

E-ALERT | Global Anti-Corruption

July 2012

ANTI-CORRUPTION MID-YEAR REVIEW

The spotlight on anti-corruption enforcement has remained intense during the first half of 2012. In the United States, the press reported in April on allegations of corruption at Wal-Mart; the Department of Justice (“DOJ”) and Securities and Exchange Commission (“SEC”) continued to bring significant enforcement actions against both corporations and individuals; and, for the first time, enforcement authorities publicly credited a company’s compliance program in their decision not to bring charges against the company.

In the UK, the Ministry of Justice proposed incorporating US-style plea agreements into UK law; the Financial Services Authority (“FSA”) asserted its oversight of anti-bribery compliance in investment banks; and a new director for the Serious Fraud Office (“SFO”) began his term. Other legislative and enforcement developments in China, Mexico, and Canada highlight the growing interest in anti-corruption enforcement around the world.

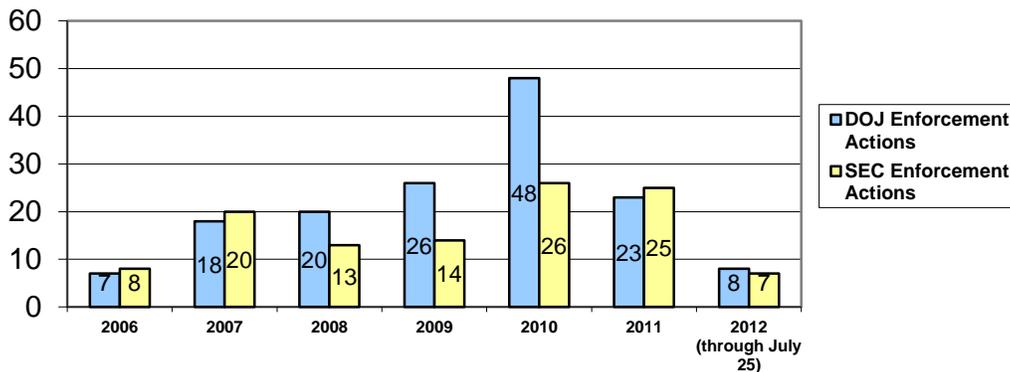
At the same time, we continue to await the results of certain watershed developments highlighted in our [2011 year-end review](#). The DOJ has not yet issued its new guidance on the US Foreign Corrupt Practices Act (“FCPA”); the SEC has not yet made its first award under the Dodd-Frank whistleblower program; and the SFO has not yet brought its first corporate prosecution under the UK Bribery Act. In other words, there is likely still much to come in 2012.

US ENFORCEMENT DEVELOPMENTS

FCPA Enforcement Actions in the First Half of 2012

Through July 17, 2012, the DOJ brought eight enforcement actions and the SEC brought seven enforcement actions, slightly fewer than at this time in 2011. Notably, more than one-third of the new enforcement actions to date this year were brought against individual defendants, with the SEC charging four individual defendants and the DOJ bringing charges against two individuals.

Enforcement Actions Brought by DOJ and SEC



Among the notable corporate settlements to date in 2012, Japanese trading company Marubeni Corporation paid \$54.6 million to settle charges stemming from the Bonny Island bribery scheme, a decade-long effort to bribe Nigerian government officials to obtain construction contracts. The Marubeni settlement brings to a close the DOJ's prosecution of the five corporations that allegedly participated in the scheme. In a press release announcing the settlement, the DOJ noted that US enforcement authorities have obtained more than \$1.7 billion in penalties and forfeiture orders from the companies and individuals involved in the Bonny Island matter.

Additionally, enforcement authorities have reached settlements with three medical device companies to date this year, levying more than \$50 million in fines and penalties against Smith & Nephew, Biomet, and Orthofix International. The settlements represent part of the authorities' widely reported "industry sweep" of medical device companies. Perhaps signalling another industry sweep, enforcement authorities have also reached settlements with two aircraft maintenance providers – BizJet International and the NORDAM Group – to date in 2012. BizJet's parent company, Lufthansa Technik, also entered into a deferred prosecution agreement with the DOJ.

Based on publicly released statements, 86 companies are currently investigating FCPA violations, suggesting that additional enforcement actions and resolutions are likely in the remainder of 2012 and beyond.

US Enforcement Authorities Continue to Focus on Individual Defendants

The first half of 2012 saw a continuation of the DOJ and SEC's efforts to charge individual defendants as a means of deterring individual and corporate wrongdoing.

- **FORMER EXECUTIVES OF NOBLE CORPORATION.** The SEC brought civil charges against three current and former executives of Noble, an oil services company, in connection with alleged bribery of customs officials in Nigeria. (Noble previously settled FCPA offenses as part of a sweeping enforcement action against freight forwarder Panalpina and six of its customers.) Noble's former Director of Internal Audit settled the charges against him, paying a \$35,000 civil penalty. Two other Noble executives – the former CEO/CFO and the current top executive in Nigeria – did not settle the charges against them and may be headed for a rare *civil* FCPA trial. Notably, the former CEO/CFO was charged in part under a theory of control person liability. (Unlike the 2009 Nature's Sunshine enforcement action, in which two Nature's Sunshine executives were charged under a "control person liability" theory even though the SEC did not allege they had any knowledge of the improper payments, the SEC alleged direct involvement by the former Noble CEO/CFO in reviewing and approving improper payments.)
- **CARSON GUILTY PLEAS.** Four former executives of Control Components, Inc. ("CCI") pleaded guilty to FCPA charges during the first half of 2012. (The California-based valve manufacturer pleaded guilty to FCPA-related charges in 2009 and paid an \$18.2 million criminal fine.) In April, CCI's former president, Stuart Carson, and his wife, Hong "Rose" Carson, the former director of sales for China and Taiwan, each pleaded guilty to one count of violating the FCPA. In May, the company's former head of worldwide sales, Paul Cosgrove, also pleaded guilty to one count of violating the FCPA. Finally, in June, David Edmonds, the former vice president of worldwide customer service, pleaded guilty to an FCPA violation as well. Edmonds' guilty plea nearly completes the government's case, in which the DOJ obtained seven individual guilty pleas and an \$18.2 million criminal penalty from the company in connection with its guilty plea. Sentencing for the four former CCI executives is scheduled to take place later this year. Charges remain pending against a final defendant in the case, Han Yong Kim, the former president of CCI's Korean office. Kim remains in South Korea.

- **SERVICE BY NEWSPAPER PUBLICATION.** Late in 2011, the DOJ indicted eight former executives and agents of Siemens, and the SEC brought civil charges against seven former executives of the company (six of whom were also charged by the DOJ), in connection with a bribery scheme involving an Argentine government contract to produce national identity cards. After the SEC tried unsuccessfully for four months to serve four of the defendants through the Hague Convention, a federal judge in June 2012 granted the SEC permission to serve a summons to those defendants via publication in the *International Herald Tribune*. The four defendants had 20 days to appear in federal court in Manhattan, or have a default judgment entered against them. Two of the defendants obtained an extension of time to respond to the Complaint. A default judgment has not yet been entered against the remaining defendants.

The continued focus by US enforcement authorities on individual defendants has led to two interesting developments: an increasing number of challenges to the authorities' interpretations of the FCPA and a series of high-profile setbacks at trial for the government. The following developments are of particular note in this regard:

- **"FOREIGN OFFICIAL" CHALLENGE REACHES APPEALS COURT.** Several individual defendants have continued to challenge the DOJ's argument that an "instrumentality" of a foreign government includes state-owned or state-controlled enterprises (thus turning their employees into "foreign officials" under the FCPA). The two defendants in *U.S. v. Esquenazi* – convicted in August 2011 of paying more than \$890,000 in bribes to officials working for the Haitian state-owned telecommunications company – recently appealed their convictions in part on the grounds that the DOJ failed to establish that the state-owned company, Haiti Teleco, was an instrumentality of a foreign government. Joel Esquenazi – sentenced to a record-setting 15-year prison term in October 2011 – has argued on appeal that the term "instrumentality" in the FCPA should be construed to encompass only foreign entities performing government functions similar to departments or agencies. Co-defendant Carlos Rodriguez has noted in his brief that the 11th Circuit previously held, in connection with another statute, that the term "instrumentality of a state" referred to "governmental units or units created by them."

The *Esquenazi* case marks the first time an appellate court has considered the scope of the term "foreign official" under the FCPA.

- **FACILITATING PAYMENTS EXCEPTION.** In May 2012, the Noble Corporation defendants described above moved to dismiss the SEC's enforcement action in part on the ground that the payments at issue fall under the FCPA's facilitation payments exception. In separately filed motions to dismiss with the federal district court in the Southern District of Texas, two defendants have argued that the alleged bribes were, in fact, payments made "to expedite or to secure the performance of a routine governmental action," which are permissible under the FCPA. Moreover, the defendants have argued that, because the defendants reasonably believed the payments were proper, the SEC failed to allege that they acted with the requisite corrupt intent under the statute. In its opposition brief, the SEC has argued that the defendants must prove the applicability of the FCPA's facilitating payments exception. Furthermore, although the SEC is not required to "plead preemptively" around this exception, the SEC has alleged that the bribes were outside the scope of the facilitating payments exception because they were paid to induce foreign officials to falsely certify facts and accept false paperwork.
- **SHOT SHOW DISMISSAL DEALS SETBACK TO US ENFORCEMENT AUTHORITIES.** The much-watched "SHOT Show" prosecutions came to a close when, after a series of mistrials and acquittals, the DOJ moved in March 2012 to dismiss with prejudice the indictments against the remaining defendants, and then moved to dismiss the charges against three defendants who had previously pleaded guilty. The prosecution had involved 22 defendants charged with FCPA violations following an FBI sting at the SHOT Show gun exhibition in Las Vegas in January 2010.

- **FORMER ABB MANAGER O'SHEA ACQUITTED.** In January 2012, US District Judge Lynn Hughes granted John O'Shea's motion for acquittal on all substantive FCPA charges after the prosecution presented its case involving an alleged conspiracy to bribe employees of a Mexican state-owned utility company. (Mr. O'Shea was employed by a US subsidiary of ABB Ltd., which reached a \$58 million settlement with the DOJ and SEC in September 2010.)
- **GOVERNMENT DROPS LINDSEY APPEAL.** In May 2012, the DOJ dismissed its appeal of Judge Howard Matz's decision overturning convictions, based on government misconduct, against Lindsey Manufacturing and two of its executives. The government's voluntary dismissal of its appeal ends its prosecution of the Lindsey defendants.

US Enforcement Authorities Credit Compliance Program in Decision Not to Charge Morgan Stanley

In one of the most significant developments of 2012 to date, the DOJ and SEC publicly credited -- for the first time -- a company's anti-corruption compliance program as a basis for declining to bring an enforcement action against the company.

In April 2012, the DOJ and SEC announced a [joint enforcement action](#) against a former managing director of Morgan Stanley, Garth Peterson. The authorities alleged that Peterson had a secret business relationship with the former chairman of a Chinese state-owned entity who had influence over the success of Morgan Stanley's real estate business in Shanghai. Among other incidents of bribery and self-dealing, Peterson secretly arranged for himself, the Chinese official, and an attorney to acquire a valuable Shanghai real estate interest via a Morgan Stanley fund. Peterson pleaded guilty to a one-count criminal information for conspiring to evade internal accounting controls and settled civil charges with the SEC, agreeing to pay more than \$250,000 in disgorgement and relinquish his interest in the Shanghai real estate (valued around \$3.4 million as of the date of the settlement).

Notably, the enforcement authorities publicly declined to charge Morgan Stanley with any FCPA violations and credited the company's anti-bribery policies and controls in the press releases and charging documents. These documents provide important guidance regarding how US regulators expect companies to design and implement effective compliance programs.

The enforcement authorities specifically credited Morgan Stanley for:

- frequently training its employees on its internal policies, the FCPA and other anti-corruption laws, including at least 54 training sessions for groups of various Asia-based personnel between 2002 and 2008;
- distributing written training materials to Peterson and other employees;
- adopting policies addressing corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions, employment, and high-risk events such as the Beijing Olympics;
- requiring its employees to certify compliance with the Company's Code of Conduct, including a section addressing corruption risks and activities that would violate the FCPA;
- conducting extensive due diligence on all new business partners and imposing stringent controls on payments made to business partners;
- operating a multilingual toll-free compliance hotline available 24 hours a day, 7 days a week; and
- maintaining a "substantial system of controls" to detect and prevent improper payments.

The DOJ charging document further noted that Morgan Stanley employed over 500 dedicated compliance officers during the period of Peterson's improper conduct, including regional compliance officers who specialized in particular regions and countries, such as China. The compliance department had direct reporting lines to the Board of Directors and regularly reported to the CEO through the Chief Legal Officer. Morgan Stanley's compliance personnel regularly monitored transactions, randomly audited particular employees, transactions and business units, and tested transactions to identify illicit payments.

Continued Focus on China and Latin America

China

A significant portion of the DOJ/SEC settlements that were initiated or concluded during the first half of 2012 involved improper conduct occurring in China. The China-related enforcement actions include:

- **GARTH PETERSON (SEC AND DOJ):** as described above, the enforcement actions against Peterson involved [improper conduct occurring in China](#).
- **BIOMET (SEC AND DOJ):** In March 2012, medical device maker Biomet paid \$22.8 million in fines and penalties to the DOJ and the SEC to [settle FCPA allegations](#) of improper conduct in China, Argentina, and Brazil. Biomet provided cash and travel benefits to doctors employed at public hospitals through its Chinese distributor in exchange for the doctors' selection of Biomet products. After Biomet began making direct sales in China in 2006, the company continued to make improper payments primarily in the form of travel benefits.
- **THE NORDAM GROUP (DOJ):** In July 2012, aircraft maintenance provider NORDAM entered into a three-year non-prosecution agreement and agreed to pay a \$2 million criminal penalty as a result of [improper conduct in China](#). NORDAM and its affiliates bribed employees of state-owned airlines in order to secure contracts.
- **CCI INDIVIDUAL DEFENDANTS (DOJ):** The guilty pleas from the four CCI defendants discussed above also involved [China-related conduct](#). In the 16-count indictment filed in April 2009, the executives were charged with making corrupt payments to officials at state-owned enterprises, including six Chinese companies.

Latin America

The FCPA made headlines in April 2012 when the *New York Times* published a front-page story alleging that a Wal-Mart subsidiary made improper payments to Mexican officials, and that the company failed to respond appropriately when the allegations surfaced internally. The *Times* article alleged that Wal-Mart's Mexican subsidiary paid more than \$24 million in bribes in order to obtain licenses to construct and operate stores throughout the country. The article further alleged that, once the payments were discovered due to a whistleblower's allegations, the company rejected outside counsel's advice to conduct a thorough, independent investigation, instead placing the investigation in the hands of an in-house lawyer who had been accused of participating in the bribery scheme.

The Wal-Mart allegations came amid other anti-corruption developments related to Latin America during the first half of 2012, including two FCPA enforcement actions involving conduct in Latin America and the DOJ's conviction of a Haitian government official for his role in a bribery scheme.

- **MEDICAL DEVICE COMPANY SETTLEMENTS.** In addition to the China-related conduct described above, Biomet made allegedly improper payments in Argentina and Brazil. Between 2000 and 2008, the company and its Argentine subsidiary paid or authorized the payment of \$436,000 in cash incentives to publicly employed HCPs in Argentina. Similarly, the company had paid commissions to surgeons in Brazil through its local distributor allegedly with the knowledge of its Director of Internal Audit and other executives. Biomet's accountants and outside counsel uncovered the improper payments in Brazil while conducting due diligence after Biomet decided to purchase its Brazilian distributor. Notably, Biomet wrote off \$4.2 million in accounts receivables owed by the Brazilian distributor when it terminated its relationship with the distributor after uncovering the improper payments. As part of its settlement with the DOJ, Biomet agreed to engage an independent monitor for a period of at least 18 months.

Medical device maker Orthofix International also settled FCPA allegations with the SEC based on improper conduct by its Mexican subsidiary. Orthofix reported in a securities filing that it had also reached an agreement with the DOJ. Orthofix's settlement involved improper payments to officials at Instituto Mexicano del Seguro Social, a government-owned healthcare institution. The subsidiary allegedly paid bribes in the form of cash or gifts – which employees referred to as “chocolates” – in exchange for sales contracts. The alleged bribes included vacation packages and gifts, such as televisions, laptops, appliances, and a car lease.

- **AIRCRAFT MAINTENANCE COMPANY SETTLEMENT.** Aircraft maintenance provider Bizjet International announced a settlement with the DOJ in March 2012, agreeing to pay an \$11.8 million fine and enter into a three-year deferred prosecution agreement to resolve allegations of improper conduct in Mexico and Panama. The company allegedly paid bribes to employees of foreign customers such as the Mexican Federal Police, the Mexican President's Fleet, and the Panama Aviation Authority, in each case to win service contracts and other business. The company allegedly paid bribes directly as well as through a shell company owned and operated by a BizJet sales manager. At least three senior executives were alleged to have been involved in the improper conduct. The company discovered the improper payments while conducting an internal audit. BizJet's indirect parent company, Lufthansa Technik AG, also entered into a three-year non-prosecution agreement with the DOJ in connection with the payments.
- **CONVICTION OF A FORMER HAITIAN GOVERNMENT OFFICIAL.** Jean Rene Duperval, the former director of international relations for state-owned Haiti Teleco, was convicted by a federal jury in March 2012 for his role in the same Haiti Teleco bribery scheme (described above) for which Joel Esquenazi and Carlos Rodriguez were convicted. The jury convicted Duperval of two counts of conspiracy to commit money laundering and 19 counts of money laundering. In May, a federal judge sentenced Duperval to nine years in prison and ordered him to forfeit \$497,331.

Dodd-Frank Whistleblower Update

Although we have yet to see an announcement of an award under the SEC's new whistleblower program, since the end of 2011, [several federal judges have issued decisions](#) addressing the anti-retaliation provisions of the Dodd-Frank Act. Certain of these decisions raise vexing questions regarding the scope of Dodd-Frank anti-retaliation protection when the whistleblower has alleged FCPA violations. For now, this developing area of the law remains unsettled, and we will continue to monitor and report on significant developments.

UK ENFORCEMENT DEVELOPMENTS

Consultation on Deferred Prosecution Agreements in the UK

In May, the UK Ministry of Justice (“MoJ”) issued for public comment a proposal to introduce US-style plea arrangements into UK law. According to the MoJ, Deferred Prosecution Agreements (“DPAs”) would provide a new enforcement tool for prosecutors to use alongside criminal prosecution and civil recovery orders in fraud, bribery, and money laundering cases, giving them the flexibility to secure appropriate penalties for wrongdoing while achieving better outcomes for victims.

Under the MoJ’s proposal, companies offered the opportunity by prosecutors to enter into a DPA would be required publically to admit wrongdoing and comply with rigorous conditions (e.g., the payment of substantial penalties, undertaking internal reform, and submitting to regular review and monitoring). The DPA process would be overseen by a judge, with responsibility for ensuring that the resolution of a matter with a DPA is in the interests of justice and that the conditions attached to each DPA are appropriate.

UK Financial Services Authority Reviews Anti-Corruption Compliance in Investment Banks

In March 2012, the UK FSA published the [findings](#) of its review of the anti-corruption controls that have been developed and implemented by investment banks (“[Review](#)”). The *Review* illustrates the FSA’s continued focus on the adequacy of the anti-corruption controls of FSA-regulated firms. Although the FSA does not enforce the UK Bribery Act 2010, firms that the FSA finds to have deficient anti-corruption systems and controls are likely to face additional scrutiny from the UK Serious Fraud Office and other enforcement agencies. The key message is that, in order to limit their potential exposure to FSA fines and prosecution under the UK Bribery Act 2010, firms must be proactive in implementing an adequate anti-corruption compliance framework.

New Director at UK Serious Fraud Office

On 23 April 2012, [David Green QC](#) began his four-year appointment as Director of the SFO. Mr. Green, who has significant prosecution experience in various UK government agencies, has indicated that the SFO will focus on investigating and prosecuting sophisticated forms of fraud and has announced several internal initiatives to achieve that goal. It is likely that the new Director will continue the SFO’s policy of guiding, assisting, and engaging with companies and senior individuals, but will be prepared to pursue a more aggressive prosecutorial approach as circumstances warrant.

GLOBAL ENFORCEMENT DEVELOPMENTS

China

- In February 2012, China’s Supreme People’s Procuratorate (“SPP”), the main investigatory and prosecutorial arm of the Chinese government, in conjunction with other PRC anti-corruption agencies, [announced](#) that a database listing individuals and companies found guilty of certain bribery offenses now has nationwide scope. Companies and individuals can now apply to have the SPP check nationwide to determine whether a particular individual or company has been convicted of certain bribery offenses in mainland China. Previously, checks were limited to one province or region, requiring an applicant to check each province separately to attain nationwide coverage.

- In March 2012, China [amended](#) its Criminal Procedure Law, effective January 1, 2013. Several of the amendments may impact the enforcement and prosecution of corruption and bribery cases in China, including allowing the retention of defense attorneys during the initial stages of investigation, explicitly allowing certain technological means (such as wiretapping and hidden cameras) for investigation of bribery and corruption cases, and permitting the confiscation of illegal gains from criminal suspects who have died or fled the country.
- Of particular relevance for life sciences companies, in June 2012, the Ministry of Health finalized [a Code of Conduct for medical professionals](#). Among other things, the Code prohibits medical professionals from accepting kickbacks, commissions, or “commercial entertainment arranged, organized, or paid for” by healthcare companies. The State Food & Drug Administration in May 2012 issued draft regulations establishing a [blacklist](#) for companies convicted of certain violations of food and drug laws, including obtaining permits or licenses through bribery or fraud. This blacklist supplements pre-existing blacklists maintained by provincial Departments of Health for life science companies convicted of bribery violations.

New Anti-Corruption Law in Mexico

Mexico enacted a new Anti-Corruption in Government Contracting Law in June 2012. The law prohibits individuals and legal entities from offering or paying money to a government official to obtain an improper benefit or advantage when procuring public contracts with the federal government. The law also penalizes false representations made during the public procurement process to gain an advantage. In addition to other penalties, individuals and entities found guilty of corruption under the new law may face disqualification from all federal government contracting for up to 10 years.

Canada Prosecutes Individuals for Bribery in Bangladesh

In June 2012, two former executives of Canadian engineering firm SNC-Lavalin Group were charged under Canada’s Corruption of Foreign Public Officials Act (“CFPOA”). They are accused of bribing officials in connection with a bid to build the Padma Bridge in Bangladesh, a project that was to be partially funded by the World Bank. Relatedly, the World Bank cancelled its \$1.2 billion credit in support of the project, citing “credible evidence” of “a high-level corruption conspiracy among Bangladeshi government officials, SNC Lavalin executives, and private individuals” in connection with the project, and an “inadequate response by the Government of Bangladesh” to investigate and prosecute those responsible.

Following on the heels of Niko Resources’ June 2011 guilty plea to one count of bribery under the CFPOA, the enforcement action against the former SNC executives may represent an increase in Canadian enforcement in the wake of an OECD report criticizing Canada’s limited enforcement of the CFPOA. Another individual, Canadian tech executive Nazir Karigar, was charged in May 2010 and is scheduled to stand trial in September 2012.

Publication of World Bank Debarment Decisions

In what it heralded as “another advance in openness and accountability in its anti-corruption work,” the World Bank announced in May 2012 that it would begin to publish the decisions of its Sanctions Board. Established in 1999, the Sanctions Board is an independent administrative tribunal with final decision-making authority over contested sanctions cases involving fraud and corruption. To date, the Board has sanctioned more than 530 firms and individuals, the majority of which were debarred temporarily or permanently from participation in operations financed by the World Bank Group.

In July 2012, the World Bank announced the debarment of two wholly-owned subsidiaries of Oxford University Press as part of a negotiated resolution agreement between the company and the World Bank. The subsidiaries made improper payments to government officials in Kenya and Tanzania in order to obtain contracts to supply textbooks in connection with two World Bank-financed projects. Oxford agreed to pay \$500,000 to the World Bank as part of the negotiated resolution. The UK SFO announced a [£1.9 million civil recovery order](#) against the company on the same day.

LOOKING FORWARD

Forthcoming DOJ FCPA Guidance

Since the DOJ announced in November 2011 that it would issue detailed FCPA guidance, industry and congressional initiatives to amend the FCPA have shifted to efforts to influence the expected DOJ guidance. The Chamber of Commerce and a coalition of public interest groups have sent competing letters to US enforcement authorities regarding the DOJ's forthcoming interpretive guidance on the FCPA. Industry groups and public interest groups alike have met with regulators to discuss the guidance, which had been expected in the late spring. In response to questions from Senator Grassley, US Attorney General Eric Holder has indicated that the new Guidance will likely include the following topics: (i) US interagency and international cooperation in global anti-corruption efforts; (ii) the FCPA's criminal intent requirement; (iii) the definitions of foreign official and facilitation payments; (iv) conspiracy and aiding and abetting in the FCPA context; (v) FCPA penalties, sentencing, and enforcement; and (vi) corporate compliance programs, including discussion of successor liability, due diligence, and the benefits of an effective compliance program.

ABOUT COVINGTON GLOBAL ANTI-CORRUPTION PRACTICE

With anti-corruption specialists in our Washington, New York, San Francisco, London, Brussels, and Beijing offices, Covington's Global Anti-Corruption team has global reach. Our team includes more than 15 senior lawyers, including partners and of counsel. Our lawyers have held senior positions in the US Department of Justice, US Attorney's Offices, White House, Securities and Exchange Commission, UK Serious Fraud Office and other government agencies involved in anti-corruption enforcement, and thus understand the approach of US and UK regulators in this area. Associates on the team have been deeply involved in all facets of our anti-corruption practice, assisting in investigations and developing compliance programs for our clients.

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