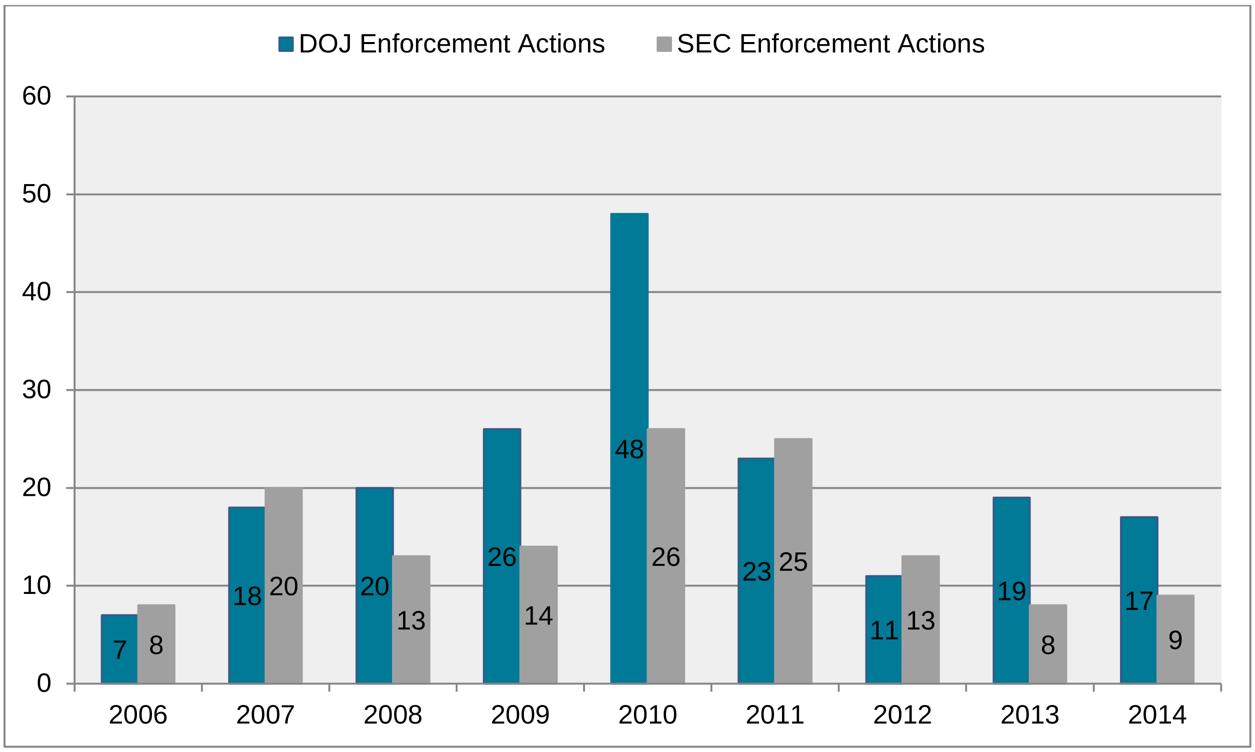
COVINGTON

Trends and Developments in Anti-Corruption Enforcement

Winter 2015

Anti-Corruption

If 2014 is any guide, 2015 will shape up to be another notable year in anti-corruption enforcement. Although the number of Foreign Corrupt Practices Act ("FCPA") enforcement actions in 2014 remained relatively stable as compared to 2013, we saw in 2014 two of the "Top 10" largest settlements of all time, and the collection by the U.S. Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") of a combined $1.56 billion in FCPA recoveries. That number is more than double the amount collected in 2013.



Leaving the numbers aside, 2014 was also noteworthy for the number of resolutions in which the benefits of self-reporting and cooperating in government investigations — and the downside risks of failing to do so — came into sharper relief. We also are closely watching the trend of cross-border cooperation between enforcement authorities, as well as substantially stepped up activity in Brazil and China. These and other notable developments from 2014 are discussed in greater detail below.

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I. Anti-Corruption Enforcement in 2014: Key Developments

A. The Carrots and Sticks of Self-Reporting and Cooperation Become Clearer

As should come as no surprise, DOJ and the SEC continue to emphasize that companies realize tangible benefits in enforcement actions through voluntary disclosure and cooperation, and that there is a significant downside risk for companies that do not self-report or cooperate. For some time, FCPA practitioners have complained that the self-reporting calculus involves trading certain risks and costs for very uncertain benefits. This criticism has not been lost on DOJ and the SEC, who have in recent years made significant efforts to bring increased transparency to their decision-making processes. But until practitioners see a robust sample size of resolutions showing how self-reporting and cooperation play into how cases are resolved, the calculus will remain uncertain. In our view, there was a significant step forward in this regard in 2014. We observed an increasing stratification in resolutions in terms of both the relative magnitude and the form of the resolution, depending on whether the company received credit for self-reporting and/or cooperation.

In 2014, we saw two very notable cautionary tales in related enforcement actions against French power and transportation company Alstom S.A., and one of its consortium partners, Japanese trading company Marubeni Corporation. In December, Alstom S.A. and three of its subsidiaries agreed to the second-largest FCPA resolution in history, under which the company will pay $772 million, the largest criminal penalty ever levied under the FCPA. The resolution involved a rare parent-level guilty plea, albeit to books and records and internal controls charges, in connection with what DOJ described as a “widespread scheme” to pay bribes in the Bahamas, Egypt, Indonesia, Saudi Arabia, and Taiwan that was “astounding in its breadth [and] brazenness.” Alstom admitted to paying approximately $75 million in “consultancy fees” to funnel bribes to secure approximately $4 billion in projects around the world — a reminder that third-party success fees, inflated commissions, and unjustified cost mark-ups are red flags for potential corruption.

In the Alstom S.A. plea agreement, as one of the factors supporting the $772 million fine, DOJ pointed to Alstom’s failure to self-report “even though it was aware of related misconduct” at a U.S. subsidiary several years before being contacted by DOJ. DOJ also pointed to Alstom’s “initial[] fail[ure] to cooperate,” exemplified by its decision to respond only to subpoenas to its subsidiaries, and noted that Alstom only provided “thorough cooperation” “after the Department charged multiple Alstom executives and employees.” While we are not in a position to comment on the substance of Alstom’s cooperation, DOJ’s view became apparent both in its public comments and the penalty it extracted.

Marubeni, which settled unrelated FCPA charges in 2012 in connection with a bribery scheme relating to a liquefied natural gas facility in Bonny Island, Nigeria, pleaded guilty in March to anti-bribery charges and agreed to pay an $88 million fine. The charges against Marubeni focused on a power project in Indonesia known as the Tarahan project, in which Marubeni partnered with Alstom and allegedly engaged consultants to pass on bribes to Indonesian officials. As with Alstom, DOJ cited Marubeni’s “failure to voluntarily disclose the conduct” at issue and its “refusal to cooperate with the Department’s investigation” in the plea documents.

While both the Alstom and Marubeni resolutions are notable simply for their magnitude, what is most interesting about them is that they show the significant impact that self-reporting and cooperation can have on FCPA resolutions. Assistant Attorney General Leslie Caldwell pointed to Alstom as an example of “what can happen when corporations refuse to disclose wrongdoing and refuse to cooperate with the Department’s efforts to identify and prosecute culpable individuals.” Similarly, Principal Deputy Assistant Attorney General Marshall Miller said that Marubeni “opted not to cooperate at all” in the government’s investigation, and instead “decided to roll the dice,” resulting in a fine that left Marubeni with “some gambler’s remorse.” A close examination of the penalties paid by Alstom and Marubeni, and how they might have been different if these companies had received credit for self-reporting and/or cooperation, bears these points out.

As set forth in Alstom’s plea agreement, the parties agreed that the applicable fine range under the U.S. Sentencing Guidelines for Alstom was $532,800,000 to $1,065,600,000, and Alstom received a fine of $772,290,000 — roughly in the middle of the applicable range. Had Alstom received credit for both voluntary disclosure and cooperation, it would have earned a significant reduction to its Guidelines “culpability score,” and the applicable fine range would have been reduced by one-half at the low and high ends. Assuming Alstom earned credit for cooperation, but not for self-reporting, the fine range also would have been reduced, though to a more modest degree. This table illustrates the difference between Alstom’s actual fine range and these two alternative scenarios.

Table 1: Alternative Guidelines Fine Ranges in Alstom Case

Scenario	Low End	High End
Actual range: No self-report or cooperation	$532,800,000	$1,065,600,000
No self-report but cooperation	$473,600,000	$947,200,000
Self-report and cooperation	$296,000,000	$592,000,000

In practice, companies that voluntarily disclose and/or cooperate typically receive fines somewhere below the low end of the applicable Guidelines range, with a discount of 20% being fairly common. Applying that discount to the Alstom case and the alternative scenarios described above, in a self-reporting and full cooperation scenario, Alstom would have paid a fine of roughly $237 million, a reduction of roughly 69% from the fine it actually paid. Assuming credit for cooperation only and an additional 20% discount, the fine would be reduced by roughly 51%.

Table 2: Alternative Guidelines Fine Scenarios in Alstom Case

Scenario	Fine	Savings from Actual Fine	Percentage Reduction
Actual fine: No self-report or cooperation	$772,290,000		
No self-report but cooperation with 20% discount	$378,880,000	$393,410,000	≈51%
Self-report and cooperation with 20% discount	$236,800,000	$535,490,000	≈69%

An analysis of the Marubeni penalty demonstrates a similar impact. At $88 million, Marubeni's fine fell roughly in the middle of the agreed-upon Guidelines range of $63,700,000 to $127,400,000. As the tables below show, had Marubeni earned credit for self-reporting and/or cooperation, it could have received a fine of less than half of what it actually paid.

Table 3: Alternative Guidelines Fine Ranges in Marubeni Case

Scenario	Low End	High End
Actual Range: No self-report or cooperation	$63,700,000	$127,400,000
No self-report but cooperation	$54,600,000	$109,200,000
Self-report and cooperation	$27,300,000	$54,600,000

Table 4: Alternative Guidelines Fine Scenarios in Marubeni Case

Scenario	Fine	Savings from Actual Fine	Percentage Reduction
Actual fine: No self-report or cooperation	$88,000,000		
No self-report but cooperation with 20% discount	$43,680,000	$44,320,000	≈50%
Self-report and cooperation with 20% discount	$21,840,000	$66,160,000	≈75%

In addition to reduced financial penalties, these resolutions illustrate how self-reporting and cooperation can impact the form of the resolution. DOJ and the SEC have a range of resolution vehicles at their disposal, including criminal pleas, deferred prosecution agreements ("DPAs"), non-prosecution agreements ("NPAs"), and declinations. The form that a resolution takes, and what corporate entity enters into the resolution (*i.e.*, U.S. parent vs. foreign subsidiary) can have significant implications in terms of collateral consequences, such as suspension and debarment risk, shareholder suits, and reputational harm. Both Alstom and Marubeni involved guilty pleas at the corporate-parent level, which severely ratchet up these risks. To drive this point home, DOJ has made the form of the Alstom and Marubeni resolutions a point of emphasis in discussing these cases. For example, speaking about the Marubeni resolution in March 2014, then-Acting Assistant Attorney General Mythili Raman drew a direct link between Marubeni's failure to self-report and cooperate and DOJ's decision to seek a parent-level guilty plea:

> This is one of only a handful of parent-level guilty pleas in an FCPA prosecution by the department. And the resolution papers make clear why. As the resolution papers set out, the criminal conduct was extremely serious; not surprisingly, Marubeni did not have an effective compliance and ethics program at the time of the offense; it did not voluntarily disclose the conduct at issue to the department; it failed to properly remediate the conduct; and it refused to cooperate with the department in its investigation even though Marubeni was under a deferred prosecution agreement with the Criminal Division

> in connection with other FCPA violations. Under those circumstances, a guilty plea by the parent company was the fair and appropriate result — a result that should cause other companies to pay closer attention to the misconduct of their employees, the seriousness with which they try to solve a foreign bribery problem when they detect one, and their decision whether or not to cooperate with the government.[1]

With Alstom and Marubeni serving as powerful examples of the "sticks" that DOJ has at its disposal to punish companies that fail to self-report or cooperate, several cases in 2014 illustrated the "carrots" that are employed by U.S. enforcers to reward companies that take a different course. Perhaps the best example of this is the declination secured by British Virgin Islands oil services company PetroTiger Ltd. What is particularly remarkable about the PetroTiger case is that the conduct at issue went to the very top — DOJ charged the former co-CEOs and general counsel in connection with bribes paid to a Colombian official to secure a $39 million oil services contract. Indeed, DOJ has held this case up as a counterweight to Alstom and Marubeni, describing PetroTiger's cooperation as "a fine example of the kind of cooperation we expect," and emphasizing that the company "self-reported and fully disclosed the relevant facts to us, even though those facts implicated two CEOs and a top in-house counsel."

Another notable example is Texas-based water management, construction, and drilling outfit Layne Christensen Company, which settled with the SEC in October for a combined $5.13 million relating to an array of alleged improper payments in Africa in connection with customs clearance, taxes, work permits, and immigration and labor inspections. The settlement papers cited Layne Christensen's self-reporting and "high level of cooperation throughout the Commission's investigation," which included providing "real-time reports of its investigative findings, producing translations of documents," making "foreign witnesses available for interviews in the United States," and sharing "summaries of witness interviews and reports prepared by forensic consultants." Speaking about this resolution in a November speech, SEC Division of Enforcement Director Andrew Ceresney explained that these cooperation efforts earned the company a civil penalty of only $375,000, less than 10% of the roughly $3.9 million it paid in disgorgement. Ceresney described this as a significant discount, given that the SEC typically seeks civil penalties closer to 100% of the disgorgement amount. DOJ has not commented on this matter, but Layne Christensen has publicly announced that DOJ's investigation is closed.

While the result in the Layne Christensen matter is notable in itself, also significant, in our view, is Ceresney's effort to quantify the benefits of voluntary disclosure and cooperation in public comments. The SEC, unlike DOJ, does not operate under the U.S. Sentencing Guidelines, which, as described above, quantify the value of self-disclosure and cooperation by way of a reduced "culpability score," and, in turn, reduced fines. While the impact of voluntary disclosure and cooperation in SEC resolutions remains more difficult to quantify in the absence of a

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[1] *See also Remarks of Assistant Attorney General Leslie R. Caldwell, Press Conference Regarding Alstom Bribery Plea* (Dec. 22, 2014) ("Through Alstom's parent-level guilty plea and record-breaking criminal penalty, Alstom is paying a historic price for its criminal conduct — and for its efforts to insulate culpable corporate employees and other corporate entities.").

framework such as the Guidelines, Ceresney's comments are a welcome window into the SEC's thinking, and may provide a useful benchmark in future resolutions.

Falling somewhere between the poles of Alstom and Marubeni, on the one hand, and PetroTiger and Layne Christensen, on the other, are the 2014 resolutions of two of the longest-running investigations in recent history, involving metals technology conglomerate Alcoa Inc., and cosmetics company Avon Products, Inc. While neither company received full credit for self-reporting, both received significant credit for cooperation.

In January, Alcoa Inc. and majority-owned subsidiary Alcoa World Alumina LLC ("AWA") settled with the SEC and DOJ for a combined $384 million, the sixth-largest FCPA resolution ever, in connection with a long-running scheme involving $110 million in payments to officials in Bahrain through a consultant. The resolution involved the third-largest disgorgement sum in FCPA history — $161 million. While a $384 million settlement can hardly be considered getting off lightly, a close look reveals that it could have been much worse for Alcoa. For one, the resolution was structured so as to avoid corporate parent Alcoa Inc. being a party to a criminal resolution, with subsidiary AWA instead taking a guilty plea. AWA faced a Guidelines penalty range of $446 million to $892 million. Citing a number of mitigating factors, including the severe financial burden that a penalty within this range would place on Alcoa's business, the magnitude of the disgorgement in the companion SEC settlement, and Alcoa's "substantial cooperation" in the investigation, DOJ agreed to a fine of $209 million, a discount of over 50% from the low end of the Guidelines range.

In December, Avon put to rest an investigation dating back to 2008, and reportedly costing the company more than $300 million in professional fees and related expenses, with a combined DOJ/SEC resolution under which it paid $135 million. The charges arose out of allegations that Avon's wholly owned Chinese subsidiary, Avon China, provided over $8 million in cash and other benefits to Chinese government officials in connection with Avon's direct sales business in China. Additionally, when this conduct came to light in the course of an internal audit in 2005, Avon allegedly failed to take sufficient remedial steps, and engaged in what DOJ described as a "cover-up." In the criminal resolution, Avon was able to avoid an anti-bribery charge, with the corporate parent Avon Products and subsidiary Avon China entering into a DPA and a guilty plea, respectively, to charges that they violated the FCPA's accounting provisions. Additionally, while Avon faced a Guidelines fine range of roughly $85 million to $169 million, DOJ, citing Avon's voluntary disclosure, cooperation, and remediation efforts, agreed to a fine of $67,648,000, a 20% discount off the low end of the range. What is particularly interesting about the resolution is that while DOJ cited Avon's "voluntary disclosure" as a factor supporting the reduced fine, it did not give Avon full credit for voluntary disclosure in the form of a 5-point reduction of Avon's culpability score under U.S.S.G. § 8C2.5(g)(1), apparently because it did not find Avon's disclosure timely. As DOJ asserted in the DPA, Avon's disclosure "came relatively soon after the Company received a whistleblower letter alleging misconduct but years after certain senior executives of the Company had learned of and sought to hide the misconduct in China." Thus, it appears that DOJ was willing to give Avon at least partial credit for its disclosure, suggesting that in some cases a late disclosure is better than no disclosure at all.

The cases and analysis discussed above provide useful guideposts as companies continue to grapple with the decision of whether to self-report. As we have said many times, voluntary disclosure carries with it certain costs and uncertain but potentially very real benefits. Thus, for many companies, self-reporting will remain unattractive for a host of reasons, including the fact that the incremental monetary loss (excluding investigative costs) between not self-reporting

($0) and self-reporting (in Alstom's case, potentially $236.8 million) can be so much greater than the incremental monetary loss between self-reporting and not self-reporting but still cooperating fully with the government's investigation (in Alstom's case, cooperating but not self-reporting would have yielded a presumed resolution of $378.9 million).

Even if the monetary difference between these two scenarios were not so substantial ($236.8 million versus $142.1 million in losses avoided), any self-reporting scenario must be presumed to carry increased investigation costs and the possibility of other collateral consequences. Any enforcement resolution can bring reputational and commercial harm, shareholder lawsuits, suspension and debarment risk, and — now more than ever — parallel foreign enforcement actions. These considerations will surely give many companies pause before making a voluntary disclosure. Other companies, however, will see the calculation differently, perhaps because of a strong desire to "front" the conduct with the government, shareholders, and other audiences. The comfort that comes from transparency — regardless of <u>why</u> the company values transparency — can be a powerful motivator. To be clear, as we have often said, if a company does not self-report, it must conduct an appropriate internal investigation and fully remediate. There are compelling compliance and business reasons to take this approach, in addition to the obvious need to have an air-tight response to questions from government regulators about the nature of the investigation and remediation undertaken by the company.

The self-reporting calculus will continue to take center stage in the years ahead. While many may remain skeptical of the benefits of self-reporting, the resolutions of 2014 undeniably provided useful benchmarks to anchor the discussion. We will be watching closely for new developments on this front in 2015 and beyond.

B. Tough Talk on "True Cooperation"

While the matters discussed above illustrate <u>what</u> companies earn when they cooperate, DOJ also made a point in 2014 of emphasizing <u>how</u> they must earn cooperation credit. The message was clear: If a company wants to earn full cooperation credit, it must be prepared to turn over evidence of individual culpability, no matter how high in the company it goes. As Principal Deputy Assistant Attorney General Marshall Miller explained in a September 2014 speech, "[v]oluntary disclosure of corporate misconduct does not constitute true cooperation, if the company avoids identifying the individuals who are criminally responsible." He added this advice to companies seeking to earn "full cooperation credit":

> [M]ake your extensive efforts to secure evidence of individual culpability the first thing you talk about when you walk in the door to make your presentation. Make those efforts the last thing you talk about before you walk out. And most importantly, make securing evidence of individual culpability the focus of your investigative efforts so that you have a strong record on which to rely.

While this seems to be more a shift in emphasis than a wholesale redefinition of the meaning of cooperation — indeed, Assistant Attorney General Caldwell has explained that "[t]his does not mean that we expect you to use law-enforcement style techniques to investigate your employees" — it is nonetheless a shift in emphasis worth noting. In the past, companies might have hoped to earn full cooperation credit for efforts such as voluntary production of documents, translating foreign language documents, making factual presentations, and making foreign witnesses available. The current, and clear, message from DOJ is that those steps will be viewed as “cooperation light” if DOJ finds that a company has made insufficient “efforts to secure evidence of individual culpability.”

C. Cross-Border Enforcement Is Here to Stay

The growing trend of cross-border cooperation in anti-corruption enforcement was on full show in 2014. As Assistant Attorney General Caldwell explained at a November FCPA conference, information sharing and strategic collaboration with foreign enforcers has become the norm: “We report schemes to one another. And, where appropriate, we discuss strategy and coordinate our use of investigative techniques, so that we can obtain the best possible results, especially in very high-impact cases.” Echoing these comments at the same conference, then-acting chief of the Fraud Section William Stellmach commented that “almost all” of DOJ’s FCPA investigations “are multi-lateral,” and “there is widespread information sharing among the regulators,” a trend we saw play out in multiple ways in 2014.

U.S. enforcement authorities publicized assistance from foreign law enforcement in a number of indictments and other enforcement actions in 2014, including the Alstom, Alcoa, Marubeni, Bio-Rad Laboratories Inc., Dallas Airmotive Inc., and Hewlett-Packard Co. settlements, as well the charges filed against former executives of PetroTiger. The list of cooperating countries spanned the globe, including Australia, Brazil, Canada, Colombia, Cyprus, Germany, Indonesia, Italy, Latvia, Liechtenstein, Lithuania, Norway, the Philippines, Poland, Saudi Arabia, Singapore, Switzerland, Taiwan, the United Arab Emirates, and the United Kingdom.

But the flow of information works both ways. This has profound implications for the already complicated and delicate self-reporting calculus, as companies contemplating voluntary disclosure in the U.S. must now be prepared for the possibility that U.S. authorities will share that information with their counterparts in other jurisdictions, many of which do not have developed enforcement and resolution frameworks that reward companies for self-disclosure and cooperation. A full discussion of how this raises the stakes for self-disclosure is for another day, but suffice it to say that companies must be attuned to a host of risks apart from parallel enforcement actions, not the least of which are serious collateral commercial consequences and reputational harm.

To illustrate these risks, one need look no further than a number of recent foreign investigations running parallel to pending U.S. investigations or following settled U.S. enforcement actions, such as in Indonesia and the U.K. concerning the Marubeni and Alstom matters. Similarly, the Vietnamese Ministry of Health reportedly opened an inquiry into sales of Bio-Rad products going back to 2005 just days after Bio-Rad’s $55 million settlement with DOJ and the SEC. And in the wake of aircraft manufacturer Dallas Airmotive’s December settlement with DOJ, the government of Peru requested that U.S. authorities provide the names of Peruvian armed forces officials who allegedly accepted bribes.

D. Enforcement Ramps Up in Brazil, China, and the European Union

In 2014, perhaps nowhere was the modern trend of cross-border enforcement on display as strongly as in Brazil, which saw a significant change in its anti-corruption enforcement landscape in 2014 with the entry into force of the Brazilian Clean Companies Act, which took effect in January 2014, as well as several large-scale bribery investigations running parallel to U.S. investigations.

The Clean Companies Act creates strict civil and administrative liability for companies that bribe domestic or foreign officials, engage in bid rigging or other fraudulent conduct affecting public procurement procedures, or hinder an investigation or supervisory work of public bodies or entities and their agents. Although Brazil has yet to publish the decree that will set forth enforcement procedures and further clarify the law, the government has asserted that it can start investigating companies under the Act prior to the decree's publication.

2014 also saw significant developments in enforcement activity in Brazil, with notable ties to U.S. enforcement activity. In August, Brazilian authorities brought criminal charges against eight current and former employees of Brazilian aircraft manufacturer Embraer S.A., alleging that the employees bribed an officer in the Dominican Republic's air force to obtain a $92 million contract to supply fighter planes. U.S. authorities have been investigating Embraer since 2010, and reportedly provided evidence to Brazilian prosecutors in response to a request for legal assistance. The criminal action against Embraer employees represents one of the first efforts by Brazilian authorities to prosecute individuals for bribing government officials outside of Brazil.

At the same time, Brazilian authorities have been investigating a massive domestic corruption case involving state-owned oil company Petrobras. After months of investigation, Brazilian prosecutors in December charged 36 individuals in connection with an alleged scheme to overbill Petrobras, provide kickbacks to Petrobras employees to obtain contracts, and funnel money to political parties in Brazil. Prosecutors charged executives at several of Brazil's major construction companies, as well as two former Petrobras executives, in connection with the scheme. In response to the indictments, Petrobras temporarily banned a number of companies from contracting with and participating in bids by Petrobras. Brazil's investigation into the corruption scheme, known as Operation Car Wash, is ongoing, and we will be monitoring developments closely, including at DOJ and the SEC and with respect to shareholder litigation. In this regard, the company already is contending with several lawsuits filed by U.S. investors, including a lawsuit brought by the city of Providence, Rhode Island alleging that the company made material misstatements about the value of its assets in bond offering documents as part of a larger bribery scheme.

Brazil's comptroller general ("CGU") also announced that it would initiate a procedure to impose sanctions against Dutch oil platform services company SBM Offshore NV after investigating whether the company paid bribes to Petrobras employees to win contracts. The CGU's announcement followed on the heels of SBM Offshore's agreement to pay $240 million in penalties to Dutch authorities to settle allegations that it bribed government officials in Angola, Brazil, and Equatorial Guinea. DOJ also investigated SBM Offshore and in November, the company disclosed that DOJ had closed its investigation without bringing charges. Petrobras reportedly will not invite SBM to participate in tenders while the CGU investigation is ongoing.

China, too, continued its ramp-up of anti-corruption enforcement, most notably convicting the China subsidiary of pharmaceutical company GlaxoSmithKline ("GSK") of commercial bribery. A court imposed the largest fine ever handed down by a Chinese court against a company, fining GSK China RMB 3 billion (approximately $490 million) for allegedly bribing doctors and other healthcare professionals. The court also convicted five GSK China executives on bribery-related charges, including CEO and U.K. citizen Mark Reilly, though with the imposition of suspended sentences, the defendants avoided imprisonment.

GSK continues to face investigation by U.S. and U.K. authorities. The U.K. Serious Fraud Office ("SFO") announced a criminal investigation into GSK's commercial practices in May, while the SEC and DOJ continued investigations of the company that began in 2010. In a July interview with Reuters, SFO Director David Green noted that the SFO's investigation of GSK was, to his knowledge, "the first time we have had cooperation with the Chinese on an SFO case."

Chinese authorities continue to investigate other multinational pharmaceutical companies, and have targeted other industries as well, reportedly including oil and gas, medical device, telecommunications, automotive, sports, media, construction, banking, securities, education, technology, and environmental consulting.

While enforcement against companies and individuals show that China is increasingly focused on the supply side of corruption, Chinese authorities have continued to target bribe recipients, including high-ranking Chinese officials, as part of a massive anti-corruption campaign under President Xi Jinping. For example, Chinese authorities arrested Zhou Yongkang, the former head of China's secret police and first member of the Politburo Standing Committee, retired or active, to be charged with corruption. Chinese authorities also are investigating a former Politburo member and military leader, General Xu Caihou, as well as former presidential aide Ling Jihua.

To accompany the increase in anti-bribery enforcement, Chinese government bureaus continued to promulgate new regulations targeted at specific corruption-related issues, including regulations requiring that the names of companies blacklisted at the provincial level for commercial bribery violations be published on a national website. And in November, the Chinese legislature released for public comment draft amendments to China's Criminal Law, which could broaden the scope of certain offenses and strengthen penalties related to bribery and corruption. The draft amendments would add provisions imposing monetary fines on a broader range of individuals convicted of bribery and corruption offenses and criminalize the offering of bribes to close relatives of state functionaries.

Finally, a number of notable European enforcement actions were finalized in 2014. In January, for example, Norwegian company Yara International ASA reached a settlement with Norwegian prosecutors to pay a 295 million NOK fine (approximately $48 million) after Yara admitted to making improper payments in Libya, India, and Russia. The Yara settlement represents one of the largest corporate fines in Norwegian history. Likewise, SBM Offshore's $240 million settlement (mentioned above) with the Dutch authorities in November 2014 represented one of the largest bribery-related penalties in the EU since the advent of the Organisation for Economic Co-operation and Development ("OECD") Anti-Bribery Convention. A number of other European countries — including the U.K., Germany, Italy, and Austria — are reported to have significant anti-corruption enforcement actions under review that may proceed to settlements in 2015, and a number of prosecutions against individuals — some arising from U.S. enforcement actions — were also commenced in Europe in 2014.

The European enforcement actions have involved a number of different measures. The SBM matter, for instance, is noteworthy for the Dutch government's willingness to settle without a criminal action, pursuant to Article 74 of the Dutch Penal Code (a feature of the Dutch enforcement regime that has been a subject of criticism from the OECD). The SBM settlement also featured the Dutch government's use of its equitable disgorgement authority — $200 million of the total $240 million settlement was in the form of disgorgement. In the U.K., as discussed below, the SFO and Financial Conduct Authority ("FCA") have been active in leveraging anti-money laundering and financial regulatory legislation to pursue cases involving bribery elements (*i.e.*, in cases that pre-dated the U.K. Bribery Act or where Bribery Act charges otherwise could not be pursued).

E. The SEC Turns to Administrative Process for Most Settlements

The SEC in 2014 made extensive use of its administrative process for bringing enforcement actions, deploying this tool to resolve all but one of the year's enforcement actions. By comparison, the SEC used the administrative process in only three of the eight settlements it reached in 2013. The increased use of the administrative process is not a fluke: In recent comments, Kara Brockmeyer, the Chief of the SEC's FCPA Unit, described the SEC's use of administrative proceedings in FCPA cases as "the new normal."

The roots of this trend may trace back to recent SEC settlements (such as the IBM and Tyco settlements concluded in 2013) where the SEC filed suit in federal court and the settlements were rejected when first presented for court approval. Administrative proceedings avoid this risk because, unlike settlements in actions brought in federal court, they are not subject to judicial approval. While much has been written recently about constitutional challenges to administrative proceedings in contested matters, as a resolution vehicle in FCPA cases they may be desirable to the SEC and companies alike. In addition to avoiding the uncertainty of the court approval process — which, as we saw in the 2013 IBM settlement, resulted in the imposition of onerous reporting requirements well beyond the scope of the parties' original agreement — we see several potential benefits to this process for companies resolving FCPA cases. These benefits include reducing the downstream risk of contempt that comes along with federal court injunctions, and a potential public perception that administrative settlements are a less severe sanction than a settlement of a complaint in federal court.

What will be particularly interesting to watch in the coming year is whether the SEC utilizes this forum to bring charges in a contested FCPA matter. While most companies choose to settle with the SEC when FCPA violations are alleged, individuals increasingly are putting the agency to its burden of proof, as described in more detail below.

F. No Respite for Small and Medium-Sized Companies

While settlements with Alstom, Alcoa, and Avon — companies with more than 40,000 global employees each — were the headline grabbers in 2014, the year also brought a number of enforcement actions against small and medium-sized companies. In the case of the SEC, this may be a function of the new "broken windows" approach to enforcement under Chair Mary Jo White, through which the SEC intends to "pursue even the smallest infractions." For example, in July, firearms manufacturer Smith & Wesson Holding Corporation agreed to a settlement with the SEC for $2 million in what FCPA Unit Chief Brockmeyer described as a "wake-up call for small and medium-sized businesses that want to enter into high-risk markets and expand their international sales."

Payments for travel, entertainment, meals, and gifts remained another area of focus, particularly for smaller companies. Two former employees of defense contractor FLIR Systems agreed to pay the SEC fines of $50,000 and $20,000, respectively, to settle FCPA charges arising out of the alleged provision of gifts, travel, and entertainment to Saudi officials for a "world tour." Similarly, Bruker Corporation, a scientific instrument manufacturer, paid $2.4 million to settle SEC charges related to payments for Chinese officials' shopping and sightseeing trips to

Europe and the U.S. Larger companies with established anti-corruption compliance programs would likely recognize the dangers of such expenses today, but these recent actions demonstrate the need for small and medium-sized companies to carefully monitor such expenses as well.

Indeed, the Bruker resolution underscores the point that regulators' expectations regarding compliance programs continue to evolve upward, even for small and medium-sized companies. In its cease and desist order in the Bruker matter, the SEC made the point that Bruker's China operations "had no independent compliance staff or an internal audit function that had authority to intervene into management decisions and, if appropriate, take remedial actions." And reiterating a point that was made several years ago in the Orthofix International resolution, the SEC criticized Bruker for its failure to translate its anti-corruption policies and procedures and training materials into local languages, and for operating a compliance hotline without local-language capability, which the SEC noted "limit[ed] its efficacy." With these pronouncements serving as fair warning, companies would be well-advised to take note of these points in assessing their own compliance programs.

G. Continued Focus on Individual Defendants

As we have observed in prior publications, in recent years DOJ has made the prosecution of individual FCPA cases an enforcement priority. 2014 was another active year in this respect: DOJ announced charges or the unsealing of charges against 10 individuals, down just slightly from 12 in 2013.

There were also notable developments on the SEC front, with the SEC bringing its first enforcement action against individuals since 2012 (the FLIR Systems employees discussed above). The SEC obtained the largest ever civil FCPA penalties and disgorgement imposed on individuals in February — for $1.46 million — after Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York entered default judgments against two former executives of Siemens AG in Argentina, Stephan Signer and Ulrich Bock.

Some individual defendants have been more willing than companies to push back, and, in at least one case, have seen favorable results. In July, two former executives of Noble Corporation, Mark Jackson and James Ruehlen, reached a settlement with the SEC on the eve of what was to be the SEC's first FCPA trial, likely aided by an important pre-trial ruling in which the court held that the SEC had the burden of negating the facilitating payments exception. Neither executive was required to pay any civil penalty or disgorgement in connection with the settlement, nor did they have to admit or deny wrongdoing. Other individual challenges have been less successful, but are nonetheless notable given the dearth of case law on the key elements of the FCPA:

- **Government Definition of "Foreign Official" Upheld on Appeal**. As we previously reported, DOJ won a victory in the U.S. Court of Appeals for the Eleventh Circuit's May 2014 decision upholding the convictions of Joel Esquenazi and Carlos Rodriguez — and the broad definition of "foreign official" and government "instrumentality" that underlay those convictions. In October, the U.S. Supreme Court denied Esquenazi's and Rodriguez's petition for certiorari, ensuring that the broad definition of foreign official adopted by the Eleventh Circuit, in the first appellate decision on the subject, would stand.

- **PetroTiger CEO Loses Motions to Dismiss and Suppress Evidence**. In December 2014, Judge Joseph E. Irenas of the U.S. District Court for the District of New Jersey denied former PetroTiger CEO Joseph Sigelman's motion to dismiss FCPA charges that centered on the scheme, described above, to pay bribes to an official of a majority-state-owned oil services company. Sigelman had argued that the oil services company no longer exercised a governmental function, and applying the FCPA's definition of "foreign official" to cover its employees would therefore render the statute void for vagueness. Should the case proceed to trial, we can expect additional litigation over this issue when it comes time for jury instructions, and possibly beyond.

Win or lose, these individual challenges serve as a reminder that options increase where investigation targets have an appetite for litigation. Because companies seldom litigate allegations of FCPA violations, many aspects of regulators' interpretation of the FCPA remain ripe for judicial challenge, with the SEC's approach to agency theory, discussed further below, being just one example.

H. Continued Use of Aggressive Legal Theories and Remedies

As we have noted in the past, U.S. enforcement authorities have a taken creative and aggressive legal positions in pursuing FCPA cases. This past year saw a continuation of that trend, most notably with the SEC staking out an expansive position on the FCPA's reach via agency theory.

- **Aggressive Use of Agency Theory**. 2014 saw the SEC make use of a potentially far-reaching agency theory to hold a parent company liable for the conduct of subsidiaries. In the Alcoa settlement, the SEC made clear that it had made "no findings that an officer, director or employee of [corporate parent Alcoa Inc.] knowingly engaged in the bribe scheme" at issue. Instead, its theory of liability was that the parent company "violated Section 30A of the Exchange Act by reason of its agents, including subsidiaries [Alcoa World Aluminum and Alcoa of Australia], indirectly paying bribes to foreign officials in Bahrain in order to obtain or retain business." This agency theory was premised on the parent company's alleged control over the business segment and subsidiaries where the conduct at issue allegedly occurred. Notably, the SEC did not rely on any evidence that parent-company personnel had direct involvement in or control over the alleged bribery scheme. Instead, the SEC pointed only to general indicia of corporate control that are the normal incidents of majority stock ownership (*e.g.*, that Alcoa appointed the majority of seats on the business unit's "Strategic Council," transferred employees between itself and one of the relevant subsidiaries, and "set the business and financial goals" for the business segment). This is notable, in our view, because it is arguably at odds with DOJ and the SEC's statement in the FCPA *Resource Guide* that they "evaluate the parent's control — including the parent's knowledge and direction of the subsidiary's actions, <u>both generally and in the context of the specific transaction</u> — when evaluating whether a subsidiary is an agent of the parent." (Emphasis added.) In the Alcoa matter, the SEC seemed to focus solely on "general" control; it did not allege any facts to support parent-level "knowledge and direction . . . in the context of the specific transaction." This potentially expansive use of agency theory underscores the need for parent companies who are subject to FCPA jurisdiction to be attentive to corruption issues and compliance in all their corporate subsidiaries, even entities over which they do not exercise day-to-day managerial control.

- **Non-FCPA Charges**. DOJ has continued to bring a wide variety of charges in connection with corrupt conduct, looking not only to the FCPA itself, but also to the mail and wire fraud statutes, which were employed in the case against former Bechtel Corporation executive Asem Elgawhary in relation to bribery and kickback allegations in 2014. DOJ also continues to pair FCPA and Travel Act charges, using the latter to reach commercial bribery, as in its April indictments of two additional high-ranking employees of broker-dealer Direct Access Partners in connection with a bribery scheme in Venezuela for which three others from the company have already pleaded guilty.

- **Forfeiture Actions**. DOJ also has looked beyond plea agreements and other criminal resolutions to pursue the fruits of corruption, using its civil authority to bring forfeiture actions against corrupt officials under the umbrella of the Kleptocracy Asset Recovery Initiative. For example, in October, DOJ touted its settlement of a forfeiture action against a sitting Second Vice President of the Republic of Equatorial Guinea, which required him to forfeit tens of millions of dollars' worth of assets in or from the U.S.

I. Whistleblowing Increasingly an International Phenomenon, But Still Plays a Limited Role in FCPA Enforcement

2014 was a notable year for whistleblowers. The SEC announced that it expected to award more than $30 million — the largest ever award through the SEC's whistleblower program — to a whistleblower who provided critical information advancing a successful non-FCPA enforcement action. The whistleblower was outside the U.S., underscoring that whistleblowing is an increasingly international phenomenon: The SEC's whistleblower tips in the last year came from 60 different countries, as well as all 50 states. Nevertheless, in the larger picture of global business, the number of FCPA-related whistleblower complaints was far from overwhelming. The SEC reported that it received only 159 FCPA-related whistleblower tips in FY2014, up slightly from 149 in FY2013. This strikes us as a relatively low number, considering that there are several thousand companies listed on U.S. exchanges.

This is not to suggest that companies should not take seriously the issues that can arise from whistleblower complaints. Far from it. For example, in June, the SEC for the first time used its new anti-retaliation authority, charging a hedge fund advisory firm and its owner with retaliating against a whistleblower who reported potentially illegal trading activity. In a press release announcing the charges, Director of Enforcement Ceresney sent a clear message to companies that "those who might consider punishing whistleblowers should realize that such retaliation, in any form, is unacceptable."

2014 also saw the first appellate decision on the extraterritorial reach of Dodd-Frank's anti-retaliation provision, when the U.S. Court of Appeals for the Second Circuit in *Liu v. Siemens* joined several district courts in concluding that the anti-retaliation provision does not apply extraterritorially. As we noted last year, however, there are a number of reasons why such decisions are unlikely to have a chilling effect on whistleblowers outside the U.S., including local labor laws that may prohibit retaliation and the continued eligibility of foreign whistleblowers to receive bounty awards.

While one might expect financial incentives to have a greater impact on the number of whistleblowers, the U.K. FCA and Prudential Regulation Authority published a joint opinion this year reaching the opposite conclusion: Financial incentives in the U.S. have not been shown to lead to an increase in the number or quality of disclosures made to regulators and benefit only a small number of whistleblowers. The report also expressed concerns that financial incentives could undermine internal whistleblowing mechanisms, lead to malicious reporting, and create other moral hazards. The U.K. government published a whistleblowing report this year stating that it does not intend to introduce financial incentives as an "integral part" of the U.K. whistleblowing framework, but it is still considering whether whistleblowers should be rewarded in cases of fraud, bribery, and corruption.

J. Increasing Challenges to Assertions of Privilege

2014 saw several challenges to privilege assertions over materials created in connection with internal investigations or the provision of compliance advice. This underscores the importance of taking steps in these contexts to ensure that applicable privileges and protections are preserved to the maximum extent possible.

- ***In re Grand Jury Subpoena***. In February 2014, the U.S. Court of Appeals for the Third Circuit issued an opinion on the crime-fraud exception to the attorney-client privilege that could have significant implications for companies seeking FCPA compliance advice and the attorneys who advise them. The Third Circuit permitted the crime-fraud exception to override an attorney-client privilege claim in a case that presented factual ambiguity on the issue of whether the advice was sought in furtherance of a crime, or rather for the legitimate purpose of complying with the law. The court held that the district court did not abuse its discretion in finding a reasonable basis to suspect that the client intended to commit a crime at the time he sought the attorney's advice (relating to whether the proposed recipient of a payment qualified as a government official), and therefore that the crime-fraud exception overrode the privilege. However, the Third Circuit indicated that these facts could also plausibly have been interpreted as a request for advice as to how to avoid violating the FCPA. The case serves as a reminder that the standards for *in camera* review and application of the crime-fraud exception are malleable, and that the "fraud" in the crime-fraud exception can be in the eye of the prosecutorial or judicial beholder. In the wake of this decision, companies would be well-served to take steps to ensure that their communications relating to compliance advice are protected from crime-fraud challenges, for example, by engaging qualified and competent counsel, and demonstrating — through the existence of a robust compliance program or otherwise — that any consultations with counsel were undertaken in good faith.
- **Protection of Internal Investigation Documents**. In *In re Kellogg Brown & Root, Inc.*, the U.S. Court of Appeals for the D.C. Circuit reaffirmed that the attorney-client privilege applies to internal investigation files so long as "obtaining or providing legal advice was one of the significant purposes of the internal investigation," "even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion." And in the case against former PetroTiger CEO Joseph Sigelman, the company's outside counsel was able to resist a subpoena seeking files related to the firm's internal investigation. The judge explained that the materials the law firm had produced to the government would be discoverable only from the government, and only if encompassed by the government's disclosure obligations. These cases are a reminder of the need to take steps in internal investigations to ensure that the privilege is fully preserved, a topic which is covered at length in this recent article by Covington attorneys.
- **SFO Takes an Aggressive Positions on Privilege**. Outside the U.S., in 2014 the U.K. SFO warned companies against using the privilege to resist the SFO's fact-finding

efforts, with SFO Director Green taking aim at privilege claims that "amount to a strategy of deliberate obstruction." A consistent theme emerged in a series of speeches delivered by Green, SFO General Counsel Alun Milford, and other SFO representatives: In determining whether a company has cooperated in an SFO investigation, the agency will scrutinize (and potentially challenge) any assertions of privilege over materials created during an internal investigation. Most important, it appears that the SFO expects corporations to turn over memoranda prepared by counsel summarizing witness interviews — documents that often are protected in the U.S. by both the attorney-client privilege and the attorney work-product doctrine. While such documents often will be privileged in the U.K. as well, Green gave an interview in August in which he stated that "claims of legal privilege on witness statements taken by external lawyers can be questionable." The SFO's position has the potential to create significant tactical challenges for corporations navigating cross-border investigations with both U.S. and U.K. dimensions.

K. New Forward-Looking Compliance Guidance

The year also saw the introduction of several noteworthy pieces of guidance on anti-corruption and compliance issues.

- **OECD Report**. In December, the OECD published a report on foreign bribery, analyzing the more than 400 cases involving bribery of foreign public officials brought since 1999. The OECD report offers insight into topics like bribery risk areas (including the use of intermediaries and paying to obtain public procurement contracts) and the industries generating the most corruption cases worldwide (*i.e.*, the extractive, construction, transportation and storage, and information and communication industries).
- **Opinion Procedure Releases 14-01 and 14-02**. DOJ published two Opinion Procedure Releases in 2014, both of which offer guidance on FCPA issues in the transactional context, and suggest that DOJ is sensitive to the issues that companies face when acquiring companies with less robust compliance programs or identified corruption issues.
  - In Release 14-01, DOJ concluded that a financial services company that owned the majority interest in a foreign company could, with appropriate safeguards and transparency, purchase the remaining minority interest from a foreign businessman who had recently become a foreign official, without running afoul of the FCPA.
  - In Release 14-02, DOJ concluded that a U.S. issuer would not be held liable under a theory of successor liability for the apparently corrupt pre-acquisition activities of a foreign company that the requestor sought to acquire. Critically, neither the acquired company, its seller, nor any of the activities at issue were otherwise subject to U.S. jurisdiction under the FCPA, leading DOJ to reiterate its position on "springing jurisdiction" set forth in the *Resource Guide*: "The acquisition of a company does not create jurisdiction where none existed before."

L. Looking Ahead to 2015

With both DOJ and the SEC recently noting that they have significant enforcement actions in the pipeline, there is no reason to expect a downturn in enforcement any time soon. In fact, U.S. enforcers have received reinforcements; the Federal Bureau of Investigation announced in January that it is tripling the number of agents focusing on FCPA investigations, with two new dedicated FCPA units based in New York and Los Angeles joining the existing unit in

Washington. Indeed, more than 100 companies have FCPA investigations that have been publicly reported or disclosed, and practitioners are watching closely for settlements in a number of high-profile pending matters and industry-wide investigations.

One particular area of interest in 2015 is whether the focus on major banks will spill over to other companies in the financial sector. The SEC has intensified its scrutiny of hedge funds and private equity firms in particular, creating a new private fund unit within its Office of Compliance Inspections and Examinations led by hedge fund and private equity senior specialized examiners. While the unit is not focused on anti-corruption compliance, kicking the tires in areas such as fee disclosures and expenses may lead to the discovery of corruption issues, particularly given that the SEC's attention is already focused on the industry.

II. Additional Global Enforcement Developments

Anti-corruption enforcement activity outside the U.S. continued on upward trend in 2014. In addition to the developments in Brazil and China discussed above, the U.K. and Canada continued to ramp up their anti-bribery enforcement efforts, although we still await a corporate resolution under the U.K. Bribery Act 2010. Other countries, including India and South Korea, considered new anti-corruption legislation, and the European Union introduced several directives touching on anti-corruption issues.

A. The U.K.

While the SFO was active in anti-corruption enforcement this year, it has not yet secured a corporate enforcement action under Section 7 of the Bribery Act, which criminalizes the failure of organizations to prevent bribery. The absence of a substantial number of completed Bribery Act cases at this juncture should not be entirely surprising, given a number of factors (including the fact that the Bribery Act does not apply retroactively, and thus any enforcement action must relate to conduct that occurred subsequent to the Act's entry into force in July 2011). Nevertheless, companies still have very little guidance on the SFO's interpretation of key elements of the offense, including the Bribery Act's extraterritorial reach and the content of "adequate procedures" sufficient to defeat a Section 7 charge.

The lack of corporate enforcement actions under the Bribery Act also means we have yet to see how the SFO will make use of DPAs, which were introduced to the U.K. legal system in February. The SFO published a detailed DPA Code of Practice for prosecutors, and SFO representatives have consistently stated that cooperation will be an essential feature of any DPA, a development we will be watching closely in 2015. While the U.K. approach to DPAs builds upon the extensive and long-standing use of DPAs and similar tools by enforcement authorities in the U.S., substantial differences remain between the two regimes. Most notably, the U.K. DPA regime envisions an early and active role for judges, in contrast to the judiciary's traditionally less active role in approving and supervising DPAs in the U.S.

To date, the SFO's Bribery Act enforcement has focused on individuals. In December, the SFO concluded its first successful prosecutions against two individual defendants involved in a Ponzi fraud scheme related to biofuel investment products. The Bribery Act charges came about because one of the defendants bribed the other to participate in the scheme.

The SFO also brought enforcement actions and secured convictions against several corporations and individuals for conduct that predated the Bribery Act.

- **Alstom Subsidiaries Charged**. The fallout for Alstom extends well beyond its DOJ settlement: During the course of the year, the SFO brought charges against two of the company's U.K. subsidiaries. In July, the SFO charged Alstom Network UK in connection with alleged bribes paid in India, Poland, and Tunisia. In December, the agency charged a different subsidiary and two employees with bribing officials at a state-controlled Lithuanian energy company.
- **Smith & Ouzman Convicted**. In December, the SFO secured its first jury conviction of a corporate entity for offenses involving bribery of foreign public officials. Printing firm Smith & Ouzman Ltd. and two of its former employees were found guilty of corruptly agreeing to make payments to public officials to win contracts in Kenya and Mauritania, contrary to section 1(1) of the Prevention of Corruption Act 1906.
- **Innospec Employees**. An appeals court in the U.K. upheld the SFO's convictions of two former Innospec executives on bribery charges in connection with a scheme to bribe Indonesian officials to win supply contracts. Chemical company Innospec pleaded guilty to bribery charges in the U.K. and FCPA charges in the U.S. in 2010.

The U.K. authorities also tackled corruption issues this year by imposing regulatory fines on companies found to lack adequate anti-corruption and anti-money laundering policies and procedures, including Standard Bank and Besso Limited, each of which paid fines to the FCA that reflected discounts based on cooperation.

In October, the Definitive Corporate Sentencing Guideline for Fraud, Bribery and Money Laundering Offences came into force. The Guideline sets out a 10-step approach to sentencing, which must be followed unless the sentencing judge considers it to be contrary to the interests of justice to do so. Aggravating factors for corporate offenders include previous convictions, causing substantial harm to the integrity of the markets or local or national governments, cross-border offenses, and impacting a large number of victims. Mitigating factors include early voluntary self-reporting and proactive cooperation.

Finally, as part of a broader review of the U.K.'s anti-corruption strategy, in December, the U.K. government announced its "U.K. Anti-Corruption Plan." This plan is intended to set the strategic direction for all anti-corruption enforcement and compliance activity in the U.K. in the coming year and ensure greater collaboration and consistency across the public and private sectors. It sets out 66 action items including a commitment by the U.K. government to examine the case for a new offense of corporate failure to prevent economic crime modeled on the Bribery Act Section 7 offense, and to consider what more can be done to incentivize whistleblowers. Most of the actions are intended to be completed over the next 12 months, but we note that this period will include a general election in the U.K. (and possible change of government) in May 2015, which might affect implementation.

B. Canada

As discussed above, suspension and debarment is a lurking risk in any FCPA resolution. That risk has received increased attention in Canada. In March 2014, the Public Works and Government Services Canada ("PWGSC"), the main contracting arm of the Canadian federal government, implemented measures to strengthen its "Integrity Framework," which has the stated goal of supporting accountability and integrity in federal government contracts and real property transactions. Under the current iteration of the Integrity Framework, contractors face an automatic ten-year debarment period from government contracting in Canada following a guilty plea or conviction for certain types of offenses, including those related to bribery and corruption, whether the offenses occur under Canadian law or similar foreign laws such as the FCPA. The 10-year debarment applies to affiliates of the contractor, which is broadly interpreted to include any entities such as parent companies, subsidiaries, and other entities under common control. The Integrity Framework's provisions are not discretionary, and the only exception to the mandatory ten-year debarment rule is where "it is necessary to the public interest to enter into business with [the contractor]." This limited exception is applied on a case-by-case basis and likely results in "additional stringent controls, administrative measures, and monitoring under the contract." PWGSC does not maintain a list of ineligible suppliers, but instead verifies the conviction status of suppliers on a case-by-case basis.

Due to the breadth and mandatory application, the Integrity Framework as presently written could have serious implications for companies resolving FCPA actions. Because any guilty plea by an entity affiliated with a government contractor in Canada can trigger the mandatory debarment provision, companies may not be able to avoid the sweep of the Framework by taking a subsidiary-level guilty plea. Facing criticism of these sweeping rules and a potential loss of suppliers, Canada's federal government reportedly is considering amendments to the Integrity Framework. PWGSC's communications director acknowledged in late January 2015 that PWGSC was in the process of setting up a special committee to review its integrity rules with the assistance of industry groups and an independent procurement ethics expert.

While companies may be focused on the Integrity Framework, Canada also stepped up its enforcement efforts against individuals in 2014. In May, Ottawa businessman Nazir Karigar was sentenced to three years in prison for his role in a failed bribery scheme intended to help Cryptometrics Canada win a contract to supply facial recognition software to Air India — the first prison sentence received by an individual for violating the Canadian Corruption of Foreign Public Officials Act. Since Karigar's sentencing, the Royal Canadian Mounted Police has charged two U.S. nationals and a U.K. national in connection with the same conspiracy.

C. India

In January 2014, India's President signed into law the Lokpal and Lokayuktas Act, 2013, a landmark law aimed at combating corruption by creating an anti-graft "Lokpal" (*i.e.*, ombudsman) with broad powers to prosecute politicians, ministers, and senior civil servants, including the country's Prime Minister. Progress establishing the new anti-corruption body has been slow, and a bill was introduced in December to change the composition of the committee tasked with appointing the leader and members of the Lokpal.

D. South Korea

The April 2014 sinking of the Sewol ferry, which resulted in over three hundred deaths and was widely attributed to corruption-related regulatory failures, reportedly increased pressure on South Korean National Assembly lawmakers to strengthen anti-corruption legislation. Although efforts were made in 2014 to pass a new anti-corruption law, the bill was tabled in January 2015 for further consideration of controversial provisions expanding the definition of "public officials" to include relatives of public officials and groups whose work was considered by the bill's drafters to be of a public nature (such as employees of private schools and news media organizations).

E. The European Union

The E.U. legislative agenda focused on anti-corruption issues last year. In February 2014, the European Commission published the first E.U. Anti-Corruption Report, highlighting the enhanced visibility of anti-corruption issues on the political agendas of E.U. Member States in the wake of the financial crisis. In addition, several new directives addressed corruption issues, including a directive aimed at eliminating corruption in public procurement procedures, amendments to the Anti-Money Laundering Directive under which national registries of beneficial corporate ownership will be created, and a directive that will require large listed companies (and other large "public interest" entities, such as credit institutions and insurance companies) to publish annual non-financial statements describing anti-bribery policies and due diligence procedures, the outcome of those policies, the principal anti-corruption risks within the company, and how those risks are managed.

Although not directly related to anti-corruption issues, a proposed new E.U. data regulation will be closely watched by companies that must undertake cross-border investigations. In March 2014, the European Parliament introduced several amendments to the regulation, including a controversial provision that, if approved, would restrict the ability of companies to deliver data to non-E.U. authorities without first obtaining the permission of European privacy regulators. If the provision is included in the final regulation, it could create challenges for companies required to produce documents that are located in the E.U. in order to comply with subpoenas or regulatory requests in the U.S.

At the same time, the E.U. and U.S. continue to negotiate a revised "Safe Harbor" framework for the transfer of data between the two jurisdictions. The negotiations leave in doubt the future of the framework, which permits U.S. companies that self-certify under the framework to receive personal data from the E.U. to the U.S. in compliance with E.U. data protection laws. We will be watching closely to see whether the E.U. and U.S. reach agreement on a new framework in 2015, as the Safe Harbor makes it significantly easier for companies that are registered to conduct cross-border investigations in the E.U. and U.S.

F. Multilateral Development Banks

The World Bank and other multilateral development banks ("MDBs") remained active in anti-corruption enforcement in 2014. In October, the World Bank's Integrity Vice Presidency ("INT") issued its annual report, which stated that INT's investigative efforts led to the sanctioning of 71 firms and individuals in the preceding year for misconduct including corruption, collusion, fraud, obstruction, and coercive practices. There were also a number of cross-debarments between the World Bank and other MDBs.

In addition to suspension and debarment, there is also a risk that the MDBs may seek substantial monetary penalties under negotiated resolution agreements. In May 2014, the Integrity and Anti-Corruption Department ("IACD") of the African Development Bank Group ("AfDB") debarred several Portugal-based joint ventures associated with the Bonny Island, Nigeria TSKJ consortium, and imposed fines totaling $22.7 million on the companies involved in the misconduct. The IACD Director stated that the financial penalties were "among the highest ever imposed by any multinational development bank and send out a credible signal that the AfDB will not tolerate corrupt practices in any of its projects."

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