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IMPLICATIONS OF INCREASING ENACTMENTS OF PRIVACY LAWS

The rise of new data privacy laws around the world has created a patchwork of various obstacles for companies attempting to investigate potential violations of anti-corruption laws. For years, data privacy laws in the European Union have posed an obstacle to preserving and obtaining documents that contain employees' personal data, broadly defined to include data that identifies a person's "physical, physiological, mental, economic, cultural or social identity."

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SHAREHOLDER BOOKS-AND-RECORDS INSPECTION OF PRIVILEGED INTERNAL INVESTIGATION DOCUMENTS

In *Wal-Mart Stores, Inc. v. Indiana Electrical Workers Pension Trust Fund IBEW*, No. 13-614 (Del. July 23, 2014), the Delaware Supreme Court applied what is known as the *Garner* doctrine, a "fiduciary exception" to the attorney-client privilege that in limited circumstances allows a shareholder to obtain privileged corporate documents relating to a company's internal investigation. The *IBEW* opinion affirmed a Chancery Court decision in a books-and-records action requiring Wal-Mart to produce documents protected by the attorney-client privilege and attorney work product doctrine, which, according to the Chancery Court, were necessary and essential to the shareholders' purpose of investigating corporate wrongdoing.

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GLOBAL WATCH

ANTI-CORRUPTION PROSECUTION ON THE RISE GLOBALLY

For the last decade, aggressive enforcement of the U.S. FCPA has dominated anti-corruption efforts globally, and that law has been a foremost concern for companies doing business in high-risk areas overseas. Other countries have been catching up, however, as governments from Brazil to the U.K. have implemented stricter, "FCPA-style" anti-bribery laws in recent years. Now, many of those countries are getting their own investigations underway, with high-profile prosecutions already in process and increasing numbers of enforcement actions expected in the coming years. These actions are giving the FCPA a run for its money, impacting not just nationals of those countries or those doing business there, but also—in the case of laws like the U.K.'s or Canada's—companies doing business in other countries as well.

The U.K., initially criticized for a slow start to U.K. Bribery Act enforcement, has both stepped up prosecutions under the law and continued to investigate and charge companies under other, older U.K. corruption laws. It took two years from the time the law went into effect for the Serious Fraud Office (SFO) to bring its first set of charges in August 2013, but by September of that year, the SFO announced that it had eight cases under investigation. A year later, the SFO is actively engaged in a number of high-profile investigations, including one involving a major international pharmaceutical company and one involving the Sweett Group, a construction and property management company. In July 2014,

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IN THE INTERIM

7/1/14: Mark Jackson and William Ruehlen settled with the SEC without paying any penalties and neither admitting nor denying any wrongdoing. Instead, Jackson and Ruehlen consented to the entries of final judgments, enjoining them from violating or aiding and abetting a violation, respectively, of Section 13(b)(2)(A). The former CEO of Noble Corporation and current head of the company's Nigeria unit were charged in February 2012 with FCPA books-and-records offenses for bribing officials in Nigeria in exchange for illegal import permits for drilling rigs.

7/3/14: Biomet announced, in a securities filing, that the SEC issued a subpoena requiring production of documents relating to "certain alleged improprieties" in the company's Brazilian and Mexican operations. According to the filing, Biomet learned of the possible violations in October 2013 and disclosed them to the SEC and DOJ in April 2014, pursuant to the terms of its deferred prosecution agreement.

7/17/14: William Pomponi, a former vice president of regional sales at Alstom Power Inc., pleaded guilty to conspiracy to violate the FCPA. Three other defendants pleaded guilty to paying bribes to Indonesian officials through two hired consultants over a seven-year period.

7/23/14: The Delaware Supreme Court affirmed a Delaware Chancery Court order requiring Wal-Mart to turn over privileged files and documents from an internal FCPA investigation to plaintiffs in a civil shareholder suit.

7/24/14: Bernd Kowalewski, the former CEO of BizJet, pleaded guilty to conspiracy to bribe government officials in Mexico and Panama. In 2012, BizJet entered into a three-year deferred prosecution agreement with the DOJ to resolve FCPA offenses in Latin America.

7/28/14: Smith & Wesson Holding Corporation agreed to an out-of-court settlement with the SEC through an internal, administrative order. Without admitting or denying any wrongdoing, the company agreed to pay the SEC $107,852 in disgorgement, $21,040 in prejudgment interest, and a $1.9 million civil penalty for paying bribes in Pakistan, Indonesia, and other countries in order to obtain gun sales to military and police forces.

7/31/14: The SEC awarded more than $400,000 to a whistleblower who reported fraud to the SEC after the company failed to address the issue internally, despite the fact that the SEC's review staff initially recommended denial of the award, claiming the information wasn't "voluntarily provided."

8/5/14: Cobalt International Energy, Inc. announced, in a securities filing, that it had received a Wells Notice in connection with the SEC's investigation of its operations in Angola and potential liabilities under the FCPA.

8/6/14: Alisa Bivens, a former foreign program director of International Adoption Guides Inc., pleaded guilty

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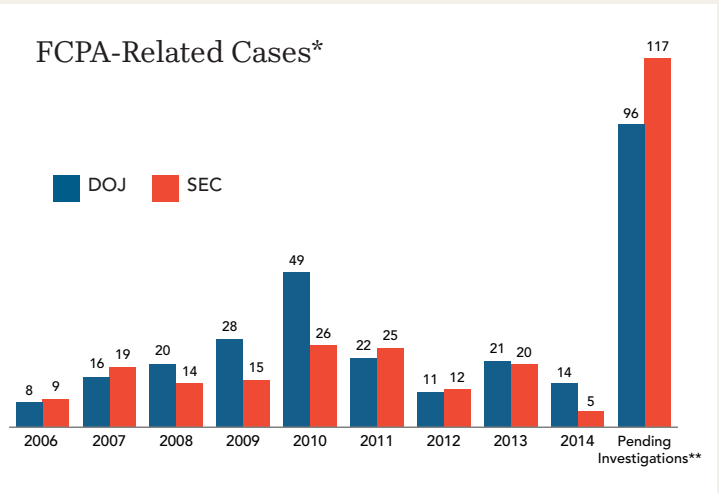
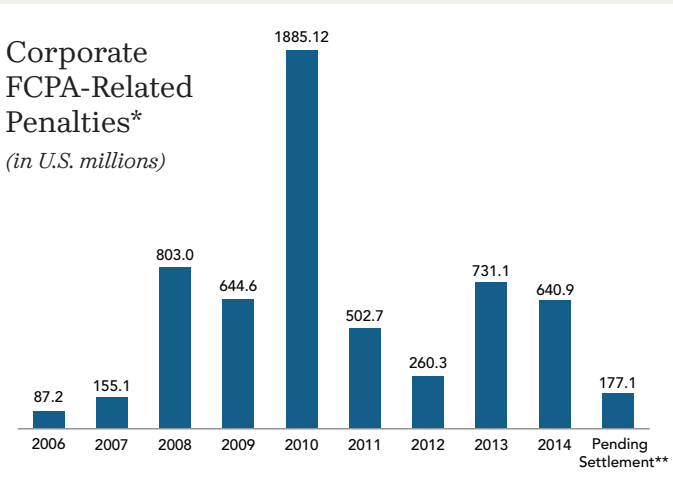


* New criminal or civil cases (settled or contested) instituted by year

** Based upon public disclosures of investigations



* Includes disgorgement; does not include non-U.S. fines

** Includes publicly disclosed reserves for future FCPA settlements

GLOBAL WATCH

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the SFO charged Alstom Network UK Ltd., a subsidiary of the Alstom Group, a French company, with corruption offenses under older U.K. corruption laws, because the alleged activity took place prior to enactment of the new U.K. Bribery Act. The company is a major multinational developer and supplier of equipment for electrical power generation and transmission, as well as rail products.

The Alstom case and others demonstrate that, in addition to ramped-up enforcement of the Bribery Act, the SFO is also willing to pursue historic, pre-Bribery Act corporate corruption. In another example from August 2014, four former Innospec Ltd. executives were sentenced for their roles in a bribery scheme in Indonesia and Iraq that was prosecuted by the SFO under those older laws. In addition, prosecutors other than the SFO (such as the National Crime Agency) are actively involved in bringing prosecutions under the Bribery Act. As a result, the number of overall prosecutions is expected to increase.

Further, as discussed in our first quarterly newsletter for 2014, there has been a sharp increase in investigations, charges, and convictions under Canada's Corruption of Foreign Public Officials Act ("CFPOA"), following a 2013 strengthening of the law and the launch of a dedicated anti-graft unit within the Royal Canadian Mounted Police. The first individual was convicted under the law in October 2013 and sentenced in May 2014 to three years in prison for his role in creating and orchestrating a failed bribery scheme on behalf of CryptoMetrics, Inc., a biometrics technology company. In June 2014, the Canadian authorities charged two additional CryptoMetrics executives—both U.S. nationals—with violations of the CFPOA, as part of its continuing investigation. Other high-profile CFPOA investigations also remain ongoing, including those of a major engineering and construction group, for alleged bribery in Bangladesh, and Blackfire Exploration Ltd., a mining company, related to activity in Mexico. In its most recent report to Parliament, the Department of Foreign Affairs and International Trade reported that there were 36 ongoing CFPOA investigations, and enforcement efforts are only likely to increase.

Finally, in China, which has long been the source of high-profile FCPA enforcement actions, the tide seems to be changing as Chinese authorities at the highest levels are taking a harder line against bribery. Since assuming the presidency in 2013, Xi Jinping has launched a wide anti-corruption campaign that has included particular scrutiny of corruption in the pharmaceutical sector. The Chinese government has launched investigations into alleged bribery involving a number of multinational and domestic pharmaceutical companies. One case began in July 2013, when Chinese authorities detained four senior executives of a company on allegations of corruption. In May 2014, after a 10-month investigation, Chinese authorities accused the former head of the company's China operations of presiding over a "massive bribery network" that reportedly resulted in over $150 million in illegal revenue for the company. Prosecution of the executive, a British citizen, has been described as a "game changer" from the perspective of anti-corruption prosecution in China, where charges against foreign-born multinational executives generally have been rare.

While still less robust than U.S. efforts, anti-corruption prosecution is clearly on the rise in other countries as well, signaling to companies that the FCPA is no longer the only game in town.

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to conspiring to defraud the United States by paying bribes to foreign officials and submitting fraudulent documents to the State Department concerning adoptions from Ethiopia. The DOJ did not include FCPA charges against Bivens and did not explain that decision. A sentencing date has not yet been set.

8/11/14: Cubist Pharmaceuticals, Inc. announced that Optimer Pharmaceuticals, a Massachusetts-based company that Cubist acquired last year for $551 million, may have violated the FCPA. According to Cubist's disclosure, the government is investigating "a potentially improper payment to a research laboratory" and an "attempted share grant by Optimer" in 2011.

8/14/14: Joel Esquenazi and Carlos Rodriguez petitioned the United States Supreme Court to review their convictions on FCPA-related charges for a scheme to bribe officials at Haiti's state-owned telecom company. Specifically, they asked the Supreme Court to consider whether the definition of "instrumentality" under the FCPA (1) fails to satisfy the constitutional requirement of adequate notice of what specific conduct violates the FCPA, and (2) is erroneously derived from commentary to an unrelated treaty [the OECD anti-bribery convention] that post-dates the FCPA's enactment. On October 6, 2014, the Supreme Court denied the defendants' petition and declined to hear the case.

8/29/14: The SEC announced the first award, in the amount of $300,000, to a whistleblower with an audit or

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IMPLICATIONS OF INCREASING ENACTMENTS OF PRIVACY LAWS

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Now, with an increasing number of countries enacting similar data protection statutes, companies attempting to investigate potential employee misconduct face even more challenges in performing a thorough internal investigation.

The ability of a company to preserve, collect, transfer, and review business documents and communications is critical when conducting an investigation. If the company or its outside counsel uncover misconduct during such an investigation and determine that the company must share that information with a governmental entity, demonstrating a thorough preservation and review of employees' records is critical to establishing an appropriate investigation. Data privacy laws, however, can make establishing a clear record of thorough documentary collection and review significantly more difficult. Internal and external counsel should be aware of these various challenges—particularly as new data privacy laws emerge around the globe—and be able to anticipate how they may impact anti-corruption investigations.

The obstacles to data collection because of foreign data privacy laws are evidenced in a Shanghai court's recent conviction of two corporate investigators—one British and one American—for purchasing personal information on Chinese citizens. The conviction was based on a 2009 amendment to the PRC Criminal Law that made the handling of certain personal data a crime. But the law itself and the Chinese government's interpretation of the law are vague, creating pitfalls for companies that rely on such information to conduct thorough fact-finding during internal investigations.

In addition to ambiguities in Chinese laws related to the treatment of personal data, China's lack of a comprehensive privacy law framework makes obtaining data from within China for review in the U.S. a difficult barrier to internal investigations. New data privacy laws in other countries—including Russia and Colombia, for instance—may also stymie a company's ability to extract data from those countries' borders and review them in the U.S. In Russia, July 2014 amendments to the country's personal data law, which take effect on September 1, 2016, will require databases that are used to record, store, or update personal data of Russian citizens to be located in Russia, thereby requiring some element of data collection and storage within Russia's borders. In Colombia, an October 2012 law (which followed similar laws in Argentina, Costa Rica, Mexico, Peru, and Uruguay) prevents the transfer of personal data to another country unless the country maintains equal or more stringent standards of personal data

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compliance function. Sean McKessy, chief of the SEC's Office of the Whistleblower, said employees who perform internal audit, compliance, and legal functions can be eligible for an SEC whistleblower award, "if their companies fail to take appropriate, timely action on information first reported internally."

9/22/14: The SEC announced a $30 million award to a whistleblower living overseas who provided key original information that led to a successful SEC enforcement action. The award is the largest award yet made by the SEC's whistleblower program, and the SEC's fourth award to a whistleblower living in a foreign country. Sean McKessy, Chief of the SEC's Office of the Whistleblower, said that "whistleblowers from all over the world should feel similarly incentivized to come forward with credible information about potential violations of the U.S. securities laws."

9/22/14: Kentucky-based General Cable Corporation, one of the largest wire and cable manufacturers in the world, announced that the Company is investigating certain commission payments involving sales to customers in Angola, Thailand, and India, including the way in which the payments were reflected in the company's books and records, which may have implications under the FCPA. General Cable said that its internal investigation has thus far determined that certain employees in its Angola subsidiary made payments to "officials of Angola government-owned public utilities that raise concerns under the FCPA and possibly under the laws of other

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protection—a provision similar to the one in the EU's Data Protection Directive and with respect to which the European Commission determined the U.S. data privacy laws were deficient.

Countries around the world are continuously pushing forward on data privacy laws, necessitating ongoing review of these changes in order to navigate them within the internal investigation context. When conducting internal investigations of potential employee misconduct, companies should consider extra steps to ensure compliance with data privacy laws. Companies should first consult with local counsel in individual countries to ensure that they can proceed with the internal investigation without violating any data privacy regulations. Additionally, U.S.-based privacy law experts can add tremendous value to this process, particularly in assessing the confluence of a variety of divergent privacy law schemes. For larger, multinational corporations, dedicated in-house employees who can remain abreast of changes in data privacy law and work with local counsel and U.S.-based privacy law experts on these matters may help ensure compliance with data privacy statutes, while balancing a need to conduct thorough internal investigations. These resources will be able to determine whether the company will be able to operate with fully compliant data processing vendors, and how best to enter into confidentiality agreements or seek protective orders if disclosure to a government entity becomes necessary.

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jurisdictions." The Company said that it has voluntarily disclosed these matters to the SEC and DOJ.

9/25/14: Australia-based BHP Billiton, the world's largest mining company, announced that it is in discussions with the SEC to resolve an investigation of potential FCPA violations that relate to the company's sponsorship of the 2008 Beijing Olympics. According to the company's statement, the issues relate primarily to matters in connection with previously terminated exploration and development efforts, as well as hospitality provided during the Beijing Olympics.

SHAREHOLDER BOOKS-AND-RECORDS INSPECTION OF PRIVILEGED INTERNAL INVESTIGATION DOCUMENTS

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The FCPA allegations at the heart of the *IBEW* case were that executives at Wal-Mart de Mexico ("WalMex"), a subsidiary of the company, paid millions in bribes to Mexican government officials in return for zoning changes and favorable permitting for new stores in Mexico. In April 2012, the *New York Times* brought these allegations to light in an article asserting that the company's executives were aware of the bribery but failed to appropriately address the conduct. The article asserted that an initial internal investigation revealed significant problems, but that the company executives dismissed its conclusions and transferred control over the investigation to the general counsel of WalMex, who himself had been a target of the investigation. That individual subsequently cleared himself and his fellow executives of any wrongdoing.

Shortly after the article's publication, a stockholder of the company, Indiana Electrical Workers Pension Trust Fund ("IBEW"), made a demand to inspect corporate books and records pursuant to Section 220 of the Delaware General Corporation Law for the purpose of investigating the allegations regarding bribery payments by WalMex employees, as well as whether and to what extent mismanagement may

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have occurred in connection with the Company's subsequent internal investigation of those allegations. Section 220, like similar laws in other states, allows a shareholder of a Delaware corporation to "inspect for any proper purpose . . . [t]he corporation's stock ledger, a list of its stockholders, and its other books and records," and is commonly used by shareholders as an investigatory tool prior to filing a derivative suit.

The company produced a variety of board-level and compliance-related documents in response to the Section 220 demand, but declined to produce certain documents, including those that it claimed were privileged. IBEW then filed a Complaint in the Delaware Court of Chancery alleging deficiencies in the company's production.

On October 15, 2013, then-Chancellor Strine ordered the company to produce an expansive set of documents relating to the allegations of bribery and the company's subsequent internal investigation, including certain documents that were subject to the attorney-client privilege and attorney work product doctrine. The Chancery Court reasoned that inspection of these documents was necessary and essential to the shareholders' purpose of investigating corporate wrongdoing and determining whether demand on the company's board to investigate this wrongdoing would be futile.

The company appealed the Court of Chancery's decision. The Delaware Supreme Court affirmed, holding that the lower court did not abuse its discretion in ordering the company to produce certain privileged documents, noting that the fiduciary duty exception to the attorney-client privilege from the Fifth Circuit's opinion in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), "allows stockholders of a corporation to invade the corporation's attorney-client privilege in order to prove fiduciary breaches by those in control of the corporation upon showing good cause." The court concluded IBEW was entitled to the documents that it demanded because they were essential to its purpose of investigating the company's handling of the WalMex investigation, whether a cover-up took place, and what details were shared with the company's board. In addition, the court found that "good cause" existed because IBEW had demonstrated a colorable claim that wrongdoing had occurred in connection with the way the investigation was conducted, and information on that subject would have been very difficult to obtain through any other means. For the same reasons, the court also held that then-Chancellor Strine had not erred in permitting discovery of attorney work product pursuant to court of Chancery Rule 26(b)(3), which the court interpreted to require the same showing as the "good cause" standard with respect to privileged documents under *Garner*.

On September 22, 2014, the company filed a motion to clarify Chancellor Strine's 2013 document production order. On October 15, 2014, Chancellor Andre G. Bouchard, who is now presiding over the case, ruled that the company's materials from its 2011 investigation in connection with the *New York Times* article needed to be included in a privilege log, but did not need to be produced. Chancellor Bouchard reasoned that these documents were outside the scope of the WalMex investigation documents that then-Chancellor Strine ordered to be produced in 2013. The company must still produce investigation records from the WalMex investigation in 2005 and 2006.

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COMPLIANCE CORNER:

MAINTAINING ANTI-CORRUPTION PROGRAMS: VERIFICATION AS A TOOL TO IMPROVE COMPLIANCE

Transparency International recently released new guidance for businesses seeking to enhance their anti-corruption programs worldwide. The guidance focuses on the importance of "verification," or the process of periodically reviewing the anti-corruption compliance mechanisms in place through document reviews, interviews, testing, and other steps, to determine the ways that those mechanisms may be improved. The two key questions are: Is the program well-designed? And, is the program functioning effectively in practice? Because compliance risks are always evolving, companies will need verification procedures to keep their programs current and to show a good faith effort to comply with anti-corruption laws should the company face enforcement proceedings. Verification is thus beneficial as both a preventive measure and as a defense. The guidance, drawing on the expertise of a variety of key players in the compliance world—compliance officers, government officials, lawyers, consultants, and others—recommends ways a company can institute or improve a verification regime to ensure that a company is utilizing the most effective model.

First and foremost, according to the guidance, is the need for a risk-based approach that identifies the areas where the company is most at risk for possible violations of anti-corruption laws. The risk-based approach analyzes risk factors such as the industry or sector involved, the country of operations, and the corporate history, among other factors, so that the verifiers can focus review on the most at-risk

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Plaintiffs will likely view the *IBEW* opinion as a significant victory and a step toward greater access to privileged corporate documents. Given the production ordered in *IBEW*, plaintiffs in some cases may make broader books-and-records demands that include demands for privileged documents, such as those relating to internal investigations. *IBEW* also affects the timing of when stockholders can obtain documents, as shareholders can seek access to privileged documents in the pre-litigation books-and-records-inspection stage where shareholders need only demonstrate a "credible basis" from which to infer that corporate "wrongdoing" took place—a standard that is more easily met than the requirement for pleading shareholder derivative claims at the motion to dismiss stage where a plaintiff must prove demand futility and allege adequate and particularized facts to support its claims. Shareholders who are granted access to information at the books-and-records stage may then use these facts to bolster their derivative complaints with specifics that will help them survive motions to dismiss.

But the result in *IBEW* should not be overstated. Shareholders still face an uphill battle in succeeding with broad document requests in books-and-records actions, including requests for privileged information. Shareholders must pass certain evidentiary hurdles, including that their requests are "necessary and essential" to the achievement of a "proper purpose," in order to gain access to documentation under a Section 220 demand. Indeed, the *IBEW* opinion reaffirmed that Section 220 inspection demands must be tailored "with rifled precision."

Moreover, even assuming that a shareholder meets these standards and seeks privileged materials, the *Garner* doctrine only "allows stockholders of a corporation to invade the corporation's attorney-client privilege in order to prove

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aspects of the company's business. The guidance also suggests that higher risk units or offices should be examined on-site, whereas lower risk areas may be reviewed from a central home office. It is, of course, impractical to review the entire company's operations for signs of weak anti-corruption compliance at once, so a risk assessment will help to identify the areas most in need of immediate review and the areas where review is a lower priority. This can lead to an efficient and effective verification process.

Next, the guidance recommends the verification team proceed to document review, interviews, forensic testing, and other steps. The team should examine not just the compliance policy itself, but the way the policy functions in practice. For example, interviews could be used to gauge how well the channels of communication actually function and whether a sufficient atmosphere of compliance is in place. In addition, a reviewer can test potentially problematic transactions, examining the substance of the transaction rather than merely assessing whether the record complies with the form requirements ascribed in the compliance policy. The goal should be identifying the true purpose of the transaction rather than simply what was recorded in order to determine if it conforms to anti-corruption laws.

The guidance also discusses who should conduct the verification process. The verification team should be sufficiently independent from the arm of the organization under review to ensure impartiality and increase credibility of the review. Often outside assistance

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fiduciary breaches by those in control of the corporation upon a showing of good cause." The determination of "good cause" requires a specific, fact-based analysis. In *IBEW*, the plaintiffs were assisted by the existence of publicly available facts—particularly, the detailed allegations included in the *New York Times* article regarding the manner in which the company had conducted its initial internal investigation—that were critical to convincing both Chancellor Strine and the Delaware Supreme Court that the standard in *Garner* had been satisfied. The court noted that, in most cases, the *Garner* exception is "narrow, exacting, and intended to be very difficult to satisfy." Moreover, both Chancellor Strine and the Delaware Supreme Court emphasized that there was a particular need for inspection of privileged materials because "there [was] a colorable basis that part of the wrongdoing was in the way the investigation itself was conducted." Where shareholders are unable to allege with sufficient support that the internal investigation was not properly conducted, *IBEW*'s ruling will be more difficult to apply.

Production of privileged documents to a shareholder pursuant to *Garner* will not waive the company's privilege with respect to third parties such as government agencies. Companies ordered to produce privileged materials should insist on confidentiality agreements that clarify that the company is not waiving any privileges, that the shareholders agree to make no further disclosure of privileged materials, and that any subsequent pleadings that contain references to such privileged materials be filed under seal. Indeed, in *IBEW*, the plaintiffs expressly agreed to "take appropriate steps to protect the confidentiality of [the Company's] privileged documents."

Corporations should view the *IBEW* opinion as a reminder that the attorney-client privilege has limitations in the shareholder derivative context and that a board's role in corporate compliance will continue to be under shareholder scrutiny. Companies should ensure that internal investigations are handled appropriately, that investigative materials are drafted with care, and that legal advice is given in good faith and with the corporation's best interest in mind. Companies should also continue to take prudent measures to protect their privileged materials, including their own internal investigative reports and related documentation, from discovery in subsequent litigation. (For a discussion on how to protect the attorney-client privilege, see Examining the Attorney-Client Privilege in Internal Investigations in our 2nd Quarter 2014 Anti-Corruption Quarterly.)

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may be necessary to ensure that the review is impartial, effective, and publically credible. Outside analysts—law firms, accounting firms, or consulting firms—are more likely able to take a fresh look at compliance procedures and generally have specialized knowledge and skills to effectively analyze problem areas and devise ways to improve compliance.

Finally, the guidance discusses ways to increase public confidence in verification procedures and, thus, the compliance scheme. By publicly reporting verification results on its website, in its public filings, or through a public framework, a company can enhance public credibility with customers or potential business partners. Also, a number of different organizations issue certificates to companies for their anti-corruption programs, but there is no real uniformity yet in the certification process and the certifications may come with other requirements and strings attached. For example, the company may be required to join the certifying organization or institute recommendations of the certifying agency. Therefore, before embarking on an outside certification process, a company would want to do extensive due diligence on the certifying agency.

Utilizing these recommendations from Transparency International, a company can improve the strength of its compliance program and, in the process, hopefully, help to prevent costly, probing government investigations. With a consistent, regular, and independent verification regime, a company also can demonstrate its commitment to rooting out possible corrupt practices before government involvement, in the event that such an investigation results.

THE FCPA/ANTI-CORRUPTION PRACTICE OF SIDLEY AUSTIN LLP

Our FCPA/Anti-Corruption practice, which involves over 90 of our lawyers, includes creating and implementing compliance programs for clients, counseling clients on compliance issues that arise from international sales and marketing activities, conducting internal investigations in more than 90 countries and defending clients in the course of SEC and DOJ proceedings. Our clients in this area include Fortune 100 and 500 companies in the pharmaceutical, healthcare, defense, aerospace, energy, transportation, advertising, telecommunications, insurance, food products and manufacturing industries, leading investment banks and other financial institutions.

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