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FINANCIAL SERVICES ADVISORY AND COMPLIANCE

FCPA Q2 2018 – QUARTERLY REPORT

The second quarter of 2018 saw the resolution of four matters — three of which were joint Department of Justice (DOJ)/Securities and Exchange Commission (SEC) resolutions, and one matter resolved just by the SEC. While the conduct in these cases was not unique insofar as Foreign Corrupt Practices Act (FCPA) matters are concerned, it's interesting to note that two of these cases involved financial institutions, one of which involved the first coordinated foreign bribery case with French authorities. If you add in the early Q3 settlement with Credit Suisse related to China hiring practices, that makes three financial institution bribery-related settlements in a one-month period.

There were several speeches by DOJ and SEC officials, including speeches related to rewarding companies that implement effective compliance programs that instill a culture of compliance, and provide full cooperation with authorities. There was also the announcement of a new no-piling-on policy. A running theme in the speeches was having a culture of compliance and the need to keep compliance programs in good working order. If a potential FCPA issue arises, companies that effectively assess risks and have well-thought-out compliance programs will ultimately be better positioned if they find themselves being scrutinized by the authorities.

I. ENFORCEMENT ACTIVITY IN Q2 2018

A. Dun & Bradstreet

On April 23, the Dun & Bradstreet Corporation (D&B) (NYSE:DNB), a global provider of business information based in New Jersey, agreed to pay the SEC more than $9 million to resolve FCPA charges. The fine consists of approximately $6 million in disgorgement, $1.1 million in prejudgment interest, and $2 million as a civil penalty. The SEC fined D&B due to improper payments made by two Chinese subsidiaries of D&B, Shanghai Huaxia Dun & Bradstreet Business Information Consulting Co., Ltd. (HDBC) and Shanghai RoadWay D&B Marketing Services Co., Ltd. (Roadway). The SEC cease-and-desist order states that HDBC and RoadWay made unlawful payments in order to obtain and retain business in China from 2006 to 2012. HDBC paid Chinese government officials to acquire financial statements on Chinese entities, which were not public, and RoadWay acquired nonpublic personal data through illegal payments to third parties. The subsidiaries recorded the improper payments as legitimate business expenses and made the payments through third-party agents in China under the mistaken belief that they would shield the company from legal liability. D&B failed to take appropriate action to stop the improper payments or false record keeping, which it discovered during the pre-acquisition due diligence process of the subsidiaries and continued to allow the activity post-aquisition.[1]

1. SEC. "SEC Charges Dun & Bradstreet With FCPA Violations," April 23, 2018, File No. 3-18446.

B. Panasonic Corporation

On April 30, Panasonic Corporation (OTCMKTS: PCRFY) and its wholly owned U.S. based subsidiary, Panasonic Avionics Corporation (PAC), agreed to resolve charges of FCPA and accounting fraud violations. Panasonic will pay the SEC approximately $143 million in disgorgement and pre-judgment interest[2] and PAC will pay the DOJ a $137.4 million criminal penalty,[3] for a combined penalty of over $280 million. Also, PAC agreed to enter into a deferred prosecution agreement (DPA) with the DOJ as part of the charges. From 2007 to 2017, PAC made payments in the Middle East, Asia, and China to obtain or retain business. From 2008 to 2014, an official at PAC offered a consulting position to a government official at a Middle Eastern state-owned airline. PAC paid the official $875,000 despite the official doing little work, but the official helped PAC in negotiating two agreements with the Middle Eastern airline worth more than $700 million. During the same time, the same executive at PAC paid $825,000 to obtain confidential non-public information about a domestic airline. PAC did not accurately reflect the payments in the company's books and records, causing Panasonic to falsify its books, records, and accounts in violation of the FCPA. Also during this time period, PAC issued new due diligence requirements for screening sales agents, which forced them to terminate contracts with sales agents that did not meet the requirements. To circumvent the new policy, certain PAC employees used a Malaysia-based sales agent that met the requirements, which then hired the terminated sale agents as sub-agents, allowing PAC to continue their relationship. Through this process, PAC employees hid approximately $7 million in payments to the sales agents by improperly reporting them as legitimate payments to the Malaysia-based sales agent.

C. Société Générale S.A.

On June 4, Société Générale S.A. (SocGen), a global financial services company, and its Curacao-based wholly owned subsidiary, SGA Société Générale Acceptance N.V ("SGA"), agreed to pay more than $860 million to resolve criminal charges by the DOJ and the Parquet National Financier (PNF). That total consists of a $585 million criminal penalty for a bribery scheme in Libya and $275 million for manipulation of the London Interbank Offered Rate (Libor), a leading benchmark for interest rates. SocGen agreed to pay half of the $585 million to the PNF, signifying the first coordinated resolution with U.S. and French authorities in a foreign bribery case. In addition to these fines, SocGen agreed to pay disgorgement and penalty fee to the U.S. Commodity Futures Trading Commission in connection with the Libor manipulation, raising the total fine paid by SocGen to over $1 billion. After the lifting of economic sanctions against Libya in 2004, SocGen paid bribes, usually through SGA, to a Libyan broker to help solicit the investments of Libyan entities to SocGen. The Libyan broker received a 1%-3% commission for each transaction and used these payments to help secure the investments from Libyan state entities for SocGen. This scheme led to SocGen obtaining investments and restructuring from the Libyan institutions worth approximately $3.66 billion, with profits of approximately $523 million. As part of the agreement with the DOJ, SocGen entered into a three-year DPA. For the Libor case, SocGen made it appear that it could borrow money at more favorable interest rates than it was actually able to do from May 2010 to October 2011. The senior executives of SocGen ordered the U.S. dollar (USD) Libor manipulation, tasking its Treasury Department with executing the deflation scheme. This misconduct altered the daily rate for USD Libor, which influenced financial products worldwide. In addition to USD Libor, SocGen employees in London and Tokyo worked to manipulate the Japan Yen Libor submissions in 2006.[4]

2. DOJ press release, "Société General S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate," June 4, 2018, https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan

3. DOJ press release, "Panasonic Avionics Corporation Agrees to Pay $137 Million to Resolve Foreign Corrupt Practices Act Charges," April 30, 2018, https://www.justice.gov/opa/pr/panasonic-avionics-corporation-agrees-pay-137-million-resolve-foreign-corrupt-practices-act.

4. DOJ press release, "Société General S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate," June 4, 2018, https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan.

D. Legg Mason Inc.

Related to the SocGen case and announced on the same day, June 4, Legg Mason Inc. (NYSE: LM), an investment management firm, agreed to pay the DOJ $64.2 million to resolve violations of the FCPA. Legg Mason Inc. also entered into a non-prosecution agreement with the DOJ. Permal Group Ltd. (Permal), an investment management firm under Legg Mason, which partnered with SocGen to solicit business from Libyan state-owned institutions was involved in seven of the transactions that SocGen paid to the Libyan broker, as Permal managed the funds invested by the Libyan institutions. Legg Mason, through Permal, earned approximately $31.6 million in profits due to the investments. The $64.2 million fine includes a penalty of $32.63 million and disgorgement of $31.62 million.[5]

II. WHAT THE ENFORCERS ARE SAYING

Rewarding companies with effective compliance programs, cooperation with law enforcement, the importance of a compliance culture in the financial sector, and a new no-piling-on policy were key topics of speeches given by DOJ and SEC officials during the second quarter. In addition, DOJ FCPA Chief Daniel Kahn spoke with the Society of Corporate Compliance and Ethics (SCCE) Compliance & Ethics Blog and discussed FCPA enforcement and compliance programs.

At the International Association of Defense Counsels' "Corporate Counsel College," **Deputy Attorney General Rod Rosenstein** urged companies to work with the DOJ. "When you work with us, you help us uphold the rule of law and ultimately help create the kind of legal environment where your companies can thrive."

5. DOJ press release, "Legg Mason Inc. Agrees to Pay $64 Million in Criminal Penalties and Disgorgement to Resolve FCPA Charges Related to Bribery of Gaddafi-Era Libyan Officials," June 4, 2018, https://www.justice.gov/opa/pr/legg-mason-inc-agrees-pay-64-million-criminal-penalties-and-disgorgement-resolve-fcpa-charges.

Rosenstein noted that corporations can be held liable for certain bad acts by their employees, and that if a corporation wants DOJ to treat the corporate entity as a victim, "[i]t should act like a victim and help ensure that the perpetrators are held accountable." Rosenstein also said that "strong compliance programs are a company's first line of defense" and "[w]hen something does go wrong, law enforcement should give the greatest consideration to companies that have effective compliance programs in place and timely report the conduct to law enforcement. … An investment in a strong compliance program can pay dividends if you find your company named as a subject or target."[6]

On May 9, 2018, **Deputy Attorney General Rosenstein** gave back-to-back speeches in New York, first to the New York City Bar Association White Collar Crime Institute and then to attendees at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act. During each speech, Rosenstein introduced the new DOJ no-piling-on policy, which calls for "[DOJ] components to appropriately coordinate with one another and with other enforcement agencies in imposing multiple penalties on a company for the same conduct." The new policy, which will be incorporated into the U.S. Attorneys' Manual, has four core features:

1. Criminal enforcement authority should not be used for improper purposes — fairness and the rule of law dictate

2. DOJ components are to coordinate with one another to achieve an equitable result

3. DOJ attorneys are to coordinate with other federal, state, local, or foreign enforcement authorities when possible

4. Certain factors should be considered in determining whether multiple penalties might serve the interests of justice in a case (egregiousness of wrongdoing, statutory mandates regarding penalties, risk of delay in finalizing a resolution, and company's level of cooperation)[7]

A few weeks later, **Acting Deputy Assistant Attorney General Richard A. Powers** gave remarks at the Organization for Economic Cooperation and Development in Paris. Powers said that the no-piling-on policy "is designed to prevent inconsistent, incompatible, or truly duplicative enforcement efforts." He also said that the policy "serves a second, equally critical purpose: it encourages us to build and to enhance relationships with our law enforcement partners, both within the U.S. and abroad."[8]

Deputy Attorney General Rosenstein again spoke about effective compliance programs at *Compliance Week*'s 2018 Annual Conference. He said that "compliance is not a one-size-fits-all proposition." A company's risk profile will drive the compliance program and risks must be continuously evaluated. There are two principal questions that DOJ asks a company that is under investigation. "First, what was the state of the compliance program at the time of the improper conduct? Second, what is the current state of the compliance function, after remediation to address any lessons learned?" There is "no rigid formula to assess the effectiveness of corporate compliance," he said. An "individualized determination" is made in each case.[9]

SEC Chairman Jay Clayton spoke about culture at the Federal Reserve Bank Conference on Governance & Culture Reform. Clayton began by referring to a recently published discussion paper written by the UK Financial Conduct Authority, which stressed: "Culture is not optional." A company's management needs to know what the culture of the organization is to effectively manage the business. "Culture is not just what is said by management to the workforce, but what is done, i.e., what actions are taken, day in and day out throughout the organization, with colleagues, customers, suppliers, and regulators," says Clayton. An organization needs to have a clear and understandable mission to be effective in the long term and how the entity pursues that mission each day defines them culturally.[10]

6. DOJ press release, "Rod J. Rosenstein, Deputy Attorney General, Remarks to the International Association of Defense Counsel's 'Corporate Counsel College," Chicago, Ill., April 26, 2018, https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-international-association.

7. DOJ press releases, "Rod J. Rosenstein, Deputy Attorney General, Remarks to the New York City Bar Association White Collar Crime Institute," New York, N.Y., May 9, 2018, https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar and "Rod J. Rosenstein, Deputy Attorney General, Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act," New York, N.Y., May 9, 2018, https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes

8. DOJ press release, "Richard A. Powers, Acting Deputy Assistant Attorney General, Remarks at the Organization for Economic Cooperation," Paris, France, June 5, 2015, https://www.justice.gov/opa/speech/acting-deputy-assistant-attorney-general-richard-powers-delivers-remarks-organisation.

9. DOJ press release, "Rod J. Rosenstein, Deputy Attorney General, Remarks at Compliance Week's 2018 Annual Conference for Compliance and Risk Professionals," Washington, D.C., May 21, 2018, https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-compliance-week-s-2018-annual.

10. SEC press release, "Observations on Culture at Financial Institutions and the SEC," Jay Clayton, SEC chairman, remarks at the Federal Reserve Bank Conference on Governance & Culture Reform, New York, N.Y., June 18, 2018, https://www.sec.gov/news/speech/speech-clayton-061818.

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Daniel Kahn, chief of the DOJ Fraud Section FCPA Unit, spoke with Adam Turteltaub about FCPA enforcement and compliance programs as part of an SCCE, Compliance & Ethics Blog podcast. Kahn said that with recent global settlements like Telia, Rolls-Royce, VimpelCom and others, "Companies should recognize that it is not just [DOJ] out there any more leading the charge." Companies "need to be thinking not only about DOJ, but also to other jurisdictions that have been impacted by the conduct" and whether companies with a problem might want to consider self-disclosing the conduct to those countries as well. The discussion turned to DOJ's Corporate Enforcement Policy and Kahn said that the department is placing a lot of emphasis on compliance programs. "Compliance by its very nature is risk-specific and company-specific," he said. DOJ is "looking to see how a company is thinking about compliance." They want to see evidence that the compliance program is working. "So, what that means will be very different for every company." When asked about compliance program certifications like ISO 37001, Kahn said that DOJ is not going to ignore a certification and will most likely treat a certification positively. However, a certification "is not a proxy for DOJ doing its own evaluation of the compliance program." In each case, DOJ will ask why the policies and controls are what they are, and whether there is evidence that they are working.[11]

11. The Compliance & Ethics Blog, "Daniel Kahn on FCPA Enforcement and Compliance Programs [Podcast], SCCE," June 14, 2018, http://complianceandethics.org/daniel-kahn-on-fcpa-enforcement-and-compliance-programs-podcast/.

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