GIBSON DUNN

July 7, 2014

2014 MID-YEAR FCPA UPDATE

To Our Clients and Friends:

Aggressive cross-border anti-corruption enforcement continued during the first half of 2014, as U.S. and foreign prosecutors pursued companies, individuals, and public officials across the globe for all manner of corruption-related offences. From football to finance, presidents to parliamentarians, no industry or individual was immune from the reach of zealous law enforcement authorities at home and abroad. The first six months of the year also witnessed a number of significant anti-corruption-related legal developments in the United States, including the Eleventh Circuit's first-of-its-kind interpretation of the term "instrumentality" in the U.S. Foreign Corrupt Practices Act ("FCPA").

This client update provides an overview of the FCPA as well as domestic and international anti-corruption enforcement, litigation, and policy developments from the first half of 2014.

FCPA OVERVIEW

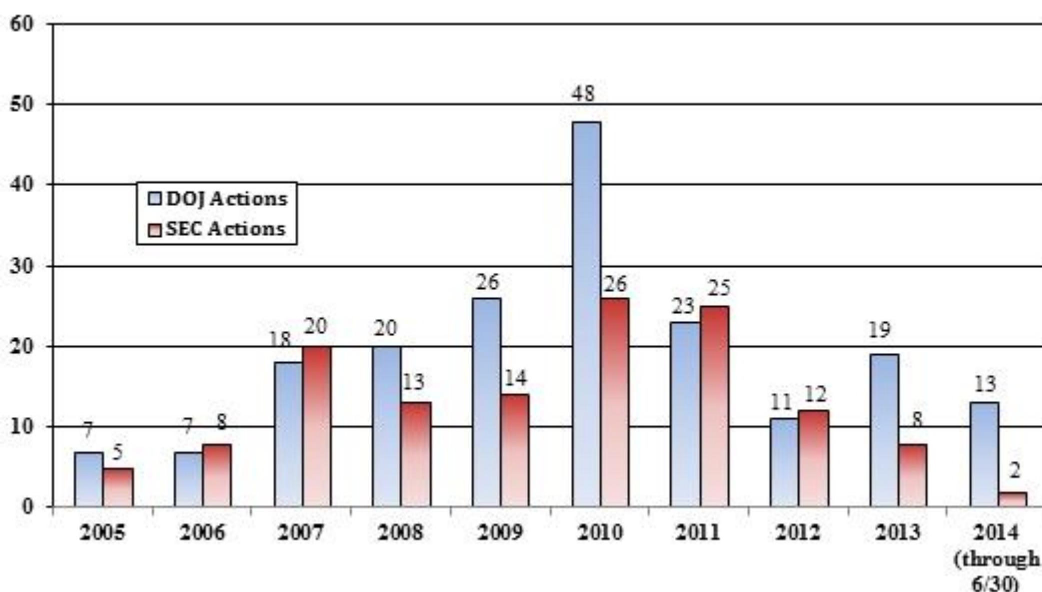
The FCPA's anti-bribery provisions make it illegal to corruptly offer or provide money or anything of value to officials of foreign governments or foreign political parties with the intent to obtain or retain business. These provisions apply to "issuers," "domestic concerns," and "agents" acting on behalf of issuers and domestic concerns, as well as to "any person" that violates the FCPA while in the territory of the United States. The term "issuer" covers any business entity that is registered under 15 U.S.C. § 78l or that is required to file reports under 15 U.S.C. § 78o(d). In this context, foreign issuers whose American Depository Receipts ("ADRs") are listed on a U.S. exchange are "issuers" for purposes of the FCPA. The term "domestic concern" is even broader and includes any U.S. citizen, national, or resident, as well as any business entity that is organized under the laws of a U.S. state or that has its principal place of business in the United States.

In addition to the anti-bribery provisions, the FCPA also has "accounting provisions" that apply to issuers and their agents. First, there is the books-and-records provision, which requires issuers to make and keep accurate books, records, and accounts, that in reasonable detail, accurately and fairly reflect the issuer's transactions and disposition of assets. Second, the FCPA's internal controls provision requires that issuers devise and maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations. Prosecutors and regulators frequently invoke these latter two sections when they cannot establish the elements for an anti-bribery prosecution or as a mechanism for compromise in settlement negotiations. Because there is no requirement that a false record or deficient control be linked to an improper payment, even a payment that does not constitute a violation of the anti-bribery provisions can lead to prosecution under the accounting provisions if inaccurately recorded or attributable to an internal controls deficiency.

2014 MID-YEAR FCPA ENFORCEMENT STATISTICS

The following table and graph detail the number of FCPA enforcement actions initiated by the statute's dual enforcers, the U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC"), during each of the past ten years.

2005		**2006**		**2007**		**2008**		**2009**		**2010**		**2011**		**2012**		**2013**		**2014 (through 6/30)**	
DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC
7	5	7	8	18	20	20	13	26	14	48	26	23	25	11	12	19	8	13	2



2014 FCPA ENFORCEMENT ACTIONS (through June 30)

Corporate Enforcement Actions

Alcoa Inc.

On January 9, 2014, the SEC and DOJ announced FCPA settlements with ***Alcoa Inc.*** ("Alcoa") and one of its U.S.-based subsidiaries, Alcoa World Alumina LLC ("Alcoa World"), respectively. The charges stem from a 2004 agreement to supply alumina (the raw material used to produce aluminum) between Alcoa World and the Kingdom of Bahrain's majority-owned aluminum smelter, Aluminium Bahrain ("Alba"). According to the charging documents, in the late 1980s certain members of the Bahraini Royal Family with influence over Alba's procurement processes requested that another Alcoa

subsidiary, Alcoa of Australia, insert an "international middleman" into the contractual relationship between the two entities. This "middleman" is not identified in the court documents, but press reports identify him as Victor Dahdaleh, the billionaire whose prosecution in the United Kingdom recently collapsed as described in our 2013 Year-End FCPA Update.

According to the charging documents, for nearly 20 years, Alcoa World and Alcoa of Australia supplied alumina to Alba through contracts with various so-called "shell entities" owned by Dahdaleh, enabling significant pricing markups that allegedly created margin used to make corrupt payments to the Bahraini Royal Family members. With respect to the supply agreement that was the subject of the charges, Alcoa World allegedly caused Dahdaleh to receive in excess of $188 million, from which amount tens of millions of dollars in bribes were allegedly paid.

To resolve the charges, Alcoa World pleaded guilty to one count of violating the FCPA's anti-bribery provisions and agreed to pay $223 million, consisting of a $209 million criminal fine and $14 million in administrative forfeiture. Alcoa, in turn, consented to the filing of a settled administrative proceeding charging FCPA bribery, books-and-records, and internal controls violations and imposing $161 million in disgorgement (net of a $14 million credit for the administrative forfeiture in DOJ's settlement). Alcoa's combined $384 million settlement is the fifth-largest FCPA settlement of all time. But as significant as is this financial penalty, it was still less than Alcoa World's gain from the relevant transactions--alleged by DOJ to have been $446 million. According to DOJ, the criminal fines were significantly reduced for a host of factors, including Alcoa's financial condition and "extensive cooperation" in the investigation.

In addition to their sheer size, the Alcoa and Alcoa World settlements are notable for the legal theories upon which they rely. First, both DOJ and the SEC employed a "willful blindness" / "conscious disregard" theory in their respective bribery charges. To support this theory, the Government cited passages from various internal company memoranda, including statements like "[t]he methodology of business in the Middle East is a complex web of interactions that are necessarily difficult to understand to disguise the payment of commissions. The SEC alleged that "[u]nlike a true distributorship," Dahdaleh's companies "never took possession of the alumina, assisted with the shipping arrangements, or otherwise performed any legitimate services for [Alcoa] or Alba"--the only function Dahdaleh "provided was to invoice Alba for the shipments at a significant markup." DOJ and the SEC also noted that Alcoa World executives continued to utilize Dahdaleh for sales to Alba after Alcoa's lawyers questioned the relationship on FCPA grounds, because "[t]he Distributorship rol[e] is something the Bahrain Government wants" and Alcoa "shouldn't get too involved with how the Distributor and the Government interact." Second, the SEC additionally relied upon an "agency" theory to charge the issuer, Alcoa, for the alleged bribery of its non-issuer subsidiaries, even after acknowledging that the order "contains no findings that an officer, director or employee of Alcoa knowingly engaged in the bribe scheme." In assigning liability to the parent issuer, the SEC alleged that: (1) Alcoa appointed the majority of representatives on one subsidiary's "Strategic Council" (and Alcoa's Head of Global Primary Products served as its chair); (2) Alcoa set the subsidiaries' "business and financial goals and coordinated [their] legal, audit, and compliance functions"; (3) the subsidiaries' employees who oversaw the Alba business reported functionally to an Alcoa manager; and (4) Alba was a significant customer, and Alcoa managers met with Alba officials and the middleman.

Marubeni Corporation

On March 19, 2014, Japanese trading company ***Marubeni Corporation*** ("Marubeni") pleaded guilty to one count of conspiracy to violate the FCPA's anti-bribery provisions, as well as seven substantive bribery counts. According to the criminal information, Marubeni employees utilized intermediaries to pay bribes to Indonesian officials, including a high-ranking Member of Parliament and senior officials in the state-owned electricity company, to secure their assistance in obtaining a $118 million power contract for itself and its Connecticut-based consortium partner, widely reported to be Alstom Power Inc. ("Alstom").

To resolve the criminal charges, Marubeni agreed to pay an $88 million fine. Notably, Marubeni's plea agreement makes clear that DOJ increased the fine based on, among factors, Marubeni's: (1) failure to voluntarily disclose its conduct; (2) refusal to cooperate with the investigation when given the opportunity to do so; (3) lack of an effective compliance and ethics program when the offense occurred; (4) failure to properly remediate; and (5) prior history of criminal conduct. The last factor is a reference to the fact that this was not Marubeni's first brush with the FCPA. As covered in our 2012 Mid-Year FCPA Update, in January 2012 Marubeni entered into a two-year deferred prosecution agreement to resolve charges arising from Marubeni's participation in the now notorious Bonny Island "TSKJ" consortium in Nigeria.

Related charges against a number of Alstom executives are discussed below.

Hewlett-Packard Company

On April 9, 2014, DOJ and the SEC announced the settlement of FCPA charges with ***Hewlett-Packard Company*** ("HP") and three of its subsidiaries in connection with alleged improper payments to government officials in Mexico, Poland, and Russia. To settle the criminal charges, a Russian subsidiary of HP agreed to plead guilty to FCPA bribery, books-and-records, and internal controls charges; a Polish subsidiary of HP agreed to enter into a deferred prosecution agreement on FCPA books-and-records and internal controls charges; and a Mexican subsidiary of HP entered into a non-prosecution agreement to avoid potential FCPA books-and-records and internal controls charges. Cumulatively, the HP subsidiaries agreed to pay $76.8 million to resolve the criminal charges. The SEC also filed a settled administrative proceeding against HP alleging FCPA books-and-records and internal controls violations, pursuant to which the company agreed to pay an additional $31.5 million in disgorgement and prejudgment interest (net of a $2.5 million credit for an administrative forfeiture in connection with the criminal resolution in Mexico), bringing the total resolution amount to just over $108 million.

Notably, the HP resolution did not involve criminal charges of any kind against the parent entity. HP also received a credit against its criminal fine in Russia for a potential payment that may be made in the future in connection with an ongoing related proceeding in Germany, and a credit against its SEC disgorgement figure for an administrative forfeiture undertaken by DOJ in connection with the criminal resolution in Mexico. These settlements demonstrate the creative measures that may be undertaken by companies in negotiating the resolution of FCPA charges.

Gibson Dunn represented HP in its DOJ/SEC settlement negotiations.

Individual Enforcement Actions

PetroTiger Defendants

On January 6, 2014, DOJ announced FCPA and other charges against ***Knut Hammarskjold***, ***Joseph Sigelman***, and ***Gregory Weisman***, respectively the former co-CEOs and general counsel of British Virgin Islands oil and gas company PetroTiger Ltd. ("PetroTiger"). According to the charging documents, the PetroTiger defendants collectively made four payments totaling more than $330,000 to an official of Ecopetrol S.A., a Colombian state-owned petroleum company, in exchange for the official approving a nearly $40 million oil services contract for PetroTiger. Additionally, the defendants were charged with a separate scheme to defraud PetroTiger by agreeing to pay an inflated price for a target company PetroTiger acquired in exchange for kickbacks from the seller.

Weisman agreed to plead guilty to a dual-purpose conspiracy count--covering both the FCPA and wire fraud schemes--in 2013, but the charges remained under seal until both Hammarskjold and Sigelman were arrested. Hammarskjold was arrested at Newark Liberty International Airport on November 20, 2013 and subsequently agreed to plead guilty to the same dual-purpose conspiracy count as Weisman in February 2014. Sigelman was arrested in the Philippines on January 3, 2014, and has to date pleaded not guilty, causing DOJ to indict him on six counts of FCPA bribery, wire fraud, money laundering, and conspiracy. Sigelman's trial is currently set for January 2015.

Group DF Defendants

On April 2, 2014, DOJ announced the unsealing of a June 2013 grand jury indictment charging six foreign nationals in connection with a scheme to bribe state and central government officials in India to corruptly procure titanium mining rights in Andhra Pradesh State. Five of the defendants were charged with FCPA bribery, among other charges, including ***Dmytro Firtash*** and ***Suren Gevorgyan*** of Ukraine, ***Andras Knopp*** of Hungary, ***Gajendra Lal***, a native of India and permanent resident of the United States, and ***Periyasamy Sunderalingam*** of Sri Lanka. Additionally, ***K.V.P. Ramachandra Rao***, a Member of the Indian Parliament who previously served as a state government official in Andhra Pradesh, was charged with money laundering in connection with his alleged receipt of the bribes. (As a foreign official, Rao is not subject to the FCPA.) Firtash, the alleged leader of the conspiracy and reportedly one of Ukraine's wealthiest men, controls an international conglomerate of corporations with interests in mineral mining and processing, organized under the corporate umbrella of the British Virgin Islands company Group DF Limited ("Group DF").

According to the indictment, in 2006 a Group DF company agreed with the State of Andhra Pradesh to set up a joint venture to mine various minerals in the region, including ilmenite (a mineral used in the production of various titanium-based products). Before mining could begin, certain licenses were required at both the state- and central-government level in India. Firtash allegedly authorized the payment of at least $18.5 million in bribes to various officials of these governments in order to obtain the licenses and further directed his subordinates to create false documentation to make it appear that these payments were made for legitimate purposes.

After residing under seal in the Clerk's Office for the U.S. District Court for the Northern District of Illinois for nearly a year, the indictment was unsealed with Firtash's arrest in Austria at the request of U.S. authorities. Firtash has since been released upon the posting of $174 million bail (paid in cash) and his promise to remain in Austria pending extradition proceedings. His co-defendants remain outside the reach of U.S. law enforcement, including Lal, the only U.S. resident of the group, who reportedly fled to Moscow to escape what he has since described as undue pressure from the Federal Bureau of Investigation ("FBI") to testify (he claims falsely) against Firtash.

In addition to the defendants' prosecution in U.S. federal court, DOJ also is seeking the forfeiture of Firtash's interest in the Group DF conglomerate, which has been described by the New York Times as "the corporate version of Russian nesting dolls, shells within shells within shells." DOJ's forfeiture allegations extend to more than 150 separate companies and 41 enumerated bank accounts, from Austria, to Cyprus, to Hungary, to the Netherlands, to Switzerland.

As interesting as is the story of this indictment, it is only the tip of the iceberg in an investigation that has all the intrigue and complexity of a John le Carré novel. Tentacles of this matter stretch back to a politically-charged investigation undertaken by several prominent U.S. law and investigative firms in 2010 at the behest of the Pro-Russian Viktor Yanukovych Administration in Ukraine. The investigation reportedly found evidence of corruption involving former Pro-Western Ukrainian Prime Minister Yulia Tymoshenko, which ultimately led to the prosecution and conviction of Tymoshenko (a prosecution that the White House publicly denounced as "politically motivated"). Not going down without a fight, Tymoshenko hired her own prominent U.S. law and investigative firms to refute the allegations against her and retaliated with a civil RICO and malicious prosecution lawsuit against Firtash, who is closely associated with the now-former Yanukovych Administration, in the Southern District of New York. That suit remains pending before the Honorable Kimba M. Wood. Firtash's arrest at the request of U.S. authorities occurred the same day that new Ukrainian Prime Minister Arseniy Yatsenyuk was visiting with U.S. President Barack Obama in the Oval Office, although DOJ denies any connection between the two events.

From the FCPA practitioner's standpoint, a noteworthy aspect of this case is its aggressive assertion of U.S. jurisdiction over foreign conduct allegedly undertaken almost exclusively by foreign nationals. Speaking to this point in announcing the indictment, Chicago U.S. Attorney Zachary T. Fardon stated, "[c]riminal conspiracies that extend beyond our borders are not beyond our reach." As its jurisdictional basis, the indictment alleges transfers of corrupt payments through U.S. bank accounts and several meetings held in the U.S. in contemplation of potential Group DF sales of titanium products to unidentified U.S.-based companies.

More Direct Access Partners Defendants

We reported in our 2013 Mid-Year and Year-End FCPA updates on DOJ's prosecution of certain former employees and managers of New York-based broker-dealer Direct Access Partners LLC ("DAP"), as well as the official of Venezuelan state-owned bank, Banco de Desarrollo Económico y Social de Venezuela ("BANDES"), who allegedly received their bribes. All pleaded guilty and it appeared for a moment that the case may be done.

But on April 14, 2014, DOJ announced indictments of DAP's former CEO ***Benito Chinea*** and Global Markets Group Managing Partner ***Joseph DeMeneses***. Chinea and DeMeneses are charged with conspiracy and substantive FCPA bribery, Travel Act, and money laundering offenses related to the scheme to pay kickbacks to the BANDES official in return for the steering of BANDES trading business to DAP, as well as obstruction charges against DeMeneses that arise from his alleged instruction to other DAP employees to delete e-mails ahead of the SEC broker-dealer examination that ultimately led to the FCPA investigation.

Chinea and DeMeneses have pleaded not guilty and are currently scheduled for trial in February 2015. As discussed in prior updates, the SEC also has a fraud complaint pending against certain DAP defendants arising from the same course of conduct, but not charged under the FCPA in light of the fact that the SEC has FCPA jurisdiction only over "issuers"--not broker-dealers. The day after Chinea's and DeMeneses's arrests were announced, the SEC sought leave to amend its complaint to add them as defendants in the civil case, which leave was granted when the defendants failed to oppose. The SEC's amended complaint also alleges a new bribery scheme against all defendants involving kickbacks paid to a government official of a separate Venezuelan state-owned bank, Banfoandes. Notwithstanding the amended complaint, the SEC's case is presently stayed pursuant to DOJ's request pending completion of the criminal investigation.

DAP shut its doors in 2013, after its primary clearing firm ceased executing its trades in response to the FCPA investigation. The broker dealer subsequently initiated bankruptcy proceedings.

Further complicating the chessboard, in late 2013 DAP filed suit against Chinea alleging the wrongful misappropriation of tens of thousands of electronic files that Chinea downloaded to a Dropbox account and forwarded to his personal e-mail account immediately prior to and following his termination. Chinea has defended the suit by arguing that his retention of the documents was authorized by DAP's other managing members and was motivated only by a need to defend himself in future proceedings. On January 8, 2014, the Honorable Louis L. Stanton of the U.S. District Court for the Southern District of New York denied DAP's motion for a preliminary injunction ordering the return of DAP's documents because, he found, DAP failed to show a likelihood of imminent harm where there was no evidence that Chinea had or planned to disseminate DAP's documents to third parties or otherwise publicize them. The case has now proceeded to discovery.

FCPA-Related Prosecutions

Even the most perfunctory perusal of FCPA enforcement dockets reveals that combining FCPA charges with other, related charges (*e.g.*, wire fraud, money laundering, Travel Act, etc.) is commonplace. But the FCPA's dual enforcement units also do not hesitate to bring purely non-FCPA charges where appropriate, as evidenced by the SEC's case against the DAP defendants described above and from the following prosecutions initiated by DOJ in the first half of 2014.

Asem Elgawhary

On February 10, 2014, DOJ announced the indictment of ***Asem Elgawhary***, a former general manager of Power Generation Engineering and Services Company ("PGESCo"), a joint venture between

Bechtel Corporation and Egyptian state-owned electricity company Egyptian Electricity Holding Company. Elgawhary is alleged to have accepted more than $5 million in kickbacks from prospective PGESCo vendors in exchange for giving them preferential treatment in the award of $2 billion in PGESCo subcontract awards. Further, Elgawhary allegedly failed to report the kickbacks he received on his tax returns.

The charges against Elgawhary include mail and wire fraud, conspiracy to commit money laundering, and tax evasion. Elgawhary has pleaded not guilty to all counts and his trial is scheduled to commence in February 2015. Motions relating to the case have been sealed.

Alfonso Portillo

The long-running prosecution of the former president of Guatemala in a New York courtroom came to an end this year. On June 11, 2014, ***Alfonso Portillo***, who led the Central American nation from 2000 to 2004, was sentenced to 70 months in prison by the Honorable Robert P. Patterson of the U.S. District Court for the Southern District of New York. Portillo pleaded guilty to the single count of conspiracy to commit money laundering in March 2014 and also agreed to forfeit $2.5 million.

Portillo is alleged to have accepted $2.5 million in bribes from the Government of Taiwan in exchange for Guatemala's continued recognition of Taiwan's sovereign status, and then to have laundered those proceeds through U.S. bank accounts. He was originally indicted in 2009, but not extradited to the United States to face the charge until 2013. Answering the question of the Manhattan U.S. Attorney's interest in the former president of Guatemala, U.S. Attorney for the Southern District of New York Preet Bharara stated, "[f]ormer President Alfonso Portillo may have thought his position of power prevented him from having to answer for accepting multi-million dollar bribes to shape his country's foreign policy [, b]ut he was wrong. . . . The U.S. banking system is not open for business to those seeking to hide illegal funds."

2014 MID-YEAR CHECK-IN ON ENFORCEMENT LITIGATION

SEC v. Ruehlen, et al. (Noble Corp. Defendants)

On July 2, 2014, one week before trial was to begin, the SEC agreed to no-admit/no-deny, no-penalty, injunction-only settlements with Gibson Dunn client ***James J. Ruehlen*** and co-defendant ***Mark A. Jackson***, respectively a current and former employee of Noble Corporation. The SEC's FCPA charges against Ruehlen and Jackson arose out of alleged payments that Noble purportedly made to customs officials in connection with renewing or extending temporary import permits for oil drilling rigs in Nigeria. As discussed in our 2012 Mid-Year FCPA Update, a third Noble employee, ***Thomas F. O'Rourke***, agreed not to contest the SEC's charges, and paid a $35,000 civil penalty in February 2012 for violations of the anti-bribery, books-and-records, and internal controls provisions. Noble also settled FCPA charges pre-litigation, agreeing to pay more than $8 million in November 2010.

Under the terms of the eve-of-trial settlements with Ruehlen and Jackson, approved by the Honorable Keith P. Ellison of the U.S. District Court for the Southern District of Texas on July 3, 2014, each defendant consented to judgment and a corresponding injunction with respect to a single record-

keeping claim without admitting or denying liability--a far cry from the numerous bribery, books-and-records, and internal controls charges initially filed against the two defendants. The settlements do not include a civil money penalty, disgorgement of any kind, or any restriction on Ruehlen's or Jackson's current or future employment.

The settlements come approximately one month after Judge Ellison denied all parties' motions for summary judgment, including the SEC's motion for partial summary judgment on the applicability of the FCPA's facilitating payment exception, at the conclusion of two days of oral argument on May 30, 2014.

As discussed in our 2012 Year-End FCPA Update, Judge Ellison ruled in December 2012 that the SEC bears the burden of negating the applicability of the facilitating payment exception. In its partial summary judgment motion, the SEC argued that the applicability of the exception turns on an "objective" inquiry into the content of foreign law, including whether the governmental action at issue is in fact authorized and "non-discretionary." The SEC filed an accompanying motion pursuant to Rule 44.1 of the Federal Rules of Civil Procedure for a determination by the Court that temporary import permits are discretionary under Nigerian law and that certain permits and permit extensions that Noble received were unlawful, including extensions in excess of the maximum authorized by an internal and unpublished Customs "Code" obtained by a former Nigerian customs officer whom the SEC retained as an expert. On the basis of its Rule 44.1 motion, the SEC argued that the payments Noble authorized to Nigerian officials in connection with renewing and extending temporary import permits cannot qualify as facilitating payments as a matter of law.

Also discussed in our 2012 Year-End FCPA Update was Judge Ellison's determination that the FCPA's usage of the term "corruptly" means "an act done with an evil motive or wrongful purpose of influencing a foreign official to misuse his position." In their motions for summary judgment, Ruehlen and Jackson argued that the undisputed evidence, including advice that Noble received from an accounting firm and a Nigerian lawyer concerning the temporary import regime in Nigeria, established that they reasonably believed that Noble was entitled to the temporary import permits it received, and thus could not have acted "corruptly."

The SEC moved to voluntarily dismiss the majority of its claims for violations of the FCPA's internal controls provisions just three days before the summary judgment deadline, purportedly "[t]o narrow th[e] case and streamline the presentation of evidence to the jury." In their motions for summary judgment on the SEC's remaining claims for violations of the FCPA's accounting provisions, the defendants argued, among other things, that the manner in which the payments were recorded (in an account entitled "facilitating payments") accurately reflected the "economic substance" of the transactions (that they were payments to government officials). The defendants also argued that contrary to the SEC's position, there is no accounting standard that required the payments at issue to be recorded in an account for "unlawful bribes."

Judge Ellison reserved decision on the motions to exclude each side's experts at the conclusion of the May 2014 hearing, and those motions were still pending when the settlements were announced on July 2. In addition to defense experts on accounting, internal controls, corporate governance, and

FCPA compliance programs, Ruehlen retained Dr. John Campbell, the former U.S. Ambassador to Nigeria and the current Senior Fellow for Africa Policy Studies at the Council on Foreign Relations, as an expert on Nigerian history, society, and governance. As reflected in his expert report, Ambassador Campbell would have testified, among other things, that (i) the nature and size of the payments that Noble authorized to Nigerian Customs officials were consistent with the types of payments that are universally made to Nigeria's poorly-paid civil servants; and (ii) such payments are made to secure the proper and timely performance of an official's responsibilities, and are viewed by Nigerians as legitimate and not "corrupt." The defense argued that Ambassador Campbell's opinions would support the reasonableness of Ruehlen's belief that the payments were required to timely secure permits to which Noble was entitled, as opposed to inducing Nigerian Customs officials to "misuse" their positions. By contrast, the SEC argued that Ambassador Campbell's testimony would improperly "rationaliz[e] bribery" and that admitting such testimony would effectively "eviscerate the prohibitions contained in the FCPA wherever rampant corruption exists." Notably, Judge Ellison in a number of instances during the May hearing recognized that evidence regarding the larger context of Nigeria as a country was necessary to understanding the case, at one point noting that he could not "see how anybody could make a judgment" concerning a payment to a Nigerian official "without knowing something about Nigeria."

The Ruehlen and Jackson settlements, earned only after two years of hard-nosed litigation that brought the parties to the brink of trial, demonstrate that those who are willing to put the Government to its burden of proof can come out materially better for their efforts.

***SEC v. Straub, et al.* (Magyar Telekom Defendants)**

We have been reporting for several years upon litigation commenced by the SEC in December 2011 against three former executives of Magyar Telekom, Plc.--***Andras Balogh***, ***Tamas Morvai***, and ***Elek Straub***--in the U.S. District Court for the Southern District of New York. The first half of 2014 was occupied by a heated discovery dispute between the parties concerning the defendants' invocation of their Fifth Amendment rights at SEC depositions and a joint effort by the parties to utilize the Hague Convention to take international discovery from 31 witnesses spread across four countries--Germany, Greece, Hungary, and Macedonia.

The Fifth Amendment issue comes up frequently in FCPA and other securities enforcement litigation with the SEC where DOJ has not wholly ruled out criminal prosecution of the SEC defendants. Here, DOJ had issued in March 2013 letters to each of the defendants advising that it had "closed its investigation of Magyar Telekom and its executives" and that it did "not intend to bring criminal charges against" the defendants. But these "declination letters" included the standard clause advising that "if additional information or evidence should be made available to us in the future, we reserve the right to reopen our inquiry." Based upon the theoretical possibility of prosecution left open by this clause, all three defendants invoked their Fifth Amendment during their November 2013 depositions in London and made it known that they would not answer substantive questions until December 2014--one month before the close of fact discovery--when in their view the criminal statute of limitations will have run. The Honorable Richard J. Sullivan ruled in May 29 and June 30, 2014 orders that a reasonable accommodation of the SEC's right to discovery and the defendants' right not to incriminate

themselves is for the depositions to occur in the United States by July 31, 2014, but be placed under seal until December 2014 pursuant to a protective order. If the defendants still refuse to answer questions at their second depositions, they will be precluded from testifying on the subjects of their invocations at trial.

***United States v. Hoskins, et al.* (Alstom Defendants)**

As discussed most recently in our 2013 Year-End FCPA Update, DOJ has filed criminal cases against four former Alstom executives--***Lawrence Hoskins***, ***Frederic Pierucci***, ***William Pomponi***, and ***David Rothschild***. Pierucci and Rothschild have pleaded guilty and are awaiting sentencing. Hoskins and Pomponi have pleaded not guilty and are each headed toward trial, with Pomponi's scheduled for November 2014. Hoskins's trial, if it goes forward, will not happen until June 2015. His case is running behind the others because he was not taken into custody on the 2013 indictment until April 2014 when, unaware of the (public) indictment and arrest warrant, he flew to the U.S. Virgin Islands en route to Dallas, Texas to visit a family member.

***United States vs. Esquenazi, et al.* (Eleventh Circuit Defines "Instrumentality")**

On May 16, 2014, the U.S. Court of Appeals for the Eleventh Circuit issued its long-anticipated ruling in the appeals of ***Joel Esquenazi*** and ***Carlos Rodriguez*** and, in doing so, became the first appellate court to interpret the term "instrumentality" as used in the FCPA. As reported in our 2011 Year-End FCPA Update, a jury sitting in the U.S. District Court for the Southern District of Florida convicted Esquenazi and Rodriguez on all 21 counts of the indictment, including seven substantive FCPA violations and one count of conspiracy to violate the FCPA, stemming from their involvement in a scheme to bribe officials of Télécommunications d'Haiti ("Haiti Teleco"). Esquenazi and Rodriguez were sentenced to fifteen and seven years in prison, respectively.

On appeal, defendants challenged the district court's jury instruction defining "instrumentality," as well as the sufficiency of evidence proving that Haiti Teleco qualified as one. In a 51-page unanimous panel opinion authored by the Honorable Beverly B. Martin, the Court affirmed the convictions and in doing so crafted a two-part, fact-intensive definition of an instrumentality: an instrumentality is an entity (1) "controlled by the government of a foreign country" that (2) "performs a function the controlling government treats as its own." Recognizing that these are "fact-bound questions," the Court identified a non-exhaustive list of relevant considerations.

"Control." To determine whether a government "controls" an entity, the Court identified six factors:

1. The foreign government's formal designation of the entity;
2. Whether the government has a majority interest in the entity;
3. The government's ability to hire and fire the entity's principals;
4. The extent to which the entity's profits go directly into the governmental fisc;

5. The extent to which the government funds the entity if it fails to break even; and

6. The length of time the foregoing indicia have existed.

Function the government "treats as its own." To determine whether the entity performs a function the government "treats as its own," the Court identified four factors:

1. Whether the entity has a monopoly over the function it exists to carry out;

2. Whether the government subsidizes the costs associated with the entity providing services;

3. Whether the entity provides services to the public at large in the foreign country; and

4. Whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.

In the case at hand, the Eleventh Circuit concluded that sufficient evidence supported the jury's necessary finding that Haiti Teleco was an instrumentality of the Haitian government and, indeed, recognized that Haiti Teleco would qualify as an instrumentality "under almost any definition [it] could craft." Among the key facts relied upon by the Court were that: (a) Haiti's national bank has owned 97% of Haiti Teleco since the early 1970s; (b) Haiti Teleco's director is appointed by the Haitian president with the consent of the prime minister and the ministers of public works and economic finance; (c) all of Haiti Teleco's board members are appointed by the president; and (d) there was expert testimony that although there is no specific law designating Haiti Teleco as a public entity, the company belonged "totally to the state" and "was considered a public entity."

A silver thread may line the Court's decision for defendants, however. For the Court also held that the Government has the burden of proving that an FCPA defendant "knew or believed the bribes would ultimately reach the hands of a foreign official." In this case, there was strong evidence that the defendants believed Haiti Teleco to be a government entity, but such proof may not be readily available to DOJ and/or the SEC in every case.

The Eleventh Circuit's two-part, multi-factored definition of instrumentality is consistent with the facts-and-circumstances approach we have seen in recent district court pronouncements and the DOJ and SEC's *FCPA Resource Guide*. Accordingly, the decision does not seem likely to alter dramatically enforcement of the FCPA.

United States v. Cilins

We reported in our 2013 Mid-Year and Year-End FCPA updates on the FCPA-related obstruction of justice prosecution of ***Frederic Cilins***, a French citizen and former advisor to Israeli mining company BSG Resources Ltd. ("BSGR"). Cilins was arrested at Jacksonville International Airport in April 2013 after he allegedly offered bribes to the widow of former Guinean President Lansana Conté in return for, among other things, her destroying contracts that purportedly evinced a BSGR scheme to bribe

Guinean officials to obtain lucrative mining rights. Unbeknownst to Cilins, the widow was cooperating with the FBI, which surreptitiously monitored and recorded Cilins as he made the offers.

Cilins pleaded not guilty to all five counts of the initial indictment. In February 2014, the grand jury returned a superseding indictment upping the number of obstruction of justice and witness tampering counts to six by adding a charge that Cilins conspired with others to obstruct not the U.S. grand jury investigation, which began in 2013, but a separate investigation conducted by civil authorities in Guinea concerning the mining licenses at issue. According to Cilins's motion to dismiss the new count of the indictment, the Government's theory was that obstruction of a foreign investigation is a crime under U.S. law so long as the underlying subject matter is within the jurisdiction of a U.S. department or agency, even if no U.S. department or agency is presently investigating the matter.

We likely will never know how the Court would have ruled on Cilins's motion to dismiss, for on March 10, 2014, three weeks before trial, Cilins pleaded guilty to a superseding information charging only one count of obstructing the 2013 grand jury investigation. Cilins admitted that he attempted to induce through bribes President Conté's widow, whom he knew to be a witness in a U.S. grand jury investigation, to leave the United States in order to avoid being questioned by the FBI regarding the allegations. Interestingly, there is no obligation in the plea agreement requiring Cilins's cooperation with the ongoing investigation.

The underlying investigation of BSGR continues, though BSGR has denied any wrongdoing. In April 2014, the Guinean government made a finding that BSGR and its joint venture partner, Vale S.A., corruptly obtained the mining rights in question and stripped their rights, a result that BSGR says it will fight in arbitration. And as described below, Rio Tinto plc, the company that lost out to BSGR/Vale in the mining concession award, has brought a RICO suit against BSGR, Vale, Cilins, and others arising from this matter.

***In re: Grand Jury Subpoena* (Crime/Fraud Exception in FCPA Case)**

On February 12, 2014, the U.S. Court of Appeals for the Third Circuit affirmed a decision by the Honorable Gene E.K. Pratter of the U.S. District Court for the Eastern District of Pennsylvania that the crime/fraud exception to the attorney-client privilege applied to otherwise privileged communications between an attorney and the target of a grand jury investigation into potential FCPA violations.

Target, the president of a Pennsylvania-based project finance consulting firm, allegedly paid $3.5 million to the sister of an official of a government-owned bank headquartered in the U.K. to secure financing for Target's oil and gas projects (due to the secrecy of grand jury proceedings, the interested parties were not identified in the Court's decision). Before making these payments, Target consulted with Attorney concerning the proposed plan to make payments to the bank official to ensure that the projects proceeded swiftly. After some preliminary research, Attorney found the FCPA and discussed with Target whether the bank was a government entity. Although Attorney did not perform enough research to definitively advise Target whether the proposed payments were lawful, he advised his client not to make the payments. Target told Attorney that he was going to make the payments anyway.

After the alleged payments came to the attention of U.K. authorities and they notified DOJ, the grand jury issued a testimonial subpoena to Attorney. Target then sought to intervene with the district court, at which point Judge Pratter determined that she would question Attorney *in camera* to determine whether the crime-fraud exception applied. After questioning Attorney in chambers, outside the presence of either party, Judge Pratter found that the crime-fraud exception did apply and enforced the grand jury subpoena. But she stayed her ruling pending Target's appeal.

The Third Circuit, in a unanimous panel opinion penned by the Honorable D. Michael Fisher, affirmed Judge Pratter's order. It endorsed the questioning of Attorney *in camera* as within the district court's discretion. With respect to the substantive question of the crime-fraud exception, the Third Circuit acknowledged this is a "close case." The key questions under Third Circuit precedent are whether the client: (1) already has formed an intent to commit the crime prior to consulting his attorney; and (2) uses the attorney's advice "in furtherance" of the crime. Here, the Court found that the facts that Target immediately rejected Attorney's advice not to make the payments, and decided after receiving the advice to route the payments through the bank official's sister, were probative evidence that Target had already formed an intent to violate the FCPA prior to consulting Attorney and used Attorney's advice to further this violation.

SEC v. Sharef, et al. **(Siemens Defendants)**

The SEC's long-running case against seven former Siemens AG representatives, initially filed in 2011 (three years after charges were settled with the company in 2008), finally came to an end in 2014. As reported in our 2013 Year-End FCPA Update, defendants ***Bernd Regendantz***, ***Carlos Sergi***, ***Uriel Sharef***, and ***Herbert Steffen*** all resolved their charges in 2013 or earlier--Regendantz and Sharef via settlement and Steffen and Sergi via dismissal. That left defendants ***Ulrich Boch***, ***Stephan Signer***, and ***Andres Truppel***.

On February 3, 2014, the Honorable Shira A. Scheindlin of the U.S. District Court for the Southern District of New York entered a final consent judgment against Truppel, the former CFO of Siemens Argentina. Truppel neither admitted nor denied the SEC's allegations that he and his co-defendants agreed to pay more than $100 million in bribes to senior government officials to secure a $1 billion contract for Siemens to produce national identity cards for the Argentine government. Truppel agreed to pay an $80,000 civil penalty and to an injunction against future violations of the FCPA's anti-bribery, books-and-records, and internal controls provisions.

The following day, February 4, 2014, Judge Scheindlin entered default judgments against remaining defendants Bock and Signer, both former Heads of Major Projects for Siemens who never appeared in the proceeding. In addition to enjoining defendants from future FCPA violations, the Court ordered Bock to pay $413,957 in disgorgement and prejudgment interest and a $524,000 civil penalty ($937,957 total) and Signer to pay a $524,000 civil penalty. In accord with the SEC's Motion for Default Judgment, Judge Scheindlin calculated the $524,000 civil penalties by treating each of four alleged corrupt payments Bock and Signer were involved with as separate violations of the FCPA's anti-bribery, books-and-records, and internal controls provisions and assessing $11,000 for each

bribery count ($44,000 total), $60,000 for each falsification of books and records count ($240,000 total), and $60,000 for each circumvention of internal controls count ($240,000 total).

These are the largest civil penalties ever assessed against individual defendants in SEC FCPA proceedings. The SEC stated that it sought the maximum penalties possible against Bock and Signer because of "the extensive and egregious nature of the[ir] violations and . . . their utter refusal to accept any responsibility for their actions."

As discussed in prior updates, criminal charges against six of these same Siemens defendants (except Regendantz, who was never charged criminally), plus two other Siemens defendants (***Eberhard Reichert*** and ***Miguel Czysch***), remain pending in the Southern District with no substantive movement since they were filed in December 2011.

Kleptocracy Forfeiture Actions

For several years now, we have been covering DOJ's efforts to recover the proceeds of foreign corruption through forfeiture actions, known as the Kleptocracy Asset Recovery Initiative. On March 5, 2014, DOJ announced the largest such action to date, seeking the forfeiture of more than $550 million from the now-deceased former Nigerian dictator General ***Sani Abacha***, his son, and other alleged coconspirators. More than $450 million of this amount has already been frozen pursuant to the execution of arrest warrants through mutual legal assistance requests to the governments of France and the Bailiwick of Jersey, and in the United Kingdom through litigation brought pursuant to the U.K. Jurisdiction and Judgments Act.

Another forfeiture action filed by DOJ in 2014, which although somewhat more modest than the case involving General Abacha also dates back to alleged corruption from the 1990s, is that against $721,951 derived from the sale of a house in Newport Beach, California. According to the complaint, announced on April 24, 2014, the house was purchased with proceeds of corruption involving former South Korean president ***Chun Doo-hwan***, who was convicted by a Korean court in 1997 of receiving more than $200 million in bribes from Korean businesses.

2014 FCPA-RELATED PRIVATE CIVIL LITIGATION

Our consistent refrain in these biannual updates is that the FCPA provides for no private right of action. Nevertheless, there are a variety of causes of action that can and have been used--to varying degrees of success--to pursue private relief predicated on foreign corruption. Indeed, the first half of 2014 brought with it a significant number of private collateral lawsuits arising from the announcement of FCPA investigations and settlements, further underscoring the point that the risks of corrupt payments extend beyond negotiations with the U.S. Government.

The following chart summarizes a number of FCPA-related private civil actions filed or resolved during the first six months of 2014.

Case Name	Date	Court	Type	Commentary
Vladimir Gusinsky Revocable Trust v. Woertz (Archer-Daniels-Midland)	01/16/14	Cir. Ct. Cook Cnty, IL	Shareholder derivative	• Suit followed ADM's Dec. 2013 DOJ/SEC FCPA settlement • Suit at pleadings stage
Copeland v. Apotheker (Hewlett-Packard)	02/10/14	N.D. Cal.	Shareholder derivative	• Suit filed shortly prior to HP's Apr. 2014 FCPA settlement, after HP announced it was in "advanced discussions" to resolve the matter with DOJ/SEC • Suit stayed pending appeal of dismissal of prior HP derivative lawsuit
Gerami v. Hyperdynamics Corp.	03/13/14	S.D. Tex.	Shareholder class action	• Filed the day after Hyperdynamics announced its business partner in Guinea declared a *force majeure* and ceased joint operations in light of DOJ/SEC's announced FCPA probe of Hyperdynamics
Williams v. Nuti (NCR Corp.)	04/08/14	N.D. Ga.	Shareholder derivative	• Settlement of 2013 suit approved on Apr. 8, 2014 • NCR agreed to pay $500,000 in attorneys' fees and to implement certain enhancements to its compliance program
Aluminum Bahrain B.S.C. v. Dahdaleh	04/28/14	W.D. Pa.	RICO	• Court dismissed Alba's suit against Dahdaleh in favor of arbitration, finding Dahdaleh was entitled as Alcoa's agent to enforce arbitration agreements between Alba and Alcoa • Alba filed a Notice of Appeal on May 20, and the appeal is now pending in the Third Circuit • As reported in our 2012 Year-End FCPA Update, Alcoa previously agreed to settle Alba's RICO claims for $85 million

Case Name	Date	Court	Type	Commentary
Rio Tinto plc v. Vale S.A.	04/30/14	S.D.N.Y.	RICO	• Suit alleges that Vale and BSGR conspired to steal Rio Tinto's trade secrets and thereafter corruptly procured mining concessions in Guinea previously held by Rio Tinto based upon the stolen trade secrets and $200 million in corrupt payments to Guinean officials
Rubery v. Kleinfeld (Alcoa)	05/02/14	W.D. Pa.	Shareholder derivative	• Parties announced on May 2 that they have reached an agreement in principle to settle the 2012 suit • Terms of the settlement not yet disclosed
Menaldi v. Och-Ziff Capital Mgmt. Grp. LLC	05/05/14	S.D.N.Y.	Shareholder class action	• Filed six weeks after Och-Ziff disclosed that it is the subject of DOJ/SEC FCPA investigations concerning sovereign wealth fund investments in Africa
Stokes v. Och (Och-Ziff Capital Mgmt. Grp. LLC)	05/30/14	N.Y. Sup. Ct.	Shareholder derivative	• Suit arises from the same DOJ/SEC FCPA investigations described immediately above

FCPA OPINION PROCEDURE RELEASE 14-01

By statute, DOJ must provide a written opinion at the request of an issuer or domestic concern stating whether DOJ would prosecute the requestor under the anti-bribery provisions for prospective (not hypothetical) conduct it is considering. Published on DOJ's FCPA website, these releases provide valuable insights into how DOJ interprets the FCPA, though only parties who join in the requests may rely upon them authoritatively.

On March 17, 2014, in the 60th FCPA opinion procedure release (14-01), DOJ stated that it did not intend to take enforcement action with respect to a transaction between an issuer and a foreign official to sever a business relationship that pre-dated the official's appointment to his government post. In 2007, the requestor, a U.S. financial services company and investment bank, purchased a majority interest in a foreign company founded and owned by a foreign businessperson. After the businessperson was appointed to serve in the foreign country's central monetary and banking agency, the requestor sought to purchase his minority interest. Although the 2007 purchase agreement contained a valuation formula for the purchase price, the parties opted not to use this formula, which was based on the average net income for the two years preceding the buyout, because the company

experienced losses during the financial crisis and the formula would have dictated that the shares had no value. Instead, the parties retained an independent accounting firm to determine the value of the shares.

DOJ confirmed that it did not intend to take enforcement action on account of the buyout. In reaching this conclusion, DOJ looked to several factors:

1. the purpose of the buyout was to sever the parties' existing financial relationship, which began before the businessperson's appointment to the office;

2. the decision to employ an alternative valuation formula was reasonable given the unforeseen financial crisis, desire to avoid litigation, and the risk that the businessperson might sell his shares to a third party;

3. the retention of an independent accounting firm assured that the payment reflected the fair market value of the shares;

4. both the requestor and the businessperson disclosed their relationships before the sale;

5. the requestor sought and received a written assurance from local counsel that the transaction was legal in the foreign country;

6. after accepting his government appointment, the businessperson recused himself from any matter concerning the award of business to the requestor, or any affiliated entities, and will continue to do so until the buyout is complete;

7. the businessperson will continue to recuse himself from any matter that commenced before or at the time of the payment for his interest;

8. the requestor officially notified its senior employees of the businessperson's ongoing recusal obligations; and

9. the businessperson will no longer have any financial incentive to assist the requestor once the sale closes.

Although the FCPA opinion procedure release process provides a valuable avenue to explore DOJ's enforcement intent prior to undertaking a transaction, and appears to have done that in this case, this release also highlights the principal weakness in the process that negates its utility in most business transactions--that is, the time necessary to complete the process. For although the release regulations require DOJ to issue an opinion within 30 days of the request, the 30-day clock resets each time there is a request for additional information from DOJ. In 14-01, the requestor made the initial request on July 8, 2013, but it took several rounds of clarifying requests and responses before DOJ determined it had all the information it required on February 13, 2014. The final opinion was released 32 days later, but from a requestor's standpoint the process took more than eight months to complete.

2014 MID-YEAR INTERNATIONAL ANTI-CORRUPTION DEVELOPMENTS

Europe

United Kingdom

U.K. authorities resolved two enforcement actions relating to foreign corruption during the first half of 2014.

On March 17, 2014, the Financial Conduct Authority ("FCA") fined ***Besso Limited*** ("Besso") £315,000 for anti-corruption systems and controls failures. The FCA leveled seven main criticisms at Besso: (1) limited bribery and corruption policies in place between 2005 and 2009, and inadequate content and implementation of the policies and procedures introduced thereafter; (2) failure to conduct adequate third-party risk assessments; (3) lack of adequate third-party due diligence; (4) failure to document the commercial bases for payments to third parties; (5) failure to periodically review third-party relationships to determine a continuing need; (6) lack of adequate management oversight to identify failings in risk assessment and due diligence of third parties; and (7) failure to maintain adequate anti-bribery and corruption records with regard to third parties. Besso received a 30% penalty reduction for agreeing to settle at an early stage of the FCA's investigation. Besso is the fourth in a series of insurance companies fined by the FCA for such failures, and shows the continuing role of the FCA in enforcing anti-corruption compliance in the regulated sector.

On June 18, 2014, ***Dennis Kerrison*** and ***Miltiades Papachristos***, respectively the former CEO and Regional Sales Director of Innospec Ltd. ("Innospec"), were found guilty of violating the U.K's Prevention of Corruption Act of 1906 by conspiring to pay bribes to Indonesian government officials to secure contracts for the sale of the TEL fuel additive. Two other individuals at Innospec, and the company itself in a separate proceeding in 2010, previously pleaded guilty to related charges. According to the Serious Fraud Office ("SFO"), this was the first contested overseas corruption case brought by the SFO concerning bribery of foreign public officials. Innospec is currently facing a civil claim in the English High Court for follow-on damages brought by a competitor which alleges that it failed to secure tenders as a result of Innospec's conduct.

European Union

On February 3, 2014, the European Commission released the first ***European Union Anti-Corruption Report***. This report provides an analysis of corruption across E.U. Member States, including steps taken to prevent and fight it. According to the report, corruption is estimated to cost the European economy €120 billion a year--just shy of the European Union's annual budget. The Commission concluded that although E.U. Member States have in place most of the necessary legal instruments to prevent and fight corruption, anti-corruption rules are not always vigorously enforced, systemic problems are not tackled effectively, and the relevant institutions do not always have sufficient capacity to enforce the rules.

On April 15, 2014, the European Parliament adopted the ***Directive on Disclosure of Non-Financial and Diversity Information by Certain Large Companies and Groups***. Pursuant to the directive,

covered companies will need to disclose information on their policies, risks, and results regarding sustainability issues, including environmental matters, social and employee-related concerns, respect for human rights, anti-corruption and bribery issues, and diversity on their boards of directors. The directive is not self-executing, and will require approval by E.U. Member States in the European Council as well as implementation by each Member's national laws in order to become effective. The Commission estimates the directive will affect approximately 6,000 companies and groups across the European Union. For further details, please see our client alert, European Parliament Adopts Broad New Compliance and Sustainability Reporting Requirements.

Germany

There were anti-corruption developments in Germany on both the enforcement and legislative fronts during the first half of 2014.

On May 15, 2014, German truck and diesel engine maker ***MAN SE*** ("MAN") (majority-owned by Volkswagen AG since 2013) took a significant step toward resolving once-and-for-all the bribery scandal that peaked with the December 2009 decision of the Regional Court in Munich to impose fines of €75.3 million each on two MAN affiliates for paying bribes both inside and outside Germany from 2002 to 2009. The shareholders approved settlements with insurers and three managing board members, including former MAN and current Volvo Cars CEO Håkan Samuelsson, to reimburse the company for approximately €45 million in damages arising from the bribery cases. Although this is significant, it is but a small fraction of what MAN estimates as €250 million in fines, disgorgements, and investigation costs incurred in connection with this matter.

More than two years after the former Federal President of Germany, ***Christian Wulff***, resigned over corruption allegations, the unprecedented prosecution came to a conclusion on February 27, 2014 when the criminal court of Hanover rendered a comprehensive acquittal on the bribery charges. The court did not find evidence of corrupt intent by either Wulff or his personal acquaintance, film maker ***David Groenewold***, in connection with hospitality benefits Groenewold provided Wulff and his family in 2008. Although the prosecution office initially launched an appeal on points of law, it thereafter withdrew its appeal on June 12, 2014, following analysis of the written decision rendered by the court on May 6. Wulff has recently published a book on his view of the case, formulating sharp criticism of the prosecution office, which he describes as "overzealous," and the media, which, in his opinion, forced him to resign in 2012.

Following on the Tenfold Increase of Corporate Fines for Compliance Violations in Germany in 2013, there are several additional far-reaching initiatives in Germany's legislative pipeline.

First, the bill for the proposed adoption of a Corporate Criminal Code (Verbandsstrafgesetzbuch) is still under heavy debate. If enacted, it will mandate, for the first time under German law, criminal investigations under certain circumstances and allow criminal sanctions to be imposed against organizational defendants (for further details see our 2013 Year-End FCPA Update). The Federal Association of In-House Counsel (Bundesverband der Unternehmensjuristen) joined criticism of the bill by many interest groups on April 29, 2014, and presented an alternative bill to amend the existing

German Administrative Offences Act ("OWiG") through provisions that (1) define adequate preventive compliance measures, (2) mitigate administrative sentencing if corporate misconduct occurred regardless of such measures, and (3) exempt corporations from administrative sentencing in cases of self-disclosure and remediation measures. However, the coalition agreement of the parties to the present Federal Government requires the government to consider the introduction of a corporate criminal code for international corporations. The justice minister of North-Rhine Westphalia, one of the key drivers behind the bill, anticipates that the bill will enter the legislative process later this year.

Second, on May 28, 2014, the Federal Cabinet resolved to adopt the Act on the Ratification of the U.N. Convention against Corruption ("U.N. Convention"). While Germany was one of the first signatory states to this Convention back in 2003, it failed to fully ratify the U.N. Convention previously due to shortcomings of its domestic criminal laws regarding the bribery of members of parliament. As this roadblock has been cleared now, it is expected that the ratification act on the U.N. Convention will come into force prior to the next G20 summit in November 2014.

Latvia

On May 30, 2014, Latvia became the 41st party to the Organisation for Economic Co-operation and Development ("OECD") Anti-Bribery Convention. The OECD Anti-Bribery Convention, which entered force in 1999, outlaws the bribery of foreign public officials in international business transactions. According to OECD Secretary-General Angel Gurria, "[j]oining the Convention will enable Latvia to play a more active role in global efforts to tackle bribery and corruption."

Norway

On February 25, 2014, Norwegian defense company ***Kongsberg Gruppen AS*** ("Kongsberg") and one of its employees were charged by the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime ("ØKOKRIM") with violating Norwegian anti-corruption laws relating to its sale of communications equipment to Romanian authorities. Between 1999 and 2008, Kongsberg entered into contracts with Romanian ministries valued at upwards of $230 million.

ØKOKRIM's prosecution of Kongsberg came on the heels of another cross-border corruption enforcement action, the largest ever undertaken by the agency. On January 15, 2014, Norwegian fertilizer-manufacturer ***Yara International ASA*** ("Yara") settled corruption charges, admitting that it had agreed to pay approximately $12 million in bribes to government officials in India, Libya, and Russia between 2004 and 2009. Yara paid nearly $48 million to resolve the matter--the largest corporate fine levied in Norwegian history. Four former Yara executives have been indicted for agreeing to pay these bribes, including the company's former CEO, COO, and CLO. The former executives are set to stand trial in Oslo in early 2015.

Russia

Combating corruption continues to be an important topic in Russian domestic policy discussions. In the regulatory arena, the country has adopted several key measures to boost the implementation of the new anti-corruption legislation described in our 2013 Mid-Year FCPA Update. In April 2014,

President Putin approved the national anti-corruption plan for 2014-15, which sets an ambitious agenda. And in January 2014, the government passed a regulation requiring state officials to declare and surrender any received gifts of unknown value or exceeding RUR 3,000 (approximately $88) in value to specially designated divisions of their government organizations (gifts determined not to exceed the threshold will be returned to the recipient). Finally, the Russian President signed into law changes to the Code of Administrative Offenses that broadened responsibility for violations of state procurement laws, including extending administrative responsibility to members of tender committees and other state employees responsible for organizing public tenders.

On the enforcement front, in February 2014 the head of the Russian Investigative Committee reported that more than 28,000 corruption cases were filed in 2013, 10,000 more than in 2012. Of these, 9,000 criminal cases were resolved (up from 6,000 in 2012), with an estimated total pecuniary loss of RUR 13 billion (approximately $381 million), of which RUR 11 billion (approximately $322 million) had been returned to the government coffers. The Russian Federation Attorney General's Office reported that administrative anti-corruption enforcement against organizations in 2013 doubled from the year before, and the aggregate amount of fines imposed on organizations in 2013 (approximately RUR 250 million, or $7.4 million) more than tripled from 2012. The enforcement authorities announced plans to ramp up the government's anti-corruption efforts, with a particular focus on the upcoming $31 billion state property privatization program.

Ukraine

In the past seven months, Ukraine has been in the news nearly daily. Ukrainians recently lived through some of the most horrific and bloody events in the country's modern history, from the toppling of the corrupt regime of former President Yanukovych, to the occupation of Crimea by the Russian Federation, and to the armed pro-Russian secession movement in eastern Ukraine. Underlying all these events was the rampant corruption that has plagued Ukraine since it restored its independence in 1991 after the collapse of the Soviet Union. No Ukrainian government has been successful in halting corruption in Ukraine, and many previous governments, especially the government of former President Yanukovych, contributed significantly to its growth.

Upon Yanukovych's flight from Ukraine, the new Ukrainian government estimated that Yanukovych's rule cost Ukraine up to $100 billion in embezzled funds. In a move familiar to those who have observed prior regime changes, the new Ukrainian government immediately vowed to crack down on corruption. But unlike prior declarations, this administration seems to be taking action, including by signing a memorandum of understanding with the European Bank for Reconstruction and Development, the OECD, and Ukrainian business associations for the establishment of the Ukrainian Anti-Corruption Initiative. One of the most important aspects of the initiative will be the establishment of an independent Business Ombudsman, who will be the first point of contact for companies faced with unfair treatment. Additionally, in May, the Ukrainian parliament adopted changes to the country's anti-corruption legislation to align it closer with the European Union's anti-corruption law.

And to help Ukraine recover the stolen assets and address other institutional issues caused by Yanukovych's corrupt rule, the United Kingdom and United States convened a forum of senior

representatives of major international financial centers in London in May 2014. The participants recognized that the international financial community and Ukraine have a shared responsibility for recovering Ukraine's stolen assets because the corrupt officials who launder embezzled funds not only violated the public trust of their communities, but also undermined the integrity of international financial systems. Most importantly, on June 27, Ukraine signed an Association Agreement with the European Union, in which the parties undertook to cooperate in, among other activities, combating corruption in the public and private sectors.

The Americas

Brazil

Brazil's Law 12.846/2013, commonly known as the Clean Companies Act, came into effect on January 29, 2014. The legislation targets bribery and other offenses related to public administration, including bid rigging, fraud in the public procurement process, and tampering with government investigations. Violations can lead to civil and administrative penalties, but not criminal enforcement (existing Brazilian laws criminalizing bribery remain on the books). Notably, as discussed in our 2013 Mid-Year and Year-End FCPA updates, the law creates strict liability on companies for the acts of their directors, officers, employees, and agents--knowledge and corrupt intent are not required. The criteria for calculating fines and penalties are set out in the statute, including a baseline requirement that the amount of penalties may never be lower than the benefit incurred by a company as a result of its corrupt or fraudulent practices. Non-monetary penalties also may be imposed, up to and including dissolution for habitual misconduct.

Enforcement of Brazil's new anti-bribery law will take place at the federal, state, and municipal levels of government across Brazil. Bribery of federal or foreign officials will be investigated and prosecuted by the Office of the Comptroller General ("CGU"). For bribery that occurs at the state or municipal level, the law confers enforcement jurisdiction on whichever level of the government is overseeing the public administration at issue.

Key components of the new Brazilian regulatory regime still have not been finalized by the government. Brazil's federal, state, and municipal governments are empowered to issue implementing regulations that specify, among other things, the enforcement regime and grounds for penalty reductions based on the existence of an effective compliance program. Although the anti-bribery law is now in effect, the federal government has not yet issued its implementing regulations, and many Brazilian states and municipalities are awaiting these core regulations before issuing their own regulations. As of June 2014, the states and municipalities that have issued regulations include the states of Paraná, São Paulo, and Tocantins, and the municipalities of Cubatão, Ilhéus, and São Paulo.

The regulations regarding effective compliance programs should inform how companies subject to the Clean Companies Act evaluate and improve their own programs. The city of São Paulo's implementing regulations provide interim guidance on what criteria the government will look for in evaluating whether a company has an effective compliance program, although the regulations indicate that the federal guidelines, once issued, will control. The factors in São Paulo's interim regulations

will look familiar to those who have studied the U.S. Sentencing Guidelines--they include: (1) the existence of consistent mechanisms and procedures for integrity and monitoring; (2) the effectiveness of internal control systems; (3) the use of codes of conduct or ethics; (4) the existence of a system for receiving and investigating anonymous whistleblower reports; (5) the adoption of transparency measures with regard to public sector relations; and (6) periodic training to promote internal integrity policies.

Taking heed of widespread premonitions regarding the possibility that invitations to the 2014 FIFA World Cup soccer tournament could be used to engender favorable treatment by Brazilian government officials, the Brazilian government issued detailed regulations governing public officials' acceptance of tickets to the events. Normative Guideline 01/2014, issued by the CGU, provides that federal officials only may accept tickets in certain limited circumstances, including when tickets are purchased using individual funds based on pre-existing family relationships or friendships, when tickets are distributed via offers available to the general public, and when tickets are distributed in connection with the official participation of the relevant agency in the tournament (with the approval of agency management). Violations of the guideline could lead to scrutiny under the Brazilian Penal Code, which provides for individual criminal liability for bribery, and under the Clean Companies Act. Similar guidance regarding the 2016 Summer Olympic Games in Rio de Janeiro could be forthcoming.

Canada

Canada's newly-enhanced anti-corruption enforcement regime reached a milestone in May, obtaining the first prison sentence for an individual convicted of violating the Corruption of Foreign Public Officials Act ("CFPOA"). ***Nazir Karigar***, whose conviction for allegedly bribing officials of Air India and an Indian Cabinet Minister was discussed in our 2013 Year-End FCPA Update, was sentenced to a three-year prison term. The sentencing court noted, as mitigating factors in his sentencing, that he cooperated in the investigation, is of an advanced age, and the fact that the alleged bribery scheme was unsuccessful in winning the contract in question. Indeed, the court described the "failure" of the bribery scheme as being "[o]f considerable importance" in its sentencing decision because "[t]he harm resulting from this scheme was likely restricted to the promotion of corruption among a limited group of foreign public officials."

In connection with the same investigation, on June 4, 2014, the Royal Canadian Mounted Police issued nationwide arrest warrants for two U.S. citizens and former executives of Cryptometrics, Inc.--the American company on whose behalf Karigar was convicted of paying bribes--charging them with violating the CFPOA. ***Robert Barra*** was Cryptometrics's CEO and ***Dario Berini*** served as its COO. A third individual, ***Shailesh Govindia***--a U.K. national who served as another agent for Cryptometrics--also was charged with CFPOA violations and fraud.

Other CFPOA charges brought against individual defendants in 2014 include two former SNC-Lavalin executives, ***Sami Bewabi*** and ***Stephane Roy***. Both were charged on January 31, 2014 with bribery of Libyan government officials.

Mexico

In February, Mexico amended its constitution to create the Federal Institute on Access to Information, a new autonomous government organization. The amendment, one of President Peña Nieto's two major anti-corruption proposals upon his election (as noted in our 2012 Year-End FCPA Update), expands Mexico's transparency laws beyond the government to political parties and unions, civil society organizations, corporations, and individuals that receive public funds. Meanwhile, the president's other marquee anti-corruption proposal--the creation of a new Anti-Corruption Commission--was approved by the Mexican Senate in December 2013, but has yet to garner the approval of the Chamber of Deputies, Mexico's lower federal legislative house.

On the enforcement front, on June 20, 2014 Mexico's attorney general announced that he has acquired arrest warrants for ***three unnamed employees of Banamex***, a Mexican subsidiary of U.S. bank Citigroup Inc. The investigation first became public in February, when Citigroup learned that Mexican shipping company ***Oceanografía***, to which Banamex had extended $585 million in short-term credit, had been debarred from public contracting by the Mexican government. A review of the credit exposure situation uncovered that a significant portion of the invoices supporting the accounts receivable purportedly due to Banamex were actually fraudulent in that they exaggerated by $400 million the value of contracts with Mexican state-owned energy company Petróleos Mexicanos. Oceanografia's CEO ***Amado Yanez*** also has been arrested on fraud charges, and at least 12 Banamex employees have been terminated in connection with this fast-breaking matter.

Asia

China

In May 2014, China's Ministry of Public Security announced the completion of its investigation of the Chinese subsidiary of U.K. pharmaceutical company ***GlaxoSmithKline plc*** ("GSKCI"), stating that it had referred the case to state prosecutors. Police allege that former GSKCI Chief and British national ***Mark Reilly*** ordered subordinates to pay £320 million in bribes to government healthcare officials throughout China over several years to boost GSKCI sales and delay the adoption of competing generic drugs.

China's domestic anti-corruption efforts continue apace, as detailed in the government's 2013 graft reports. Among other statistics, the reports indicate that in 2013 a total of 51,306 officials were investigated for work-related crimes (up by 8.4% from 2012), 5,515 people were charged for paying bribes (up by 18.6% from 2012), and 31,000 officials were convicted for corruption. Extending its crackdown on graft in the healthcare sector, China also introduced a "corruption blacklist" of drug makers and medical device manufacturers found to have paid bribes, effective from March 1. Firms put on the list once are banned for two years from selling within the region where they were implicated, while those appearing on the list twice within five years are banned nationally, also for two years. Numerous reports also indicate that the anti-graft campaign is widening its net with an expansive state audit into 14 major state-owned enterprises--of which the "central target" is allegedly State Grid Corp., the state-owned power utility that supplies nearly 90% of the country.

Further high-profile punishment of senior officials included the Sichuan Deputy Party Secretary and a former People's Liberation Army general who became the highest ranking military official to be brought down for corruption. Chinese authorities also seized $14.5 billion in assets linked to the retired domestic security chief ***Zhou Yongkang***, the most senior Chinese politician to be ensnared in a corruption investigation since the Chinese Communist Party came into power in 1949.

India

The first half of 2014 continued where 2013 left off, with the national debate over India's stubbornly endemic corruption moving from the streets to Parliament and the polls. While the citizenry hailed 2013's legislative victories as a sign that the country is finally beginning to heed the demands of the anti-corruption movement, reality quickly set in during the first part of 2014 as continued political wrangling threatens to derail progress on multiple fronts.

The passage of the Lokpal and Lokayuktas Bill (2011) ("Lokpal Act") in December 2013, for example, marked a historic event, creating an independent body ("Lokpal") with broad powers to investigate corruption complaints against the highest political authorities, including the Prime Minister. The implementation of the law immediately hit a snag, however, as political opponents were unable to agree upon the members or timetable of a selection committee tasked with finding Lokpal candidates. Ironically, the law's implementation further stalled with a victory in the June 2014 General Elections by the anti-corruption-focused Bharatiya Janata Party ("BJP") that was so overwhelming, no other party garnered enough seats in Parliament's lower house (the Lok Sabha) to earn the right to appoint the Leader of the Opposition. Per the Lokpal Act, the Leader of the Opposition is a required member of the Lokpal selection committee.

Korea

The April 2014 sinking of the ferry Sewol, which tragically left 302 people missing or dead, appears to have revived efforts by Korea's National Assembly to pass the anti-corruption legislation first proposed in August 2013 by the Korean Anti-Corruption and Civil Rights Commission. The proposed Act on the Prevention of Illegal Solicitations and Conflicts of Interest (formerly, Anti-Corruption and Conflicts of Interest Act) has been pending in the legislature since 2013. But when a government investigation revealed that the Sewol had repeatedly passed safety inspections by the Korean Register of Shipping, despite safety and corruption concerns raised by a former employee of the ship's operator, President Park Geun-hye strongly urged the National Assembly to pass the anti-corruption legislation. On May 27, 2014, the National Policy Committee of the National Assembly reviewed the draft bill and recommended that it be strengthened.

Middle East and Africa

Qatar

The U.K.'s *Sunday Times* has reported that corruption and bribery played a large role in the decision to host the 2022 football World Cup tournament in Qatar. Reports allege that the former Asian Football Confederation ("AFC") chief, Mohamed bin Hammam, used a $5 million "slush fund" to bribe

officials of the Fédération Internationale de Football Association ("FIFA") in order to win support for Qatar's bid. The organizers of the official Qatar 2022 bid have denied that bin Hammam played any formal role in the bid committee. Bin Hammam was banned for life from football by FIFA in 2012 over allegations of financial corruption and conflicts of interest. FIFA's Ethics Committee has retained the former U.S. Attorney for the Southern District of New York, Michael J. Garcia, to conduct a global investigation regarding corruption in world football, including the allegations relating to the award of hosting rights for 2018 and 2022 World Cups, a report of which is expected in July.

African Development Bank Settlement

On March 21 and May 28, 2014, the African Development Bank Group's Integrity and Anti-Corruption Department ("IACD") announced settlements with the four multinational companies whose participation in the "TSKJ" Bonny Island, Nigeria consortium led to $1.5 billion in FCPA fines and penalties between 2009 and 2011. Specifically, the IACD levied penalties of $6.5 million upon ***KBR LLC***, $5.7 million upon ***Snamprogetti Netherlands B.V.***, $5.3 million upon ***Technip S.A.***, and $5.2 million upon ***JGC Corp.***, and debarred for a three-year period several Portugal-based joint ventures associated with the TSKJ consortium. This debarment will also have cross-debarment effect with the Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank Group, and World Bank Group.

The IACD emphasized that the $22.7 million in total penalties imposed upon the TSKJ members will be returned to the affected region and used to fund anti-corruption efforts. As we have reported in prior updates, the fact that significant penalties imposed upon companies in connection with FCPA prosecutions are remitted to the U.S. Treasury rather than being repatriated to the victimized countries has been a source of significant tension with certain foreign governments, particularly in Africa.

CONCLUSION

As has become our semi-annual tradition, over the following two weeks Gibson Dunn will be publishing a series of enforcement updates for the benefit of our clients and friends as follows:

Tuesday, July 8 - 2014 Mid-Year Update on Corporate NPAs and DPAs;

Wednesday, July 9 - 2014 Mid-Year False Claims Act Update;

Thursday, July 10 - 2014 Mid-Year Criminal Antitrust and Competition Law Update;

Monday, July 14 - 2014 Mid-Year Securities Enforcement Update;

Tuesday, July 15 - 2014 Mid-Year Securities Litigation Update; and

Wednesday, July 16 - 2014 Mid-Year Electronic Discovery and Information Law Update.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these issues. We have more than 110 attorneys with FCPA experience, including a number of former federal prosecutors, spread throughout the firm's domestic and international offices. Joe Warin, a former Assistant U.S. Attorney, served as FCPA counsel to the first non-U.S. compliance monitor and as compliance monitor for another company that settled FCPA charges during 2010. In 2009, he completed his compliance consultancy for Statoil A.S.A. pursuant to its DOJ and SEC FCPA settlements. Please contact the Gibson Dunn attorney with whom you usually work, or any of the following:

Washington, D.C.
F. Joseph Warin (+1 202-887-3609, fwarin@gibsondunn.com)
Judith A. Lee (+1 202-887-3591, jalee@gibsondunn.com)
David P. Burns (+1 202-887-3786, dburns@gibsondunn.com)
David Debold (+1 202-955-8551, ddebold@gibsondunn.com)
Michael S. Diamant (+1 202-887-3604, mdiamant@gibsondunn.com)
John W.F. Chesley (+1 202-887-3788, jchesley@gibsondunn.com)
Daniel P. Chung (+1 202-887-3729, dchung@gibsondunn.com)
Maura M. Logan (+1 202-887-3617, mlogan@gibsondunn.com)
Oleh Vretsona (+1 202-887-3779, ovretsona@gibsondunn.com)
Christopher W.H. Sullivan (+1 202-887-3625, csullivan@gibsondunn.com)
Stephanie L. Connor (+1 202-955-8586, sconnor@gibsondunn.com)
Elizabeth Goergen Silver (+1 202-887-3623, esilver@gibsondunn.com)
Courtney M. Brown (+1 202-955-8685, cmbrown@gibsondunn.com)

New York
Reed Brodsky (+1 212-351-5334, rbrodsky@gibsondunn.com)
Joel M. Cohen (+1 212-351-2664, jcohen@gibsondunn.com)
Lee G. Dunst (+1 212-351-3824, ldunst@gibsondunn.com)
Mark A. Kirsch (+1 212-351-2662, mkirsch@gibsondunn.com)
Jim Walden (+1 212-351-2300, jwalden@gibsondunn.com)
Alexander H. Southwell (+1 212-351-3981, asouthwell@gibsondunn.com)
Lawrence J. Zweifach (+1 212-351-2625, lzweifach@gibsondunn.com)
Adam P. Wolf (+1 212-351-3956, awolf@gibsondunn.com)

Dallas
Evan S. Tilton (+1 214-698-3156, etilton@gibsondunn.com)

Denver
Robert C. Blume (+1 303-298-5758, rblume@gibsondunn.com)
Ryan T. Bergsieker (+1 303-298-5774, rbergsieker@gibsondunn.com)
Laura M. Sturges (+1 303-298-5929, lsturges@gibsondunn.com)
John D.W. Partridge (+1 303-298-5931, jpartridge@gibsondunn.com)

GIBSON DUNN

Los Angeles
Debra Wong Yang (+1 213-229-7472, dwongyang@gibsondunn.com)
Marcellus McRae (+1 213-229-7675, mmcrae@gibsondunn.com)
Michael M. Farhang (+1 213-229-7005, mfarhang@gibsondunn.com)
Douglas Fuchs (+1 213-229-7605, dfuchs@gibsondunn.com)

Orange County
Nicola T. Hanna (+1 949-451-4270, nhanna@gibsondunn.com)

San Francisco
Thad A. Davis (+1 415-393-8251, tadavis@gibsondunn.com)
Marc J. Fagel (+1 415-393-8332, mfagel@gibsondunn.com)
Charles J. Stevens (+1 415-393-8391, cstevens@gibsondunn.com)
Michael Li-Ming Wong (+1 415-393-8333, mwong@gibsondunn.com)
Winston Y. Chan (+1 415-393-8362, wchan@gibsondunn.com)

London
Patrick Doris (+44 20 7071 4276, pdoris@gibsondunn.com)
Charlie Falconer (+44 20 7071 4270, cfalconer@gibsondunn.com)
Philip Rocher (+44 20 7071 4202, procher@gibsondunn.com)
Mark Handley (+44 20 7071 4277, bmhandley@gibsondunn.com)

Paris
Benoît Fleury (+33 1 56 43 13 00, bfleury@gibsondunn.com)
Bernard Grinspan (+33 1 56 43 13 00, bgrinspan@gibsondunn.com)
Jean-Philippe Robé (+33 1 56 43 13 00, jrobe@gibsondunn.com)
Audrey Obadia-Zerbib (+33 1 56 43 13 00, aobadia-zerbib@gibsondunn.com)

Munich
Benno Schwarz (+49 89 189 33-110, bschwarz@gibsondunn.com)
Michael Walther (+49 89 189 33-180, mwalther@gibsondunn.com)
Mark Zimmer (+49 89 189 33-130, mzimmer@gibsondunn.com)
Eike W. Grunert (+49 89 189 33-121, egrunert@gibsondunn.com)

Hong Kong
Kelly Austin (+852 2214 3788, kaustin@gibsondunn.com)
Adam S. Goldberg (+852 2214 3717, asgoldberg@gibsondunn.com)
Oliver D. Welch (+852 2214 3716, owelch@gibsondunn.com)

Dubai
Peter Gray (+971 (0) 4 704 6805, pgray@gibsondunn.com)

São Paulo
Lisa A. Alfaro (+55 (11) 3521-7160, lalfaro@gibsondunn.com)

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