

October 2015

# Alert

## Q3 2015: Regulatory Round-Up

### White Collar Defense & Investigations

This round-up contains a summary by sector of certain key global regulatory developments which occurred during the third quarter of 2015. Detail contained within is publicly available information. This note does not contain legal commentary on the matters mentioned.

#### Financial Services

- On 5 October, the U.S. Supreme Court declined, without comment, to review a December 2014 ruling by the 2nd U.S. Circuit Court of Appeals in New York that threw out the 2012 convictions of hedge fund managers **Todd Newman** and **Anthony Chiasson** for engaging in a scheme involving tips about Dell Inc. and Nvidia Corp. Newman, a former Diamondback Capital Management portfolio manager, and Chiasson, co-founder of Level Global Investors, were convicted in 2012 and sentenced to 4-1/2 years and 6-1/2 years in prison, respectively. In the ruling reversing their convictions, a three-judge panel held that in order to prosecute a recipient of material inside information (a “tippee”) for trading on it, prosecutors must prove that the tippee knew that an insider disclosed the information *and* that the insider received some personal benefit in exchange for passing along the information. The court also narrowly defined what constituted a benefit to the insider by saying it could not be just be a friendship but had to be of “some consequence.”<sup>1</sup>
- The SFO has applied to the Crown Court to decide whether evidence relevant to the agency’s investigation and held by **Barclays** must be turned over to the SFO. The SFO is seeking evidence relating to Barclays £5.8 billion emergency cash call during the financial crisis which Barclays claims is covered by legal privilege. On 28 September, a judge lifted a gagging order relating to a two day hearing held in private in July 2015 following applications made by various media groups.<sup>2</sup> A further hearing is scheduled for December.
- On 28 September, the Swiss competition authority announced that it was investigating **UBS, Julius Baer, HSBC, Barclays, Deutsche Bank, Morgan Stanley** and **Mitsui** on suspicion of price fixing in the precious metals market.<sup>3</sup> This follows investigations by EU and U.S. authorities into the metals markets and their benchmarks which were launched earlier this year.
- The SFO is considering whether to open an inquiry into **Lloyds Banking Group** regarding whether the bank pushed companies into administration for its own financial gain.<sup>4</sup>

- On 25 September, Westminster Magistrates Court postponed the extradition hearing of U.K. trader, **Navinder Singh Sarao**, known as the 'Flash Crash' trader, because U.S. authorities added allegations to their extradition request and a senior lawyer on Sarao's defense team was unable to attend court due to an injury. Sarao was indicted on 2 September on charges including 22 counts of alleged manipulation and wire and commodities fraud by using algorithmic trading software to manipulate the price of e-mini S&P 500 futures contracts. He is also facing a parallel case by the U.S. Commodity and Futures Trading Commission.<sup>5</sup>
- On 22 September, **RT Jones Capital Equities Management** agreed to settle charges brought by the SEC in the U.S. that it had inadequate cybersecurity measures and between 2009 and 2013, it had failed to protect personal data held on clients.<sup>6</sup> RT Jones Capital agreed to pay \$75,000 without admitting or denying the allegations. This is the first SEC settlement focused on inadequate cybersecurity measures.
- On 18 August, **BNY Mellon** agreed to pay a fine of \$14.8 million to settle allegations that it violated the FCPA by hiring foreign officials' relatives as interns. BNY Mellon settled without admitting or denying the allegations.<sup>7</sup>
- On 5 August, the SFO opened a criminal investigation into business and accounting practices at **Quindell plc**. KPMG is also facing an inquiry by the Financial Reporting Council (the U.K.'s accountancy watchdog) for its work as the company's auditor.
- On 3 August, **Tom Hayes**, the first individual to be charged and stand trial in the U.K. as a result of the SFO's ongoing criminal investigation into the manipulation of LIBOR, was found guilty of eight counts of conspiracy to defraud and sentenced to 14 years in prison.

## Motor

- The following 11 countries are now investigating **Volkswagen** following its emission scandal: U.K., U.S., South Korea, France, Italy, Canada, Germany, India, Russia, Australia and Spain. Government authorities have commenced investigations as a result of the U.S. Environmental Protection Agency saying that Volkswagen illegally installed software in diesel cars, allowing the company to conceal from U.S. regulators how much toxic gas its cars emitted.<sup>8</sup>

- On 17 September, **General Motors** signed a deferred prosecution agreement with the U.S. Attorney's Office for the Southern District of New York. Under the agreement, General Motors agreed to install an independent monitor and admitted that it concealed a defect in car ignition switches from the public and U.S. regulators between 2012 and 2014.<sup>9</sup>

## Oil & Gas

- On 5 October, **BP** came to a record settlement of \$20.8 billion with the Department of Justice, along with the five Gulf States Alabama, Florida, Louisiana, Mississippi, and Texas, for the civil lawsuit arising out of the 2010 Deepwater Horizon oil spill in the Gulf of Mexico. If approved by the U.S. District Court in New Orleans, this will be the largest settlement with a single entity in the history of the DOJ. BP must pay \$5.5 billion as a federal Clean Water Act penalty, \$8.1 billion in natural resource damages, \$5.9 billion to cover state and local economic claims, and \$600 million for other claims such as reimbursement of natural resource damage assessment costs. This penalty that will repay the government for its costs in responding to the disaster comes after BP's guilty pleas in 2012 to criminal charges including felony manslaughter, environmental crimes, and obstruction of Congress; BP's payment of \$4 billion in criminal fines; and BP's imposition of comprehensive measures to improve the company's drilling procedures, safety protocols, and corporate ethics. The civil settlement acknowledges that BP continues to comply with those requirements.<sup>10 11</sup>
- The SFO has opened a criminal investigation into **Soma Oil & Gas Holdings Ltd**, Soma Oil & Gas Exploration Limited, Soma Management Limited and others in relation to allegations of corruption in Somalia.<sup>12</sup>

## Pharma

- On 5 October, **Bristol-Myers Squibb** ("BMS") settled FCPA charges with the SEC for \$14.4 million. The SEC found books and records violations regarding BMS' joint venture in China wherein: (i) BMS China failed to respond to red flags arising out of audits that revealed employees falsely recorded expense reimbursement documents to generate funds to pay healthcare providers at state-owned hospitals in exchange for prescription sales; (ii) BMS China was slow to institute a formal FCPA compliance programme, training was not

accessible to part of the sales force, and known deficiencies were not timely remediated; and (iii) internal documents revealed improper benefits provided to healthcare providers such as cash payments, gift cards, entertainment, jewellery, speaking engagements, and sponsorships to international conferences. The settlement includes the disgorgement of the total profits earned by BMS China as a result of the conduct (\$11.4 million) and a \$2.75 million civil penalty.<sup>13</sup>

## Other

- On 6 October, New York federal prosecutors accused **the former president of the United Nations General Assembly** of orchestrating a \$1.3 million bribery scheme that turned the deliberative body into “a platform for profit.” A criminal complaint unsealed in Manhattan court charged **John Ashe** and five other individuals with engaging in a wide-ranging corruption scheme. Prosecutors said Ashe, an Antiguan citizen who headed the General Assembly between September 2013 and September 2014, accepted over \$500,000 in bribes in exchange for his support for a multibillion-dollar, U.N.-sponsored conference centre in Macau, China. He received an additional \$800,000 in bribes from various Chinese businessmen, the complaint said. The five other defendants charged on Tuesday were Francis Lorenzo, the deputy permanent representative to the U.N. for the Dominican Republic; Ng Lap Seng, the billionaire developer of the Macau conference center; Ng’s assistant, Jeff Yin; and Shiwei Yan and Heidi Hong Piao, two U.S. citizens who allegedly facilitated the bribes from Chinese businessmen. Ashe, 61, was charged with two counts of subscribing to false and fraudulent income tax returns. He was not charged with bribery, and prosecutors said in a footnote of the complaint that he has diplomatic immunity for conduct “within the scope of his official positions.”<sup>14</sup>
- On 25 September, Scottish authorities announced that **Brand-Rex Limited** paid £212,800 to dispose of an offence under section 7 of the Bribery Act 2010 by way of a civil recovery order under the Proceeds of Crime Act 2002. Brand-Rex which develops and supplies cabling systems operated an incentive scheme for U.K. distributors and installers under which those who met or exceeded sales targets were eligible for certain rewards, including foreign holidays. One of its independent installers offered their rewards to an individual who was in a position to influence decisions as to the purchase of one of Brand-Rex’s customer’s cabling solutions. Scottish authorities determined that Brand-Rex’s decision to self-report was a key consideration for determining the company being suitable for a civil recovery settlement rather than facing criminal prosecution.<sup>15</sup>
- On 25 September, Swiss prosecutors announced that they have opened criminal proceedings against the president of **Fifa, Sepp Blatter**, “on suspicion of criminal mismanagement as well as – alternatively – on suspicion of misappropriation”.<sup>16</sup>
- David Green, Director of the Serious Fraud Office (SFO) spoke at the Cambridge Economic Crime Symposium on 7 September.<sup>17</sup> The Director provided a summary of: (i) the significant results over the last 12 months, including the conviction of Sustainable AgroEnergy under the Bribery Act; (ii) new investigations including Tesco, Bank of England and Forex; (iii) ongoing investigations, including GlaxoSmithKline, Barclays and Rolls Royce; and (iv) the anticipation of two Deferred Prosecution Agreements to be completed before the end of 2015.
- On 10 September, Deputy Attorney General Sally Quillian Yates announced new guidance to all DOJ prosecutors and civil trial attorneys regarding crediting corporations for cooperation during DOJ’s investigation when determining corporate liability for misconduct. Going forward, if a company wants any credit for cooperation, it must identify all individuals involved in the wrongdoing, regardless of their position, status, or seniority in the company, and provide all relevant facts about their misconduct. This threshold requirement of complete cooperation as to individuals not only governs criminal investigations, but applies to civil investigations as well, and department attorneys will be actively investigating individuals at every step of the process – before, during and after any corporate cooperation.<sup>18</sup>
- The Australian Securities and Investments Commission has announced that it may make companies and individuals pay for its investigations if they lead to successful prosecution or civil proceeding. The new approach will apply to all investigations started on or after 29 July.<sup>19</sup>

<sup>1</sup> [http://www.nytimes.com/2015/10/06/business/dealbook/supreme-court-denies-request-to-hear-insider-trading-case.html?\\_r=0](http://www.nytimes.com/2015/10/06/business/dealbook/supreme-court-denies-request-to-hear-insider-trading-case.html?_r=0)

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- <sup>2</sup> <http://www.ft.com/cms/s/0/5257a858-6680-11e5-a57f-21b88f7d973f.html#axzz3n2ultNUm>
- <sup>3</sup> <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/11895552/Switzerland-probes-banks-over-precious-metals-price-fixing.html>
- <sup>4</sup> <http://www.ft.com/cms/s/0/2d3a0844-5d5d-11e5-9846-de406ccb37f2.html#axzz3n2ultNUm>
- <sup>5</sup> <http://www.law360.com/whitecollar/articles/707326/-flash-crash-trader-s-extradition-hearing-postponed>
- <sup>6</sup> <http://globalinvestigationsreview.com/article/4082/sec-makes-statement-intent-cybersecurity-enforcement-action>
- <sup>7</sup> <http://globalinvestigationsreview.com/article/3682/sec-settles-first-hiring-practices-fcpa-case-bny-mellon>
- <sup>8</sup> <http://globalinvestigationsreview.com/article/4110/volkswagen-scandal-11-countries-investigating>
- <sup>9</sup> Deferred Prosecution Agreement in full: <http://www.justice.gov/usao-sdny/file/772301/download>
- <sup>10</sup> <http://www.justice.gov/opa/file/625141/download>
- <sup>11</sup> Fact Sheet Proposed Consent Decree With BP for the Deepwater Horizon /Macondo Oil Spill: <http://www.justice.gov/opa/file/780696/download>
- <sup>12</sup> 31 July 2015
- <sup>13</sup> Cease-and-Desist Order, Bristol-Myers Squibb Co., Exchange Act Release No. 76073 (October 5, 2015), <http://www.sec.gov/litigation/admin/2015/34-76073.pdf>
- <sup>14</sup> [http://www.law360.com/whitecollar/articles/711356?nl\\_pk=5e0d36ba-99b9-4ff1-87d7-54760a74f39c&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=whitecollar](http://www.law360.com/whitecollar/articles/711356?nl_pk=5e0d36ba-99b9-4ff1-87d7-54760a74f39c&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar)
- <sup>15</sup> <http://www.crownoffice.gov.uk/media-site/media-releases/1144-glenrothes-cabling-company-pays-212-800-after-reporting-itself-for-failing-to-prevent-bribery-by-a-third-party>
- <sup>16</sup> <http://www.ft.com/cms/s/0/378713d0-6395-11e5-a28b-50226830d644.html#axzz3n8uJFcxU>
- <sup>17</sup> Full speech can be found at: <http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2015/cambridge-symposium-2015.aspx>
- <sup>18</sup> <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>
- <sup>19</sup> <http://globalinvestigationsreview.com/article/3666/australian-regulator-recover-corporate-investigation-costs>
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If you have questions concerning the contents of this Alert, or would like more information about Weil's White Collar Defense & Investigations, please speak to your regular contact at Weil, or to:

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