Top 10 International Anti-Corruption Developments for November 2018

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Client Alert

In order to provide an overview for busy in-house counsel and compliance professionals, we summarize below some of the most important international anti-corruption developments from the past month, with links to primary resources. This month we ask: How will new policies announced by the U.S. Department of Justice (DOJ) affect prosecutions of individuals and cases involving China? How is one African country reacting to alleged bribery by Chinese nationals? How many FCPA-related tips did the U.S. Securities and Exchange Commission (SEC) Office of the Whistleblower receive in Fiscal Year 2018? The answers to these questions and more are here in our November 2018 Top 10 list.

1. **DOJ Announces Revisions to the Yates Memo.** On November 29, 2018, Deputy Attorney General (DAG) Rod Rosenstein announced changes to the September 2015 “Yates Memo” on individual accountability for corporate wrongdoing. Under the Yates Memo, companies seeking cooperation credit in criminal cases were required to “identify all individuals involved in or responsible for the misconduct at issue.” Under the revised policy, companies must “identify every individual who was substantially involved in or responsible for the criminal conduct.” Although he did not expressly define “substantial involvement,” the DAG suggested that the term would include those individuals “who authorized the misconduct” or otherwise “play[ed] significant roles in setting a company on a course of criminal conduct,” as opposed to an individual in a large corporation whose “routine activities … were part of an illegal scheme” or “who are not likely to be prosecuted.” In civil cases, DOJ attorneys may now offer partial cooperation credit. For maximum credit in a civil case, a company “must identify every individual person who was substantially involved in or responsible for the misconduct.” But a company may also receive partial cooperation credit “even if the company is either unwilling to stipulate about which non-managerial employees are culpable, or eager to resolve the case without conducting a costly investigation to identify every individual who might face civil liability in theory, but in reality would not be sued personally.” Because the purpose of these changes was to bring policy in line with actual practice—according to the DAG, the Yates Memo was not being “strictly enforced” in all cases—it is not clear that the revisions will substantially change DOJ’s approach to corporate prosecutions. Nevertheless, by relaxing the strict language of the Yates Memo, it may offer companies additional room to advocate for cooperation credit and to pursue more expeditious resolutions.

2. **DOJ Announces China Initiative.** On November 1, 2018, Attorney General Jeff Sessions announced that he had ordered the creation of a “China Initiative” designed to identify trade theft cases and to ensure that DOJ assigns adequate resources to prosecute them and to bring them “to an appropriate conclusion quickly and effectively.” The China Initiative will be led by DOJ’s
National Security Division, with the participation of several other DOJ components, including the Criminal Division, which houses the FCPA Unit. Although Attorney General Sessions did not mention the FCPA in his remarks, a Fact Sheet on the China Initiative stated that one of the Initiative’s goals is to “Identify Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete with American businesses.” If this goal is carried out, it will be a break from DOJ’s usual FCPA enforcement practice. With certain exceptions, such as the pharma initiative, DOJ has pursued FCPA cases opportunistically, relying on corporate self-disclosures, whistleblowers, media articles, and similar sources to make cases as evidence becomes available. To be sure, DOJ has used information learned in one case to pursue related cases, which has sometimes resulted in a sustained focus on a particular region or industry. DOJ has also long stressed that FCPA enforcement helps level the playing field for American businesses competing in global markets. But, to our knowledge, DOJ has not previously set out to identify cases involving companies from a specific country that are competing with U.S. businesses. We will see over time how much of a break in practice the China Initiative will actually be.

3. Third Circuit Denies Business Executive’s Appeal in FCPA Case Involving Multilateral Development Bank. On November 8, 2018, the U.S. Third Circuit Court of Appeals rejected Dimitrij Harder’s efforts to reduce his five-year term of imprisonment for violating the FCPA. Harder pleaded guilty in April 2016 in the Eastern District of Pennsylvania to two counts of violating the FCPA for allegedly bribing a senior official at the European Bank for Reconstruction and Development (EBRD) to secure millions of dollars for development projects in Eastern Europe. In July 2017, he was sentenced to five years’ imprisonment. On appeal, Harder challenged the district court’s sentencing calculations, arguing that he should have received a reduced sentence because his bribery did not cause a loss to any victim (Harder argued that the projects involved in the bribery scheme were, in fact, economically beneficial) and that his sentence created an unwarranted sentencing disparity since the average sentence for a defendant in an FCPA case over the past ten years was 13 months’ imprisonment, while one third of convicted FCPA defendants received probation. In rejecting Harder’s appeal, the Third Circuit held that the district court had considered all of Harder’s arguments as procedurally required, that his sentence was within the Sentencing Guidelines range, and that, “If anything, the chart [of sentences in other FCPA cases] reflected a lack of general consensus on the appropriate sentences for FCPA violators.”

4. Texas-Based Offshore Drilling Company Resolves Brazil FCPA Allegations with SEC. On November 19, 2018, SEC announced that Vantage Drilling International agreed to disgorge $5 million to resolve allegations that its predecessor, Vantage Drilling Company (VDC), failed to implement adequate internal controls in connection with its relations with its largest shareholder and third-party agents. According to the SEC’s administrative order, VDC lacked sufficient internal accounting controls in relation to the heightened risk of conducting business in the oil and gas industry in Brazil and, as a result, increased the risk that it financed bribes to officials at Brazil’s national oil company, Petróleo Brasileiro S.A. (Petrobras), by making certain payments to the shareholder in 2008 and 2012. The company neither admitted nor denied the allegations. In August 2017, the company announced that DOJ had declined to pursue charges in the same matter.

5. DOJ and SEC Decline FCPA Charges against U.S.-Based Education Company. In a November 29, 2018 securities filing, Laureate Education, Inc. disclosed that it had received letters from DOJ and SEC stating that the agencies had closed their investigations into an $18 million donation by one of the company’s network institutions in Turkey. In 2016, the company disclosed that it was conducting an internal investigation into the circumstances of the donation and had voluntarily disclosed the matter to DOJ and SEC. The company also reported it had taken steps to enhance its internal controls and compliance policies and had terminated a senior executive who improperly directed the disbursement of donation funds.
6. **Three Venezuelan Citizens Charged with PDVSA-Related Offenses.** On November 20, 2018, DOJ announced that Raúl Gorrin Belisario, a Venezuelan billionaire who owns Globovision news network, had been charged in the Southern District of Florida with conspiring to violate the FCPA’s anti-bribery provisions and to launder millions of dollars. According to the recently unsealed indictment, the conspiracy allegedly involved laundering funds through a bank in the Dominican Republic in order to pay bribes to Venezuelan government officials in exchange for contracts to conduct currency exchange schemes. Gorrin has been accused of wiring money to the officials and providing them with access to private jets, yachts, homes, horses, high-end watches, and a fashion line through various shell companies. One of the officials whom Gorrin allegedly bribed was Alejandro Andrade Cedeño, Venezuela’s former national treasurer, who pleaded guilty under seal in the Southern District of Florida in December 2017 to one count of conspiracy to commit money laundering. On November 27, 2018, DOJ announced that Andrade had been sentenced to 10 years’ imprisonment and ordered to forfeit $1 billion, as well as all of the assets involved in the alleged scheme, including vehicles, horses, aircraft, real estate, and watches. On November 29, 2018, DOJ announced that Gabriel Arturo Jiménez Aray, the former owner of the Dominican Republic bank through which the funds were allegedly laundered, was sentenced to three years in prison for facilitating illegal transactions and bribes through the bank as part of the currency exchange scheme. Jiménez had pleaded guilty under seal in the Southern District of Florida in March 2018 to one count of conspiracy to commit money laundering. These are the latest charges to be announced in the sprawling investigation into alleged corruption and embezzlement at Venezuela’s national oil company, Petróleos de Venezuela S.A. (PDVSA).

7. **Petroecuador Seeks Restitution from Former Adviser in Bribery Case.** On November 27, 2018, Jose Larrea, a former financial advisor at Ecuador’s national oil company, Petroecuador, was sentenced to 27 months’ imprisonment for his role in an alleged conspiracy to commit money laundering. Larrea pleaded guilty in the Southern District of Florida in September 2018 and admitted to wiring over $1 million between U.S. bank accounts to conceal an alleged bribery scheme involving payments made to Petroecuador officials in an effort to obtain new business from the company. On November 26, 2018, Petroecuador filed a motion for the court to recognize its status as a victim and for an order of restitution. Petroecuador likely faces an uphill battle. The same district court judge, Marcia G. Cooke, rejected a similar claim for restitution by Costa Rica’s state-owned telecommunications company, Instituto Costarricense de Electricidad (ICE), in an FCPA case in 2011. (The U.S. Eleventh Circuit Court of Appeals dismissed ICE’s appeal for lack of jurisdiction in August 2012.) Nevertheless, the ICE decision was fact-intensive, turning on the district court’s finding that ICE was a co-conspirator in the bribery scheme, and it is possible that Petroecuador will fare differently, making this an interesting case to watch.

8. **SEC Annual Whistleblower Report Documents “Record-Breaking” Total Awards and Number of Tips.** On November 15, 2018, the SEC Office of the Whistleblower published its annual report to Congress. According to the report, the office enjoyed a “record-breaking” year in fiscal year 2018, ordering its largest whistleblower awards to date, awarding more money to whistleblowers who provided ”new and critical information” than in all prior years combined, and receiving the highest number of whistleblower tips than in any previous year (a 76% increase since FY 2012). According to the report, 202 of the record 5,282 tips received in FY 2018 related to the FCPA, down slightly from the 210 FCPA-related tips received in FY 2017. The report noted that the Supreme Court’s February 2018 decision in Digital Realty Trust, Inc. v. Somers to limit Dodd-Frank anti-retaliation protections to whistleblowers who report directly to SEC may have contributed to the uptick in tips in 2018. We predicted such an uptick in our discussion of the Digital Realty case in the February 2018 Top 10. The report is thus another reminder that companies should take steps to ensure that their whistleblower policies and procedures, including anti-retaliation policies, appropriately encourage internal self-reporting. The report noted that SEC staff is currently...
reviewing comments on new rules proposed in response to Digital Realty that were submitted during a public comment period that ended in September 2018. The report also noted that whistleblower tips were received from individuals in 72 foreign countries, with individuals in Canada (89), the UK (85), Australia (45), and China (40) leading the way.

9. SFO Update.

- **SFO Achieves Mixed Results in Oil Contract Bribery Case.** On November 27, 2018, the UK Serious Fraud Office (SFO) announced that three former FH Bertling Group senior executives and one ConocoPhillips employee were convicted for their roles in alleged schemes in which FH Bertling employees made corrupt payments to secure a ConocoPhillips freight forwarding contract, eventually worth over £16 million, and to ensure that ConocoPhillips would ignore inflated prices that FH Bertling charged for additional freight services. Stephen Emler (FH Bertling) and Giuseppe Morreale (FH Bertling) pleaded guilty in connection with the freight forwarding contract; while Christopher Lane (ConocoPhillips) pleaded guilty and a jury convicted Colin Bagwell (FH Bertling) in connection with the overcharging scheme. The SFO also announced that three other individuals had been acquitted on related charges on November 27, 2018. (See our September 2017 Top 10 for more on this case.)

- **SFO Announces Key Priorities.** In a November 21, 2018 speech, Matthew Wagstaff, the SFO’s Joint Head of Bribery & Corruption, announced three key priorities for the SFO: (1) progressing cases “at pace,” particularly at the investigation phase; (2) working collaboratively with partners, particularly DOJ, as international anti-corruption enforcement increases; and (3) making the best use of available tools, particularly corporate liability for failure to prevent bribery under the U.K. Bribery Act and deferred prosecution agreements.

10. **Three Chinese Nationals Charged with Bribery in Kenya.** On November 26, 2018, prosecutors in Kenya charged three senior employees of China Roads and Bridges Corporation with attempting to bribe Kenyan investigators with 900,000 Kenya shillings ($8,000) to influence an investigation into an alleged plot to skim millions of shillings from the daily revenue of a $3.2 billion railway project funded by China. The arrests are the latest in a series of high profile corruption charges against Chinese nationals and Kenyan officials working on Chinese-funded infrastructure projects in Kenya in recent years. In September 2015, Kenya’s Ethics and Anti-Corruption Commission arrested two senior officials at China Roads and Bridges Corporation for allegedly bribing authorities to avoid charges for overloaded trucks. In August 2018, two senior Kenyan officials were also charged with fraud related to the payment of over $2 million to entities who falsely claimed ownership of land affected by the Chinese-funded railway line.

**Endnote**

FCPA: Sets a High Bar for Compliance

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