugitives that have fled abroad with their illicit gains. Over 400 suspects have been reportedly seized by the public security authorities under this program.[157]

In the private sector, the record fine imposed on the Chinese subsidiary of GlaxoSmithKline (GSK) sent a strong signal to the pharmaceuticals industry, and more broadly, to the international business community operating in China that foreign companies are also on the enforcement radar. On September 19, 2014, the Intermediate People's Court in Changsha ruled after a closed hearing that GSK and its executives were guilty of bribing non-state functionaries.[158]

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[155] For further information, *see* Martin Evans, *Judge blasts National Crime Agency after blunders cause case to collapse*, THE TELEGRAPH (Dec 2, 2014), *available at* http://www.telegraph.co.uk/news/uknews/crime/11268097/Judge-blasts-National-Crime-Agency-after-blunders-cause-case-to-collapse.html.

[156] Press Release, Supreme People's Procuratorate (Oct. 31, 2014), *available at* http://gjwft.jcrb.com/2014/10yue/1z9y/index.shtml.

[157] *See* Xinhua (Dec. 9, 2014), *available at* http://www.ccdi.gov.cn/special/ztzz/ztzzjxs_ztzz/201411/t20141127_32067.html.

[158] *See* Xinhua (Sept. 19, 2014), *available at* http://news.xinhuanet.com/fortune/2014-09/19/c_1112553520.htm.

The court levied a fine of RMB3 billion (approximately $484 million) on the company and imposed suspended sentences of imprisonment between two to four years on the executives. The court found that GSK bribed Chinese medical professionals, who are considered non-state functionaries under Chinese law, to promote its drugs and the value of bribes involved were "very large." The company's former country manager, Mark Reilly, and other four executives were held liable by the court as the person directly in charge and who organized, facilitated, and actively implemented the bribery scheme. In addition to paying bribes, one of the executives was also found guilty of the offense of non-state functionaries taking bribes for taking advantage of her position to receive bribes. In deciding the penalties, the court recognized that the company and the executives were eligible for mitigated punishment for surrendering themselves to the authorities and confessing their offense.

D. Brazil

Brazil continues to step up its efforts to combat bribery and corruption through a combination of new legal instruments, increased domestic enforcement, and enhanced international cooperation. The most notable development in recent years was the enactment of Brazil's first anti-bribery statute applicable to companies, Law 12,846/2013 (the "Clean Company Act").[159] The statute provides for strict civil and administrative liability of companies for acts "against the public administration, national or foreign."[160] Sanctioned conduct includes bribery, bid-rigging, fraud in the execution and performance of contracts with the government, and obstruction of audits, inspections, and investigations by public officials.

Following the Act's entry into force on January 29, 2014, companies held liable for "acts against the public administration" will be subject to fines of up to twenty percent of their gross revenue in the year preceding initiation of an investigation, publication of the condemnatory decision, and disgorgement. In establishing the amount of the fine, Brazilian authorities will consider factors such as the amount of the undue advantage and the degree of injury caused to the public administration. Both the cooperation of the investigated entity and the existence of an effective compliance program are mitigating circumstances that may reduce the fine, but are not affirmative defenses. Taking a leaf out of Brazil's competition law enforcement book, the Clean Company Act also provides for a leniency program that gives authorities discretion to reduce fines by two thirds for the first entity that cooperates with investigations.

These legislative developments have been accompanied by a more aggressive enforcement strategy at the federal level, spearheaded by the Brazilian Federal Police and by the Federal Prosecutor's Office (*Ministerio Publico Federal*). The most high-profile enforcement action initiated in 2014 was *Operacão Lava Jato* ("car wash" in Portuguese), which was launched by the Brazilian Federal police in March of 2014 in six states and the Federal District, and has led to the arrest of more than thirty individuals at the time of this writing. *Operacão Lava Jato* involves an

[159] Brazil has long had criminal anti-bribery statutes, both on the supply and demand sides, that apply to individuals, and these remain in place following the enactment of the Clean Company Act. Brazil, like many civil law countries, does not have corporate criminal liability. Brazil has had an active competition law regime and enforcement authority (CADE) for a number of years, which includes corporate civil and administrative liability provisions not dissimilar to those in the Clean Company Act.

[160] Because corporate liability for an agent's conduct is strict, liability is independent of an administrative or judicial showing of culpability.

alleged bid-rigging scheme in which funds derived from over-priced contracts to build various Petrobras refineries were diverted to a number of political parties in President Roussef's coalition. As a result of on-going investigations, a former senior Petrobras executive, one "*doleiro*" involved in money laundering, and four other senior executives of implicated construction companies, have entered into leniency programs and are now cooperating with the Brazilian authorities. US authorities are also reportedly investigating Petrobras, a partially state-owned enterprise and SEC "issuer," in connection with the conduct unveiled to date by *Operacão Lava Jato*. The conduct at issue in this case predates the entry into force of the Clean Company Act.

Finally, in late October 2014, the OECD Working Group on Bribery published Brazil's Phase 3 Report, in which it evaluates and makes recommendations for Brazil's enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The Report commends Brazil for improvement in discrete areas, in particular the enactment of the Clean Company Act, but criticizes Brazil for its low level of enforcement of foreign bribery in Brazil. The Phase 3 Report notes that Brazil has only opened five investigations related to foreign bribery in the fourteen years since Brazil joined the Convention, and urges Brazil to step up its enforcement efforts against foreign bribery in the near future. Likewise, the 2014 report of Transparency International on the Enforcement of the OECD Antibribery Convention continues to classify Brazil as a country with "little or no enforcement". Brazilian authorities have been credited by US authorities for their cooperation in recent cases including most recently Dallas Airmotive (discussed *supra* in Section IV.G.).

E. Canada

As discussed in our 2013 Year in Review, Canada in 2013 amended its anti-bribery statute, the Corruption of Foreign Public Officials Act (CFPOA), to comply with its obligations under the OECD Convention. Canada expanded the jurisdictional scope of the CFPOA and added a bookkeeping offense that criminalizes committing or concealing bribery using improper accounting techniques.[161] The legislation also provided for the eventual removal of the facilitation payments exception on a date to be fixed by the Governor in Council.[162] The Canadian Government reportedly continues to delay the elimination of the facilitation payment exception to allow for Canadian companies to implement compliance programs.[163]

Changes to the Canadian anti-bribery regime have been coupled with the launch of the Royal Canadian Mounted Police (RCMP) National Division and increased enforcement against individuals for violations of the CFPOA.[164] The last public official estimate, from 2013, stated

[161] Fighting Foreign Corruption Act, S.C. 2013, c.26 § 4; Corruption of Foreign Public Officials Act, S.C. 1998, c.34 §§ 4, 5.
[162] Fighting Foreign Corruption Act, S.C. 2013, c.26 §§ 3(2), 5.
[163] Thomas Fox, *North of the 49th: Recent Developments in Canadian Anti-Corruption Enforcement*, JDSupra Business Advisor (Dec. 5, 2014), *available at* http://www.jdsupra.com/legalnews/north-of-the-49th-recent-developments-i-71480/.
[164] Samuel Rubenfeld, *Canada Targets Individuals in Anti-Bribery Push*, WALL ST. J. (June 9, 2014), http://blogs.wsj.com/riskandcompliance/2014/06/09/canada-targets-individuals-in-anti-bribery-push/.

that the RCMP had 35 open anti-corruption investigations.[165] In 2014, Canada reached several important enforcement milestones, including the first term of imprisonment imposed for violation of the CFPOA. On May 23, 2014, Mr. Nazir Karigar was sentenced to three years in prison for arranging bribes to public officials at Air India on behalf of CryptoMetrics, Inc.[166] Following the sentence, the RCMP charged US nationals Robert Barra and Dario Bernini and UK national Shailesh Govinda with violations of the CFPOA related to the CryptoMetrics, Inc. bribery scheme.[167]

The decision to pursue prosecutions against foreign nationals is telling because the RCMP had difficulty enforcing the CFPOA against foreign nationals in 2014. Mr. Abul Hasan Chowdhury, a national of Bangladesh and the former Minister of State, was one of five individuals charged in 2013 under the CFPOA related to a bribe on behalf of SNC-Lavalin Group, Inc. for the right to construct a bridge in Bangladesh.[168] The court in that case dismissed the indictment against Mr. Chowdhury on the basis that foreign nationals were not within the jurisdiction of the CFPOA.[169] The Court noted, however, that Mr. Chowdhury was not residing in a country subject to an extradition treaty and that Canada would have jurisdiction if it could "lay hands" upon him.[170]

Canada is likely to continue augmenting the enforcement tools available to the RCMP. Canadian enforcement of the CFPOA against foreign nationals will be tested in 2015 as Canada attempts to extradite US and UK nationals pursuant to the charges against CryptoMetrics, Inc.

F. Germany

Germany had a number of legislative developments in 2014. In November, Germany ratified the 2003 UN Convention against Corruption. Despite being one of the first signatories to the accord in December 2003, ratification was delayed due a provision requiring fixed penalties for politicians committing bribery.[171] Germany satisfied this provision when it introduced five-year jail sentences for such Parliamentarians in February of this year.[172] In September, an amendment to Section 108e of Germany's Criminal Code also entered into force, broadening the scope of

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[165] Canada, *Exporting Corruption*, TRANSPARENCY INTERNATIONAL, Oct. 23, 2014, *available at* http://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2014_assessing_enforcement_of_the_oecd.

[166] Dave Seglins, *Nazir Kariga, Air India Bribe Plotter, Sentenced to 3 Years in Prison*, CBC NEWS, May 23, 2014, *available at* http://www.cbc.ca/news/canada/ottawa/nazir-karigar-air-india-bribe-plotter-sentenced-to-3-years-in-prison-1.2651998.

[167] Samuel Rubenfeld, *Canada Charges US Executives as Anti-Bribery Push Advances*, WALL ST. J., June 4, 2014, *available at* http://blogs.wsj.com/riskandcompliance/2014/06/04/canada-charges-american-executives-as-anti-bribery-push-advances/.

[168] *Chowdhury v. H.M.Q.*, 2014 ONSC 2635, No. M065/14 (Ontario Super. Ct. Justice Apr. 28, 2014), ¶¶ 5, 6, *available at* http://s3.documentcloud.org/documents/1180722/snc-chowdhury-2014onsc2635-1.pdf.

[169] *Id.* ¶¶ 40, 41, 49.

[170] *Id.* ¶¶ 6, 7, 57.

[171] *Belatedly, Germany ratifies UN anti-corruption convention*, DEUTSCHE WELLE (Nov. 14, 2014), http://www.dw.de/belatedly-germany-ratifies-un-anti-corruption-convention/a-18066424.

[172] *Id.*

criminal conduct for bribing "delegates" (members of the European Parliament, a parliament of the Federal Republic). Previously, Section 108e criminalized only the "buying or selling a vote for an election or ballot." Revised Section 108e makes it unlawful to offer, promise, or give an undue advantage to a member of governmental bodies. The amendment also makes it unlawful for Parliamentarians to solicit, accept, or promise the acceptance of an undue advantage.[173]

In 2014, Germany continued its investigation efforts, particularly into defense contractor activities. Prosecutors fined Rheinmetall AG $46 million in an investigation of alleged bribes in connection with arms sales in Greece[174] and reportedly indicted Stefan Zoller, the former manager of EADS Germany (now Airbus Group) for conduct relating to bribery in Romania.[175] Germany also resolved ongoing cases, acquitting former Federal President Christian Wulff of highly-publicized corruption charges[176] and settling its case against Bernie Ecclestone, Chief Executive of Formula One, for $100 million.[177]

G. European Union

In 2014, the European Union adopted Directive 2014/24/EU of 26 February 2014 (the 2014 Directive), which significantly changes the previous standards regarding mandatory and permissive debarment from participation in public tenders, and expressly repeals and replaces Directive 2004/18/EC of 31 March 2004 (the 2004 Directive).[178]

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[173] Strafgesetzbuch [StGB] [Penal Code], Nov. 13, 2009, Bundesgesetzblatt [BGBL.] 945, as amended, §108e (Ger.); Isabell Gernand, *New German Anti-Bribery Regulation on Bribing Members of Parliament Entering into Force*, GLOBAL COMPLIANCE NEWS (Sept. 8, 2014) http://globalcompliancenews.com/new-german-anti-bribery-regulation-bribing-members-parliament-entering-force/.

[174] Jimmy Hoover, *Rheinmetall Unit to Pay $46M In Alleged Greek Arms Bribery*, LAW 360 (Dec. 10, 2014), http://0-www.law360.com.texsl.iii.com/articles/603419/rheinmetall-unit-to-pay-46m-in-alleged-greek-arms-bribery.

[175] Ben Dipietro, *Corruption Currents: Fallout From Petrobras Scandal Intensifies*, WALL ST. J.(Dec. 10, 2014), http://blogs.wsj.com/riskandcompliance/2014/12/10/corruption-currents-fallout-from-petrobras-scandal-intensifies/.

[176] Melissa Eddy, *German Ex-Leader Acquitted of Graft Charges From His Time as Governor*, N.Y. TIMES, (Feb. 27, 2014), http://www.nytimes.com/2014/02/28/world/europe/christian-wulff.html?_r=0.

[177] John F. Burns, *Formula One Chief Bernie Ecclestone Settles Bribery Case for $100 Million*, N.Y. TIMES (Aug. 5, 2014), http://www.nytimes.com/2014/08/06/world/europe/formula-one-chief-settles-bribery-case-for-100-million.html?_r=0.

[178] Article 57, Directive 2014/24/EU of the European Parliament and of the Council, 2014 O.J. L 94, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG. Under the previous legislation, any candidate or tenderer convicted by a national court of fraud, corruption, money laundering, or participation in a criminal organization was subject to mandatory and permanent debarment from participation in public contracts. The 2004 Directive also allowed for permissive debarment under certain circumstances. *See* Article 45, Directive 2004/18/EC of the European Parliament and of the Council, 2004 O.J. L 134, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:en:PDF.

Like its predecessor, the 2014 Directive includes mandatory and permissive debarment provisions. It provides for mandatory debarment of contractors subject to a conviction by final judgment for fraud, corruption, participation in a criminal organization, terrorist offenses, money laundering or terrorist financing, and child labor and other forms of human trafficking. And it allows for permissive debarment of contractors in nine situations, including grave professional misconduct rendering the contractor's integrity in question, prior agreements aimed at distorting competition, and efforts to unduly influence the decision-making process or to obtain confidential information. However, a key distinction between the 2004 and 2014 Directives is the latter's introduction of a "reliability" standard, pursuant to which a contractor may avoid even mandatory debarment by providing evidence of its reliability.[179]

To prove reliability, a contractor is required to show that it paid (or attempted to pay) compensation for damage caused by a criminal offense or misconduct, actively collaborated with the investigating authorities, and took concrete technical, organizational and personnel measures to prevent further criminal offenses or misconduct.[180] The sufficiency of this evidence is evaluated in light of the gravity and circumstances of the misconduct or criminal act. Unless a final judgment mandating exclusion has already been issued, a contractor that satisfactorily demonstrates reliability may be subjected to neither mandatory nor permissive debarment.

If the US experience is a guide, these provisions could significantly influence the manner in which companies respond to evidence of potential misconduct.

In addition to changes to procurement procedures, the European Commission released the first European Union Anti-Corruption Report on February 3, 2014, as part of a broader policy framework of biannual reviews.[181] The Report was based on compiled corruption-monitoring data and opinion surveys of the public and business community in the European Union. The Report noted that the perception of corruption is widespread in the European Union and that actual experience with corruption varies substantially by country. The Report found that limited criminal liability for elected officials and the financing of political parties, among other things, were areas of concern for Member States. The Report also identified urban development, construction, and healthcare as vulnerable sectors across the European Union. Finally, the Report studied public procurement procedures across Europe and compiled a country report for each Member State.

The Anti-Corruption Report increases the European Commission's legitimacy as a player in the European Union's fight against corruption by contrasting its performance with that of national and local authorities. The Report, however, fails to examine European Union institutions, which have been subject to recent allegations of high-level corruption.[182] Time will tell whether the Report signals a shift in power in the area of anti-corruption and whether the European Commission will spur standardization of anti-corruption legislation in the European Union.

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[179] Art. 57 ¶ 6.
[180] Id.
[181] The Report is available at http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf. *See also* Steptoe's prior client advisory, *The European Commission's First Biannual EU Anti-Corruption Report*, http://www.steptoe.com/publications-9420.html.
[182] James Kanter, *Anti-Corruption Group Finds Fault with European Union*, N.Y. TIMES (Apr. 24, 2014), http://www.nytimes.com/2014/04/24/business/international/anti-corruption-group-finds-fault-with-european-union.html.

XI. WORLD BANK AND OTHER MULTILATERAL DEVELOPMENT BANK ANTI-CORRUPTION ENFORCEMENT

The Multilateral Development Banks (MDBs) and other regional bodies continued their active enforcement of fraud and anti-corruption standards in 2014. Led by the World Bank Group, MDBs continued to impose sanctions through their debarment regimes, the recognition of other MDBs' sanctions through cross-debarment agreements, and referral to national authorities. During the World Bank's 2014 fiscal year, it formally sanctioned seventy-one entities, including those entities debarred as a result of a default sanction and entities that reached Negotiated Resolution Agreements with the Bank, for misconduct including fraud, corruption, collusion and/or coercion.[183] In addition, the World Bank recognized 15 debarments during fiscal year 2014, as a result of the 2010 Cross-Debarment Agreement among the World Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the African Development Bank, and the Inter-American Development Bank.[184] To date, 582 entities have been cross-debarred by these MDBs since the agreement was signed.[185] The World Bank also made twenty-two referrals to national authorities in fiscal year 2014.

Notable cases settled recently in the MDB community include the African Development Bank's Negotiated Resolution Agreements with several partners of the TSKJ Nigeria consortium involved in contracts for liquefied natural gas production plants on Bonny Island, Nigeria. The African Development Bank first announced a settlement of $17 million with Kellogg Brown & Root LLC (KBR), Technip S.A., and JGC Corp., with KBR paying $6.5 million, Technip $5.3 million, and JGC $5.2 million. A couple of months later, the Bank announced that Snamprogetti Netherlands B.V. also agreed to pay $5.7 million in penalties. The Bank had alleged that between 1995 and 2004, these parties had paid $180 million in bribes to Nigerian officials in return for Bonny Island contracts worth $6 billion.

The World Bank's Sanctions Board issued fourteen decisions in 2014. Notable litigated decisions include the debarment of OOO Armada Center (formerly known as OOO RBC Center) for a period of two years. The parent company, OAO Armada, received a letter of reprimand for failure to supervise its subsidiary. Both companies were sanctioned for fraudulent practices for the failure to disclose a conflict of interest in a proposal submitted by OOO Armada Center. The case illustrated not only that the Bank is increasingly using letters of reprimand as a sanction, but that it is taking this layered approach of a letter of reprimand for the parent company and a debarment for the subsidiary. This approach is consistent with the Bank's developing views on culpability and its

[183] In comparison, the World Bank debarred seventy two entities during fiscal year 2013. Of the sanctioned entities, seven received letters of reprimand or conditional non-debarment.

[184] In 2010, these MDBs formally signed an agreement to cross-debar firms and individuals found to have engaged in wrongdoing in MDB-financed development projects. Under the cross-debarment agreement, entities debarred for more than one year by one MDB may be automatically sanctioned for the same misconduct by the other participating development banks.

[185] The vast majority of the cross-debarments were the result of sanctions levied by the World Bank, the Asian Development Bank and the Inter-American Development Bank. These three institutions have been, and are likely to continue to be, the most active of the MDBs in seeking public debarments for conduct in violation of their specific guidelines. However, due to the advent of cross-debarment, any debarment over one year risks automatic recognition by other signatories to the cross-debarment agreement.

agenda—still being tested in litigation—to hold parent companies responsible for the actions of their subsidiaries.

For the first time, in 2014, the Office of Suspension and Debarment (OSD) of the World Bank issued a *Report on Functions, Data and Lessons Learned 2007–2013*, designed to capture the OSD's operations since its inception.[186] The Report explains that the "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)."[187] The Report stated that INT had submitted 172 cases to OSD for review between 2007 and 2013.[188] Interestingly, the Report also notes that in thirty-eight percent of the cases OSD had reviewed, "OSD determined that there was insufficient evidence to support one or more of the claims made by INT, resulting in the referral of the case back to INT for revision."[189]

Although the World Bank began a systematic review of its sanctions system in 2013, this reform initiative has not significantly advanced in 2014. It is believed that the Office of General Counsel will make recommended changes to the system in 2015, but the implementation of any changes will likely take some time.

In addition to MDBs, regional authorities' procurement and debarment standards continue to be strengthened, enhancing the collateral risks of an FCPA/corruption case. Multinational firms are particularly focused on the European Community exclusion standards, affecting European Union procurement, individual EU state procurement, and European Union IFIs (such as the European Investment Bank), including the new EU directive on debarment described above.

XII. CONCLUSION

The last year saw continued focus by the US DoJ and SEC on prosecuting foreign bribery, including the conclusion of several years-long investigations and two "top ten" FCPA settlements. Cooperation with other national law enforcement and investigative authorities continued throughout 2014, coupled with an increase in non-US enforcement.

Enforcement activity in 2015 is likely to remain robust. There is a strong pipeline of publicly-disclosed FCPA investigations from 2014 and earlier that are ripe to produce resolutions in 2015. The FBI has recently announced it is increasing FCPA investigative resources. At least one individual trial is set for 2015. We also expect the trend of increasing enforcement activity outside the United States and within MDBs to continue unabated in 2015.

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[186] *Available at* http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,contentMDK:23584747~menuPK:9601822~pagePK:64168445~piPK:64168309~theSitePK:3601046,00.html.
[187] *Id.* at 10.
[188] *Id.* at 23.
[189] *Id.* at 30.

APPENDIX: Table of 2014 Cases, by Element

Anti-Bribery Provisions: Substantive Elements	Case
• **Officials Involved**	• Bahraini government officials and executives working for the state-owned enterprise Aluminium Bahrain B.S.C. (*Alcoa*) • Officials for power, grid, and transportation state-owned entities around the world (*Alstom*) • China Ministry of Commerce (MOFCOM) and State Administration for Industry and Commerce (AIC) licensing officials (*Avon*) • Journalists at Chinese state-run media organizations (*Avon*) • Government officials in Russia, including the Ministry of Health (*Bio-Rad*) • Officials at government-owned hospitals and laboratories in Vietnam (*Bio-Rad*) • Officials at government-owned hospitals in Thailand (*Bio-Rad*) • Brazilian Air Force, Peruvian Air Force, the Office of the Governor of the Brazilian State of Roraima, and the Office of the Governor of the San Juan Province in Argentina (*Dallas Airmotive*) • Officials of Russian state entity/trade agency in charge of awarding contract for Public Prosecutor's Office *(HP Russia)* • Official of Polish National Police and Interior Ministry (*HP Poland)* • Official of Mexican state-owned petroleum company *(HP Mexico)* • Tax Authorities in Mali, Guinea, DRC (*Layne Christensen*) • Customs officials in Burkina Faso, DRC (*Layne Christensen*) • Police, border patrol, immigration, and labor inspectors in Burkina Faso, Guinea, Tanzania, and the DRC (*Layne Christensen*) • Member of Indonesian Parliament (*Marubeni*) • Officials of Indonesian state-owned electricity company, "Perusahaan Listrik Negara" (*Marubeni*) • Military and police forces in Pakistan, Indonesia, and other countries (*Smith & Wesson*)

• **Third Parties Involved, if any**	• Consultants/intermediaries (*Alcoa, Alstom, Avon, HP Mexico, HP Russia, Marubeni*) • Agents (*Bio-Rad, Smith & Wesson*) • Distributors (*Bio-Rad*) • Front companies (*Dallas Airmotive*) • "Local Agent" (*Layne Christensen*) • Outside Counsel (*Layne Christensen*) • Customs Brokers (*Layne Christensen*)
• **Value Provided**	• More than $110 million through consulting fees, commissions, and third-party markups (*Alcoa*) • Approximately $75 million (*Alstom*) • $8 million in gifts, meals, entertainment, travel, cash; sponsorship of articles, and purchases of ads in state-owned newspapers (*Avon*) • $4.6 million to Russian agents that did not appear to perform legitimate services (*Bio-Rad*) • $2.2 million to agents or distributors that made payments to government officials in Vietnam (*Bio-Rad*) • $708,608 to a distributor in Thailand offering improper payments to Thai government officials (*Bio-Rad*) • Range from $3,000 to $20,000 (*Dallas Airmotive*) • At least $125,000 through intermediary/consultant (*HP Mexico)* • More than $630,000 in cash and gifts; several thousand dollars in improper travel and entertainment; percentage of contract revenues (*HP Poland)* • Approx. €8 million *(HP Russia)* • Approximately $370,000 through third parties and in cash (*Layne Christensen*) • Approximately $1.4 million (*Marubeni*) • $11,000 in guns to officials (*Smith & Wesson*)
• **Action, Inaction, Influence or Advantage Sought:**	• Long-term contracts with Aluminium Bahrain B.S.C. (*Alcoa*) • Securing power, grid, and transportation projects (*Alstom*) • Granting of licenses (*Avon*) • Suppressing negative news stories (*Avon*) • Avoiding fines/penalties (*Avon*) • Sales of clinical and diagnostic equipment to the Russian government (*Bio-Rad*) • Sales to government-owned hospitals and laboratories in Vietnam (*Bio-Rad*) • Sales to government customers in Thailand (*Bio-Rad*) • Obtaining and retaining engine maintenance, repair, and overhaul (MRO) service business (*Dallas Airmotive*) • Contract with Mexican government with a net value of

	$2.5 million *(HP Mexico)* • Contracts with Polish government valued at $60 million (*HP Poland)* • Contract with Russian Public Prosecutor's Office valued at €35 million (*HP Russia)* • Reduction of tax assessments (*Layne Christensen*) • Reduction of customs duties and penalties (*Layne Christensen*) • Expedited import and export process (*Layne Christensen*) • Immigration-related actions, including securing border entry, work permits, and avoiding penalties (*Layne Christensen*) • Contract, valued at $118 million, with Indonesia's state-owned electricity company to build a major power plant in Indonesia (*Marubeni*) • Attracting new gun sale business (*Smith & Wesson*)
• **Combined Total Fines, Penalties, Disgorgement, Pre-Judgment Interest**	• $384 million (*Alcoa*) • $772.29 million (*Alstom*) • $135 million (*Avon*) • $55.05 million (*Bio-Rad*) • $14 million (*Dallas Airmotive*) • $108 million (*HP and subsidiaries)* • $5.1 million (*Layne Christensen*) • $88 million (*Marubeni*) • $2.03 million (*Smith & Wesson*)

Anti-Bribery Provisions: Jurisdictional Elements	**Case**
• **Dd-1 or dd-2 jurisdiction**	• *Alstom* (Parent and US subsidiaries) • *Avon* (Parent and Chinese subsidiary) • *Alcoa* (Parent and US-based subsidiary) • *Bio-Rad* • *Dallas Airmotive* • *HP (Parent)* • *Smith & Wesson*
• **Dd-3 territoriality**	• *HP Russia* • *Alstom Switzerland* • *Marubeni*

Accounting Provisions: Substantive Elements	Case
• **Nature of Alleged Books and Records Inaccuracy**	• Improperly recording sales to a distributor as legitimate, and payments to a distributor/agent as commissions, which instead were to make payment to government officials (*Alcoa*) • Recording payments as "commissions" and "consultancy fees" (*Alstom*) • Paying consultants based on vague invoices supported by inadequate back-up documentation (*Alstom*) • Recording gifts as "samples" and "public relations business entertainment" (*Avon*) • Submitting false expense reimbursement requests to fund cash payments to officials (*Avon*) • Describing personal trips for officials as "site visits" or "study trips" (*Avon*) • Submitting false invoices by consultant (*Avon*) • Improperly recording payments to distributors and agents as commissions, advertising, and training fees (*Bio-Rad*) • Paying officials of SOEs under the guise of collaboration and research agreements (*Bruker*) • Off-the-books cash payments; improperly accounting for gifts, travel, and entertainment expenses provided to official; mischaracterizing corrupt payments as legitimate expenses (*HP Poland)* • Entering secret/off-the-books contract with inflated prices, without authorization or power of attorney; off-the-books project pricing/financial records; false SOX certification; falsely recording bribes as consulting fees, commissions, costs of goods and services, and other legitimate expenses (*HP Russia)* • Recording payments to avoid tax penalties as "advance of audit," "take up cost," "fret fees for container," tax expenses, legal expenses (*Layne Christensen*) • Recording improper customs-related payments as "per diems," "intervention expenses," "Honoraires," "commissions," "service fees," "governor office release rig," and "release documents for rig44" (*Layne Christensen*)

• **Nature of Alleged Internal Control Weaknesses**	• Failing to devise and maintain accounting controls to detect and prevent the use of distributors and consultants to make improper payments to government officials, (*Alcoa*) • Referring to consultants by code names; little to no due diligence on consultants despite the presence of red flags; knew or knowingly avoiding taking action to discover that consultants were paying bribes; retaining multiple consultants to purportedly perform the same service; assisting consultants in preparing false documentation; failing to conduct audits or testing of consultant payments (*Alstom*) • Circumventing corporate compliance policies on consultant agreements and payments; submitting false certifications to the US Agency for International Development (USAID) concerning the use and payment of consultants on projects funded by USAID (*Alstom*) • Providing cash, gifts, entertainment, and travel directly to government officials, hiring family members of officials, and donating to a charity associated with an official (*Alstom*) • Concealing findings of an internal audit and failing to implement audit recommendations (*Avon*) • No due diligence on consultant and contract with consultant did not have FCPA safeguards (*Avon*) • Failing to devise and maintain adequate internal accounting controls to detect and prevent payments to agents for which there was not evidence that the requested services were rendered (*Bio-Rad*) • Not providing in local language FCPA and ethics training materials, as well as toll free hotline service for employees to report complaints anonymously (*Bruker*) • Failing to adequately monitor and supervise China senior executives to ensure that they enforced anti-corruption policies and kept accurate records concerning payments to Chinese officials (*Bruker*) • No independent compliance staff or an internal audit function in the China office that had authority to intervene into management decisions or take remedial actions as necessary (*Bruker*) • Entering into agreements with front companies tied to foreign officials; making payments to third parties with the understanding that funds would be directed to foreign officials; directly providing gifts to foreign officials (*Dallas Airmotive*) • Providing improper gifts, travel and entertainment;

	avoiding controls designed to detect and prevent cash payments and bribes; using mechanisms to make and conceal cash payments through agents (*HP Poland)* • Bypassing controls over third-parties and off-the-books contracts; using mechanisms to make and conceal payments to third parties; executing contracts without proper authority (*HP Russia)* • Internal transfers of funds and payment approvals without documentation or justification (*Layne Christensen*) • Engaging lawyers at the suggestion of tax officials without any due diligence (*Layne Christensen*) • Gift of guns to officials through a third-party agent to secure a contract (*Smith & Wesson*)

Nature of Resolution: DoJ	**Case**
• **Plea (Parent or Subsidiary)**	• *Alstom* • *Alstom Switzerland* (subsidiary) • *Avon China* (subsidiary) • *Alcoa* (subsidiary) • *HP Russia (subsidiary of HP)* • *Marubeni Corp.*
• **Deferred Prosecution Agreement**	• *Alstom Power* (subsidiary) • *Alstom Grid* (subsidiary) • *Avon* (parent) • *Dallas Airmotive* • *HP Poland (subsidiary of HP)*
• **Non-Prosecution Agreement**	• *Bio-Rad* • *HP Mexico (subsidiary of HP)*
• **Monitor**	• *Alstom* (separate World Bank resolution) • *Avon*

Nature of Resolution: SEC	**Case**
• **Civil Injunctive Action**	• *Avon*
• **Civil Administrative Action (Cease and Desist Order)**	• *Alcoa* (parent) • *Bio-Rad* • *Bruker* • *HP* • *Layne Christensen* • *Smith & Wesson*
• **Monitor**	• *Avon*
• **Non-Prosecution Agreement**	• *N/A*

• **Deferred Prosecution Agreement**	• *N/A*

International Cooperation	**Case**
• **Countries Cited for Assistance with US investigation**	• Australia (*Alcoa*) • Brazil (*Dallas Airmotive*) • British Virgin Islands (*Bio-Rad*) • Canada (Ontario) (*Alcoa*) • Cyprus (*Alstom*) • Germany (*Alstom, HP)* • Guernsey *(Alcoa)* • Hungary (*HP)* • Indonesia (*Alstom, Marubeni*) • Italy (*Alstom, HP)* • Latvia (*Bio-Rad, HP)* • Lichtenstein (*Alcoa*) • Lithuania (*Bio-Rad, HP)* • Mexico (*HP)* • Norway (*Alcoa*) • Poland (*HP)* • Saudi Arabia (*Alstom*) • Singapore (*Alstom*) • Spain (*HP)* • Switzerland (*Alcoa, Alstom, Marubeni*) • Taiwan (*Alstom*) • UK (*Alcoa, Alstom, HP, Marubeni)*

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