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White Collar and Regulatory Enforcement: What To Expect In 2015

Yet again, the past year has witnessed a staggering array of massive financial settlements in regulatory and white collar matters. Prominent examples, among many others, include Toyota, which was fined $1.2 billion in connection with resolving an investigation into safety defects; BNP, which pleaded guilty and paid $8.9 billion to resolve criminal and civil investigations into U.S. OFAC and other sanctions violations; Credit Suisse, which also pleaded guilty and paid $2.6 billion to resolve a long-running cross-border criminal tax investigation; and the global multi-agency settlements with six financial institutions for a total of $4.3 billion in fines, penalties and disgorgement in regard to allegations concerning attempted manipulation of foreign exchange benchmark rates. The government also continued to generate headlines with settlements arising out of the financial crisis, including settlements with numerous financial institutions totalling more than $24 billion. We have no reason to expect that this trend will change in 2015.

Notwithstanding the continuing imposition of jaw-dropping fines and penalties, there were several other major new developments worthy of close attention by companies facing these kinds of investigations. In particular, DOJ demanded, in several instances, that companies seeking to resolve such investigations enter guilty pleas, and signaled, in a closely watched speech by Principal Deputy Assistant Attorney General for the Criminal Division Marshall Miller, that the price for obtaining cooperation credit now includes disclosing information leading to the prosecution of individual employees. In addition, in weighing the appropriate penalties, the government has promised close scrutiny of a corporation's compliance program, the timeliness of its self-reporting, and the completeness of its cooperative efforts.

In this environment, achieving comprehensive resolutions of large-scale investigations has become even more challenging, with the government requiring more extensive admissions, and asking for more onerous structural/remedial undertakings. The question inevitably arises whether any company will seek to push back by taking the government to trial.

Also, as a result, there is a greater focus on evaluating the impact of such pending matters in connection with deal due diligence. Indeed, Biomet's planned $13 billion sale to Zimmer Holdings may be affected by the outcome of a federal bribery investigation that gathered steam after the announcement of the transaction. Relatedly, questions of whether the government will go after a successor, the depth and breadth of compliance representations and warranties, and issues regarding successor liability have become even more complex. It is worth noting in this connection that a New York appellate court recently held that the "common interest " doctrine can protect from discovery pre-closing communications among merger parties and their counsel even if there is no pending or anticipated litigation.

Finally, the costs of these massive investigations, particularly as many of them go on for years and often expand across borders, have become prohibitive. This underscores how critically important it is to have effective compliance systems in place to detect and prevent problems in the first place.

Below we review in detail some of the most important enforcement developments of 2014 and some of the key issues that we expect to see unfold during 2015.

The Pendulum Swings Back Toward Indictments of Corporate Entities

Since the collapse of Arthur Andersen in 2002, which led to the loss of tens of thousands of jobs, federal prosecutors have been appropriately and sensibly cautious about subjecting a corporate entity to criminal charges. The Department has often publicly noted that its decision-making in this area has been informed by a concern to avoid triggering the demise of a large institution with many innocent constituencies, including shareholders, employees, customers and counter-parties. In 2014, however, the government signaled that it is revisiting its approach. Prosecutors now seem to view concerns about collateral consequences with a higher degree of skepticism and appear, at least in some circumstances, to be willing to subject a corporate entity, even in a regulated industry, to criminal charges.

The new approach was foreshadowed in a speech last March by the United States Attorney for the Southern District of New York, Preet Bharara. Mr. Bharara announced that, in his view, "after Arthur Andersen, the pendulum has swung too far and needs to swing back a bit. And so you can expect that before long a significant financial institution will be charged with a felony or be made to plead guilty to a felony, where the conduct warrants it."

Less than two months later, Credit Suisse became the first financial institution in over a decade to plead guilty to a crime – in that case, conspiracy to aid tax evasion. BNP Paribas was close behind with its guilty plea to a one-count information charging the bank with conspiring to violate U.S. economic sanctions. In later discussing those convictions, Mr. Bharara took the opportunity to stress that "BNP and Credit Suisse were charged criminally and pled guilty and the sky did not fall."

The government was able to take this drastic step without triggering the devastating collateral consequences of causing the failure of the companies by extensively collaborating in advance with banking regulators to ensure that these institutions would not lose their charters or otherwise be prevented entirely from doing business. Thus, although BNP has been restricted from clearing certain transactions as a correspondent bank in New York and London, it was not subjected to an outright ban on all dollar-clearing functions. Similarly, Credit Suisse's license to operate in New York was not revoked. Notwithstanding DOJ's efforts to limit the fallout, however, the U.S. Department of Labor recently held a public hearing on the proposed exemption allowing the bank to continue serving as a qualified professional asset messenger for retirement plans. Thus, the ultimate impact of the Credit Suisse conviction has not yet been determined.

The long-standing practice of settling investigations with financial institutions, disclosing findings of wrongdoing and imposing significant penalties, yet granting waivers of regulatory bans or exclusions, has also prompted some debate within the SEC. Commissioner Kara Stein publicly dissented from an order granting a waiver of the automatic disqualification from eligibility as a "well-known seasoned issuer" to the Royal Bank of Scotland after a guilty plea by one of its subsidiaries for manipulation of LIBOR. She questioned the traditional granting of waivers in all cases, suggesting that such waivers may need to be negotiated on a case by case basis going forward.

However, Commissioner Stein supported the conditional and more limited waiver granted to Bank of America after it resolved civil and criminal investigations involving its sales of mortgaged-backed securities. That waiver was found to be acceptable because it was limited in time, so the bank will have to go back to the SEC to show it is deserving of the waiver for an additional period. The waiver will be extended if certain conditions are met, including a review by an independent compliance consultant and a certification by the bank that the consultant's recommendations have been implemented.

The significance of these steps is unmistakable. The government appears to be committed, at least in certain circumstances, to imposing the most severe sanctions imaginable, limited only by an effort to prevent the institution from failing. What remains to be seen – and this is a matter of grave concern that all institutions should consider – is whether the government, in its zeal to impose the most severe punishments possible, may miscalculate when assessing the risks of adverse collateral consequences and thus cause a significant institution to fail.

DOJ and state prosecutors have also been paying close attention to companies that have entered into deferred prosecution agreements but have not kept up their end of the bargain. Bank of Tokyo-Mitsubishi was recently fined an additional $365 million by New York's Department of Financial Services after a $250 million settlement in June. The bank allegedly misled regulators about its transactions with entities under U.S. sanctions and pressured its outside consultant to remove incriminating language in a report to be submitted to DFS. Standard Chartered Bank was similarly fined an additional $300 million for its failure to remediate anti-money laundering compliance problems as required in its 2012 settlement. In announcing the most recent sanctions, New York Superintendent of Financial Services Benjamin Lawsky stressed that "If a bank fails to live up to its commitments, there should be consequences." These examples demonstrate that government oversight does not end at the time an agreement is signed. It is critical that companies remain vigilant to ensure that employees are abiding by the forward-looking terms of such agreements.

SEC Enforcement Developments

Midway through 2014, the Second Circuit issued its long-awaited decision in the *Citigroup* appeal, in which the court upheld the SEC's practice of settling enforcement cases on a "neither admit nor deny" basis. (*See our memorandum* Second Circuit Limits Judicial Review of SEC Settlements). In a strongly worded opinion, the Second Circuit made clear that courts must accord the SEC's policy judgments "significant deference," including with respect to whether, when and how to resolve enforcement proceedings. The district court's review of a settlement is limited to determining whether the proposed order is fair and reasonable and, if an injunction is sought, that "the public interest [will] not be disserved." The scope of this review is exceedingly narrow: "[a]bsent a substantial basis in the record for concluding that the proposed consent decree does not meet these requirements, the district court is required to enter the order." The Second Circuit thus eliminated any doubt that a district court oversteps its bounds if it seeks to substitute its own assessment of the "public interest" for the SEC's exercise of discretion.

Nothing in the *Citigroup* decision, however, changed the policy determination that the SEC had earlier made – during the pendency of the appeal – to begin requiring admissions in certain settlements. Enforcement officials have said that the agency will continue to seek admissions in selected cases, and the SEC has obtained admissions in two settlements sub-

sequent to the Second Circuit decision. While the SEC has publicly described the criteria it considers in determining when to seek admissions, those criteria are open to considerable interpretation and the admissions cases to date have spanned a broad spectrum of conduct. It remains to be seen how the SEC will use this tool going forward, now that its historical approach to settling cases has received the strong endorsement of the Second Circuit.

Debate swirled late in the year in response to statements by SEC officials that the agency would bring increasing numbers of its enforcement actions as administrative proceedings, rather than in federal court. Critics of this trend note that, in the administrative forum, the hearing officer is an SEC administrative law judge; respondents have minimal opportunity to conduct discovery; pretrial proceedings are limited, with cases rapidly going to hearing; there is no jury; the federal rules of evidence do not apply, which enables the SEC for example to present hearsay evidence; and appeals go to the Commission, with any eventual further appeal to a federal circuit court governed by a deferential standard of review. In response, SEC officials argue that the agency's enforcement staff does not have unfair advantages when litigating in an administrative proceeding. There have been several recent attempts to challenge the SEC's use of the administrative forum in particular cases on constitutional and other grounds. So far, those challenges have either failed on procedural grounds or been mooted by settlements. As the SEC continues to bring more cases administratively, a litigated decision on the merits becomes more likely.

Whistleblowers continue to be a significant feature of the SEC enforcement landscape. The SEC received 3,620 whistleblower reports in fiscal 2014, the highest total since the inception of the Dodd-Frank bounty program in 2011. The single largest category of tips continues to be "corporate disclosure and financials." The SEC has made 14 awards to whistleblowers since the inception of the program. The agency made nine of those awards in fiscal 2014, including its largest single award, which was in excess of $30 million. According to the SEC Office of the Whistleblower, the recipient of this award, who resides in a foreign country, provided information that "allowed the Commission to discover a substantial and ongoing fraud that otherwise would have been very difficult to detect." Moreover, the Commission made this award *notwithstanding* its determination that the whistleblower had engaged in "unreasonable" delay before reporting the violations. This award thus appears to reflect the SEC's very strong interest in incentivizing whistleblowers. The SEC's annual whistleblower report also states that 80% of award recipients reported their concerns internally to their employer before going to the SEC – thus reinforcing the importance of companies maintaining robust processes to respond to concerns voiced internally by employees.

Finally, the need for careful handling of whistleblower matters was underscored by the SEC's first enforcement case, *In the Matter of Paradigm Capital Management, Inc.* charging an employer with retaliation against a whistleblower.

Shifting Insider Trading Rules

As 2014 came to a close, the Second Circuit handed down an important insider trading decision in *United States* v. *Newman*. The Second Circuit announced new interpretations of insider trading law, criticizing what it termed the "doctrinal novelty" of the Government's "recent insider trading prosecutions, which are increasingly targeted at remote tippees many levels removed from corporate insiders."

The Court held that to be liable under Section 10(b) and Rule 10b-5, it must be proven (in a criminal case, beyond a reasonable doubt) that the tippee-defendant accused of insider trading "*knew* of the tipper's breach, that is, he knew the information was confidential *and divulged for 'personal benefit'"* (emphasis added). As in *Newman* itself, in future cases involving remote tippees, there may be "no evidence that [the defendant] was aware of the source of the inside information," making it difficult for the Government to proving that the ultimate tippee knew the information was divulged for a "personal benefit."

Newman also rejected the government's attempts to infer "personal benefit" from the "mere fact of a friendship, particularly of a casual or social nature" between the insider-tipper and his or her immediate tippee. The Court required "proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." The relationship must "suggest[] a quid pro quo from the latter, or an intention to benefit the latter." Asserting that the Second Circuit's opinion applied a new and incorrect definition of personal benefit and threatens the effective enforcement of the securities laws, the government has filed in the Second Circuit a petition seeking a rehearing and a rehearing en banc.

Until the Supreme Court or Congress speaks, it is impossible to have full confidence in these or any other "rules" announced by any court other than the Supreme Court interpreting the insider trading laws. As Justice Scalia noted when certiorari was denied in *Whitman* v. *United States*, "only the *legislature* may define crimes and fix punishments" (emphasis in the original). But the law of insider trading has been defined mostly by judges.

Even if *Newman* is universally followed, it leaves important questions open, for example, as to the elements of the misappropriation theory. And, whatever the content of the legal rules, the government retains enormous practical power over the lives of individuals and businesses. It would thus be unwise to rely too heavily as a compliance matter on the rules announced in *Newman*.

Insider trading remains a high priority for the SEC and Department of Justice. The SEC has charged 80 people in cases involving insider trading in FY 2014 alone. Long prison sentences continue to be meted out; for example, Matthew Martoma, a former trader for SAC Capital Advisors, received a nine year sentence after his conviction for using inside information about the results of a clinical trial to trade in shares of two drug companies. Investigations continue to abound (including based on political intelligence—that is, trading in advance of a public disclosure of a change in government policy or the announcement of a revised interpretation of an agency rule, for example), and those investigations without more can wreak enormous damage. The government continues to use its full arsenal of undercover tools; this year, it photographed an incriminatory document but left it in place to keep the investigation secret and allow

wrongful trading to continue. And the SEC recently charged Wells Fargo with failure to maintain adequate controls to prevent insider trading, an offense which does not require proof of insider trading itself.

As always, financial firms need to ensure they have appropriate policies and procedures in place to guard against trading based on inside information. *Newman* should not be seen as reducing the practical risks that firms face, or the practical steps they should take to protect themselves.

Cross-Border Tax Enforcement

The government continued to be extremely active in 2014 in the area of cross-border tax enforcement. We expect this trend to continue unabated in 2015, notwithstanding the looming phase-in of reporting on U.S. related accounts by foreign financial institutions under the Foreign Account Tax Compliance Act.

The biggest cross-border tax news in 2014 was the filing of criminal charges against Switzerland's second largest bank, Credit Suisse. The bank's guilty plea, the first in over a decade by a major financial institution, and the accompanying $2.6 billion in penalties and restitutionary payments resolved investigations by the DOJ, IRS, SEC and New York Department of Financial Services. While the plea agreement did not require Credit Suisse to turn over names of U.S. customers, the bank agreed to provide information under the DOJ's Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks ("Swiss Bank Program"). The information includes anonymized information on former clients that likely will enable the IRS to develop cases against former Credit Suisse customers and third-party enablers. The statement of facts accompanying the resolution made clear that the government did not find Credit Suisse's initial efforts to end its U.S. cross-border business, or its initial internal review and cooperative efforts, to be adequate, thus highlighting the risks for institutions that come under scrutiny if they do not promptly and effectively investigate and remediate potential misconduct that is discovered.

In late 2014, the government resolved another long-standing investigation in the cross-border tax enforcement area as the DOJ entered into a deferred prosecution agreement with Bank Leumi. The Bank Leumi DPA covered the bank's units in Switzerland, Israel and Luxembourg, and resolved investigations by the DOJ, IRS and New York Department of Financial Services. Bank Leumi agreed to pay a total of $400 million, and the settlement specifically noted that the bank had turned over the names of more than 1500 U.S. clients in connection with the DPA. The bank acknowledged that it assisted U.S. customers in evading U.S. tax and reporting obligations, including by assisting in the set-up of sham offshore entities to hold offshore undeclared accounts, actively assisting in the opening and maintenance of undeclared accounts and in repatriating offshore account proceeds by making loans that were secretly secured by assets in the offshore accounts.

The Credit Suisse and Bank Leumi resolutions, along with the Bank Wegelin guilty plea entered in January 2013 (the bank ultimately closed), leave eleven so-called Category 1 Swiss banking institutions under the Swiss Bank Program (*i.e.*, those banks already under criminal investigation prior to the announcement of the DOJ Swiss Bank program discussed below) that still have yet to resolve their cases. (One of those remaining banks, Bank Frey, an-

nounced in October 2013 that it was closing as a result of the U.S. investigation.) It is likely that 2015 will see additional criminal resolutions in some of these investigations.

In addition, we expect that many of the approximately 100 Swiss banks reported to have joined the DOJ Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks, announced back in August 2013, to resolve their participation in the coming year, either with non-prosecution agreements or non-target letters. Those banks entering into NPAs will, among other things, be required to pay penalties for unremediated U.S. related accounts, implement steps to ensure no further business with undeclared U.S. clients and provide information relating to former customer accounts, including the banks to which accounts or assets moved. The information provided will likely lead to investigations of bank customers, as well as of other financial institutions and third-party service providers in and outside of Switzerland.

The Bank Leumi resolution is indicative of a broader trend, as the Government's focus has widened beyond banking institutions in Switzerland. Information obtained from criminal investigations, the DOJ Swiss Bank Program, the IRS's Offshore Voluntary Compliance Initiatives and other sources apparently has served as the basis for investigations of banks in many other jurisdictions. Jurisdictions as to which the DOJ and IRS have announced enforcement actions include Israel, India, the Caribbean and Panama.

Consistent with this trend, the government brought a criminal case in March 2014 based on a sting operation in which undercover agents posed as U.S. clients seeking to launder the proceeds of a bank fraud in the U.S. The investigation targeted one U.S. and two Canadian nationals alleged to be operating a Cayman Islands-based business that assisted U.S. clients engaged in tax evasion or laundering the proceeds of illegal activities by establishing and operating offshore nominee entities and related bank accounts. The three defendants ultimately pleaded guilty to conspiring to launder monetary instruments and conceal offshore accounts. And in December, the IRS issued John Doe Summonses to numerous U.S. record-keepers, including Federal Express, UPS, DHL, HSBC USA and the Federal Reserve Bank of New York for U.S- located information on U.S. clients of a Panamanian legal and administrative service provider that is alleged to have assisted U.S. clients in tax evasion through the establishment and operation of offshore entities and related undeclared accounts (the lead for the investigation was developed during a prior DEA sting operation targeting marketers of counterfeit drugs which the DEA later passed on to the IRS).

The SEC also remains an active participant in certain of these investigations. In November, HSBC settled an SEC enforcement action alleging its Swiss-based cross-border business was an illegal, unregistered broker dealer. HSBC's settlement of $12 million included the repayment of all of its profits from the business over eight years and a substantial penalty. Given that the HSBC business had only 380 U.S. permanent resident accounts and had been closed before the commencement of the investigation, one can anticipate continued aggressive enforcement by the SEC in cases where offshore bankers are found to have provided unregistered broker-dealer or investment advisory services to U.S.-located clients.

The government's cross-border efforts have not come without bumps in the road however. In October, for example, a Florida jury acquitted Raul Weil, formerly the number two executive at Swiss bank UBS, of charges of conspiracy to evade income taxes. And a California jury acquitted a U.S. representative of Israeli Bank Mizrahi Tefahot of a scheme to aid U.S. customers in accessing off-shore assets with loans secured by undeclared foreign accounts. Both

cases turn on somewhat unique facts, and neither is likely to deter continued government enforcement efforts. In the Weil case, the defense conceded that there had been illegal conduct by certain former bank employees, but successfully contended that the government had not proven that the senior executive participated in or knew about that conduct. In the Bank Mizrahi case, the government apparently failed to establish that the defendant was aware of the illegal collateralization of the loans.

In what may have been a public declaration that its efforts will not be deterred, just a month after these jury verdicts, the government indicted a former banker from Rahn & Bodmer, another Category 1 Swiss bank. And in December, a federal jury in Los Angeles convicted two tax-return preparers for their role in assisting U.S. clients in tax evasion, including by establishing sham offshore entities in Belize and elsewhere, opening offshore accounts at the Luxembourg units of two Israeli banks, and submitting false tax returns on behalf of those clients.

Against this backdrop, the retirement of Senator Carl Levin (D. Michigan), a longstanding and persistent activist for aggressive enforcement against offshore tax evasion as Chair of the Senate Permanent Subcommittee on Investigations, is unlikely to dampen the DOJ's or IRS's cross-border tax enforcement efforts. At least in the near term, the momentum of continuing investigations is substantial and the government continues to develop new sources of substantial information to support additional investigative efforts. Foreign financial institutions, particularly those with operations in what may be viewed as tax haven jurisdictions, should consider taking steps to ensure that they are aware of the full scope of their past and ongoing business involving accounts in which U.S. persons hold a direct financial or indirect beneficial interest and have adequately documented those accounts and remediated any issues that may have been identified.

Foreign Corrupt Practices Act/Anti-Corruption Enforcement

Inflation may not exist in most realms these days, but the costs of settling foreign bribery charges continue to get more expensive. Last year not only marked the largest *corporate* criminal settlement in U.S. history (with Alstom SA paying $772 million to settle criminal charges it bribed government officials in Indonesia and elsewhere), but also the largest *individual* settlement (with former Siemens executives each paying a $524,000 penalty plus disgorgement to resolve charges of bribery in Argentina).

If anything, however, the rising cost of settlements understates the massive cost and disruption of modern-day FCPA investigations and the increasingly aggressive tactics being employed by the government. In our experience, the scope, duration and cost of such worldwide investigations -- frequently involving forensic accounting, foreign law complexities and national data privacy restrictions that thwart the efficient collection and review of email and other evidence -- cannot be overstated.

So too, the tactics employed by the government in FCPA investigations increasingly include law enforcement techniques previously reserved chiefly for organized crime and narcotics cases. Notably, in the government's investigation of senior Petro-Tiger executives suspected of having bribed Colombian government officials to land contracts with Colombian energy concerns, the government directed the company's general counsel to wear a wire in his future

conversations with the company's CEO notwithstanding claims that the general counsel previously had acted as the CEO's personal as well as corporate counsel. The use of highly-placed, long-trusted informants is apt to become a more common practice. This reality magnifies the likelihood that the government will detect misconduct and successfully prosecute the wrongdoers. At the same time, the government's use of these methods also presents an opportunity to educate corporate personnel about the heightened risks of participating in questionable activities, as well as the danger inherent even in communications that could be misinterpreted. It remains to be seen whether the extraordinary step of inducing a general counsel to wear a wire arose from unique circumstances in the Petro Tiger case, or rather represents a new incursion into territory that may present thorny ethical issues. In any event, the Petro Tiger investigation shows that it is ever more crucial for in-house and outside counsel to define whom they represent and which conversations are attorney-client privileged and/or attorney work product protected.

Despite the increasing severity of FCPA investigations, there still are no clearly-defined benefits -- much less "safe harbors" -- for effective compliance and self-reporting under the FCPA. Under the bribery laws of other countries, notably the U.K. Bribery Act, an effective compliance program and/or self-reporting is often a complete defense to any charges or penalties. Likewise, the Antitrust Division's leniency program offers specific protections from prosecution and treble damages in collateral civil actions if a cartel member is the first to self-report, as well as fine reductions for second-in and other cooperating parties.

In contrast, with respect to the FCPA, the benefits of an exemplary corporate compliance program and self-reporting are at best unpredictable. If, for example, a company detects and self-reports a problem in a local jurisdiction, it immediately opens itself up to criticism that its compliance program, while well-designed and sound overall, was ineffective in preventing misconduct *in that local jurisdiction or instance* -- a true "Catch 22"situation. As we noted last year, the SEC has stated publicly that "if we find the violations on our own, the consequences will surely be worse than if you had self-reported the conduct" and that failure to self-report will lead to a bigger "stick" being used. Nonetheless, the government has historically refused to commit itself on precisely when, and under what circumstances, a well-designed and well-run compliance program and/or self-reporting will spare a company the massive cost and reputational damage of a full-blown investigation and penalties. For example, while Smith & Wesson received a declination from the DOJ, it nonetheless settled FCPA charges arising out of similar conduct with the SEC. And to date, the SEC has entered into only two deferred prosecution agreements and one non-prosecution agreement. Against this backdrop, perhaps the SEC has recognized the need in the current enforcement environment to promote the "carrot" in other ways. In remarks delivered in November 2014, SEC Director of Enforcement Andrew Ceresney, in an effort to highlight the tangible benefits of cooperation, cited two recent FCPA settlements in which the corporate defendants received substantial discounts in the respective penalties as a result of self-reporting and exemplary cooperation.

Looking ahead, we continue to view the FCPA as one of the highest risk areas for corporations operating abroad. Any doubt in this regard should have been dispelled by press reports that the FBI was significantly augmenting its resources devoted to uncovering and investigating foreign bribery. Foreign-based companies subject to US law often face the toughest challenges, because they are less familiar with the nuances and subjectivity of FCPA enforcement and may not appreciate how much turns on FCPA controls in each local jurisdiction, as opposed to general policies set by headquarters. We expect no respite from the rising cost of settlements

as prosecutors compete to surpass each other and Congress shows no interest in clarifying the law in ways that would make it easier to comply with and more consonant with the laws of our major trading partners. As a result, companies doing business overseas should continue to ensure that they have robust anti-corruption compliance programs, training and monitoring systems that set the right tone at the top and effectively implement that tone on the ground in foreign business locations. Such an approach may include periodically assessing the particular anti-corruption risks a company faces from the conduct of day-to-day business operations around the world, with particular attention being devoted to potential risks when entering new foreign markets or expanding or entering new businesses in existing foreign markets.

Criminal Antitrust and Manipulation

Consistent with the government's pattern of amassing substantial penalties in other areas, the DOJ's Antitrust Division collected approximately $1.8 billion in criminal fines and penalties in its 2014 fiscal year. A large percentage of that total represented fines paid by foreign manufacturers in the Division's ongoing investigation into collusive activity in the automotive parts industry. Another significant portion of that amount resulted from the Division's continuing joint investigation with DOJ's Criminal Division of the alleged manipulation of global benchmark interest rates, including LIBOR.

As noted above, prosecutors have increasingly sought to penalize recidivists – companies that have resolved previous claims but have failed to abide by their settlement terms. While Bridgestone paid $425 million, the fourth largest fine the Division has ever obtained, to resolve its participation in the anti-vibration rubber cartel, perhaps more noteworthy is that this figure reflected an increase of at least $100 million based on the company's failure to disclose its participation in the conspiracy to fix the price of anti-vibration rubber parts when it previously agreed to resolve the marine hose cartel investigation back in 2011. In announcing the fine, Deputy Assistant Attorney General Brent Snyder stressed that "the Antitrust Division will take a hard line when repeat offenders fail to disclose additional anticompetitive behavior."

DOJ'S manipulation investigations into LIBOR and other global benchmark interest rates remain ongoing, although there have been several significant settlements, including most recently, the deferred prosecution agreement with Lloyds requiring the payment of an $86 million criminal penalty, and an admission of wrongdoing and acceptance of responsibility. Lloyds is the fifth major financial institution to admit to manipulation and pay a criminal fine. However, the resolution involved a criminal information charging Lloyds with wire fraud rather than any antitrust violations, notwithstanding allegations that a Lloyds LIBOR submitter and a Rabobank trader had unlawfully conspired to submit contributions intended to benefit their own trading positions, rather than rates complying with the definition mandated by LIBOR. The combined total of fines paid by the five firms in this investigation now exceeds $1.2 billion.

As noted at the outset, the global investigation into alleged manipulations of the foreign exchange markets yielded a total of $4.3 billion in settlements from six major financial institutions in November. The settlements were reached with the CFTC (which alone obtained over $1.4 billion in penalties from five of the institutions), the U.S. Office of the Comptroller of the Currency, the U.K. Financial Conduct Authority and the Swiss Financial Markets Supervisory Authority. FX traders at these institutions were alleged to have coordinated their trading with traders at other banks, using private chat rooms to exchange confidential customer order infor-

mation and trading positions. These traders were also alleged to have altered trading positions and to have reached agreement on collective trading strategies as part of a scheme to manipulate certain FX benchmark rates.

International enforcement cooperation remains a key Division priority. The prosecutors and regulators of these and other jurisdictions can be expected to continue extending their collaborative efforts in the coming year. As Deputy Assistant Attorney General Snyder has stressed "with each passing year, the world gets smaller and there are fewer places to hide from international cartel enforcement."

Getting M&A Deals Done in the Current Environment

In the current enforcement environment, companies are devoting considerable resources to developing and implementing effective compliance programs. Nonetheless, even companies with robust compliance programs that have avoided problems may nonetheless "inherit" the compliance risks or problems of companies with which they pursue corporate transactions, be it a merger, acquisition or joint venture. Such risks place a premium on effective pre-signing due diligence and post-closing integration efforts.

Pre-signing due diligence should be tailored to the risk profile presented by the deal counterparty. Considerations include the counterparty's various business lines and geographic locations, the regulatory regimes applicable to the counterparty's operations, and the history of past compliance issues at the counterparty as well as more generally in the business areas in which the counterparty operates. In addition, diligence should focus on the scope and adequacy of the counterparty's existing compliance culture, programs and controls, including written policies and procedures, implementing controls (especially in foreign jurisdictions) and monitoring and reporting measures. Targeted interviews of relevant compliance and business personnel can be used to supplement the review of written materials. In addition, it is important to ensure that any financial due diligence undertaken by a business team is effectively integrated into compliance due diligence in order to ensure that any financial practices or issues that may indicate possible compliance questions are fully considered.

In the real world, it is often difficult to get perfect access to information concerning compliance matters at a deal counterparty. Deal terms, such as representations and warranties can sometimes be used to allocate or otherwise manage FCPA risk in a transaction. Still, effective post-closing compliance integration efforts are often just as important as pre-closing measures. This kind of post-closing attention can help to ensure that any open issues are adequately reviewed and any necessary remedial measures or new compliance protocols or controls to bring the counterparty up to the same standards are implemented in a timely manner. This is especially important where certain questionable conduct or practices are identified at a counterparty that, pre-transaction, might not have been subject to liability under U.S. laws or regulations. Indeed, in a recently issued FCPA opinion release, the DOJ reaffirmed guidance from the 2012 DOJ-SEC Resource Guide that "[s]uccessor liability does not, however, create liability where none existed before." In the case covered by the opinion release, an acquirer had identified a number of likely improper payments made by the foreign target company. Because the payments had no apparent jurisdictional nexus to the U.S., the DOJ concluded that it would not take action for past conduct that would not have been subject to the FCPA, and the acquisition by the U.S. headquartered company would not retroactively create FCPA liability for the target

company's past conduct. In a cautionary note, however, the DOJ emphasized that it expressed no view on the adequacy or reasonableness of the acquiror's compliance integration efforts and encouraged companies engaged in M&A transactions to conduct effective post-closing integration, including appropriate enhancements to compliance policies, controls and training, and following up on any potential issues that may have been identified or that were not able to be adequately vetted during pre-signing due diligence.

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