The Asia Pacific Top Ten FCPA Activities of 2015

Of the twelve corporate actions resolved in 2015, almost half of which had a significant Asia Pacific connection, ten were subject to civil resolution by the US Securities and Exchange Commission (**SEC**) only, with just two being subject to criminal resolution by the US Department of Justice (**DOJ**). While 2015 was notable for this increase in the number of resolutions based on books-and-records and internal controls violations, the drop in DOJ corporate prosecutions should be seen as temporary given the DOJ's recent staffing increases.

Our top ten list for 2015 considers all five of the corporate prosecutions in 2015 that featured a significant Asia Pacific connection, and also looks at a number of other FCPA-related actions and activities pertinent to companies operating in the Asia Pacific region. In each case, we highlight key points for clients to consider when implementing and managing anti-corruption policies and programmes in the region going forward.

Top 10 in APAC

- Bristol-Myers Squibb
- Hitachi
- Mead Johnson
- Louis Berger
- BHP Billiton
- GlaxoSmithKline
- NCR Corporation
- Group DF: Dmity Firtash
- Chun Doo-Hwan
- Hui Chen appointed as DOJ compliance counsel

Enforcement Actions

1. Bristol-Myers Squibb

The SEC announced a USD14 million settlement with the New York-based pharmaceutical company on October 5, 2015. The agreement settled charges that a BMS joint venture in China had provided cash, jewelry, other gifts, meals, travel, entertainment, and sponsorship to state healthcare providers from 2009 to 2014 and inaccurately recorded the spending as legitimate business expenses. The SEC found that BMS failed to respond effectively to red flags, did not investigate claims of fake invoices and receipts, and was slow to remediate holes in its internal controls. Under the settlement, BMS agreed to pay a fine of USD14.75 million, including disgorgement of profits and prejudgment interest, and to report for two years on its remediation measures.

Key points

- While the SEC found that BMS had clearly violated the FCPA's internal controls and record-keeping provisions, the DOJ declined to bring any enforcement action. This case is part of the trend of SEC-only books and records charges, as seen in the BHP Billiton, Mead Johnson, and Hitachi cases.

2. Hitachi

In September 2015, Japanese conglomerate Hitachi Ltd. agreed to pay USD19 million to the SEC for alleged violations of the FCPA's books and records provisions, the second largest civil FCPA penalty. According to the SEC complaint, Hitachi sold 25 percent of one of its South African subsidiaries to a front company that functioned as a funding vehicle for South Africa's ruling party, the African National Congress (**ANC**). Hitachi awarded "success fees" to the front company (improperly recorded as "consulting fees") of more than USD1 million for power station contracts. The SEC's complaint states that after Hitachi learned that the front company was a fundraising arm of the ANC, Hitachi did not alter its arrangement and instead continued to encourage the front company to use its political influence to help Hitachi obtain power station contracts in South Africa.

Key points

- Several points are worth highlighting. First, the recipient of the alleged improper payments in this case was a political party rather than government official(s), as is usually the case. Second, although Hitachi is no longer a US person under the FCPA, it was one during at least part of the time covering the alleged wrongdoing, because it had American Depositary Shares listed on the New York Stock Exchange between 2005 and 2012 which triggered a retrospective jurisdictional hook for the SEC. Third, following a trend with increasing ramifications for companies cooperating with multilateral organizations, the Integrity and Anti-Corruption Department of the African Development Bank followed the SEC settlement with an announcement that it too had settled with Hitachi, imposing a one-year debarment and monetary sanctions.

3. Mead Johnson

Mead Johnson Nutrition Inc., an infant formula manufacturer, entered into a USD12 million SEC settlement on July 28, 2015, based on charges that its Chinese subsidiary had made improper payments exceeding USD2 million to healthcare professionals at state-owned hospitals. The alleged purpose of the cash payments and other incentives, made over a five-year period, was to ensure that its formulas were recommended to expectant and new mothers, and to obtain patient contact information for direct marketing. The SEC alleged that the improper payments were paid to third-party distributors in China through "distributor allowance" funds, over which Mead Johnson's employees exercised some degree of control and guidance. The company was found to have inaccurately reflected those payments in its books and records and to have had inadequate internal accounting controls. Mead Johnson agreed to pay a total of USD11 million in fines, disgorgement, and prejudgment interest.

Key points

- This case is representative of the high-risk nature of operating in the health care sector, particularly in China.

4. Louis Berger

Louis Berger International Inc, a New Jersey-based construction management company, entered into a deferred prosecution agreement (**DPA**) with the DOJ on July 17, 2015, under which it admitted to FCPA violations, and agreed to a USD17.1 million criminal penalty, to implement rigorous internal controls and to retain a compliance monitor for a minimum of three years. The DPA resolved charges that Louis Berger paid USD3.9 million in bribes to foreign government officials in India, Indonesia, Vietnam and Kuwait to secure government construction management contracts between 1998 and 2010. In addition, two former executives pleaded guilty to conspiracy and violations of the FCPA and are awaiting sentence. To conceal the payments, the co-conspirators made payments described as "commitment fees" and per diems to third-party vendors.

Key points

- This case confirms the circumstances in which the DOJ will consider awarding DPAs. Louis Berger was deemed a suitable candidate for a DPA because the company self-reported the FCPA offenses, made both US and foreign employees available for interviews, and assisted with the collection of evidence. It also undertook extensive remediation, including terminating the officers and employees responsible for the corrupt payments, and improving its compliance program and internal controls.

5. BHP Billiton

On May 20, 2015, Australia-based global resources companies BHP Billiton Ltd and BHP Billiton Plc successfully avoided a criminal penalty by agreeing to a cease and desist order with the SEC. The USD25 million settlement was based on charges that BHP failed to devise and maintain sufficient internal controls over its global hospitality program in connection with its sponsorship of the 2008 Olympic Games in Beijing.

According to the SEC, BHP invited 176 government officials, primarily from countries in Africa and Asia, to attend the Games, ultimately providing event tickets, luxury hotel accommodation, meals, offers of business-class airfare, and other hospitality worth USD12-16,000 per package to 60 such officials and their guests. The SEC alleged that the invitations were extended to government officials who were in a position to help the company with its business or regulatory endeavors. It found that BHP failed to provide employees with specific training as to the bribery risks associated with such invitations, adopted an insufficient "check the box" approach to compliance, and failed to implement meaningful procedures for reviewing and approving the invitations. The settlement (under which BHP neither admitted nor denied the SEC's findings) also required BHP to self-report on the operation of its anti-corruption compliance program for one-year.

Key points

- While this case represents the largest financial penalty levied by the SEC to date for FCPA violations, the size of the penalty may reflect the SEC's increased zeal in pursuing alleged FCPA infringements, rather than the scale of BHP's wrongdoing. Neither the DOJ nor the SEC was able to link the allegations of improper travel and entertainment to the award of any specific contract. Accordingly, the SEC could not order disgorgement of contract profits and the DOJ declined to file criminal charges.

Ongoing Investigation

6. GlaxoSmithKline

The GlaxoSmithKline (**GSK**) investigation continued globally in 2015, after the record USD490 million fine imposed by Chinese anti-corruption authorities in 2014 following a conviction for bribery. Following that decision, the DOJ and the UK Serious Fraud Office (**SFO**) both announced ongoing investigations separately being conducted into GSK's operations in China and elsewhere. This will be a case to follow in 2016 as GSK may find itself with additional US and UK penalties.

Key points

- Multinational and PRC corporations are reviewing their anti-corruption policies and practices in recognition that the DOJ and SEC are not the only agencies ready to impose hefty fines for international corrupt wrongdoing. The SFO's investigation may be the first action to answer the question whether fines in one country will mitigate fines imposed by anti-corruption enforcement agencies in other countries.

Declination

7. NCR Corporation

In August 2015, NCR Corporation (**NCR**), a US-listed ATM manufacturer, reported that the SEC did not intend to recommend an enforcement action. NCR had disclosed to shareholders in 2013 and 2014 that the SEC and the DOJ were investigating a whistleblower report received by NCR and a related internal investigation conducted by NCR jointly with external counsel. NCR has not reported a similar declination by the DOJ.

A shareholder lawsuit against NCR relating to these allegations ended in a 2014 settlement, under which NCR agreed to strengthen its compliance program by increasing training and developing a China-specific mechanism to monitor gifts and entertainment expenditures.

Key points

- Although there is limited information on the facts surrounding the alleged FCPA violations, it is clear that prompt action (both in response to whistleblower reports and shareholder complaints) followed by disclosure to the proper enforcement agencies and the market, may generate the most positive results.

Also of note

- Eli Lily also disclosed in February 2015 that the DOJ had declined to bring criminal charges following the 2012 SEC settlement in which the company was fined USD29.4 million based on bribery-related conduct in China and elsewhere.

Individuals

8. Group DF: Dmity Firtash

Dmitry Firtash, a Ukrainian national, was charged alongside five other non-US nationals, in April 2014 in connection with an international racketeering conspiracy to pay bribes of at least USD18.5 million (transmitted through US financial institutions) to government officials in India to obtain mining rights.

Firtash was arrested in March 2014 on a US arrest warrant in Austria. However, on April 30, 2015, the Viennese court denied the US extradition request, stating "political motivation is the basis for rejecting extradition even if a crime occurred, but in Mr Firtash's case there is no evidence of a crime." Undeterred, the DOJ indictment remains and the other alleged co-conspirators will continue to avoid travelling to countries more willing to enforce their extradition treaties with the United States.

Key points

- All six defendants in this case are foreign nationals and the only connection to the United States seems to be the defendants' use of US financial institutions in the alleged wrongdoings. This case is representative of US authorities' aggressive long-armed prosecution of FCPA violations. However, the Austrian court's refusal of the extradition request reflects, to some extent, other jurisdictions' criticism of this approach.

9. Chun Doo-Hwan

The former president of South Korea, Chun Doo-Hwan, settled the DOJ's civil forfeiture cases against his assets on March 4, 2015. The cases arose from Chun's 1977 conviction in South Korea for receipt of more than USD200 million in bribes from Korean companies in exchange for granting favorable treatment and avoiding retaliatory actions from Chun's administration.

According to the DOJ, Chun and his relatives laundered part of the corruption proceeds through a web of companies in both South Korea and the United States. Under the settlement, Chun forfeited almost USD1.1 million in US-based assets traceable to bribes. The DOJ also assisted South Korea in recovering approximately USD27.5 million as partial restitution.

Key points

- These forfeiture cases were brought under the DOJ's Kleptocracy Asset Recovery Initiative, an effort among US federal law enforcement agencies to target the proceeds of foreign official corruption. While individuals who qualify as "foreign officials" may not be charged directly with violations of FCPA for accepting bribes, US authorities can nevertheless take action against them through other avenues such as money laundering charges related to FCPA violations. In early 2015, the FBI also announced the establishment of a new anti-corruption squad consisting of 23 FBI agents, eight of which would be dedicated to anti-kleptocracy and asset forfeiture investigations.

10. Hui Chen appointed as DOJ compliance counsel

On November 3, 2015, the DOJ Criminal Division's Fraud Section appointed Hui Chen as full-time Compliance Counsel. Chen's mission is to provide expert guidance in assessing the quality and effectiveness of companies' corporate compliance programs and proposing reforms of ineffective compliance programs upon resolutions.

Chen was appointed as a consultant to provide objectivity and independence in her reviews, based on her prior experience of compliance programs as in-house counsel at a number of multi-national corporations. Prior to this role, Chen was Global Head of Anti-Bribery and Corruption at Standard Chartered Bank, Assistant General Counsel at Pfizer, Inc., and in the Compliance Division at Microsoft Corporation, holding significant compliance positions including Director of Legal Compliance for the Greater China Area. She conducted extensive compliance investigations into Microsoft's operations in Europe, Asia, Latin American, and the Middle East.

Key points

- This role demonstrates the DOJ's focus on effective corporate compliance programs in determining whether and to what extent a company should be held liable for failing to prevent or detect wrongdoing by its employees. Chen's familiarity with business operations and compliance matters in Asia and China in particular indicates the DOJ's continued interest in FCPA enforcement actions in the region.

Conclusion

The increased focus on compliance with the books and records provisions of the FCPA is a trend that we expect to continue in 2016. It reinforces the importance of implementing and enforcing a compliance program that effectively addresses all aspects of the FCPA; it is not sufficient to protect against the headline-grabbing anti-bribery and anti-corruption provisions alone. With the US investigation into GSK still ongoing, following the blockbuster penalty imposed by China in 2014, we can also expect to see a continued focus on the healthcare and pharmaceutical sectors in the region.

Contacts

Wendy Wysong
Partner

T: + 852 2826 3460
(Hong Kong)
+ 1 202 290 7634
(Washington)
E: wendy.wysong
@cliffordchance.com

Kabir Singh
Partner

T: + 65 6410 2273
E: kabir.singh
@cliffordchance.com

Diana Chang
Partner

T: + 61 2 8922 8003
E: diana.chang
@cliffordchance.com

Kirsten Scott
Counsel

T: + 61 8 9262 5517
E: kirsten.scott
@CliffordChance.com

Michelle Mizutani
Counsel

T: + 81 3 5561 6645
E: michelle.mizutani
@cliffordchance.com

Richard Sharpe
Senior Associate

T: + 852 2826 2427
E: richard.sharpe
@cliffordchance.com

Montse Ferrer
Registered Foreign Lawyer

T: + 852 2826 3562
E: montse.ferrer
@cliffordchance.com

Nicola Dresch
Registered Foreign Lawyer

T: + 852 2826 3425
E: nicola.dresch
@CliffordChance.com

Feifei Yu
Legal Assistant

T: + 852 2825 8091
E: feifei.yu
@cliffordchance.com

Clifford Chance, 27th Floor, Jardine House, One Connaught Place, Hong Kong

www.cliffordchance.com