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TRENDS AND DEVELOPMENTS IN ANTI-CORRUPTION ENFORCEMENT (2014)

Anti-corruption enforcement remained active in 2013. We saw the return of nine-figure settlements in anti-corruption enforcement actions, including two of the ten largest settlements in the history of the Foreign Corrupt Practices Act (FCPA). This past year also was marked by a continued focus on individual conduct, with DOJ prosecutors announcing FCPA charges against a number of individuals. Outside of the United States, 2013 will be remembered for increased global attention to anti-corruption issues, including a growing focus by Chinese enforcement authorities on the activities of multinational pharmaceutical companies, Brazil's enactment of a new anti-corruption law applicable to companies, India's creation of an anti-graft watchdog, and an expansion of Canada's foreign anti-corruption law.

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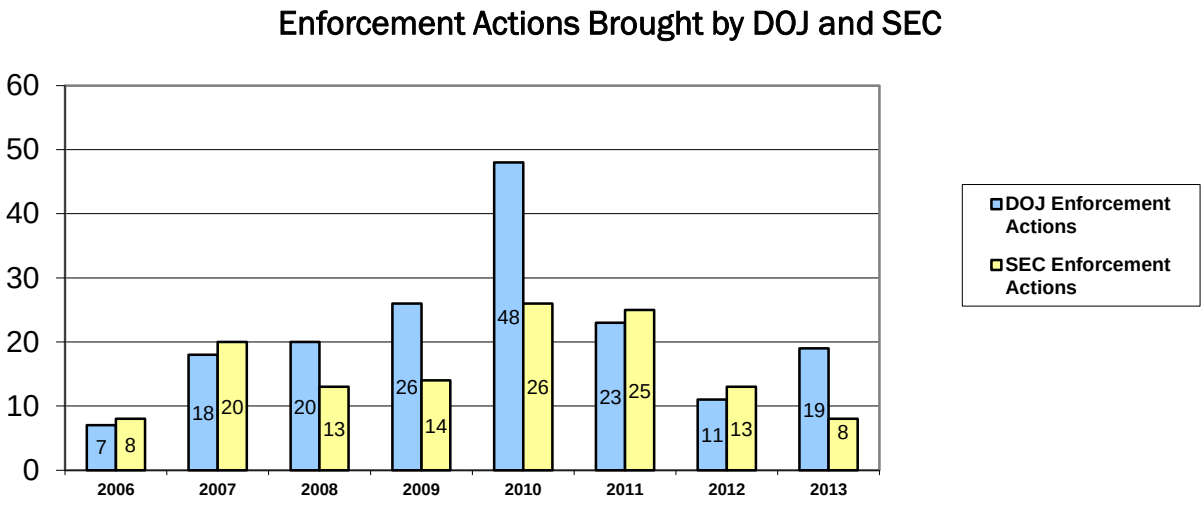
LESSONS LEARNED FROM ANTI-CORRUPTION ENFORCEMENT IN 2013

The past year witnessed a resurgence in both the number of enforcement actions and corresponding monetary recoveries. U.S. regulators announced a total of 27 FCPA enforcement actions[1] – 19 by DOJ and 8 by the Securities and Exchange Commission (SEC) – that resulted in monetary recovery of more than $720 million, nearly triple the dollar value in 2012.



A review of these 27 enforcement actions, together with relevant judicial decisions and publicly reported investigations, yields ten key takeaways that compliance professionals should consider as 2014 unfolds.

The Era of Large FCPA Recoveries Continues.

The size and scale of enforcement actions in 2013 indicate that the drop in high-dollar resolutions in 2012 likely was an anomaly, rather than evidence of an emerging trend. More than $550 million of this year's monetary recoveries came from two oil and gas industry companies that joined the list of the "top 10" largest FCPA settlements in history. In the fourth largest FCPA settlement of all time, French company Total S.A. agreed to pay $398 million to settle charges with DOJ and the SEC for conduct related to access to Iranian oil and gas fields. In the ninth largest settlement, Switzerland-based company Weatherford International paid $152.6 million to DOJ and the SEC for FCPA violations in Africa and the Middle East. DOJ also charged Weatherford with export controls violations under the International Emergency Economic Powers Act and the Trading with the Enemy Act, which resulted in additional payments of $100 million. In remarks made to an ABA conference in October 2013, leaders of the FCPA units at DOJ and the SEC indicated that the pipeline of cases remains active, with both units reportedly working at maximum capacity. Given that the pipeline presumably includes long-running investigations of Wal-Mart and other major multinational companies, we fully expect that the era of large monetary recoveries will continue in 2014 and beyond.

[1] The SEC also brought charges against two Chinese companies and three individual defendants alleging violations of the FCPA's accounting provisions and other federal securities laws (discussed below), but the agency did not include these actions in its list of FCPA enforcement actions for 2013.

The trend of large-dollar settlements looks set to continue in 2014. Just nine days into the new year, DOJ and the SEC announced a $384 million settlement with Alcoa – the fifth largest FCPA settlement in history – for a bribery scheme involving payments to foreign officials in Bahrain tied to the aluminum industry. The U.K. Serious Fraud Office (SFO) separately charged London-based businessman Victor Dahdaleh with paying bribes to officials in Bahrain in connection with the same events, but dropped those charges in December 2013 in the middle of a seven week trial, after a key witness's testimony was called into question.

DOJ Continues to Focus on Individual Defendants, and the SEC Pledges to Follow Suit.

This past year saw a continued focus by FCPA enforcers on prosecuting individuals. In the second quarter alone, DOJ announced FCPA charges against ten individuals. While certain of those charges were filed in 2011 and 2012 – and only unsealed this past year – the newly reported and newly charged cases confirm that DOJ will seek to hold individuals, and not just companies, accountable for FCPA violations.

Several prosecutions against individual defendants warrant additional comment:

- **BizJet Executives.** In April 2013, DOJ unsealed charges against four former executives of BizJet, a company that had settled charges with DOJ in March 2012 for improper payments involving aircraft maintenance and repairs in Latin America. While two of the defendants remain at large, the other two defendants have cooperated with DOJ throughout the investigation. One defendant was employed in an undercover capacity by DOJ, evidencing DOJ's continued willingness to employ the full panoply of investigative tools to develop FCPA cases.
- **Alstom Executives.** Over a several month period in 2013, DOJ announced charges against four current and former executives of Alstom, a French provider of equipment and services for high-speed rail. As with BizJet, prosecutors originally filed charges against two of the Alstom defendants under seal, and announced the charges only after one of the defendants was arrested upon arrival at JFK Airport. The Alstom case shows that prosecutors are actively pursuing and tracking cases, not simply relying on passive techniques such as self-reporting. Notably, prosecutors brought the charges against the Alstom executives even though the company has not been charged (it reportedly is under investigation in the U.S. and U.K.). We will be watching to see whether DOJ employs this individuals-first approach in future cases, as doing so may indicate an effort by prosecutors to gain leverage over potential cooperators, a tactic commonly employed in other areas of law enforcement.
- **Direct Access Partners Employees.** In yet another case involving individuals, DOJ brought charges against three employees of broker-dealer Direct Access Partners (DAP). In an example of regulators' ability to leverage one another's investigative work, these charges reportedly resulted from a periodic examination of DAP undertaken by the broker-dealer examination staff of the SEC's New York Regional Office.
- **Obstruction Charges in FCPA Investigation.** Lastly, we note that prosecutors brought obstruction of justice charges against French citizen Frederic Cilins for allegedly interfering with an FCPA-related grand jury investigation. The alleged conduct included "scheming to destroy documents and induce a witness to give false testimony." This highlights once again that long-standing prosecutorial tools are fully part of DOJ's enforcement arsenal.

In addition to DOJ's prosecution of individuals, last year also saw the SEC publicly embrace a greater focus on individual accountability. During an October 2013 speech, the SEC's new chairwoman, Mary Jo White, explained that she wants "to be sure [the SEC is] looking first at the individual conduct and working out to the entity, rather than starting with the entity as a whole and working in." Time will tell whether these comments translate into more aggressive enforcement against

individuals by the SEC, but it will not surprise us to see a trend in that direction as the SEC's FCPA enforcement evolves under Chairwoman White and Director of Enforcement Andrew Ceresney's leadership.

Regulators' Expansive View of FCPA Jurisdiction Has Not Faced Meaningful Challenges, and Seems Here to Stay.

In the 2012 *Resource Guide to the U.S. Foreign Corrupt Practices Act*, DOJ and the SEC articulated their view of the statute's jurisdictional reach, a position that many FCPA practitioners felt was overly expansive in certain respects. Last year's enforcement actions were consistent with regulators' expansive view of the statute, with little evidence that any judicial check is in the cards. The jurisdictional challenges in 2013 to regulators' interpretation of the FCPA were on the margins, and the judicial decisions they yielded failed to shift the enforcement landscape:

- In *SEC v. Straub*, Judge Richard J. Sullivan of the Southern District of New York rejected motions to dismiss brought by three former executives of Magyar Telekom accused of bribery who argued that they lacked the requisite "minimum contacts" to satisfy the due process requirements of personal jurisdiction. The court held that the minimum contacts standard was satisfied because the defendants' statements to auditors would ultimately impact potential investors in the U.S. The court further held that the complaint sufficiently pled the statutory jurisdictional element of the alleged FCPA anti-bribery violations – that the defendants made use of the means or instrumentalities of interstate commerce in furtherance of their FCPA violations – by alleging that the defendants sent emails which were "routed through and/or stored on network servers located within the United States" and contained documents that "were essentially [the defendants'] offers to pay or promises to pay the alleged bribes."
- In *SEC v. Sharef*, Judge Shira A. Scheindlin of the Southern District of New York granted a motion to dismiss an enforcement action by German national Herbert Steffen, one of seven former Siemens AG executives charged by the SEC in 2011. The court agreed that the SEC could not satisfy the requisite "minimum contacts" with the U.S., for, unlike the *Straub* defendants, Steffen did not authorize the bribes, and the SEC did not allege that he had any involvement in the falsification of SEC filings or misleading presentations to auditors. Because the court held that it lacked personal jurisdiction over Sharef, it did not reach the question of whether the SEC had adequately satisfied the interstate commerce element of the FCPA's anti-bribery provisions.

In light of these opinions and in the absence of any other significant jurisdictional challenges, we do not foresee any change in regulators' broad views of jurisdiction in FCPA cases. The following examples from last year's enforcement actions only reinforce our belief in this regard:

- **Total:** In the $398 million settlement with Total, DOJ relied on one wire transfer through New York to assert jurisdiction. The remaining acts in furtherance of the conspiracy all occurred outside of the U.S. The charges against Total also illustrate that conspiracy charges (likely aided in the Total case by a tolling agreement) permit prosecutors to reach conduct well beyond the five-year statute of limitations; much of the underlying conduct occurred more than 10 years ago.
- **Bilfinger:** In December 2013, DOJ announced a settlement with the German engineering and services company Bilfinger SE, which agreed to pay $32 million to resolve allegations that it violated the FCPA by taking part in a scheme to bribe Nigerian government officials to obtain contracts valued at approximately $387 million. According to the charges, Bilfinger conspired with subsidiaries of Willbros Group to violate the FCPA, with a joint venture playing a central role in the charged conduct. (Willbros and one of its subsidiaries settled related charges in May 2008; two former Willbros executives and a consultant also pled guilty to FCPA charges between 2006 and 2009.) Bilfinger is the latest example of DOJ's willingness to bring FCPA charges

against companies that are neither issuers nor domestic concerns for conduct occurring largely overseas. Here, prosecutors relied on the fact that Bilfinger entered into a conspiracy with Willbros, which, as an issuer, is subject to the FCPA's anti-bribery provisions. In addition, the charges against Bilfinger included two substantive counts based on the use of "any means and instrumentalities of interstate and international commerce" — namely, (1) a flight between two U.S. cities to discuss promised bribe payments, and (2) a wire transfer from the U.S. to Germany.

- **ADM**: In December 2013, Archer Daniels Midland Company (ADM) agreed to pay $54.2 million to settle FCPA enforcement actions with DOJ and the SEC based primarily on conduct involving its subsidiaries, which reportedly paid bribes to officials in Ukraine in order to secure the release of over $100 million in value-added tax (VAT) refunds. Specifically, ADM's Ukraine subsidiary (ACTI Ukraine) pled guilty to a criminal charge of conspiring to violate the FCPA's anti-bribery provisions. With respect to jurisdiction, the criminal information describes how employees of ACTI Ukraine communicated with ADM employees in Illinois and how employees of ADM's German subsidiary (an uncharged co-conspirator) made misleading statements about the VAT issue to executives in ADM's tax department. ADM itself settled books and records and internal controls violations with DOJ (through a non-prosecution agreement) and the SEC based on the conduct in Ukraine. The settlement documents included separate allegations that a joint venture in Venezuela involving ADM's Latin American subsidiary made improper payments.

U.S. Regulators Continue to Emphasize the Importance of Cooperation and Robust Compliance Enhancements.

Numerous FCPA settlements in 2013 reinforced the importance of full cooperation with regulators after an investigation has started, regardless of whether the investigation originated with the company's own disclosure. In addition to cooperation, several 2013 settlements further emphasized the government's expectation that companies undertake a robust assessment of their corruption risks and significantly enhance their compliance programs in response to issues identified in investigations. Finally, a number of settlements in 2013 indicate that companies willing to implement robust compliance program enhancements are less likely to be subject to a government-imposed monitorship for the duration of their deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs).

- **Weatherford's Cooperation and Compliance Enhancements Reduce Penalties**. Weatherford's settlement highlights the importance of both cooperation and compliance. As a backdrop, regulators described Weatherford's conduct as a "widespread scheme" in which "bribes and improper payments were an accustomed way for Weatherford to conduct business." The company reportedly failed to cooperate with authorities at the outset of the investigation – including informing the SEC that a witness was missing or dead when in fact he still worked at the company, and failing to take steps to prevent employees from deleting electronic data – before changing its approach. Although the SEC did impose an enhanced penalty for this conduct early in the investigation, DOJ's penalties were at the bottom of the sentencing guidelines range. The reduced penalties imposed on Weatherford reportedly stemmed in part from the company's extensive cooperation and remediation efforts following its early missteps. Among other measures, Weatherford (i) conducted an extensive worldwide internal investigation, (ii) made U.S. and foreign employees available for interviews, (iii) produced more than 3.8 million pages of data, and (iv) disciplined employees responsible for the misconduct.

  The settlement also sheds light on the type of compliance review and enhancements that regulators expect. According to press releases accompanying the settlement, Weatherford's early compliance program was characterized by the "nonexistence of internal controls[,]" the company "did not have a dedicated compliance officer or compliance personnel," "did not

translate [its anti-corruption policy] into any language other than English," and "did not conduct anti-corruption training." As part of its cooperation and remedial efforts, Weatherford (i) conducted more than 30 anti-corruption reviews in many countries where the company operates, (ii) significantly increased the size of the company's compliance department and established a high-level compliance position, (iii) enhanced its anti-corruption due diligence protocol for third-party agents and consultants, and (iv) retained an ethics and compliance professional to conduct an assessment of its ethics and compliance policies and procedures.

- **Stryker Credited for "Meaningful" Improvements to Compliance Program.** In October 2013, medical device maker Stryker Corporation agreed to pay more than $13 million to settle SEC allegations that the company violated the FCPA's books and records and internal controls provisions. The conduct at issue reportedly involved approximately $2.2 million in improper payments to employees of public healthcare institutions in Mexico, Poland, Romania, Argentina, and Greece. In settling the charges, the SEC emphasized the vast improvements that Stryker made to its anti-corruption compliance program. At the time the improper payments were made, Stryker had corporate anti-corruption policies, but the SEC alleged that those policies were "inadequate and insufficiently implemented on the regional and country level," and further noted that Stryker's foreign subsidiaries "were organized in a decentralized, country-based structure" operating pursuant to "individual policies and directives implemented by country or regional management." During the course of the investigation, Stryker established a company-wide anti-corruption compliance program with (i) policies and procedures establishing due diligence and documentation requirements for relationships with foreign officials, health care professionals, consultants, and distributors, (ii) compliance monitoring and corporate auditing tailored to anti-corruption, (iii) a chief compliance officer and sizeable full-time audit and compliance staff, (iv) expanded anti-corruption training for all employees, and (v) maintenance of an ethics hotline.
- **ADM Credited for Meaningful Cooperation and Worldwide Risk Assessment.** Like Weatherford and Stryker, ADM received credit for its extensive cooperation and compliance enhancements, taking "early, extensive, and unsolicited remedial efforts." Those efforts included (i) conducting a world-wide risk assessment and corresponding global internal investigation, (ii) making numerous presentations to DOJ on the status and findings of the internal investigation, (iii) voluntarily making current and former employees available for interviews, and (iv) compiling relevant documents by category for DOJ. The SEC also credited ADM for immediately opening an investigation after outside auditors identified problems in Ukraine, and for terminating employees involved in the misconduct.
- **A Compelling Example of Cooperation Cannot Overcome the Absence of a Compliance Program.** In 2013, Ralph Lauren settled charges with regulators after disclosing improper payments made to the company's customs broker in Argentina. The company uncovered the misconduct during an internal investigation that was initiated after its employees initially raised concerns. Ralph Lauren self-reported its findings to both the SEC and DOJ and adopted a number of remedial measures, including firing its customs broker, cooperating extensively with the SEC, and undertaking a world-wide review of its operations that uncovered no other violations.

  Despite the fact that Ralph Lauren disclosed the misconduct, undertook remedial efforts, and cooperated extensively, it did not secure a declination. Instead, the company entered into NPAs with DOJ and the SEC, and paid a total of approximately $1.6 million. DOJ's FCPA Unit Chief offered insights into why Ralph Lauren received an NPA, using the 2012 declination following an investigation of Morgan Stanley in China as a counterpoint. According to the FCPA Unit Chief, the "striking feature" was that "[Ralph Lauren] did not have an anti-corruption program in Argentina," whereas Morgan Stanley did in China.

Travel, Gifts, and Entertainment Should Remain an Area of Focus for Corporate Compliance Programs.

Several enforcement actions in 2013 reveal the continued importance of internal accounting controls designed to evaluate travel, gifts, and entertainment contemplated for government officials. These cases offer lessons for compliance professionals who are responsible for ensuring that their compliance programs adequately assess these risks.

- **Diebold Enforcement Action Focuses on Travel and Entertainment.** In October 2013, Diebold resolved FCPA charges with DOJ and the SEC, agreeing to pay a total of approximately $48 million. The enforcement action was based, in part, on $1.8 million in gifts, entertainment, and non-business travel expenses that the company provided to employees of state-owned and state-controlled bank customers in China and Indonesia. The SEC's press release was blunt: "A bribe is a bribe, whether it's a stack of cash or an all-expense-paid trip to Europe."
- **Even Travel for Legitimate Business Purposes Must be Carefully Reviewed for Indicia of Improper Intent.** Stryker's settlement with the SEC (discussed above) included allegations that the company improperly covered travel costs for employees of public hospitals in Poland and Romania, and then recorded those expenses as legitimate travel expenses. Certain of the allegations appear clearly to cross the boundary of legitimate business travel — for example, payment for a Polish hospital director and her husband to stay six nights in New York City and attend two Broadway shows, as well as a five-day trip to Aruba. However, the settlement also shows that regulators will view ostensibly legitimate business travel as improper if they perceive an intended *quid pro quo*. Specifically, Stryker Romania allegedly selected a Romanian doctor to attend a conference because the company expected to receive a contract in return. On its face, sponsoring a qualified doctor to attend a legitimate medical conference might not raise a red flag, highlighting the need for a robust compliance process that digs deeper to assess the real purpose behind the expenditure.
- **Major Sporting Events Present Compliance Challenges for Companies.** In its complaint against Weatherford, the SEC alleged that the company provided improper travel and entertainment to officials of an Algerian state-owned company, including a trip for two to attend the 2006 World Cup in Germany. The settlement followed on the heels of BHP Billiton's announcement that regulators were investigating hospitality provided as part of the company's sponsorship of the 2008 Beijing Olympics. Companies that wish to sponsor or otherwise provide hospitality at the upcoming 2014 World Cup in Brazil would be wise to review – and consider enhancing – their internal controls relating to such entertainment and hospitality in order to mitigate the known risk in this area.

Regulators Continue to Focus on Improper Payments to Customs and Revenue Officials.

Several enforcement actions in 2013 demonstrate that regulators continue to focus on improper payments to customs and revenue officials. Compliance professionals, in turn, would be well served to explore customs and revenue issues as part of their periodic anti-corruption risk assessments, and to determine whether their policies and internal accounting controls adequately assess risk in these areas.

- **The Long Tail of Panalpina.** In April 2013, Parker Drilling Company agreed to pay approximately $15.9 million to resolve FCPA charges brought by DOJ and the SEC. Parker Drilling reportedly authorized payments to an intermediary knowing that the funds would be used to influence a Nigerian government panel reviewing Parker Drilling's compliance with the country's customs and tax laws.

Parker Drilling is the latest settlement stemming from DOJ's investigation of the Panalpina Group and its oil and gas customers; in 2010, Panalpina and six of its customers collectively paid more than $230 million to settle FCPA enforcement actions. (Another company tied to Panalpina, Nabors Industries, reported in 2013 that DOJ had declined to initiate an enforcement action, following on the heels of a similar decision by the SEC in 2012.) The Panalpina line of cases squares with statements from DOJ's FCPA Unit Chief that DOJ follows the evidence where it leads. With the announcement of the Nabors Industries declination and the Parker Drilling settlement, perhaps regulators have now reached the end of the long tail of Panalpina.

- **Payments to Customs Officials Often Are Not Facilitating Payments.** One week after DOJ announced the Parker Drilling settlement, DOJ and the SEC announced NPAs with Ralph Lauren relating to bribes paid to Argentine customs officials through local customs brokers. One notable aspect of the resolution was the statement in the DOJ NPA that the payments "were not for routine government action as defined by Title 15, United States Code, Section 78dd-1(b)" – in other words, they were not facilitating payments. A similar statement appeared in DOJ's DPA with Noble Corporation in 2010, another case involving payments to customs officials, which was resolved together with the Panalpina case. This serves as a reminder to companies that even relatively small payments to customs officials cannot be assumed to be facilitating payments.
- **ADM Subsidiaries Make Payments to Obtain VAT Refunds**. The ADM enforcement action (described above) involved subsidiaries in the Ukraine and Germany that paid $22 million in bribes to Ukrainian officials between 2002 and 2008 to secure the release of VAT refunds totalling approximately $100 million. Although the companies had a legitimate claim to the VATs, the government had stopped paying the refunds because it lacked sufficient funds. This has been a recurring problem in Ukraine, and companies that conduct business there would be wise to review VAT refunds as a part of any risk assessment or compliance review.

Corporate Hiring Practices Come Under Scrutiny.

Last year saw the hiring practices of the financial services industry come under intense scrutiny in China. The story broke with reports that a U.S. financial institution had hired the children of well-connected Chinese officials (so-called "princelings") in order to steer business opportunities to the firm. The U.S. government inquiry has reportedly expanded to the hiring practices of other leading banks and hedge funds. These inquiries confirm that companies' risk assessments and compliance programs should address hiring practices involving government officials and their relatives. We would not be surprised if authorities begin scrutinizing whether similar conduct is occurring in other countries, particularly those with significant state-controlled business opportunities, and in other industries beyond financial services.

The Trend Toward the "Hybrid Monitorship" Continues.

Four of the seven companies that resolved DOJ enforcement actions in 2013 were required to engage compliance monitors. Of those, only one was required to appoint a compliance monitor for the duration of its deferred prosecution agreement; the other three all received 18-month "hybrid" monitorships under which the companies agreed to self-monitor during the second half of their three-year DPAs. These settlements emphasized that the compliance monitor "should use a risk-based approach" and "is not expected to conduct a comprehensive review of all business lines, all business activities, or all markets." These settlements provide further evidence of what appears to be a trend towards self-monitoring arrangements as part of FCPA settlements.

Regulators Around the World Continue to Focus on the Life Sciences Industry.

- **Chinese Authorities Target Pharmaceutical Industry**. The summer of 2013 witnessed a flurry of stories in the Chinese and international media about the Chinese government's investigation of multinational and domestic pharmaceutical companies. While GlaxoSmithKline (GSK) received the most attention after the Chinese government announced that it had detained four senior executives of GSK China, a number of other multinational and later domestic pharmaceutical companies were also identified as being the subject of government scrutiny. According to the media reports, pharmaceutical companies bribed Chinese healthcare professionals (HCPs) to prescribe their drugs and companies allegedly used local vendors (particularly travel agencies) to create non-existent promotional meetings and/or fake invoices to create slush funds for bribery. Some stories also suggested that the companies provided HCPs with perks like all-expenses-paid vacations. Not surprisingly, these developments did not escape the attention of U.S. regulators.

  Chinese authorities' interest in the pharmaceutical sector extended beyond investigations of multi-nationals to the promulgation of rules affecting both the supply and demand sides of bribery and corruption in the industry. On December 25, 2013, China's National Health and Family Planning Commission (NHFPC) issued Regulations on the Establishment of Commercial Bribery Records for the Purchase and Sale of Medicines, which require details of companies blacklisted at a provincial level for commercial bribery violations to be published on a national website as of March 1, 2014. The NHFPC also issued Nine Prohibitions for Strengthening Ethical Conduct in the Healthcare Industry (the Nine Prohibitions). While the language in the Nine Prohibitions is subject to multiple interpretations in places, the document generally reiterates and, potentially, expands slightly on earlier documents that prohibit certain conduct by HCPs and healthcare institutions.

- **Improper Payments to HCPs Violates FCPA's Accounting Provisions.** In April 2013, Koninklijke Philips Electronics N.V. (Philips), a Netherlands-based issuer, agreed to pay over $4.5 million to the SEC to settle alleged violations of the accounting provisions based on improper payments by Philips' Polish subsidiary to Polish HCPs. The Philips settlement reaffirms regulators' broad application of the FCPA when it comes to the parent-subsidiary relationship and the accounting provisions. There was no evidence in the settlement indicating that the issuer-parent knew of or suspected its subsidiary's conduct. For more than a decade, however, the SEC has taken the position that an issuer violates the books and records provisions when a subsidiary's false accounting entries are incorporated into the issuer's books and records.

- **DOJ and the SEC Continue to Treat Healthcare Professionals as "Foreign Officials."** Consistent with years past, the Philips and Stryker settlements (discussed above) focused on payments to healthcare professionals employed by public institutions. In a related development, regulators' broad definition of "instrumentality," under which employees of state-owned or state-controlled enterprises qualify as "foreign officials," is currently being challenged before the U.S. Court of Appeals for the Eleventh Circuit in *United States v. Esquenazi*, No. 11-15331 (discussed below).

- **Device Makers Secure Declinations**. Medical device maker Zimmer Holdings Inc. announced that it had received letters of declination from DOJ and the SEC after a five-year investigation into the company's marketing and sales practices outside of the United States. Device maker Medtronic announced several months later that it also received word from DOJ and the SEC that regulators would not pursue enforcement actions against the company. Both companies had received letters of inquiry from enforcement authorities in 2007, along with several other device makers.

Conduct in China Continues to Be a Focus of U.S. Enforcement Authorities and Is Increasingly a Focus of Chinese Regulators.

- **Regulators Reach Settlements with China-based Companies and Chinese Nationals.** The first FCPA settlement in 2013 involved the China-based company, Keyuan Petrochemicals Inc., and its former Chief Financial Officer, Li Aichun, a Chinese national. The defendants were charged with violating several federal laws, including the FCPA's books and records provision. Keyuan allegedly operated an off-balance cash account it used to fund gifts for Chinese government officials working at various government agencies. This settlement appears to be the first FCPA-related enforcement action against a China-based company. Two weeks later, another China-based company, RINO International Corporation, and two of its executives entered into a settlement with the SEC for allegedly maintaining two different sets of financial records. These two settlements confirm that U.S.-listed Chinese companies and their executives, like all issuers, must pay particular attention to accounting and corporate governance. Using the FCPA's accounting provision, U.S. regulators can bring an FCPA enforcement action even where there is insufficient evidence of bribery.
- **Chinese Authorities Actively Pursue Corruption.** 2013 proved to be an active year for Chinese enforcement authorities as well. In addition to the pharmaceutical investigations mentioned above, the Chinese government has actively targeted: (i) high-ranking government and Community Party officials and executives of large, state-owned enterprises, (ii) mid- and lower-level government and Communist officials, and (iii) violations of commercial bribery laws, via investigations brought by local Administrations for Industry and Commerce (AICs), particularly in the pharmaceutical, medical device, and construction sectors. The Chinese government has continued to issue more anti-corruption-related directives, and we anticipate this trend to continue in 2014.

GLOBAL ENFORCEMENT DEVELOPMENTS

China was not the only country to make headlines in 2013 for corruption-related developments. Countries continue to pass more robust anti-corruption laws, and anti-corruption investigations are now being pursued in more countries than ever before. This increased enforcement activity outside the United States presents opportunities for cooperation, but it also creates a number of challenges. From evidence gathering to resolving cases, FCPA enforcers and companies alike may increasingly find that the proliferation of enforcement outside the United States brings new headaches. The globalization of enforcement will be a key trend to watch in 2014 and beyond, as it could have profound implications for how companies approach anti-corruption investigations and compliance.

New and Expanded Anti-Corruption Legislation Takes Hold in 2013.

- **Brazil Enacts New Anti-Corruption Legislation.** In August, Brazil passed a law creating civil liability for companies that bribe public officials or commit bid rigging and other fraud in the public procurement process. Previously, only individuals could be prosecuted for corruption. The newly enacted Brazilian Clean Companies Act (the Act) subjects Brazilian and foreign business and professional entities to civil and administrative sanctions for promoting, offering, or giving "directly or indirectly, an improper benefit to a public agent . . . or . . . a third person related to him." The Act specifically prohibits (1) bid rigging and other related fraudulent conduct, and (2) efforts to "hinder the investigation or supervisory work of public bodies, entities, or agents." It took effect on January 29, 2014.
- **Canada Broadens Foreign Anti-Corruption Law.** In June 2013, Canada enacted a significant expansion of its foreign anti-corruption law, known as the Corruption of Foreign Public Officials Act (CFPOA). The enhanced law took effect at a time of growing anti-corruption enforcement in

Canada. The legislation makes four important changes to Canadian law prohibiting improper payments to foreign officials: (i) expands the jurisdictional reach of the CFPOA to cover bribery anywhere in the world by Canadian citizens, permanent residents present in Canada, and entities incorporated, formed, or otherwise organized under Canadian law, (ii) prohibits facilitating payments, (iii) establishes a books-and-records offense for individuals, and (iv) increases the penalties for bribing foreign public officials.

- **India Creates Anti-Graft Watchdog.** On January 1, 2014, President Pranab Mukherjee signed into law the Lokpal and Lokayuktas Bill, 2013 (Lokpal Bill), which creates a new anti-corruption agency responsible for investigating corruption in India. Although the Lokpal Bill currently covers only Indian public officials and not foreign public officials, officials of public international organizations, or private businesses, it nevertheless appears to indicate a renewed commitment by India's government to combat corruption.
- **Amended Russian Law Requires Companies to Establish Compliance Programs.** On January 1, 2013, Russia implemented an amendment to its anti-corruption law imposing an affirmative obligation on companies that operate in Russia to establish anti-corruption compliance programs.

Increase in Transnational Cooperation.

- **Creation of an International Bribery Taskforce in the U.K.** In June 2013, the City of London Police announced the creation of an international foreign bribery task force as part of a new trans-border agreement to combat foreign bribery. The purpose of the task force is to enable like-minded countries to work together to strengthen their investigations into instances of foreign bribery and to support the OECD and UN anti-bribery conventions.

  The task force will be comprised of investigators from the Australian Federal Police, the U.S. Federal Bureau of Investigation (FBI), the Royal Canadian Mounted Police, and the City of London Police's Overseas Anti-Corruption Unit. The task force is expected to enhance law enforcement's response to foreign bribery on an international scale by providing a platform for police experts from participating countries to share knowledge, skills, and investigative methodologies. The task force anticipates meeting annually to discuss trends and challenges relating to foreign bribery of public officials.
- **U.S.-French Cooperation in Total Case.** U.S. enforcement authorities continue to cooperate with law enforcement around the world in connection with investigations into foreign bribery, as indicated by the FBI's participation in the international bribery taskforce. The Total enforcement action (noted above) was the "first coordinated action by French and U.S. law enforcement in a major foreign bribery case," according to the leader of DOJ's Criminal Division. In addition to DOJ and SEC enforcement actions, French enforcement authorities also brought charges against four individuals – including Total's Chairman and CEO – in French Criminal Court for violations of France's law against foreign bribery. In July 2013, a French judge acquitted Total and the individual defendants.

Global Enforcement Actions.

A review of other notable international enforcement actions in 2013 underscores the increasingly global nature of anti-corruption enforcement. This globalization of enforcement is also evident from several matters currently being handled by Covington. As noted above, multi-jurisdictional enforcement cries out for increased cooperation and communication among global regulators. While that has occurred in a number of notable cases, there are still others where such cooperation and communication is lacking. We will be watching this dynamic closely in the year ahead.

- **The Netherlands:** On December 30, 2013, the Dutch branch of accounting firm KPMG (KPMG N.V.) reached a €7 million settlement with Dutch authorities for allegedly assisting its client, construction contractor Ballast Nedam, disguise bribes paid to foreign agents in Saudi Arabia from 2000 to 2003. (In 2012, Ballast Nedam reached a separate settlement for €17.5 million with Dutch authorities.) As part of the settlement, KPMG N.V. agreed to implement additional compliance measures. The three former KPMG N.V. audit partners involved in the scheme are reportedly under investigation.
- **Norway:** In early January 2014, Norwegian authorities fined Norwegian fertilizer company Yara International $48 million for bribes allegedly paid by a Swiss subsidiary to senior government officials in India and Libya, as well as corrupt payments to suppliers in Russia. Norway's National Authority for Investigation and Prosecution of Economic and Environmental Crime is evaluating whether to prosecute individuals.
- **World Bank:** In April 2013, the World Bank announced the longest-ever debarment resulting from a negotiated settlement against the Canadian engineering firm SNC-Lavalin Inc. (SNC), based on allegations that SNC made improper payments to officials in Bangladesh in order to secure a $50 million contract. Under the terms of its agreement with the World Bank, SNC and 100 of its subsidiaries are prohibited from bidding on World Bank-funded projects for ten years. The debarment period may be reduced to eight years if the company provides evidence that it has implemented an anti-corruption compliance program. The World Bank debarment also operates to bar SNC from bidding on projects financed by other international development banks, including the Asia Development Bank, the African Development Bank, and the European Bank for Reconstruction and Development.

  Canadian authorities separately announced bribery charges in 2013 against several SNC employees as part of a broader corruption investigation reportedly involving improper payments in Bangladesh, Algeria, and other countries.

Continued Risk of International Financial Institution Debarment.

As illustrated by SNC's World Bank debarment, the world's major international financial institutions (IFIs) have all developed policies and internal resources to investigate and debar companies that engage in corruption, fraud, collusion, and other forms of misconduct in connection with IFI-financed projects. More than 100 individuals and entities from around the world were sanctioned by the major IFIs in 2013. Those efforts were led primarily by the World Bank, whose Integrity Vice Presidency is responsible for investigating misconduct in World Bank-financed projects and submitting potential debarment cases to a specially-appointed Sanctions Board for consideration. A number of cases in 2013 involved negotiated resolutions with companies that agreed to cooperate with the IFIs following the initiation of sanctions investigations.

The major IFIs also continued their practice in 2013 of mandatory cross-debarment, pursuant to the 2010 Agreement for Mutual Enforcement of Debarment Decisions entered into by the World Bank, the European Bank for Reconstruction and Development, the Asian Development Bank, the Inter-American Development Bank, and the African Development Bank. Under the 2010 agreement, certain debarment sanctions by any one of the participating IFIs will result in automatic cross-debarment by the other participating IFIs, even if the underlying misconduct relates only to one IFI. The IFIs also continued their practice in 2013 of cooperating with national enforcement authorities and referring cases to those authorities, which led to several national anti-bribery prosecutions in 2013.

The prospect of IFI debarment continues to represent a substantial anti-corruption enforcement risk for companies that participate in projects finances by IFIs, and there is every indication that the IFIs

will continue their practice of investigating sanctionable practices and bringing debarment cases in 2014.

LOOKING AHEAD TO 2014

Introduction of DPAs in the U.K.

In April 2013, the U.K. passed legislation authorizing the use of DPAs in certain economic crimes, including bribery, fraud, and money laundering, which is scheduled to take effect in February 2014. Under the new U.K. law, organizations entering into DPAs will be required publicly to admit certain facts indicating wrongdoing and to comply with rigorous conditions, such as the payment of a financial penalty, implementation or updating of a compliance program, payment of compensation to victims, and disgorgement of profits. In return, the U.K. SFO and Crown Prosecution Service will agree to suspend criminal charges. The U.K. version of DPAs envisions an early and active role for judges, in contrast to the less active role traditionally played by judges in the U.S. in reviewing and approving DPAs. The U.K. process also requires that any alleged breaches of a DPA be reviewed by a judge. Again, this differs from the U.S., where the enforcement agency generally determines in the first instance whether a breach of a DPA has occurred, as well as how such a breach should be remedied. The effect of DPAs on the U.K.'s anti-corruption enforcement efforts will be an interesting development to watch in 2014, particularly in light of the SFO's announced intention to focus on big cases.

SFO Emphasizes Its Commitment to "Striking Tigers as Well as Flies" and Announces Its Intention to Conduct Sector Sweeps.

The SFO's Joint Head of Bribery and Corruption announced in November 2013 that the SFO is committed to focusing its efforts and resources on tackling the most complex cases of economic crime. In December 2013, the SFO demonstrated that commitment when it announced the launch of a criminal investigation into allegations of bribery and corruption at Rolls-Royce, following Rolls-Royce's December 2012 announcement that it passed information to the SFO regarding alleged bribery and corruption involving its intermediaries in overseas markets, including Indonesia and China.

Perhaps as part of the SFO's commitment to "striking tigers," the Director of the SFO announced in October 2013 that the SFO intends to focus on sector sweeps, which have been a fixture of U.S. enforcement for several years. The construction, public contract, extractive and oil and gas sectors were specifically mentioned as SFO targets due to their vulnerability to economic crime.

FCPA Allegations by Dodd-Frank Whistleblowers Increase While Judicial Decisions Limit the Scope of Anti-Retaliation Provisions.

The 2013 Annual Report from the SEC Office of the Whistleblower announced an increase of FCPA-related whistleblower reports, from 115 tips (3.8% of total tips) in fiscal year 2012 to 149 (4.6% of total tips) in fiscal year 2013. The report also highlights a record $14 million award to a whistleblower, although the SEC has not disclosed what type of case led to the award or other details which could potentially reveal the whistleblower's identity.

2013 also saw another federal court determine that the anti-retaliation provision of the Dodd-Frank Act has no extraterritorial application. In October 2013, Judge William H. Pauley III of the Southern District of New York held that the anti-retaliation provision is "purely a domestic concern" without extraterritorial application, applying the presumption against extraterritoriality adopted by the

Supreme Court in *Morrison v. National Australia Bank, Ltd.*, and the reasoning of Judge Nancy F. Atlas of the Southern District of Texas in a June 2012 decision construing the same provision.

While commentators have suggested that these decisions may have a chilling effect on foreign whistleblowers, we do not foresee a precipitous decline in whistleblower reports. First, the decisions on the extraterritoriality of the anti-retaliation provision of Dodd-Frank do not apply to the separate Dodd-Frank whistleblower bounty provisions; a foreign national may be eligible for whistleblower awards even if he or she cannot bring suit under the anti-retaliation provisions. Second, many whistleblowers are not employees of the company about which they are making a report, and thus are not concerned about retaliation. Third, and most important, companies would be ill-advised to retaliate against whistleblowers regardless of the applicability of Dodd-Frank anti-retaliation protections. Local labor laws may bar such actions, and many companies have compliance policies that prohibit retaliation against whistleblowers, regardless of whether they are covered by Dodd-Frank's anti-retaliations provisions. Moreover, retaliation against a whistleblower could have severe consequences in any SEC or DOJ enforcement action, including preventing a company from receiving credit for an effective compliance program under the U.S. Sentencing Guidelines.

Thus, as a practical matter, decisions addressing the extraterritorial application of the anti-retaliation provisions should not change how companies act with respect to whistleblowers. In fact, the Chief of the SEC's Office of the Whistleblower has indicated that his office will pursue enforcement actions against companies who retaliate against whistleblowers, noting that "[e]mployers who retaliate against individuals who report to us in good faith do so at their peril." As whistleblower bounties are publicized, we expect whistleblower reports will continue to rise.

Recent Developments Suggest Trend Towards Increased Judicial Scrutiny of Settlements.

Three 2013 cases – *DOJ v. HSBC*, *SEC v. Tyco International*, and *SEC v. IBM* – suggest 2014 may see increased judicial scrutiny of negotiated settlements with federal enforcement authorities. Judge John Gleeson of the U.S. District Court for the Eastern District of New York, reviewing the deferred prosecution agreement that DOJ filed against HSBC for anti-money laundering and sanctions violations, invoked authority to approve and oversee the implementation of the DPA pursuant to the court's "supervisory power," a position that he acknowledged to be "novel." Although Judge Gleeson ultimately afforded "significant deference" to the government's prosecutorial discretion and approved the HSBC DPA "without hesitation," this ruling still could be significant if other federal judges begin to assert the same supervisory power but choose not to afford the same degree of deference.

Judge Richard J. Leon of the U.S. District Court for the District of Columbia also has shown that judges may adopt a more proactive and searching review of FCPA-related settlements. Nine months after Tyco and the SEC announced a $13.1 million foreign bribery settlement, Judge Leon finally approved the final judgment in the action, imposing a two-year reporting requirement under which Tyco must submit to the court and to the SEC: (i) annual anti-bribery compliance reports, (ii) immediate disclosures of potential FCPA violations, and (iii) disclosures within 60 days of learning that it is the subject of a federal criminal investigation, federal administrative proceeding, or major civil lawsuit. Similarly, Judge Leon took more than two years to approve a $10 million FCPA settlement between the SEC and IBM. The settlement terms include enhanced reporting by IBM to the court over the next two years regarding its compliance program and potential FCPA violations. Both IBM and Tyco have been the subject of prior enforcement actions, settling cases with the SEC in 2000 and 2006, respectively. Increased judicial scrutiny of FCPA settlements is a trend to watch in 2014.

First Appellate Decision Construing Scope of "Foreign Official" Expected in 2014.

In 2014, we expect to see an appellate decision construing regulators' broad definition of "instrumentality," under which employees of state-owned or state-controlled enterprises qualify as "foreign officials." This interpretation is currently being challenged before the Eleventh Circuit in *United States v. Esquenazi*, No. 11-15331. Briefing on the appeal was completed in October 2012; oral argument took place in October 2013. Although the *Esquenazi* case stems from alleged improper payments in the telecommunications industry, any ruling on the definition of "instrumentality" and "foreign official" under the FCPA will affect enforcement actions in other industries.

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