



FCPA/Anti-Bribery Mid-Year Alert 2010

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INTRODUCTION

More than ever before, companies and individuals must focus on compliance with the anti-corruption laws of multiple jurisdictions. While the U.S. Government continues its aggressive enforcement of the U.S. Foreign Corrupt Practices Act (FCPA) against U.S. companies and individuals, the U.S. Government is also increasing its enforcement efforts against non-U.S. companies and individuals. Meanwhile, U.S. companies and individuals that do business abroad face an even more complex legal landscape as other jurisdictions have begun to enforce their laws more aggressively, and some jurisdictions have enacted new anti-corruption legislation, such as the landmark U.K. Bribery Act. These developments make it all the more essential that companies — both in the U.S. and elsewhere — maintain compliance programs that satisfy all of the jurisdictions where they do business. As explained throughout this Alert, failure to do so all too often results in harsh consequences, including enormous corporate fines and prison time for individual executives.

In the United States, the Department of Justice has repeatedly reaffirmed its ever-increasing commitment to anti-corruption enforcement. For example, on July 25, 2010, Attorney General Eric Holder told African leaders in Kampala, Uganda, “I have made combating corruption, generally and in the United States, a top priority.” Meanwhile, the outgoing head of the DOJ’s FCPA unit stated that his section could grow as much as 50% in 2010 and 2011; the FBI announced an increase in its staff dedicated to FCPA enforcement; and the U.S. Securities and Exchange Commission created a specialized unit devoted solely to FCPA enforcement.

It appears that there will be more than enough anti-corruption enforcement activity in the near future to keep the additional personnel busy. Assistant Attorney General Lanny Breuer recently stated that the DOJ was pursuing more than 120 FCPA investigations. And the recently-enacted financial services reform act could lead to increased FCPA enforcement activity by increasing employee whistleblowing, because the act contains a provision that mandates that the SEC pay a reward of 10-30% of the total sanctions to whistleblowers in certain securities enforcement actions.

But enforcement activity surely will not be limited to cases that arise from corporate disclosures and employee whistleblowers, historically the most common sources of FCPA cases. Rather, the DOJ and FBI opened a new front in their anti-corruption efforts in the so-called “SHOT Show” case, in which twenty-two individuals from sixteen different companies in the military and law enforcement products industry were arrested in a first-of-its-kind undercover FCPA sting operation conducted by the FBI and the DOJ. That case demonstrated that the DOJ and the FBI would devote increased attention to individual prosecutions and the use of traditional law enforcement methods such as sting operations, and both agencies suggested further undercover operations were forthcoming.

The expansion of U.S. enforcement efforts is not limited to U.S. companies and individuals. To the contrary, in the last few months alone, U.S. enforcement authorities have reached enormous FCPA settlements with non-U.S. companies, including settlements with BAE

(\$400 million), Daimler (\$185 million), ENI and Snamprogetti (\$365 million), and Technip (\$338 million), and a settlement in principle with Alcatel-Lucent (\$137 million).

Meanwhile, U.S. companies and individuals face an increasingly aggressive enforcement environment in other jurisdictions where they do business. For example, the new U.K. Bribery Act, which is scheduled to go into effect in April 2011, has very broad jurisdictional provisions that can reach any entity that carries on a business, or part of a business, in the U.K., even if the underlying conduct does not have any substantive connection to the U.K. This is particularly significant because the new U.K. Act is in some ways more stringent than even the FCPA. The U.K. Act, for example, creates a new strict liability corporate offense for failure to prevent bribery. Under this provision, a company can be guilty of a crime where an “associated person” such as a commercial agent engages in bribery, even if employees of the company had no knowledge of the agent’s conduct. The U.K. Act does, however, provide for an affirmative defense if the company can demonstrate that it had in place “adequate procedures” to prevent the bribery. This strict liability scheme, with its affirmative defense, makes it all the more essential that any company doing business in the U.K. has a state-of-the-art anti-corruption compliance program.

The United Kingdom is far from alone in increasing its enforcement efforts. As but one more example, an investigating magistrate in France, a country previously considered to be behind the international anti-bribery enforcement curve, opened a formal investigation into oil giant Total in connection with Oil-for-Food related allegations stemming from an investigation first launched in 2002.

To the extent that international anti-corruption enforcement was once viewed as an exclusively American endeavor, recent developments demonstrate that perspective to be out of date at best. At a May 31, 2010 speech to the OECD in Paris, Attorney General Holder lauded the international community’s efforts at fighting corruption, stating that “none of the progress the United States has made would have been possible without the long-term cooperation of our law enforcement partners around the globe.”

This Alert discusses these anti-corruption developments and many others. After the Table of Contents, this Alert begins with a summary and analysis of certain critical enforcement trends and lessons to be learned from the settlements and other related developments. Following that summary and analysis are (i) a review of focus issues; (ii) brief discussion of the statutory requirements of, and penalties under, the FCPA; (iii) a description of FCPA settlements and criminal matters from 2005 to early 2010 in reverse chronological order; (iv) a discussion of other FCPA and related developments; and (v) a summary of each DOJ Review and Opinion Procedure Release issued from 1980-present.

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SUMMARY AND ANALYSIS

The combination of resolved actions, ongoing criminal and regulatory investigations, DOJ Opinion Releases and other developments discussed below underscore a number of important lessons and themes of which companies should be aware in conducting their operations, designing and implementing their compliance programs, considering whether to enter into potential transactions or to affiliate with an international agent, intermediary or joint venture partner, and dealing with government agencies. These lessons take the form of both enforcement trends and practice lessons.

Enforcement Trends

- *Vigorous Enforcement in the United States*: Despite the change in Administrations, and perhaps the expectations of some, FCPA enforcement remains a high priority for the United States government under President Obama. On January 13, 2010, Robert Khuzami, Director of the Securities and Exchange Commission's Division of Enforcement, announced the creation of a specialized FCPA enforcement unit. There can be no doubt that FCPA violations pose one of the most, if not the most, significant corporate challenges to U.S. companies operating internationally and international companies listed on the American exchanges or with activities that touch the U.S. In addition, in February 2010, the DOJ's top anti-corruption prosecutor stated that "the United States government is going to focus on corruption in a far more rigorous way than it has in the past." He added that the DOJ will continue to increase its emphasis on FCPA enforcement and that the DOJ Fraud Section "could grow by as much as 50%" in 2010 and 2011. These comments come *after* several years in which the enforcement activities of the DOJ and SEC have set a new record each year in terms of investigations, settlements, and fines.
- *Other Countries' Increased Enforcement of Their Own Anti-Corruption Laws*: Countries around the globe from Cambodia to the UAE are actively evaluating and enhancing their anti-corruption efforts. Russia and the U.K., for example, have adopted strengthened anti-corruption statutes, while OECD Convention signatories like Germany (which also has over 100 open corruption investigations), France, Norway and Switzerland (to name a few) are aggressively enforcing anti-corruption laws. In 2010, the OECD began releasing publicly for the first time enforcement statistics for OECD Convention signatory nations, which could further prompt enforcement activity by countries seeking to avoid the appearance of inactivity. Non-OECD nations such as China, and to lesser extent Nigeria, have also aggressively investigated and prosecuted corruption offenses, including with respect to foreign nationals.
- *Increased International Cooperation Between Anti-Corruption Regulators*: To a greater extent than ever, international regulators are cooperating in their anti-corruption enforcement efforts. The BAE, Siemens, Innospec, and Alcatel-Lucent settlements all included cooperation between U.S. and European authorities, and the ongoing Hewlett-Packard investigation appears to involve German, Russian and U.S. authorities.

Moreover, U.S. regulators may consider enforcement activities by non-U.S. regulators in determining the ultimate disposition of a matter, as illustrated by the Siemens, Flowserve, and Akzo Nobel matters. Indeed, in both the Siemens and Akzo Nobel proceedings, the DOJ was willing to take into account settlements with foreign regulators when determining whether, and to what extent, to impose a criminal sanction. Echoing and encouraging this trend, the OECD's recently-released Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions encourages member countries to cooperate with authorities in other countries in investigations and legal proceedings. (See, e.g., *Alcatel-Lucent*, *Flowserve*, *AGCO*, *Innospec*, *Siemens*, *Akzo Nobel*, *BAE*, *Hewlett-Packard*, *OECD Developments*).

- *Larger Corporate Penalties*: The civil and criminal fines resulting from FCPA prosecutions and settlements continue to rise. In November 2008, SEC Deputy Director of Enforcement Scott Friestad stated that “[t]he dollar amounts in cases that will be coming within the next short while will dwarf the disgorgement and penalty amounts that have been obtained in prior cases.” His words certainly proved accurate with the combined \$1.6 billion in penalties levied against Siemens far exceeding all previous FCPA-related sanctions. Siemens was quickly followed by the KBR/Halliburton settlement totaling \$579 million. Combined fines and disgorgement amounts in the hundreds of millions of dollars, while once thought improbable, now appear almost commonplace, with the BAE (\$400 million), Daimler (\$185 million) and Alcatel-Lucent (\$137 million) settlements following this trend.
- *Prosecutions of Individuals*: The SEC and DOJ remain willing to pursue charges against individuals when the facts warrant such action. Attorney General Holder recently declared that “prosecuting corruption is a cornerstone of [the DOJ’s] enforcement strategy,” and U.S. regulators have indicated that, even within the context of corporate settlements involving heavy fines, they will also seek to hold culpable individuals criminally liable. As in *Fu*, *Martin*, *Philip*, *Wooh* and *Srinivasan*, individual enforcement actions can follow or coincide with settlements with the company. By contrast, in such cases as *Stanley*, *Sapsizian* and *Steph*, the government brought cases against the individuals before reaching a resolution with their employers. The government has also shown it is willing to pursue individuals in their capacity as “domestic concerns” without pursuing associated entities, as illustrated by the actions against *Gerald* and *Patricia Green*, *Mario Covino*, *Richard Morlok* and the former officers of *PCI*. These individuals may not even be United States citizens, though they work for United States companies or in United States offices. The Control Components prosecutions included indictments of foreign citizens acting abroad as agents of a domestic concern. The DOJ recently obtained its most severe sentence for an individual’s FCPA violation to date, the 87 month prison term handed to *Charles Paul Jumet* for his involvement in a bribery scheme in Panama. (See, e.g., *Control Components*, *Covino Willbros Group*, *PCI*, *ITXC*, *Philip*, *Green*, *Srinivasan*, *Fu*, *Martin*, *Wooh*, *Alcatel-Lucent*, *Steph*, *Jumet & Warwick*, *Innospec*).

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- Willingness to Try Corruption Charges: With the now completed trials of Frederic Bourke, Congressman William Jefferson, and Gerald and Patricia Green, it is now clear that the United States government is willing to try corruption charges to a jury when it is unable to reach a satisfactory settlement agreement. The convictions in whole or in part of each of these individuals make clear that such prosecutions can be successful.
 - Regulators May Force or Reward Management Changes: In certain circumstances, regulators may use enforcement actions as a tool to force a change in management where the regulators believe management is insufficiently attuned to FCPA concerns. Regulators may also reward companies that change management in response to findings of misconduct or seek lesser penalties where management changed before the misconduct came to light. For example, the DOJ praised Siemens for its remedial efforts, including that it “replaced nearly all of its top leadership.” Similarly, in the case of Bristow, the misconduct was discovered by the company’s newly-appointed CEO, and the SEC imposed no monetary penalty on the company. (See, e.g., *Technip, Siemens, Schnitzer, Bristow*).
 - Expansive Jurisdictional Reach: As the Siemens settlement (among others) confirms, U.S. regulators continue to take an expansive jurisdictional view as to the applicability of the FCPA. The charging documents applicable to Siemens Venezuela, Siemens Bangladesh, and Siemens Argentina detail connections, but not particularly close or ongoing connections, between the alleged improper conduct and the United States. Similarly, the United States government has continued to seek the extradition of Jeffrey Tesler and Wojciech Chodan, both United Kingdom citizens who were indicted for their involvement in the Bonny Island, Nigeria bribery scheme and who are described in the charging documents as “agents” of a domestic concern. Clearly, regulators in what they deem to be appropriate circumstances, will look carefully for hooks to establish U.S. jurisdiction over perceived violations of anti-corruption legislation. (See, e.g., *BAE, Siemens, Tesler and Chodan*).
 - Use of Related Statutes: The BAE case demonstrates the continuing use by U.S. authorities and other regulators of complementary statutes (such as export control laws or false statement statutes) to bring bribery-related charges. The interconnectivity of the various statutes, and the relative ease by which certain offenses can be established, is a reminder not to take a narrowly technical view of anti-corruption compliance. In addition, U.S. authorities’ use of other statutes to bring charges allows them to seek greater penalties and expands their ability to punish corrupt conduct, even when an FCPA violation might not be established.
 - Export Control and Government Contracts Connection: Government contractors and companies subject to U.S. export controls may face heightened scrutiny and risks with regard to anti-corruption compliance. As the BAE case illustrates, such companies may be required to make representations to the government, which can themselves become the source of legal liability if those representations are inaccurate or incomplete with respect to anti-corruption elements. Such

companies must be cognizant not only of anti-corruption rules, but also of the legal liability they face for making statements regarding their anti-corruption efforts as part of regulatory schemes such as the export control laws and federal acquisition regulations. As the DOJ's push to broaden anti-corruption enforcement continues, this intersection of different enforcement regimes will become even more important.

- *Breadth of the False Statement Statute*: The willingness of the DOJ to take a more expansive approach to anti-corruption enforcement is underscored by the use of the false statement statute, which generally can reach a wide-range of conduct, from informal communications (such as the letters sent by BAE to the Department of Defense) to court, regulatory, or congressional testimony. Companies must be cognizant that they will be held potentially accountable for virtually any representation made to the U.S. government or a U.S. government official regarding anti-corruption compliance.
- *Money Laundering, Wire Fraud, and Related Financial Crimes*: Prosecutors also remain committed to enforcing laws prohibiting other financial crimes such as money-laundering and wire fraud that often intersect with FCPA enforcement actions. (See, e.g., *Green, O'Shea, Haiti Teleco, Innospec, Military and Law Enforcement Products Sting*).
- *Prosecution for Payments to Foreign Ministries or Private Parties*: The United States government has shown its willingness to prosecute improper payments to individuals and entities other than "foreign officials." In the Schnitzer Steel and related settlements, the government asserted violations of the FCPA based on payments not only to government officials in China, but also to employees of private steel mills in China and South Korea, explaining "[t]hese mills were privately owned and the managers were not foreign officials. However, Schnitzer violated the FCPA by failing to properly account for and disclose the bribes in its internal records and filings." Similarly, without addressing the issue directly, the Oil-for-Food prosecutions are premised on improper payments made to government accounts rather than to foreign officials, with the York proceeding also including allegations of numerous payments to commercial, non-governmental parties outside the Oil-for-Food Programme. The related proceedings against Monty Fu and Syncor similarly involved payments to doctors employed by both public and private hospitals in Taiwan. More recently, the Control Components' prosecutions coupled FCPA charges with charges that the company violated the Travel Act by making corrupt payments to private entities, both in the United States and abroad, in violation of California state law against commercial bribery. (See, e.g., *Control Components, AB Volvo, Flowserve, Akzo Nobel, Philip, Chevron, Ingersoll-Rand, York, Fu, Textron, Wooh, El Paso*).
- *Creative Methodologies for Uncovering Information*: The Siemens settlement demonstrated regulatory approval (manifested by its consideration as part of the company's cooperation credit) of a groundbreaking amnesty and leniency program aimed

at providing company counsel with timely, complete and truthful information about possible violations of anti-corruption laws. Siemens instituted an amnesty program whereby employees were encouraged to voluntarily report corrupt practices without fear of termination or claims by the company for damages. The approval of such a program likely signals regulatory acceptance of the broader use of creative approaches to collect and process accurate and complete information from within a company and, in turn, respond appropriately to such information. The financial reform act, passed by Congress on July 15, 2010, takes a more aggressive approach, mandating that the SEC pay whistleblowers who provide it with original information leading to enforcement actions over \$1 million a reward of 10-30% of the total sanctions collected. (*See, e.g. Siemens, Restoring American Financial Stability Act*).

- *Increased Use of Traditional Law Enforcement Techniques*: The common thinking has been that enforcement actions are most likely to arise from self-reporting companies or whistleblowers. As the Military and Law Enforcement Products indictments demonstrate, the DOJ is increasingly using the assistance of the FBI and traditional law enforcement techniques to find and investigate violations of the FCPA. The success of the sting operation can only be seen as a harbinger for future similar types of activities, consistent with the report from *The New York Times* that law enforcement officials have indicated that as many as six other undercover operations are currently underway. This use of sting operations also signals the DOJ's willingness to seek out individuals and companies that are willing to violate the law, not just investigate those who have already done so. As Assistant Attorney General Lanny Breuer stated, "[f]rom now on, would-be FCPA violators should stop and ponder whether the person they are trying to bribe might really be a federal agent." (*See, e.g. Military and Law Enforcement Products Sting*).
- *Increase in FCPA-Related Civil Suits*: There has been a noticeable increase in recent years of FCPA-related civil actions. These suits have taken several forms, including suits by foreign governments, public company shareholders and business partners. (*See, e.g., Immucor, Iraqi Oil-for-Food Suit, Faro, Grynberg, Argo-Tech v. Yamada, Harry Sargeant, Panalpina*).
- *Clarification on Successor Liability*: Companies often face uncertainty over the legal liabilities they may inherit as a result of mergers, acquisitions or partnerships. A critical question is under what circumstances, if any, a company can be held liable for acts deemed "in furtherance" of an acquired company's or joint venture partner's improper payments. In Release 08-02, the DOJ addressed this question and reasoned that the requestor, Halliburton, would not violate the FCPA by acquiring the target, Expro, which may or may not have violated the FCPA prior to the acquisition. The DOJ premised this determination on the fact that the money to be paid to acquire the company would go to Expro's shareholders, not Expro itself. Moreover, the stock ownership in Expro was widely disbursed. Thus, it was unlikely that any of the shareholders were corruptly given their shares such that they would be improperly enriched by the acquisition. Implicitly, the Release can be read to endorse the view that payments to shareholders or joint venture partners who have received their shares corruptly would violate the FCPA.

Similarly, numerous FCPA settlements have arisen out of pre-acquisition due diligence, and companies will often postpone acquisitions pending resolution of any FCPA issues discovered in due diligence. The DOJ has indicated that acquirers may be held liable for the pre-acquisition misconduct of their targets, at least where they do not undertake significant remedial measures and disclose the discovered misconduct. (*See, e.g., DOJ Opinion Procedure Releases 08-02, 03-01, 04-02, Syncor, Titan*).

- *Direct Parent Company Involvement Not Required*: The U.S. Government will prosecute parent companies based on the conduct of even far-removed foreign subsidiaries and even in the absence of alleged knowledge or direct participation of the parent company in the improper conduct. As a result, as the Willbros Group and several Oil-for-Food settlements make clear, companies must ensure that their anti-corruption compliance policies and procedures are implemented throughout the corporate structure and are extended quickly to newly acquired subsidiaries. (*See, e.g., Fiat, Faro, Willbros Group, AB Volvo, Flowsolve, Westinghouse, Akzo Nobel, Ingersoll-Rand, York, Bristow, Paradigm, Textron, Delta & Pine, Dow*).
- *Foreign Subsidiaries Treated as Agents of the Parent*: The criminal information underlying the DOJ's action against Schnitzer Steel's Korean subsidiary describes the subsidiary as Schnitzer Steel's "agent." The government has asserted that a foreign subsidiary acted as the agent of its United States parent corporation on at least one other occasion (in the 2005 enforcement proceedings against Diagnostic Products Corporation and its Chinese subsidiary). The agency theory reflected in Schnitzer and Diagnostic Products could potentially be used (at least as an initial enforcement posture) to hold parent companies liable for acts of bribery by a foreign subsidiary, despite the parent's lack of knowledge or participation. In addition, when the subsidiary's financials are consolidated into its own, this can give rise to an independent violation by the parent of the FCPA books and records and internal controls provisions if the parent company is a U.S. issuer. (*See, e.g., Philip (Schnitzer)*).
- *Control Person Liability*: The SEC charged Nature's Sunshine Products, Inc. executives Douglas Faggioli and Craig D. Huff in an FCPA action as control persons under Section 20(a) of the Exchange Act. Control person liability theory allows the SEC more flexibility to charge individuals within a company with securities violations even when evidence of direct knowledge or participation in the violative behavior may be lacking; and the SEC's charging documents did not allege any direct involvement or participation of Faggioli or Huff in the underlying books-and-records and internal controls FCPA violations. The Faggioli and Huff prosecutions underscore the risks faced by executives who do not adequately supervise those responsible for compliance with the accounting provisions of the FCPA. (*See, e.g., Nature's Sunshine*).
- *Broad Reading of the "Obtain or Retain" Business Element*: The SEC and DOJ continue to read the "obtain or retain business" element of the FCPA broadly to capture a wide range of conduct beyond the prototypical payment to win a contract award, including payments to expedite and approve patent applications, to obtain favorable treatment in

pending court cases, to schedule inspections, to obtain product delivery certificates, to alter engineering design specifications in favor of a particular bidder, to obtain preferential customs treatment, to avoid or expedite necessary inspections, to alter the language in an administrative decree, to obtain governmental reports and certifications necessary to market a product, and to reduce taxes. (See, e.g., *Helmerich & Payne, Nature's Sunshine, AGA Medical Corporation, Willbros Group, Bristow, Delta & Pine, Martin, Dow, Vetco, Kay, Dimon*).

- *Recidivism will be Punished Harshly*: Repeat offenders will be punished harshly. In both Vetco and Baker Hughes, the large fines reflected, in part, the fact that the companies had previously violated the FCPA and had failed to implement the enhanced compliance processes and procedures to which they agreed as part of the settlements of those earlier prosecutions. ABB, which reached an FCPA settlement in 2004 and has subsequently disclosed further potentially improper payments to the DOJ and the SEC, may face similar treatment if it is found to have again violated the FCPA. (See, e.g., *Vetco, Baker Hughes, ABB*).
- *Requirement of Monitors or Consultants*: Settlements over the past several years continued the trend of requiring the appointment of monitors or consultants to companies to help ensure FCPA compliance. The Siemens settlement involved not only the first non-U.S. national appointed as a monitor (former German Finance Minister Dr. Theo Waigel), but also the appointment of “Independent U.S. Counsel” to advise the monitor. Certain settlements, such as those with Siemens, Willbros Group, AGA and Faro, appear to reflect a change in practice, where rather than the DOJ appointing the monitor directly, the settling company is permitted to choose its own corporate monitor, subject to DOJ approval. On March 7, 2008, Acting Deputy Attorney General Craig S. Morford issued a memorandum providing internal guidance for DOJ components regarding the use and selection of corporate monitors. The nine principles in the “Morford Memo” are designed to create greater consistency in the selection process and avoid conflicts of interest, among other things. With the appointment of a monitor by the SFO in the Mabey & Johnson case, and the apparent contemplation of a French monitor in the Alcatel-Lucent and Technip settlements, this tool is now being utilized by non-U.S. regulators as well. (See, e.g., *Innospec, Siemens, Faro, AGA, Willbros Group, Delta & Pine, Baker Hughes, Vetco, Mabey & Johnson, Alcatel-Lucent*).
- *Self-Reporting, Remedial Measures, and Cooperation*: Through a variety of means, the DOJ and SEC have signaled that companies that self-report violations and cooperate extensively with governmental investigations may face less severe penalties. For example, despite allegations of wide-ranging improper conduct over a sustained period, including illicit payments to government officials in Kazakhstan, China, Mexico, Nigeria, and Indonesia between 2002 and 2007, the DOJ entered into a non-prosecution agreement with Paradigm in return for the company paying a relatively small fine of \$1 million, implementing new enhanced internal controls, and retaining outside counsel for eighteen months to review its compliance with the non-prosecution agreement. In doing so, the DOJ emphasized as “significant mitigating factors” the fact that Paradigm “had

conducted an investigation through outside counsel, voluntarily disclosed its findings to the Justice Department, cooperated fully with the Department and instituted extensive remedial compliance measures.” The SEC recently announced new standards to evaluate cooperation by companies and individuals, including the use of DOJ-like deferred prosecution agreements with the attendant requirements of full cooperation, waiver of statute of limitations, and enhanced compliance measures. (*See, e.g., Innospec, Siemens, Faro, AGA, Westinghouse, Bristow, Paradigm, Textron, Dow, Baker Hughes*).

- *Continued Cooperation as a Condition of Settlement*: In many instances, initial settlements require a party to continue to cooperate with an ongoing investigation, and until recently, a company’s willingness to waive the attorney-client privilege was factored into such cooperation credit. Although a revision to the DOJ’s prosecutorial guidelines prohibits the practice of seeking attorney-client waivers as an element of cooperation, it will likely have little impact on the DOJ’s requirement that companies continue to provide it with significant factual information in order to be given credit for cooperation. (*See, e.g., Filip Principles, Martin, Wooh, Vetco, El Paso, Textron*).
- *Opinion Releases as Guidance*: The DOJ has, to date, issued 53 Opinion Procedure Releases. While the releases each caution that they have “no binding application to any party that did not join in the request,” the Releases nevertheless serve as a significant body of guidance as to the DOJ’s position on numerous factual circumstances and interpretations of the statute. In fact, in Opinion Release 08-02, the DOJ explicitly refers to one of its previous Opinion Releases as “precedent.” The DOJ’s invocation of the word precedent (even if not sufficient to be relied on in court proceedings or otherwise) underscores the seriousness with which companies should view the guidance offered by the DOJ in its releases. (*See, DOJ Opinion Procedure Release 08-02*).
- *Use of Constructive Knowledge Standard*: Though the DOJ did not charge BAE with any violation of the FCPA, the case involves BAE’s failure to maintain an effective anti-corruption compliance program. The Information repeatedly states that BAE failed to maintain an effective anti-corruption program because it ignored signaling devices that should have alerted it of a “high probability” that third parties would make improper payments. The frequent invocation of the “high probability” language and the reliance on circumstantial factors should be taken as a stark reminder of the DOJ’s willingness to rely on this constructive knowledge element of the FCPA and a further reminder that the standard can be seen as satisfied by the DOJ where conduct falls short of actual knowledge. (*See, e.g., BAE*).
- *Targeting Suspect Jurisdictions*: The BAE Information provides a firm reminder that conducting business in or through suspect jurisdictions is a red flag. The DOJ took particular issue with BAE’s utilization of both the British Virgin Islands and Switzerland as jurisdictions notorious for discretion. Companies are well advised to ensure that there is a legitimate reason for the use of such jurisdictions, as opposed to using them as a masking technique or for an illicit motive (such as inappropriate tax avoidance by the agent). The Senate PSI Report also highlights the need for enhanced scrutiny when

dealing with transactions involving accounts in notoriously opaque banking centers. (See, e.g., *BAE, Senate PSI Report, NATCO*).

- *Willingness to Prosecute Foreign Government Officials*: Though the FCPA does not apply to foreign officials, enforcement agencies have begun to use alternative avenues to prosecute foreign officials implicated in corrupt conduct. Both the Haiti Teleco and Gerald and Patricia Green cases have recently seen charges brought against government officials for charges such as money laundering and transportation of funds to promote unlawful activity. (See, e.g., *Gerald and Patricia Green, Haiti Teleco*).

Lessons

- *Need for Appropriate Due Diligence*: The watershed 2007 Baker Hughes settlement made clearer than ever the compelling need for appropriate due diligence on agents and intermediaries, a message enforcement officials have reinforced through more recent settlements and other announcements. The failure to conduct due diligence leaves a company in a position where it cannot rationally form a basis to conclude that no illegal payment was made and therefore can subject the company to liability under at least the relevant recordkeeping and internal control requirements. The AB Volvo and Textron settlements both were based in part on the failure to conduct adequate due diligence and the need for enhanced compliance measures when conducting business in the Middle East. There was similar language in the Tyco settlement regarding South Korea and in the Siemens charging documents regarding the developing world as a whole. Indeed, the prosecuting attorney in Frederic Bourke's trial emphasized in closing that "He [Bourke] didn't ask any of his lawyers to do due diligence." Failure to appreciate critical need of due diligence exposes companies and individuals to the possibility of similar allegations. This view has more recently been embraced by the international community, with the OECD releasing guidance on internal controls, ethics and compliance programs that counsels towards the adoption of a risk-based approach to due diligence. (See, e.g., *Frederic Bourke Jr., DOJ Opinion Procedure Release 08-02, DOJ Opinion Procedure Release 08-01, Tyco, UIC, Siemens, AB Volvo, Ingersoll-Rand, Paradigm, Textron, Delta & Pine, Baker Hughes, BAE, Technip, Snamprogetti*).
- *Need to Structure and Staff Compliance Functions Appropriately*: Through a variety of means, governmental officials have emphasized the need for companies to take measures to ensure that their compliance obligations are taken seriously at the highest level of management and that the compliance function is appropriately structured and staffed. In Siemens, the charging documents emphasized that the company's compliance apparatus lacked sufficient resources and was faced with an inherent conflict of interest as it was tasked both with preventing and punishing breaches and with defending the company against prosecution. The Daimler prosecution similarly criticized the company's compliance efforts, stating that one of the factors that contributed to the improper conduct was "an inadequate compliance structure." (See, e.g., *Siemens, Daimler*).

- *Paper Procedures Are Not Enough*: Company procedures that require due diligence, anti-corruption covenants, other contractual provisions and certifications, or appropriate accounting practices provide no protection (and may prove harmful) when they are not followed. (See, e.g., *UIC, Siemens, Lucent, Chevron, Ingersoll-Rand, Fu, Textron, Baker Hughes, El Paso, Technip*).
- *Need to Recognize the Importance of Foreign Investigations*: The Siemens charging documents repeatedly emphasized that non-U.S. corruption investigations and prosecutions constitute significant red flags that a company may have violated the FCPA. The DOJ Information favorably cited the advice given to Siemens by outside counsel that one such foreign investigation provided the DOJ and SEC “ample” basis for investigating Siemens and those agencies would expect Siemens, at a minimum, to conduct an adequate investigation of the allegations and the larger implications of any improper conduct that was discovered. In today’s environment of increased cross-border enforcement activity and investigative cooperation, companies would be wise to assume that an investigation conducted in one jurisdiction may have implications in other jurisdictions in which the company does business. (See, e.g., *Siemens, BAE, AGCO, Alcatel-Lucent*).
- *Attempts to Structure Transactions and Arrangements to Avoid Anti-Corruption Liability are Unlikely to Succeed*: Companies are unlikely to be able to insulate themselves from anti-corruption liability by the use of offshore companies and similar arrangements. The U.S. government regarded KBR’s use of a Portuguese-based operating company to enter into contracts with the “consultants” that made payments to foreign government officials as evidence of its knowledge of the improper conduct and a deliberate attempt to shield the company from FCPA liability. An SEC spokesperson recently emphasized that the U.S. Government “will not tolerate violations of the FCPA, regardless of the lengths to which public companies will go to structure their corrupt transactions to avoid detection.”
- *Need to Examine Carefully the Qualifications of Agents and Third Parties*: It is critical for companies to understand the background, competence and track record of their agents and intermediaries, including third-party distributors. Third parties that are insufficiently qualified or with little or no assets (*i.e.*, a “brass plate” company) should be avoided. Agents and third parties based in developed countries such as the United Kingdom are not exempt from these requirements. (See, e.g., *Siemens, AB Volvo, Chevron, Paradigm, Baker Hughes, Ott and Young*).
- *Careful Examination of the Tasks to Be Performed by Agent is Critical*: Companies must examine the competence of an agent to provide the particular tasks for which it is being engaged and the value of those tasks relative to the agent’s compensation. “Paper tasks” will not suffice. Companies must validate the tasks allegedly being provided by the agent to ensure they are undertaken. In addition, unusually high and/or undocumented commissions, fees or expenses should be carefully reviewed to determine if such payments are justified on commercial grounds. (See, e.g., *UIC, InVision, Fiat, Siemens*,

Faro, Willbros Group, ITXC, AB Volvo, Flowserve, Westinghouse, Akzo Nobel, York, Paradigm, Baker Hughes, Ott and Young, UTStarcom).

- *Government Official as a Source of Third Parties: Agents, Vendors, Subcontractors and Joint Venture Partners:* Companies are reminded to be especially cautious when third parties are suggested to them by government officials, especially when the government official is in a position to affect the company's business. Similarly, agents who are former government officials with close ties to current officials may pose a particular risk. (See, e.g., *UIC, Paradigm, Baker Hughes*).
- *Need to Closely Review Changes in Agreements with an Agent or Third Party:* A significant change in the payment or other material terms of an agreement with an agent or third party can be a potential red flag to which management should pay close attention. Several of the Oil-for-Food settlements, including those with Fiat, Chevron, Flowserve and Akzo Nobel, involved scenarios in which arrangements with third parties were altered to facilitate or mask improper payments. Thus, changes in the nature or terms of arrangements with third parties should be closely examined to ensure that they have a legitimate basis. (See, e.g., *Fiat, Flowserve, Akzo Nobel, Chevron*).
- *Need to Conduct Appropriate Employee and Third Party Training:* Companies that fail to conduct appropriate employee or third party training may face liability if the conduct of those parties ends up violating anti-corruption laws. Employees overseeing high-risk transactions should receive frequent training. Such training may also serve to surface improper activity so that it may be effectively remediated. (See, e.g., *Helmerich & Payne, Faro, Philip, Lucent, Fu, DOJ Opinion Procedure Release 09-01*).
- *Broad Reading of "Foreign Official":* U.S. federal prosecutors continue to construe the term "foreign official" to include even relatively low level employees of state agencies and state-owned institutions, such as workers in hospitals, telecommunications companies, ship-yards, and steel mills and members of an executive committee overseeing the construction of a government-owned hotel. It appears that journalists working for state-owned media concerns and an unpaid manager of a government majority-owned entity also fall within the government's broad interpretation of "foreign official." There is every reason to believe that jurisdictions outside the U.S. will take a similarly expansive view. (See, e.g., *DOJ Opinion Procedure Release 08-03, DOJ Opinion Procedure Release 08-01, Lucent, York, Fu, Delta & Pine, Wooh, Dow, Vetco, UIC, ITT*).
- *"Anything of Value":* The FCPA prohibits far more than mere cash payments and can be violated by the provision of such diverse benefits as travel, entertainment, scholarships, vehicles, property, shoes, watches, electronics, office furniture, stock and share of profits. The Daimler settlement alleges that Daimler agreed to forego claims against Iraq in front of the United Nations Compensation Commission in exchange for business, suggesting that failure to pursue an otherwise lawful claim may, in certain circumstances, also be

considered a thing of value. (See, e.g., *Avery Dennison, PCI, AB Volvo, Lucent, Philip, Ingersoll-Rand, York, Delta & Pine, Dow, Kozeny, UTStar, Daimler*).

- *Anti-Corruption Laws Cover “Promises” to Make Payments and Payments that Do Not Accomplish Their Purpose*: An executed payment that results in the company obtaining or retaining business is not necessary for an FCPA violation. As the AB Volvo and Flowserve settlements illustrate, improper payments that are authorized but never ultimately made are still considered improper. In addition, as the Martin prosecution indicates, an unsuccessful attempt to influence a foreign official can suffice. (See, e.g., *Innospec, Avery Dennison, ITXC, AB Volvo, Flowserve, Jefferson, Martin, Textron*).
- *Narrow View of Facilitation Payments*: The U.S. Government takes a very narrow view of what constitutes a “facilitation” payment – *i.e.*, a payment that expedites routine or ministerial governmental acts and does not run afoul of the FCPA. For example, the DOJ’s settlement with Westinghouse appears to rest on, among other things, payments for services such as scheduling shipping inspections or obtaining product delivery certificates. This U.S. government approach appears consistent with recent OECD statements that recommend countries review their laws on facilitation payments, a move seen as a step towards full prohibition by the OECD. (See, e.g., *Westinghouse*).
- *No De Minimis Exception*: There is no de minimis exception to the FCPA’s prohibitions. The Baker Hughes prosecution included charges associated with a \$9,000 payment; the Dow settlement featured numerous payments of “well under \$100”; the Paradigm settlement involved “acceptance” fees of between \$100-200; and the Avery Dennison settlement similarly involved \$100 payments. (See, e.g., *Avery Dennison, Paradigm, Baker Hughes, Dow*).
- *Discontinue Improper Payments Once Discovered*: Once payments to an agent or others are determined to be inconsistent with the FCPA, anti-corruption standards, or company policies, termination of the payments is expected, and further action, such as revising codes of ethics and compliance training will be viewed favorably by regulators. Creative payment arrangements, such as a severance arrangement, or alternative structures such as the use of third party intermediaries to continue the improper practices, should be avoided. (See, e.g., *Daimler, DPC Tianjin, Willbros Group, Monty Fu, Philip, Baker Hughes, Delta & Pine, Chiquita, Textron*).
- *Mergers and Acquisitions*: Anti-corruption issues can arise in the context of mergers and acquisitions, as illustrated by Opinion Releases 08-01 and 08-02. Acquirers are well-advised to conduct sufficient FCPA due diligence prior to closing, including examining the target’s agency relationships and joint venture partners, to avoid unanticipated exposure due to the acquired company’s undisclosed practices. When such pre-acquisition due diligence is not possible, it appears that the DOJ may grant special dispensation to conduct post-acquisition due diligence, but likely only if coupled with extensive reporting requirements. (See, e.g., *eLandia, PCI, Baker Hughes, Vetco*,

Basurto, DOJ Opinion Procedure Release 08-02, DOJ Opinion Procedure Release 08-01).

- *Commonality of Practice Not an Excuse*: Correcting a widely-held misperception, the fact that a practice is common in a region or industry is not a defense. Furthermore, as Chiquita, NATCO and Dimon illustrate, even in extreme circumstances, such as extortion by foreign officials, prosecutors are unlikely to excuse illegal conduct. (*See, e.g., DOJ Opinion Procedure Release 08-03, Faro, Willbros Group, Lucent, El Paso, Dow, Baker Hughes, Chiquita, Textron, Kay, Natco, Dimon*).
- *Hidden Beneficial Owners*: Entities such as shell companies can easily conceal or obscure the identities and locations of their beneficial owners, and thus the true source or destination of funds. Any due diligence procedure must include the objective of learning the identities of all beneficial owners and actual control persons of shell companies, holding companies, trusts, charities, and other sources or destinations of funds. The Senate Permanent Subcommittee on Investigations Report and the Daimler prosecution illustrate that even U.S. companies and banks can be used to facilitate improper conduct, reinforcing the need for vigilance when dealing with any third party. (*See, e.g., Senate PSI Report*).
- *Experienced Anti-Bribery Counsel Required*: While the mere use of outside counsel will not completely insulate a company from FCPA liability, the selection of experienced anti-corruption counsel gives the greatest chance of compliance with the expectations and requirements of enforcement agencies. Recently, the DOJ rejected three potential independent monitors recommended by BAE as insufficiently qualified for the position. (*See, e.g., Siemens, KBR/Halliburton, Ingersoll-Rand, Baker Hughes, BAE*).

FOCUS ISSUES

As noted in the Introduction, there has been a steady increase in international anti-corruption enforcement over the last few years. Below is a discussion of a select number of recent international enforcement developments.

OECD Developments

The Organisation for Economic Co-operation and Development (“OECD”) has recently taken several steps aimed at increasing the anti-corruption enforcement efforts of member countries and signatories to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention”). Among other things, the OECD Working Group on Bribery on June 15, 2010, in conjunction with its Annual Report, for the first time released enforcement statistics of the OECD Convention signatories. The statistics showed that, between the time the OECD Convention entered into force in 1999 and May 2010, 148 individuals and 77 entities were sanctioned under criminal proceedings for foreign bribery. The statistics also showed, however, that only 13 of the 38 party nations reported enforcement actions in that timeframe, and only five reported more than 10 actions. Such figures are likely to increase already-growing pressure on nations to more vigorously enforce their anti-corruption laws.

Previously, on November 26, 2009 the OECD released the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (“Recommendation”). Perhaps the most notable aspect of the Recommendation is Annex II, Good Practice Guidance on Internal Controls, Ethics and Compliance (the “Good Practice Guidance”) released on February 18, 2010.

The Good Practice Guidance sets forth a list of suggested actions to ensure effective internal controls for the prevention and detection of bribery. The OECD recognized that there could be no one-size-fits-all approach to compliance programs, and that small and medium sized enterprises in particular would need to adjust the guidance to fit their particular circumstances. The Good Practice Guidance is significant, however, in that it signals the endorsement of a risk-based approach to compliance. As the guidance states: “[e]ffective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery should be developed on the basis of a risk assessment addressing the individual circumstances of a company, in particular the foreign bribery risks facing the company (such as geographical and industrial sector of operation).” The twelve themes that the OECD recommends be incorporated into a compliance program are the following:

- Strong, explicit and visible support and commitment from senior management to the company’s internal controls, ethics, and compliance programs or measures for preventing and detecting bribery;
- A clearly articulated and visible corporate policy prohibiting foreign bribery;

- Individual responsibility for compliance at all levels of the company;
- Senior corporate officers with adequate levels of autonomy from management, resources, and authority have oversight responsibility over ethics and compliance programs, including the authority to report to independent monitoring bodies;
- Ethics and compliance programs designed to prevent and detect foreign bribery, applicable to all entities over which the company has effective control that address gifts, hospitality and entertainment, customer travel, political contributions, charitable donations and sponsorships, facilitation payments, and solicitation and extortion;
- Ethics and compliance programs designed to prevent and detect foreign bribery, applicable, to third parties and including three essential elements: (i) properly documented risk-based due diligence and oversight; (ii) informing third-parties of the company's commitment to legal prohibitions on bribery as well as the company's code of ethics and compliance program; and (iii) a reciprocal commitment from the third party;
- A system of financial and accounting procedures, including internal controls, reasonably designed to ensure accurate books, records and accounts so as to ensure that they cannot be used for bribery or to hide bribery;
- Measures designed to ensure periodic communication and documented training on the company's ethics and compliance program;
- Measures to encourage and provide positive support for the observance of ethics and compliance programs at all levels of the company;
- Disciplinary procedures to address violations of anti-bribery prohibitions;
- Effective measures for (i) providing guidance to directors, officers, employees, and, where appropriate, business partners on complying with the company's ethics and compliance program, including in urgent situations in foreign jurisdictions; (ii) internal and, where possible, confidential reporting by, and protection of, directors, officers, employees and, where appropriate, business partners, who are either unwilling to violate ethics rules under instructions or pressure from superiors or are willing to report breaches of the law or ethics rules in good faith and on reasonable grounds; and (iii) undertaking appropriate action in response to such reports;
- Periodic reviews of the ethics and compliance programs designed to evaluate and improve their effectiveness in preventing and detecting bribery.

The Recommendation itself, applicable to OECD member countries and other countries that are party to the OECD Convention, recommends that member countries “take concrete and meaningful steps” in several areas to deter, prevent and combat foreign bribery. Among the steps recommended are the following:

- *Facilitation Payments:* The Recommendation urges member nations to undertake periodic reviews of policies regarding facilitation payments and encourages companies to prohibit or discourage the use of such payments. Member countries should also remind companies that when facilitation payments are made, they must be accurately accounted for in books and financial records. The Recommendation also urges member countries to raise awareness of public officials regarding domestic bribery laws and regulations in order to reduce facilitation payments.
- *Tax Measures:* The Recommendation urges member nations to implement the 2009 Council Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, which recommends that member countries disallow tax deductibility of bribes. The Recommendation also suggests that independent monitoring be carried out by the Committee on Fiscal Affairs.
- *Reporting Foreign Bribery:* Member countries are encouraged to ensure that accessible channels and appropriate measures are in place for reporting suspected acts of bribery of foreign officials to law enforcement authorities, including reporting by government officials posted abroad. The member countries are further encouraged to take steps to protect public and private sector employees who report suspected acts of bribery in good faith.
- *Accounting Requirements:* Member countries are encouraged to prohibit the establishment of off-the-books accounts and the making of inadequately identified transactions, recording of non-existent expenditures, entry of liabilities with incorrect identification of their object, and the use of false documents for the purpose of bribing foreign officials or hiding such bribery and provide criminal penalties for such activities. They are also urged to require companies to disclose contingent liabilities and to consider requiring companies to submit to an external audit and maintain standards to ensure independence of those audits. More notably, the Recommendation contemplates member countries requiring auditors who find indications of bribery to report their findings to a monitoring body and potentially to law enforcement authorities.
- *Internal Controls:* Member countries are encouraged to develop and adopt internal controls, ethics and compliance programs and to encourage government agencies to consider compliance programs as factors in decisions to grant public funds or contracts. They are also asked to encourage company management to make statements disclosing their internal controls, including those that contribute to the prevention and detection of bribery and provide channels for the reporting of suspected breaches of the law. Additionally, member countries are to encourage companies to create independent monitoring bodies such as audit committees.
- *Public Advantages:* The Recommendation suggests that member countries allow authorities to suspend from public contracts or other public advantages companies that have been found to have bribed foreign public officials. It also asks that member countries require anti-corruption provisions in bilateral aid-funded procurement, promote

proper implementation of anti-corruption provisions in international development institutions, and work with development partners to combat corruption in all development efforts.

- *International Cooperation*: The Recommendation encourages member countries to cooperate with authorities in other countries in investigations and legal proceedings including by sharing information, providing evidence, extradition, and the identification, freezing, seizure, confiscation, and recovery of the proceeds of bribery. It also encourages countries to investigate credible allegations of bribery referred by other countries and consider ways of facilitating mutual legal assistance between member and non-member countries and international organizations and financial institutions that are active in the fight against bribery.

Also released in conjunction with the Recommendation was Annex I, Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“Annex I”). Annex I sets forth in more detail some of the general suggestions presented in the main Recommendation. Among other things, Annex I, (i) suggests that member countries should not provide a defense or exception for situations where the public official solicits a bribe; (ii) suggests that member countries provide training to officials posted abroad so they can provide information to their country’s corporations when such companies are confronted with bribe solicitations; (iii) encourages countries not to restrict the liability of legal persons (*i.e.*, corporations) to instances where natural persons are prosecuted or convicted; (iv) recommends that countries ensure that legal persons cannot avoid responsibility for conduct by using intermediaries to offer, promise or pay a bribe; and (v) encourages countries to be vigilant in investigating and prosecuting violations. In this respect, Annex I states that countries should seriously investigate complaints and credible allegations and not be influenced by external factors such as economic interest, foreign relations or the identity of persons or companies involved.

The Recommendation comes as the OECD launches its Phase 3 review process of Convention signatories, which examines, among other things, the enforcement efforts and results of such countries. In releasing the guidance, the OECD is likely drawing attention to those areas on which it will particularly focus - such as the liability of legal persons, the use of intermediaries, and increased international cooperation. The release of the Good Practice Guidance is also significant because it provides helpful guidance to companies looking to better structure their internal compliance efforts to address their industry and company specific risks.

United Kingdom Anti-Bribery Developments

On May 20, 2010, the new coalition government in the United Kingdom announced in its five-year policy program a proposal to create a single agency to focus on the investigation and prosecution of economic crime, combining work that is currently done by multiple agencies, including the Serious Fraud Office (“SFO”), the Financial Services Authority (“FSA”), and the Office of Fair Trading. This proposal comes on the heels of several other major steps by the U.K. to enhance its efforts to combat corruption offenses and other economic crimes. These

other steps include Parliament's recent passage of one of the strongest anti-corruption laws of any developed nation, the SFO's release of guidance on effective compliance programs and corporate cooperation in anti-corruption matters, and several enforcement actions by the SFO, including guilty pleas from high-profile companies such as BAE Systems and Mabe & Johnson.

Below are discussions of (i) the proposal for a new regulatory agency; (ii) the Bribery Act; (iii) recent guidance from the SFO on self-reporting of corruption and proper anti-corruption controls; and (iv) a discussion of recent enforcement activity by the SFO. Together, these actions represent a dramatic shift in anti-corruption enforcement by the United Kingdom and make clear that any company that does business in the U.K. must be carefully attentive to anti-corruption concerns and must have in place effective compliance procedures, including due diligence procedures for "associated persons" such as commercial agents and joint venture partners. Indeed, the extraordinarily broad jurisdictional reach of the Bribery Act means that liability could attach for U.S.-based companies that carry on business in the U.K., regardless of whether the conduct in question involved activities in the U.K.

- *Proposed New Agency to Address Economic Crime*

Prime Minister David Cameron and Deputy Prime Minister Nick Clegg released the new government's five-year policy program on May 20, 2010, in a document entitled *The Coalition: Our Programme for Government*. As part of its plan to overhaul the financial industry, the government announced that it would create a new enforcement agency that would combine the work currently undertaken by various other agencies, including the SFO.

The announcement was made in a single paragraph: "We take white collar crime as seriously as other crime, so we will create a single agency to take on the work of tackling serious economic crime that is currently done by, among others, the Serious Fraud Office, Financial Services Authority and Office of Fair Trading."

Currently, the Financial Services Authority ("FSA") is responsible for overseeing the financial markets, and it can file criminal charges against individuals that engage in practices such as insider trading. The Office of Fair Trading ("OFT"), on the other hand, is an anti-trust and consumer protection agency that has brought price-fixing cases. How exactly the new agency will combine the work of these agencies with the corporate fraud focus of the SFO is not yet clear.

Moreover, it remains to be seen how great a priority the creation of this agency will be for the new coalition, particularly in light of severe budget constraints. Nevertheless, the SFO noted in a statement that its prosecutorial experience would contribute substantially to the new agency. The FSA added that it "will engage with government to ensure effective implementation of their policy of seeking to ensure the current strong momentum in enforcement work — which underpins our credible deterrence agenda — is maintained." At the very least, the new government's proposal to create a new enforcement agency demonstrates its commitment to enforcing economic criminal laws, such as the recently-passed Bribery Act of 2010.

- Bribery Act 2010

On April 8, 2010, the House of Commons passed legislation to consolidate, clarify, and strengthen U.K. anti-bribery law. The previous U.K. anti-bribery legal regime had been an antiquated mix of common law and statutes dating back to the 19th century, and then Justice Secretary Jack Straw conceded that the law had been “difficult to understand ... and difficult to apply for prosecutors and the courts.”

The newly passed Bribery Act, which is scheduled to go into effect in April 2011, creates four categories of offenses: offenses of bribing another person; offenses related to being bribed; bribery of foreign public officials; and failure of a commercial organization to prevent bribery. The first category of offenses prohibits a person (including a company as a juridical person) from offering, promising, or giving a financial or other advantage (i) in order to induce a person to improperly perform a relevant function or duty; (ii) to reward a person for such improper activity; or (iii) where the person knows or believes that the acceptance of the advantage is itself an improper performance of a function or duty. The second category of offenses, offenses related to being bribed, prohibits requesting, agreeing to receive, or accepting such an advantage in exchange for performing a relevant function or activity improperly.

The third category of offenses, bribery of foreign public officials, is the most similar to the U.S. FCPA. According to the U.K. Act’s Explanatory Notes, the prohibitions on foreign bribery are meant to closely follow the requirements of the OECD Convention, to which the U.K. is a signatory. Under the Bribery Act, a person (again, including a company) who offers, promises, or gives any financial or other advantage to a foreign public official, either directly or through a third party intermediary, commits an offense where the person’s intent is to influence the official in his capacity as a foreign public official and the person intends to obtain or retain either business or an advantage in the conduct of the business.

Finally, and perhaps most significantly, the Bribery Act creates a separate strict liability corporate offense for failure to prevent bribery, applicable to any corporate body or partnership that conducts part of its business in the U.K. Under this provision, a company is guilty of an offense where an “associated person” commits an offense under either the “offenses of bribing another person” or “bribery of foreign public officials” provisions in order to obtain or retain business or a business advantage for the company. An “associated person” includes any person who performs any services for or on behalf of the company, and may include employees, agents or subsidiaries. While failure to prevent bribery is a strict liability offense, an affirmative defense exists where the company can show it had in place “adequate procedures” to prevent bribery. The Bribery Act tasks the Secretary of State to publish guidance on such adequate procedures. In July 2010, the Ministry of Justice announced that the Government would undertake a “short consultation exercise on the guidance about procedures which commercial organisations can put in place to prevent bribery on their behalf,” beginning in September 2010.

The offense of failure to prevent bribery stands in contrast to the FCPA’s standard for establishing liability for the actions of third-parties, such as commercial agents. Whereas the FCPA’s anti-bribery provisions require knowledge or a firm belief of the agent’s conduct in

order for liability to attach, the U.K. Act provides for strict liability for commercial organizations for the acts of a third-party, with an express defense where the company has preexisting adequate procedures to prevent bribery. This strict liability criminal offense creates significant new hazards for corporations when they utilize commercial agents or other third parties. In effect, the actions of the third party will be attributable to the corporation, regardless of whether any corporate officer or employee had knowledge of the third party's actions. The affirmative defense places a great premium on having an effective compliance program, including, but not limited to, due diligence procedures. In the U.S., the existence of an effective compliance program is not a defense to an FCPA charge, though the DOJ and SEC do treat it as one of many factors to consider in determining whether to bring charges against the company, and the U.S. Sentencing Guidelines include it as a mitigating factor at sentencing.

The Bribery Act has several other notable differences from the FCPA, and in many ways, the U.K. law appears broader. Portions of the Act are applicable to any entity that carries on a business, or part of a business, in the U.K., whether or not the underlying conduct has any substantive connection to the U.K. Furthermore, the Bribery Act criminalizes bribery of private persons and companies in addition to bribery of foreign public officials. The Act also provides no exception for facilitation or "grease" payments, nor does it provide any exception for legitimate promotional expenses, although it is arguable that properly structured promotional expenses would not be considered as intended to induce a person to act improperly and therefore would not violate the Act.

- *Guidance Regarding Adequate Procedures to Prevent Bribery*

As noted above, the U.K. Bribery Act instructs the Secretary of State to publish guidance regarding "adequate procedures" to prevent bribery, for purposes of the defense to the new crime of failure of a commercial organization to prevent bribery. The SFO, however, has previously published guidance that is largely consistent with the U.S. Sentencing Commission's guidance on effective compliance programs and the DOJ's guidance on the FCPA. Specifically, on July 21, 2009, the SFO provided guidance regarding effective compliance programs when it issued corporate guidance on self-reporting corruption offenses. The SFO outlined a non-exclusive list that would help establish whether a corporation has adequate anti-corruption procedures, including: (i) a clear and visibly supported statement of anti-corruption culture; (ii) a Code of Ethics; (iii) principles that are applicable regardless of local law or culture; (iv) individual accountability; (v) policies on gifts, hospitality, and facilitation payments; (vi) a policy on outside advisers and third parties, "including vetting and due diligence and appropriate risk assessments"; (vii) a policy concerning political contributions and lobbying activities; (viii) training; (ix) regular checks and auditing; (x) a helpline; (xi) "a commitment to making it explicit that the anti-bribery code applies to business partners"; (xii) appropriate and consistent disciplinary processes; and (xiii) the effect of any remedial action if there have been previous cases involving corruption.

The SFO guidance also addressed self-reporting in corruption matters. The guidance outlines important initial factors that the SFO will address in self-disclosure cases, including whether the corporate board appears genuinely committed to resolving the issue and adopting a

better corporate culture. Other significant factors include whether the company cooperates with the SFO in handling the investigation, works with regulators abroad to reach a global settlement, and understands the need for public transparency. The SFO will also consider whether the company is prepared to discuss resolution of the issue through such means as civil recovery, a program of training and culture change, actions against individuals, and potentially external monitoring. The guidance notes that the failure to self report will be regarded as a negative factor by the SFO should it discover the improper activity through other means. The guidance also confirms that the SFO will begin to offer opinion procedure releases — similar to those issued by the DOJ — for cases where a corporation discovers an overseas corruption issue within a company it seeks to acquire.

- *Enforcement Activity*

The SFO is becoming more aggressive in its investigation and prosecution of fraud and corruption and has stated that it expects that its Anti-Corruption Domain will conduct more criminal investigations and prosecutions with the passage of the Bribery Act. Before the Act had passed Parliament, the SFO had begun “moving significant skills” to the anti-corruption campaign, had been “investing heavily in training,” and announced its intention to expand to 100 the staff focusing on anti-corruption.

Perhaps an indication of things to come, the SFO has ratcheted up its efforts to combat corruption since mid-2009 with a number of notable investigations and settlements. On July 8, 2009, the SFO announced that it had entered into a plea agreement with Mabey & Johnson, a bridge building company owned by a wealthy British family, relating to bribery offenses and violations of United Nations sanctions. The company will pay £6.6 million in fines as a result of its voluntary disclosure, and an independent monitor must now approve its internal compliance program. The charges, described more fully below, relate to Mabey & Johnson’s activities in Iraq as part of the Oil-for-Food Programme scandal as well as the company’s activities in activities in Jamaica and Ghana.

In a rare prosecution of an individual on corruption charges, the SFO, on December 1, 2009, charged Robert John Dougall with conspiracy to corrupt. Dougall, the former Vice President of Market Development of DePuy International Limited, was alleged to have made corrupt payments to medical professionals in the Greek healthcare system. These payments were said to have been made to encourage sales of orthopedic products supplied by the company. In April 2010, Dougall pleaded guilty and was sentenced to one year in prison, despite a request from the SFO for a lighter sentence in consideration of his service as a valuable witness in the case. In May 2010, the U.K. Court of Appeal reversed the ruling of the trial court and affirmed the suspended sentence requested by the SFO. However, the Court also reprimanded the SFO and their U.S.-style plea agreement approach, saying that “agreements between the prosecution and the defense about the sentences to be imposed in fraud and corruption cases were constitutionally forbidden” and that sentencing should be left up to judges.

Additionally, on February 5, 2010 the SFO settled charges with British arms maker BAE Systems PLC (“BAE”). Although the charges stem from a bribery investigation into BAE

activities around the world, the U.K. settlement is limited to the defense contractor's failure to keep accurate accounting records relating to payments made to the Tanzanian government. Previously, investigations against BAE and their actions in Saudi Arabia had been stopped by then-Prime Minister Tony Blair as a result of national security concerns.

On February 25, 2010 the SFO brought charges against a U.K. subsidiary of the U.S. chemical company, Innospec Inc., relating to alleged corrupt activity in Indonesia. The SFO obtained financial penalties against the company in the amount of \$12.7 million as part of a global settlement involving the DOJ, SEC, and OFAC.

Further, on March 24-25, 2010, several U.K. offices of French industrial giant Alstom were searched by police officers and agents of the SFO, and three Alstom UK directors were arrested and questioned on the first day of the operation. The three men were released without charge the same evening after questioning. The SFO indicated that the three directors are suspected of bribery, corruption, conspiracy to pay bribes, money laundering and false accounting.

Most recently, on April 6, 2010, the Wall Street Journal reported that U.K. authorities (as well as the DOJ) were investigating the activities of Alcoa's agent in Bahrain, a U.K. resident who is suspected of bribing officials of the state-owned construction company, Alba. Neither the SFO nor the DOJ has commented on the investigation, though the DOJ's involvement has been known for some time. Each of these cases is discussed in more detail below.

African Enforcement Activity

Over the past few years, there have been increased regional and local efforts to combat the culture of bribery present throughout much of Africa. In addition to the broader United Nations Convention Against Corruption, many countries have signed or ratified the African Convention on Combating Corruption. Locally, many countries have formed their own anti-corruption agencies and enacted legislation to enable them to combat corruption more effectively.

In some respects, these efforts have been successful. According to the 2008 World Bank Worldwide Governance Indicator, for instance, Liberia showed more improvement in controlling corruption over the previous two years than any other country in the world. Likewise, recent anti-corruption initiatives in Gambia have led to the investigation and arrest of two permanent secretaries at the Department of State for Agriculture. In addition, as discussed below, there are continued talks of one of Africa's strongest anti-corruption crusaders - former Nigerian Economic and Financial Crimes Commission ("EFCC") chairman Nuhu Ribadu - returning to Nigeria to renew the fight against corruption.

Improvement does not mean eradication, and, despite these initiatives, problems persist. For example, reports on Mauritania illustrate the continuing pervasiveness of corruption in the region. According to the State Department's 2010 Investment Climate Statement, Mauritania "does not have laws, regulations, and penalties to combat corruption effectively. What laws and regulations do exist are not effectively enforced." In fact, under Mauritanian law, it is not a

crime to give or accept bribes. Transparency International ranked Mauritania at 130 on its Corruption Perception Index. As an illustration of how rampant corruption remains in Africa, Mauritania's ranking is still higher than nearly two-thirds of the countries in the West Africa region.

Below are discussions of select recent corruption events and trends in the region.

- Algeria

In mid-January 2010, Algeria's Intelligence and Security Department launched a corruption probe to investigate allegations of impropriety by senior executives at Sonatrach, Algeria's state-owned energy company. According to various media reports, officials are investigating alleged corruption by Sonatrach officials and various suppliers, including research and consulting firms in which the sons of Sonatrach CEO, Mohamed Meziane, appear to hold interests. As part of the investigation, authorities are reported to be investigating the award of a \$580 million contract to Italian oil and gas company Saipem to extend a pipeline system in northeast Algeria.

The investigation has focused on Meziane, but also includes his two sons, two Sonatrach vice presidents, the former president of Algeria's state-owned bank, Credit Populaire d'Algérie (CPA), and numerous others. Meziane has been suspended from his position at Sonatrach and placed under judicial supervision with seven other Sonatrach executives. Meziane's two sons and four Sonatrach executives have been held without bond pending the corruption, bribery, and criminal conspiracy charges. On March 23, 2010, Reuters reported that five senior employees in a regional Sonatrach office were also arrested as part of the investigation.

Some experts have argued that the charges against Sonatrach executives are politically motivated and represent a bid by the country's military to wrest control from President Abdelaziz Bouteflika following a 2008 constitutional amendment that allowed the president to seek a third term. Control of Sonatrach affords much political power: it employs over 120,000 people, accounts for 98% of all foreign currency brought into the country, and provides a fifth of Europe's oil and gas needs. Further indicating the possibility of an internal power struggle, Algeria Oil Minister Chakib Khelil has stated that he will not resign despite allegations that he approved the contracts under investigation.

At the same time, the Algerian government has taken steps to strengthen its anti-corruption laws. In March 2010, an Algerian government official told Reuters that the government now requires foreign companies to sign a "statement of probity" before they may be considered for contracts with state-owned entities. By signing the statement, the foreign companies agree not to promise gifts, information, or training tips to any government official "to facilitate the treatment of its file to the detriment of fair competition."

- Ghana

Ranked in Transparency International's 2009 Corruption Perception Index as the 69th least corrupt nation in the world, Ghana received the best rating among all the mainland nations

of West Africa. Ghana established its own Serious Fraud Office (“SFO”) in 1998 to investigate public and private corruption, and the government is drafting legislation that would revise certain aspects of the anti-corruption laws, including more clearly defined treatment of proceeds from illicit activities such as bribery. Ghana also passed a “Whistle Blower” law in 2006 designed to encourage and protect citizens who volunteered information regarding corrupt practices.

Leading up to the December 2008 elections, then-opposition candidate and now-President John Atta-Mills declared his intent to expand Ghana’s anti-corruption efforts, including establishing an oversight committee to monitor the new ruling party, providing the SFO the ability to initiate prosecutions without the approval of the attorney general, and granting the Commission on Human Rights and Administrative Justice – another anti-corruption investigative unit – the power to investigate government officials on allegations of corruption.

In July 2009, Ghana’s former Foreign Minister Akwasi Osei-Adjei became the first official from the former administration to be formally charged with allegations of corruption and causing a financial loss to the state in relation to a deal that exported rice from India to Ghana. Osei-Adjei and Daniel Charles Gyimah, the former Managing Director of the National Investment Bank, are alleged to have diverted almost 3,000 bags of rice for personal gain as part of the scheme and are currently facing eight counts of conspiracy, contravening the Public Procurement Act, using public office for profit, stealing and willfully causing financial loss to the state. The trial is currently adjourned. In February, the Managing Editor of the Enquirer newspaper, Raymond Archer, was convicted of contempt for publishing stories that alleged that Osei-Adjei and Gyimah had influenced prosecution witnesses to testify in their favor.

Also, in January 2010, U.S. and Ghanaian officials were reported to be investigating the relationship between the Texas-based oil company Kosmos and EO, a Ghanaian oil company purportedly set up by political allies of former Ghanaian president John Kufuor. One of EO’s principals, Kwame Bawuah Edusei, the “E” in the company, is reported to be a longtime political ally of Kufuor and served as Ghana’s Ambassador to the United States until January 2009. George Owusu, the “O” in the company, previously worked at Royal Dutch Shell and has also served as a consultant to Kosmos. Kosmos is owned by U.S. private equity groups Blackstone and Warburg Pincus.

EO reportedly brought Kosmos into Ghana and retained a 3.5 percent stake in an offshore oil block that was awarded to Kosmos by the Ghana government. As part of the deal, Kosmos agreed to finance EO’s share of exploration and development costs up to the production of first oil, which some have described as an unusually favorable financing arrangement for EO. Kosmos ultimately found substantial quantities of oil in the block. The investigation by the U.S. Department of Justice and Ghanaian officials involves allegations that EO had used its political connections to obtain the offshore oil block for Kosmos and EO on advantageous terms. EO and Kosmos have denied any wrongdoing. Kosmos has further asserted that Ghana is attempting to force it to sell its interests at a below-market price to GNPC, the state oil company. EO moved from Ghana to the Cayman Islands before the 2008 elections ended in opposition victory.

- *Nigeria*

Nigeria has a strong anti-corruption legal framework, even if the practicable application of that framework is questionable. The State Department's 2010 Investment Climate Statement for Nigeria cautioned that, "corruption persists in the awarding of government contracts."

Over the last several years, however, Nigeria has made some progress, and is now 130th on Transparency International's Corruption Perception Index. In August 2009, Secretary of State Hillary Clinton traveled to Nigeria, where she and other State Department officials urged Nigeria to intensify anti-corruption efforts. "We strongly support and encourage the government of Nigeria's efforts to increase transparency, reduce corruption (and) provide support for democratic processes in preparation for the 2011 elections," Clinton said while in Abuja. Much of this improvement occurred when the nation's anti-corruption agency, the Economic and Financial Crimes Commission ("EFCC"), was headed by former executive chairman Nuhu Ribadu. During his tenure in 2007, Nigeria was admitted into the Paris-based Egmont Group of Financial Intelligence Units after having been removed from its list of non-cooperative countries the year before. Ribadu arrested and charged several former governors of various Nigerian states, noting that there also were ongoing investigations into the activities of many sitting governors, to whom Nigerian law grants immunity while in office.

In December 2007, Ribadu arrested and charged James Ibori – the former governor of the large and oil-rich Delta State and one of the most high profile individuals in Nigeria – on 170 counts of corruption and money laundering. Ibori, who had been a key financier of former Nigerian president Umaru Yar'Adua, who died in May 2010, officially earned less than \$25,000 per year, but had more than \$35 million in assets frozen by a British court in connection to money laundering charges in the U.K.

The arrest of Ibori appears to have sparked a backlash against the growing anti-corruption campaign. During the same month that he made the controversial arrest, Ribadu was removed from office and sent on compulsory ten-month leave to study a course at the Nigeria Institute of Policy and Strategic Studies. Before his compulsory training ended, Ribadu was demoted from his position. He was also charged with not declaring his assets while in office, a criminal offense. He eventually left Nigeria and moved to London following several unsuccessful attempts on his life. In early 2008, a new presidential directive instructed all agencies to secure the consent and approval of the Attorney General before initiating any criminal proceedings. The country's first Financial Intelligence Unit director for the Egmont Group resigned in November 2008.

In May 2008, Farida Waziri was appointed as the new EFCC chair, and she has been criticized for not pursuing prosecutions as robustly as her predecessor. Despite the firing of several top investigators and ongoing delays, Waziri stated in May 2009 that the investigations into ten ex-governors – including seven cases she had inherited from Ribadu – were still ongoing.

An official traveling with Secretary Clinton in her August 2009 visit to Nigeria noted that the EFCC had “performed weakly since the departure of Mr. Ribadu,” and indicated a desire to continue working with Ribadu on anti-corruption initiatives. Such attention to cross-border cooperation has been reflected in the Nigerian press, which has begun reporting on foreign-based investigations, such as the Italian public prosecutor’s investigation of the role of Eni S.p.A. in the Bonny Island scandal described below.

Ribadu has not yet returned to Nigeria, and, after originally fleeing to London, currently resides in the United States, but in May 2010 all charges against him were formally dropped. There has been speculation that Nigeria’s newly sworn-in President, Goodluck Jonathan, will appoint Ribadu as a special adviser on fighting corruption.

Ibori, meanwhile, was acquitted of all 170 counts in December 2009, but was arrested again by Interpol in May 2010 in Dubai. Ibori faces extradition to either Nigeria or the U.K. to face charges including money-laundering and fraud. Ibori is alleged to have looted \$290 million from the Delta state coffers between 1999 and 2007. In April 2010, Ibori had filed suit to restrain the EFCC from arresting him.

- Niger

In July 2009, Justice authorities in Niger issued an international arrest warrant for the Former Niger Prime Minister Hama Amadou. A Government spokesman said the warrant was issued “because an inquiry has revealed that he holds 15,000 shares in the West African bank, Ecobank.” Reports indicate Amadou will be charged with illegal enrichment and money laundering.

Amadou denied the allegations and claimed President Mamadou Tandja’s only aim was to have him thrown into prison. “His primary objective is to arrest me and throw me in prison for some reason or other,” he told Radio France International “Do you think someone is capable of stealing 16 billion CFA francs from the budget of Niger? If I had stolen 16 billion then why haven’t the ministers who helped me steal it been named in the file?,” he demanded.

Amadou previously spent nearly a year in jail on charges of theft of state funds, specifically that he had embezzled 100 million CFA (approximately \$216,000) of foreign aid, but he was released in April 2009 to seek medical treatment. He returned to Niger in March 2010 after a year in exile.

In February 2010, Niger’s constitution and all state institutions were suspended as a result of a *coup d’etat*. The coup followed President Tandja’s dissolution of the National Assembly and changes to the country’s constitution that extended his term an additional three years and eliminated term limits. President Tandja and his ministers were put into a military camp, and the country is currently being run by the junta, Supreme Council for the Restoration of Democracy.

FCPA ELEMENTS AND PENALTIES

The FCPA has two fundamental components: (1) the Anti-Bribery Provisions in Section 30A of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and in Title 15, United States Code,² and (2) the Books and Records and Internal Accounting Control Provisions in Sections 13(b)(2)(A)³ and 13(b)(2)(B)⁴ of the Exchange Act, respectively (collectively, the “Accounting Provisions”). The DOJ has exclusive jurisdiction to prosecute criminal violations of the FCPA, while the DOJ and the SEC share jurisdiction over civil enforcement actions.

Anti-Bribery Provisions

The FCPA’s Anti-Bribery Provisions prohibit, among other things, (i) an act in furtherance of, (ii) a payment, offer or promise of, (iii) anything of value, (iv) to a foreign official,⁵ or any other person while knowing that such person will provide all or part of the thing of value to a foreign official, (v) with corrupt intent, (vi) for the purpose of (a) influencing an official act or decision, (b) inducing a person to do or omit an act in violation of his official duty, (c) inducing a foreign official to use his influence with a foreign government to affect or influence any government decision or action, or (d) securing an improper advantage, (vii) to assist in obtaining or retaining business.⁶

The term “foreign official” is broadly defined to mean any officer or employee of a foreign government, agency or instrumentality thereof, or of a public international organization, or any person acting in an official capacity on behalf of such government, department, agency, or instrumentality, or public international organization.⁷ The term foreign official has been construed by federal prosecutors to include employees, even relatively low-level employees, of state-owned institutions.

Under the FCPA, “a person’s state of mind is ‘knowing’ with respect to conduct, a circumstance, or result” if he or she has actual knowledge of the conduct, circumstance or result or “a firm belief that such circumstance exists or that such result is substantially certain to occur.”⁸ In addition, knowledge of a circumstance can be found when there is a “high probability” of the existence of such circumstance.⁹ According to the legislative history,

[T]he Conferees agreed that “simple negligence” or “mere foolishness” should not be the basis for liability. However, the Conferees also agreed that the so called “head-in-the-sand” problem – variously described in the pertinent authorities as

¹ Codified at 15 U.S.C. §§ 78dd-1(a).

² 15 U.S.C. §§ 78dd-2(a), 78dd-3(a).

³ Codified at 15 U.S.C. § 78m(b)(2)(A).

⁴ Codified at 15 U.S.C. § 78m(b)(2)(B).

⁵ The FCPA further prohibits payments to foreign political parties and officials thereof.

⁶ See 15 U.S.C. §§ 78dd-1(a).

⁷ 15 U.S.C. §§ 78dd-1(f)(1).

⁸ *Id.*

⁹ See 15 U.S.C. § 78dd-1(f)(2)(B).

“conscious disregard,” “willful blindness” or “deliberate ignorance” – should be covered so that management officials could not take refuge from the Act’s prohibitions by their unwarranted obliviousness to any action (or inaction), language or other “signalling [*sic*] device” that should reasonably alert them of the “high probability” of an FCPA violation.¹⁰

Since the 1977 enactment of the FCPA, the Anti-Bribery Provisions have applied to U.S. and foreign issuers of securities that registered their securities with or reported to the SEC and to domestic concerns such as U.S. citizens and companies organized under U.S. law or with a principle place of business in the U.S., if the U.S. mails or a means or instrumentalities of U.S. interstate commerce (such as an interstate wire transfer) were used in furtherance of the anti-bribery violation.¹¹ In 1998, amendments to the Anti-Bribery Provisions generally extended U.S. jurisdiction to cover acts outside of U.S. territory in furtherance of an anti-bribery violation by U.S. issuers and domestic concerns and acts inside U.S. territory in furtherance of an anti-bribery violation by other persons, such as foreign non-issuers and foreign nationals, who were not previously subject to the FCPA.¹² Such extended jurisdiction is not dependent upon the use of U.S. mails or means or instrumentalities of U.S. interstate commerce.¹³

The FCPA also applies to officers, directors, employees, or agents of any organization subject to the FCPA and to stockholders acting on behalf of any such organization.¹⁴

The Exception and Defenses to Anti-Bribery Violations

Under the FCPA, facilitating payments “to expedite or to secure the performance of a routine governmental action” are exempted from the Anti-Bribery Provisions.¹⁵ This is a narrow exception, only applying to non-discretionary acts such as obtaining official documents or securing utility service and not applying to any decision to award or continue business with a particular party,¹⁶ and many other jurisdictions and international conventions do not permit facilitation payments.

There are also two affirmative defenses to the FCPA. Under the “written law” defense, it is an affirmative defense to an FCPA prosecution if the payment, gift, offer, or promise of anything of value that is at issue was lawful under the written laws and regulations of the recipient’s country.¹⁷ It is also an affirmative defense if the payment, gift, offer, or promise of anything of value was a reasonable, *bona fide* expenditure directly related either to the promotion, demonstration, or explanation of products or services, or to the execution or performance of a contract with a foreign government or agency.¹⁸ Both defenses, however, are

10 H.R. Rep. No. 100-576, at 920 (1987) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1953.

11 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

12 15 U.S.C. §§ 78dd-1(g), 78dd-2(i), 78dd-3(a).

13 *Id.*

14 15 U.S.C. §§ 78dd-1(a), (g), 78dd-2(a), (i), 78dd-3(a).

15 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

16 15 U.S.C. §§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B), 78dd-3(f)(4)(B).

17 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).

18 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

narrow in practice and, because they are affirmative defenses, it would be the defendant's burden to prove their applicability in the face of an FCPA prosecution.

Accounting Provisions

The FCPA's Accounting Provisions apply to issuers who have securities registered with the SEC or who file reports with the SEC.¹⁹ The Books and Records Provisions compel such issuers to make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.²⁰ The Internal Accounting Controls Provisions require such issuers to devise and maintain a system of internal accounting controls regarding accounting for assets, enabling the preparation of financial statements, and providing reasonable assurances that management authorizes transactions and controls access to assets.²¹ As used in the Accounting Provisions, "reasonable detail" and "reasonable assurances" mean a level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.²²

Penalties

The FCPA imposes both criminal and civil penalties. Willful violations of the Anti-Bribery Provisions carry maximum criminal fines of \$2 million for organizations and \$250,000 for individuals, per violation.²³ Under U.S. criminal law, alternative fines of up to twice the pecuniary gain from the offense apply instead, if the alternative fine exceeds the maximum fine under the FCPA.²⁴ Individuals also face up to five years' imprisonment for willful violations of the Anti-Bribery provisions.²⁵ Anti-bribery violations also carry civil penalties of up to \$10,000 for organizations or individuals, per violation.²⁶ These fines are not indemnifiable by a person's employer or principal.²⁷

Willful violations of the Accounting Provisions carry maximum criminal fines of \$25 million for organizations and \$5 million for individuals, or, if greater, the alternative fine of twice the pecuniary gain.²⁸ Individuals face up to 20 years' imprisonment for willful violations

19 15 U.S.C. § 78m(b)(2). The Accounting Provisions were passed as part of the original 1977 FCPA legislation out of concern over companies improperly recording payments on their books and records and failing to fully account for illicit "slush" funds, from which improper payments could be made. These provisions, however, have broader application than simply within the context of the FCPA. For purposes of this Alert, when violations of these provisions are alleged in the context of improper payments to foreign officials or similar conduct, they are referred to as violations of the FCPA's Accounting Provisions. When violations occur in situations not involving improper payments (*see, e.g.*, the Willbros Group settlement discussed *infra*), they are described as the Exchange Act's books and records and/or internal controls provisions.

20 15 U.S.C. § 78m(b)(2)(A).

21 15 U.S.C. § 78m(b)(2)(B).

22 15 U.S.C. § 78m(b)(7).

23 15 U.S.C. §§ 78ff(c), 78dd-2(g), 78dd-3(e); 18 U.S.C. § 3571(b)(3), (e).

24 18 U.S.C. § 3571(d), (e).

25 15 U.S.C. §§ 78ff(c)(2)(A), 78dd-2(g)(2)(A), 78dd-3(e)(2)(A).

26 15 U.S.C. §§ 78ff(c), 78dd-2(g), 78dd-3(e).

27 15 U.S.C. §§ 78ff(c)(3), 78dd-2(g)(3), 78dd-3(e)(3).

28 15 U.S.C. § 78ff(a); 18 U.S.C. § 3571(d), (e).

of the Accounting Provisions.²⁹ Civil penalties for violations of the Accounting Provisions include disgorgement of any ill-gotten gains and penalties up to \$500,000 for organizations and \$100,000 for individuals, per violation, in actions brought by the SEC.³⁰

²⁹ 15 U.S.C. § 78ff(a).

³⁰ 15 U.S.C. § 78u(d)(3), (5).

FCPA SETTLEMENTS AND CRIMINAL MATTERS³¹**2010*****Technip and Snamprogetti***

On June 28, 2010 and July 7, 2010, Technip S.A. (“Technip”), a French-based construction, engineering and oilfield services company, and Snamprogetti Netherland B.V. (“Snamprogetti”), a Dutch subsidiary of the Italian oil and gas company ENI S.p.A. (“ENI”), each settled FCPA charges with the SEC and DOJ. The SEC separately charged Technip and Snamprogetti with violations of the FCPA’s anti-bribery, books and records, and internal controls provisions, while the DOJ entered into deferred prosecution agreements with the two companies charging each with two counts of violating and conspiring to violate the FCPA’s anti-bribery provisions. ENI was also charged by the SEC with violating the FCPA’s books and records and internal controls provisions.

Under the terms of the agreements, Technip will pay a combined \$338 million in fines, disgorgement and prejudgment interest. Snamprogetti will pay \$240 million in fines to the DOJ, and Snamprogetti and ENI will jointly pay \$125 million in disgorgement and prejudgment interest to the SEC. Technip’s deferred prosecution agreement provides for an independent compliance monitor to be appointed for a term of two years. The agreement specifically provides for a “French national” to serve as the monitor and for the monitor’s charge to include monitoring compliance with French anti-corruption law as well as the FCPA. The charges stem from Technip and Snamprogetti’s participation in the TSKJ joint venture in Nigeria between 1994 and 2004, which is discussed below in connection with the KBR/Halliburton case.

Dimon

On April 28, 2010, the SEC filed a settled civil enforcement action against four former employees of the tobacco merchant Dimon, Inc. (“Dimon”), now Alliance One International, Inc., for violating the FCPA’s anti-bribery provisions and aiding and abetting violations of the internal controls and books and records provisions. At the time of the alleged conduct, Dimon was a U.S. issuer; and Alliance One International is a U.S. issuer that was formed in May 2005 by the merger of Dimon and another company.

The allegations stem from payments allegedly made to foreign officials at a regulatory entity established by Kyrgyzstan to regulate the sale and export of Kyrgyz tobacco and at Thailand’s government-owned tobacco monopoly. Without admitting or denying the allegations, a former country manager, regional financial director, international controller, and senior vice president for sales consented to the entry of final judgments permanently enjoining each of them

31 The description of the allegations underlying the settlements (or other matters such as the ongoing criminal cases) discussed in this Alert are based substantially on the government’s charging documents and are not intended to endorse or confirm the allegations thereof, particularly to the extent that they relate to other, non-settling entities or individuals.

from further such violations. The regional financial director and international controller also each consented to a \$40,000 civil penalty.

According to the SEC's complaint, from 1996 through 2004, Dimon's wholly-owned Kyrgyz subsidiary, Dimon International Kyrgyzstan ("DIK"), paid over \$3 million in bribes to Kyrgyzstan officials, including officials of a Kyrgyz government entity, JSC GAK Kyrgyztamekisi ("Tamekisi"), which regulates the sale and export of Kyrgyz tobacco, and local officials known as Akims, who controlled various tobacco regions. Tamekisi, which owns and operates all the tobacco fermentation plants in Kyrgyzstan, signed an agreement with Dimon International Inc. (USA), a wholly-owned Dimon subsidiary based in the U.S., that included a five cent per kilogram charge for "financial assistance." Dimon's country manager in Kyrgyzstan allegedly paid this charge by delivering bags of \$100 bills to a high-ranking Tamekisi official upon request. The SEC alleged that these cash payments had no legitimate business purpose and that a total of approximately \$2.6 million was paid to this Kyrgyz official under the arrangement. The country manager also paid approximately \$260,000 in bribes to the Akims for allowing DIK to purchase tobacco from the regions under their control.

Additionally, the SEC's complaint indicates that Kyrgyz tax officials repeatedly conducted extortive tax audits of DIK, but the extortive nature of the audits did not excuse the employees' resulting corrupt payments. On one occasion, the tax officials determined that DIK failed to submit two reports, imposed a fine of approximately \$171,000, and threatened to satisfy the fine through the seizure of DIK's local bank accounts and inventory if DIK did not make a cash payment to tax authorities. Dimon's country manager made the payment and, in total, made payments of approximately \$82,850 to tax authorities from 1996 through 2004.

The country manager made the alleged payments to Kyrgyz officials through a bank account, held in the country manager's name, known as the "Special Account." The SEC alleged that Dimon's regional finance director was not only aware of the Special Account, but also authorized transfers to the Special Account from Dimon subsidiaries, traveled to Kyrgyzstan to discuss the records associated with the Special Account, and was aware of the transaction activity in the Special Account. The SEC further alleged that Dimon's international controller was aware of the Special Account, knew that the Special Account was used to make cash payments, revised the manner in which payments from the Special Account were recorded, and received but failed to act upon a 2002 internal audit report that concluded that DIK management was challenged by a "cash environment," that DIK had potential internal accounting controls issues relating to cash, and that corruption in Kyrgyzstan exposed Dimon to financial risk.

Additionally, from 2000 to 2003, Dimon allegedly colluded with two unnamed competitors to pay bribes of approximately \$542,590 to officials of TTM, Thailand's government-owned tobacco monopoly, relating to more than \$9 million in sales contracts. According to the SEC, Dimon's contracts with TTM included "special expenses" or "special commissions" calculated on a per-kilogram basis that were actually kickbacks to TTM officials. The kickbacks were paid through Dimon's agent. The payments were authorized by Dimon personnel in the U.S. and Brazil, including a senior vice president of sales who allegedly knew that the payments were indirectly going to TTM officials. The senior vice president allegedly

structured certain commission payments as several smaller payments and e-mailed an unidentified employee in Brazil about how to avoid raising “too many questions” in the U.S. about the commissions. After the senior vice president stopped authorizing the payments in 2004 (because the TTM officials’ demands had grown too large), TTM stopped purchasing tobacco from Dimon.

Dimon and the unnamed competitors also arranged for sightseeing trips for TTM officials that included piranha fishing, trekking in the Amazon jungle, and trips to Argentina, Milan, and Rome. The SEC alleged that these trips were not for business purposes.

The SEC publicly stated that its investigation is ongoing and that Dimon’s former Kyrgyz country manager’s settlement reflected the SEC’s consideration of his cooperation with the SEC’s investigation.

Daimler

On April 1, 2010, Daimler AG (“Daimler”), a German automotive company and foreign issuer traded on the New York Stock Exchange, resolved DOJ and SEC FCPA investigations. According to Daimler’s 2004 Annual Report, the SEC first notified Daimler of its investigation in August 2004 after a former employee in DaimlerChrysler Corporation’s Corporate Audit Department filed a whistleblower complaint with the U.S. Department of Labor and, subsequently, in a U.S. district court. According to court records, the whistleblower alleged that Daimler wrongfully terminated him for questioning Daimler’s use of secret bank accounts to make improper payments to foreign officials in violation of the FCPA. Daimler’s July 28, 2005 quarterly report disclosed that it was also cooperating with a DOJ investigation into the same conduct.

Ultimately, Daimler and three of its subsidiaries resolved DOJ criminal prosecutions. A U.S. district court accepted pleas of guilty to criminal violations of, and conspiracies to violate, the FCPA’s anti-bribery provisions by two Daimler subsidiaries, DaimlerChrysler Automotive Russia SAO (“DCAR,” now known as Mercedes-Benz Russia SAO) and Daimler Export and Trade Finance GmbH (“ETF”). The court approved deferred prosecution agreements (“DPAs”) between the DOJ and Daimler and a Daimler subsidiary, DaimlerChrysler China Ltd. (“DCCL,” now known as Daimler North East Asia Ltd.). Prior to the court’s approval of the DPAs, the DOJ had charged DCCL with a criminal violation of, and a conspiracy to violate, the FCPA’s anti-bribery provisions, and the DOJ had charged Daimler with a criminal violation of, and a conspiracy to violate, the FCPA’s books and records provisions.

As part of its DPA, Daimler admitted to making tens of millions of dollars in improper payments to foreign officials in at least 22 countries between 1998 and January 2008 and that the corrupt transactions with a territorial connection to the U.S. earned Daimler more than \$50 million in pre-tax profits.

Collectively, Daimler and its subsidiaries paid a criminal penalty of \$93.6 million. The U.S. asserted that the criminal fine was approximately 20% below the low end of the U.S. Sentencing Guidelines’ recommended fine range, but the nature and extent of Daimler’s

cooperation warranted the reduced criminal fine. The DOJ specifically commended Daimler's extensive internal investigation and its remediation efforts, the latter of which included terminating 45 employees and sanctioning another 60. In addition, the DOJ noted Daimler's efforts to reform its anti-bribery compliance program before its resolution with the DOJ. Daimler agreed to adopt internal accounting controls, adopt a compliance code with the minimum elements specified in Daimler's DPA (including direct reporting by one or more senior corporate officials with compliance responsibility to Daimler's Board of Management and Supervisory Board), and engage former FBI Director Louis J. Freeh as a corporate compliance monitor for a term of three years from the date of DCAR's and ETF's guilty pleas.

To resolve the SEC's investigation, Daimler agreed to disgorge more than \$91 million in ill-gotten gains and consented to a final judgment in a civil enforcement action, without admitting or denying the SEC's allegations that Daimler violated the anti-bribery, books and records, and internal accounting controls provisions of the FCPA.

General Allegations

As part of its DPA with the DOJ, Daimler stipulated to the truth and accuracy of a sixty-five page Statement of Facts that describes "many of the details" of Daimler's "practice of making improper payments in violation of the anti-bribery and books and records provisions of the FCPA," although the DOJ only formally charged Daimler with books and records violations. Daimler also expressly admitted responsibility for the acts of its subsidiaries, employees, and agents described in the Statement of Facts. Daimler admitted to the following general allegations about its improper practices.

Daimler paid bribes to foreign officials through the use of corporate ledger accounts known internally as "third-party accounts" or "TPAs," corporate "cash desks," offshore bank accounts, deceptive pricing arrangements, and third-party intermediaries. Daimler then recorded the bribes as "commissions," "special discounts," or "nützliche Aufwendungen" ("N.A.," which translates to "useful" or "necessary" payments). Daimler's FCPA violations resulted from an inadequate compliance structure, the lack of centralized oversight of its operations, a culture that encouraged or tolerated bribery of foreign officials, and the involvement of several key executives in the improper conduct.

In 1999, Germany's legislation implementing the 1998 amendments to the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions came into force. The same year, at the request of Daimler's head of internal audit, Daimler's Board of Management discussed the need for an integrity code that would include anti-bribery provisions. Some participants at this meeting expressed concern at the impact of such a code on Daimler's business in certain countries. Daimler nonetheless adopted a written integrity code, but in practice the company did not make sufficient efforts to enforce the code, train employees regarding compliance with the FCPA or other applicable anti-bribery statutes, audit the use of TPAs, or otherwise ensure that Daimler was not continuing to make improper payments. Daimler's internal audit department continued to raise concerns about the propriety of the TPAs and the controls relating to TPAs, eventually recommending in 2001 that all TPAs be

shut down. However, not until 2005, after the SEC and DOJ investigations had begun, did Daimler eliminate the use of TPAs and adopt the internal accounting controls necessary to prevent, detect, and deter improper payments to foreign officials.

Summaries of Stipulated Violations

Below are summaries of selected stipulated violations.

- Russia

Daimler, through DCAR, sold vehicles and spare parts in Russia to various government customers including the Russian Ministry of Internal Affairs, the Russian military, and several city governments. Between 2000 and 2005, Daimler made approximately €65 million in sales to Russian government customers. In connection with these sales, Daimler and DCAR made over €3 million in improper payments to Russian government officials, either directly or indirectly.

Daimler and DCAR allegedly used various methods to make the improper payments to Russian government officials. Sometimes these payments were made by over-invoicing the government customer and paying the excess back to the foreign official, directly or indirectly. Payments were often wired to U.S. or Latvian bank accounts owned by shell companies--including shell companies registered in the U.S.--to disguise the true beneficiary of the payment. In addition, cash payments were occasionally made directly to government officials or to third-parties with the knowledge that the payment would be passed on in whole or in part to government officials.

- China

Daimler, with the assistance of DCCL, sold vehicles to government customers in China. Daimler's government customers included the Bureau of Geophysical Prospecting, a division of the China National Petroleum Corporation, and Sinopec Corp., a state-owned energy company. Between 2000 and 2005, Daimler made improper payments of over €4 million in the form of commissions, travel, and gifts to Chinese government officials in connection with more than €12 million in sales to government customers. Daimler allegedly inflated the sales price on vehicles sold to Chinese government or government-owned customers and maintained the overpayments in a "special commissions" account, from which improper payments were made. Some payments were made by DCCL's head of sales and marketing, who had authority to wire funds from another account in Germany to Chinese officials or third parties. Often the payments were made into U.S. bank accounts of third parties--several of which were U.S.-registered corporations--that performed no services for Daimler and on which no due diligence was done. Daimler made these payments with no system in place to check their legitimacy.

- Vietnam

Daimler sold vehicles in Vietnam through its joint venture with a government entity. Daimler owned 70% of the joint venture, Mercedes Benz Vietnam ("MBV"), through a Singapore subsidiary. Between 2000 and 2005, Daimler employees working for MBV made

improper payments to foreign officials to obtain or retain business. The highest levels of MBV management knew of, and openly encouraged, such payments. MBV made, or promised to make, more than \$600,000 and €239,000 in improper payments to foreign officials, and incurred \$22.3 million in debt investing in a government-owned high tech park that was then transferred to a U.S. company for only \$223,000, to obtain business that generated more than €4 million in profits and more than an additional €890,000 in revenue.

Daimler and MBV used sham consulting agreements with third parties, including U.S. companies, to disguise the payments. MBV's CFO questioned the legitimacy of one such consulting agreement with Viet Thong Limited Company, which did not exist until after the date of its consulting agreement with MBV. Other MBV employees provided the CFO with Viet Thong's purported 2004 analysis of Mercedes-Benz vehicle emissions in Vietnam; however, the employees plagiarized this analysis from a public 1998 report of Ford Escort emissions and pasted Viet Thong letterhead on the plagiarized report.

- Turkmenistan

In 2000, Daimler gave a high-level Turkmen government official an armored Mercedes-Benz S Class passenger vehicle, worth more than €300,000, as a birthday gift. Daimler employees believed that Daimler would receive large government contracts in exchange for this gift. In 2002, Daimler provided the same official with golden boxes with an inscription of his personal manifesto translated into German, worth approximately \$250,000, in exchange for the official's long-term commitment to Turkmenistan's purchase of Daimler vehicles. The golden boxes were recorded on Daimler's books as "expenses to develop Commonwealth of Independent States' successor market - Turkmenistan." From 1999 to 2003, the stipulated payments also include "N.A." payments of \$45,000 and more than DM2.5 million in cash, and €195,000 in cash and a vehicle, in connection with contracts valued at more than €3 million and DM21.8 million.

- Nigeria

Daimler operated in Nigeria through a joint venture with the Nigerian government. Daimler only owned 40% of the joint venture, Anambra Motor Manufacturing Company ("Anammco"), but it controlled the joint venture through its power to appoint the managing director, who had unfettered discretion to run the joint venture's business. Daimler also appointed three of the seven directors on Anammco's board.

The stipulated payments include improper payments to Nigerian officials from TPAs, either in cash or to the officials' Swiss bank accounts. For example, from 1998 to 2000, Daimler made more than DM1.5 million and €1.4 million in improper payments to officials at the Nigerian president's official office and residence in exchange for sales of more than \$350,000 and DM15.8 million. Daimler also made improper payments of more than €50,000 to officials of a sugar company majority-owned by the Nigerian government in exchange for a \$4.6 million contract. Other improper payments related to the sale of a heavy vehicle to the Nigerian Police Force, buses to the Nigerian government for a world youth soccer tournament, vehicles for the

8th All-Africa Games in 2003 (including the transfer of an improper payment to a bank account in the U.S.), and buses to a local Nigerian government.

- West Africa

Daimler operated in West Africa through a majority-owned subsidiary, Star Auto S.A. (“Star Auto”). Daimler made improper payments to foreign officials in the Ivory Coast and Ghana, including a \$170,000 commission to an agent who negotiated a sale to the Army of Ghana, through a TPA. In 1999, Daimler was awarded a contract worth \$14.5 million to supply trucks to a logging operation in Liberia. Daimler’s local dealer gave a senior Liberian government official an armored Mercedes-Benz passenger car, worth approximately €267,000, in connection with the contract.

- Latvia

Between 2000 and 2006, EvoBus GmbH (“EvoBus”), a wholly-owned Daimler subsidiary, made approximately €1.8 million in “commission payments” to third parties, with the understanding that such payments would be passed on to members of the Riga City Council, to win contracts to supply buses to two public transportation entities valued at approximately €30 million. Two of the third parties were U.S.-based entities that entered into sham consulting contracts with EvoBus.

- Austria and Hungary

In 2005, EvoBus Hungarian Kft. (“EvoBus Hungary”) acquired 17 buses from EvoBus Austria GmbH (“EvoBus Austria”) and resold them to Volanbusz, a state-owned public transport company in Budapest. EvoBus Austria agreed to pay a “commission” of €333,370 to a U.S. company, USCON Ltd., knowing that all or part of the payment would be passed on to Hungarian government officials. During the SEC and DOJ investigation, the CEO of EvoBus Austria attempted to conceal the true nature of the payments by creating and backdating a phony consulting agreement; however, USCON had been dissolved two years before the commission payment was made.

- Turkey

In the fall of 2006, during the internal investigation, Daimler’s Corporate Audit department discovered a safe in the offices of Daimler’s majority-owned distributor in Turkey, MB Turk. The safe contained binders labeled “N.A.” that recorded more than €6 million in third-party payments in connection with sales to non-Turkish government customers in North Korea, Latvia, Bulgaria, Romania, Russia, Saudi Arabia, Yemen, and other countries. These sales generated approximately €5 million in revenue. Of the more than €6 million in third-party payments, at least €3.88 million were improper payments and gifts to non-Turkish foreign officials.

- Indonesia

Between 1998 and 2006, Daimler's largest government customer in Indonesia was Perum Damri, a state-owned bus company. During this time period, Daimler's local affiliates in Indonesia provided unspecified gifts, travel, and entertainment to foreign officials associated with Perum Damri. Daimler earned approximately \$8.36 million in revenue from Perum Damri during this period. Daimler affiliates also made large cash payments (totaling as much as \$120,000 in the case of one affiliate) to Indonesian tax officials in order to reduce tax obligations. The affiliates attempted to roll the amounts of the improper payments into their internal record of their tax payments, but the tax payments were paid only by wire and the improper payments were made only in cash.

- Croatia

ETF provided financing for Daimler exports to countries without a local Daimler Financing Company, such as Croatia. In connection with a public tender for the sale of fire trucks to the government of Croatia, valued at €85 million, the Croatian government required ETF to partner with a former weapons manufacturer that the Croatian government controlled and partially owned. Between 2002 and 2008, ETF made more than €3 million in improper payments to this entity, with the understanding that all or part of these payments would be paid to Croatian officials in connection with the fire truck contract. ETF also made more than €1.6 million in improper payments to shell companies in the U.S. with the same understanding.

- Oil for Food

In connection with the sale of vehicles and spare parts to the Iraqi government under the United Nations' Oil for Food Programme, Daimler inflated the book value of the contracts to hide 10% commissions to the government of Iraq. In total, Daimler paid approximately \$5 million in commissions to the Iraqi government.

Veraz Networks, Inc.

On June 29, 2010, Veraz Networks, Inc. ("Veraz") consented to the entry of a proposed final judgment in a SEC civil enforcement action, without admitting or denying the allegations in the SEC's Complaint. Veraz consented to a \$300,000 civil penalty for violations of the FCPA's books and records and internal controls provisions. The agreement is subject to court approval.

The California-based company describes itself as "the leading provider of application, control, and bandwidth optimization products," including Voice over Internet Protocol communications, with products and services ranging from flexible network design to industry-leading voice compression technology.

The SEC alleged that Veraz engaged a consultant in China who sought to secure business for Veraz with a telecommunications company controlled by the government of China. The SEC alleged that Veraz's books and records did not accurately reflect \$4,500 in gifts from the consultant to officials at the telecommunications company, which a supervisor at Veraz approved

and described in e-mail as a “gift scheme,” or the promise of a \$35,000 “consultant fee” in connection with a deal worth \$233,000. Veraz discovered the improper fee and cancelled the sale prior to receiving payment.

The SEC further alleged that a Veraz employee used a Singapore-based reseller as an intermediary to make or offer improper payments to the CEO of a telecommunications company controlled by the government of Vietnam. The SEC alleged that Veraz approved the employee’s conduct and reimbursed the employee for questionable expenses, including gifts and entertainment for employees of the telecommunications company and flowers for the CEO’s wife. The SEC did not allege any specific value for the gifts or entertainment provided to this telecommunications company.

Regarding both the China and Vietnam violations, the SEC alleged that Veraz had failed to devise and maintain an effective system of internal accounting controls.

From April 2008, when Veraz learned of the SEC’s investigation, through March 31, 2010, Veraz incurred approximately \$3 million in expenses related to the investigation.

Haiti Teleco

There have been several indictments, arraignments, and guilty pleas between mid-2009 and early 2010 relating to a scheme by three U.S. telecommunication companies (two of which are described as “interrelated” in charging documents) to bribe foreign officials at the Republic of Haiti’s state-owned telecommunications company, Telecommunications D’Haiti (“Haiti Teleco”).

The DOJ’s investigation has cast a wide net, with indictments filed against officers of the U.S. telecommunications companies, individuals associated with the intermediary companies, and, perhaps most notably, the Haiti Teleco officials themselves. As U.S. Attorney Jeffrey H. Sloman stated upon announcing the guilty plea of one of these officials, “[t]oday’s conviction should be a warning to corrupt government officials everywhere that neither they nor their money will find any safe haven in the United States.”

Haiti Teleco is the only provider of landline telephone service to and from Haiti, and accordingly, all international telecommunications companies must contract with the state-owned company to provide their customers with non-cellular telephone access to Haiti. The DOJ’s investigation arose from a scheme involving three U.S. telecommunications companies, all based in Miami, Florida, to make improper payments to two foreign officials at Haiti Teleco through several intermediary shell companies between November 2001 and March 2005. The two officials implicated in the scheme - Robert Antoine and Jean Rene Duperval - both worked as Director of International Relations for Haiti Teleco (Antoine from May 2001 to April 2003; Duperval from June 2003 to April 2004). In that position, they had responsibility for negotiating contracts with international telecommunications companies on behalf of Haiti Teleco. In return for the corrupt payments, Haiti Teleco granted the U.S. companies preferred telecommunication rates, reduced the number of minutes for which payments were owed, and provided various credits to reduce the debt that the companies owed it.

Although Antoine and Jean Rene Duperval, as foreign officials, cannot be charged with violations of the FCPA, they were indicted for conspiracy to commit money laundering and, in Duperval's case, substantive money laundering charges. Antoine pleaded guilty on March 12, 2010, and was later sentenced to four years in prison and ordered to pay \$1,852,209 in restitution and to forfeit \$1,580,771. Duperval was arraigned on March 22, 2010 and pleaded not guilty.

Previously, in December 2009, the DOJ indicted Joel Esquenazi and Carlos Rodriguez, the president and vice-president, respectively, of one of the three U.S. telecommunication companies for their alleged involvement in the scheme. According to the indictments, Esquenazi and Rodriguez paid more than a million dollars in bribes to foreign officials at Haiti Teleco to obtain improper business advantages. The indictment stated that Esquenazi and Rodriguez disguised these bribes as payments for consulting services to intermediary companies, reporting such payments as commissions and consulting fees on its books and records, though no consulting services were provided by the intermediaries. The indictment also alleges that Esquenazi provided Duperval with a Rolex watch. Each individual was charged with (i) conspiring to violate the FCPA and to commit wire fraud; (ii) seven substantive FCPA violations; (iii) conspiring to commit money laundering; and (iv) twelve substantive money laundering violations. Both pleaded not guilty in January 2010. On April 27, 2009, the former controller from the same telecommunication company, Antonio Perez, pleaded guilty to conspiracy to violate the FCPA and money laundering laws.

The DOJ also indicted several individuals who served as intermediaries for the corrupt payments. An individual named Juan Diaz pleaded guilty on May 15, 2009 to money laundering and one count of conspiring to violate the FCPA in connection with his role in the scheme. According to his criminal information, Diaz received over a million dollars from the three U.S. telecommunications companies in the account of his company, J.D. Locator, to be delivered to the two foreign officials. Diaz admitted that he kept over \$73,000 as commissions for facilitating the bribes. Diaz has yet to be sentenced.

In addition, on February 19, 2010, an individual named Jean Fourcand pleaded guilty to a single count of money laundering for his role in facilitating the improper payments. According to the indictment and other documents, Fourcand received checks from J.D. Locator, which he deposited and then used to purchase real property valued at over \$290,000. Fourcand sold the property and issued a check for approximately \$145,000 to Haiti Teleco official Antoine. The indictment also states that Fourcand received nearly \$15,000 worth of pre-paid calling cards from Esquenazi and Rodriguez, the cash proceeds from the sales of which he also gave to Antoine.

The DOJ also indicted an individual from a third intermediary company called Telecom Consulting Services Corp. ("Telecom Consulting") for allegedly assisting in directing payments from the U.S. telecommunications companies to J.D. Locator. This individual, Marguerite Grandison, was the company's president as well as the sister of Haiti Teleco official Duperval. She was charged with (i) conspiracy to violate the FCPA and commit wire fraud; (ii) seven substantive FCPA violations; (iii) conspiracy to commit money laundering; and (iv) twelve substantive money laundering violations. She has pleaded not guilty.

The Haiti Teleco case is still unfolding, with those individuals who have pleaded not guilty set to face trial in July 2010. In addition, as other telecommunications companies, intermediaries, and co-conspirators are anonymously implicated in the charging documents, additional indictments could be forthcoming.

Innospec

On March 18, 2010, Innospec, Inc. (“Innospec”) and its U.K. subsidiary, Innospec Limited, settled criminal and civil charges with the DOJ, the SEC, OFAC, and the U.K. Serious Fraud Office (“SFO”) regarding activities in Iraq, Indonesia, and Cuba. Most of the charges relate to Innospec’s sale of Tetraethyl Lead (“TEL”), an additive for lead-based fuel that is used in piston engine light aircraft and some automobiles. Since the passage of the U.S. Clean Air Act in 1970 and similar legislation elsewhere, most countries now mandate the use of cleaner, unleaded gasoline, and the market for TEL has steadily declined as a result. Demand for the additive existed in Indonesia until 2006 and still persists in a few countries in the Middle East and North Africa, including Iraq.

The DOJ charges state that Innospec paid the Iraqi Ministry of Oil and Iraqi government officials bribes and kickbacks to secure and retain contracts for the purchase of TEL under the U.N. Oil-For-Food Programme and to derail the acceptance of competing products. Under the scheme, Innospec’s agent in Iraq, a Lebanese/Canadian dual citizen named Ousama Naaman, submitted bid responses on behalf of the company that incorporated a 10% markup, while separately signing a side letter to state that he would forward the markup to the Iraqi government. The charging document and plea agreement also stated that Innospec paid for the travel and entertainment expenses of Ministry of Oil officials. The separate SFO charges stated that Innospec Limited, the U.K. subsidiary, made payments to commercial agents knowing that the agents were making payments to Indonesian officials in order to delay Indonesia’s phase-out of TEL and to secure purchase orders of TEL by Pertamina, the Indonesian state-owned petroleum refinery.

Innospec entered into a plea agreement with the DOJ concerning twelve counts of wire fraud, violations of the FCPA’s anti-bribery and books and records provisions, and conspiracy relating to activities in Iraq. At the same time, Innospec Limited pleaded guilty in a crown court in London to conspiracy to corrupt in violation of the Criminal Law Act of 1977 in relation to its activities in Indonesia. The SEC brought a settled enforcement action charging the company with violations of the FCPA’s anti-bribery, books and records, and internal controls provisions relating to activities in both Iraq and Indonesia. Innospec and OFAC entered into a settlement agreement regarding the separate matter of a Swedish company that Innospec acquired that continued to maintain an office and conduct business in Cuba in violation of the Cuban Assets Control Regulations.

As a result of its settlements with the U.S. and U.K. enforcement agencies, Innospec will pay up to \$40.2 million. This amount includes a criminal fine of \$14.1 million pursuant to the DOJ plea agreement, a disgorgement of profit to the SEC in the amount of \$11.2 million, a fine of \$12.7 million relating to the SFO settlement, and a separate fine of \$2.2 million to OFAC for

violations of the Cuba embargo. A portion of the fines owed to the DOJ and SFO are contingent upon future sales of TEL and related products through at least 2012. In addition, Innospec agreed to retain an independent compliance monitor for a period of at least three years.

On August 8, 2008, Naaman, Innospec's agent in Iraq, was indicted by the DOJ on one count of conspiracy to commit wire fraud and to violate the FCPA and two counts of violating the FCPA's anti-bribery provisions. He was arrested on July 30, 2009 in Frankfurt, Germany and pleaded guilty to a superseding information on June 25, 2010.

Christian Sapsizian & Alcatel-Lucent

Alcatel-Lucent is a French telecommunications company that provides products and services to voice, data, and video communication service providers. Alcatel-Lucent's American Depository Shares are listed on the New York Stock Exchange and registered with the SEC. Alcatel-Lucent is the result of a November 30, 2006 merger between Alcatel and Lucent Technologies, Inc. An FCPA investigation into the latter was resolved in 2007 and is described later in this Alert.

On February 11, 2010, Alcatel-Lucent disclosed that in December 2009 it reached agreements in principle with the SEC and DOJ to resolve FCPA offenses related to several countries, including Costa Rica, Taiwan, and Kenya. If finalized and approved by a U.S. district court, these agreements would require Alcatel-Lucent to pay \$137.4 million, consisting of \$45.4 million in disgorgement of ill-gotten gains and prejudgment interest to the SEC and a \$92 million criminal fine to the DOJ. Alcatel-Lucent would neither admit nor deny allegations in a SEC civil complaint that it violated the FCPA's anti-bribery and accounting provisions. The company would enter into a deferred prosecution agreement ("DPA") with the DOJ to resolve alleged criminal violations of the accounting provisions, and three Alcatel-Lucent subsidiaries-- Alcatel-Lucent France (formerly Alcatel-Lucent CIT), Alcatel-Lucent Trade, and Alcatel Centroamerica--would plead guilty to criminal violations of the anti-bribery and accounting provisions. Both agreements would require Alcatel-Lucent to engage a French compliance monitor for a term of three years.

Alcatel-Lucent's March 23, 2010, Form 20-F confirmed that the agreements with the SEC and DOJ were still only agreements in principle. Although it is unclear in what other countries Alcatel-Lucent's FCPA violations occurred, the following information about the FCPA investigations involving Costa Rica, Taiwan, Kenya, and other countries is available in Alcatel-Lucent's public filings and court documents.

- *Costa Rica*

On June 7, 2007, Christian Sapsizian, a French citizen and former Alcatel CIT executive, pleaded guilty in U.S. district court to violating the FCPA's anti-bribery provisions and conspiring to do so. The charges related to his participation in a scheme to bribe senior Costa Rican government officials in order to obtain business for Alcatel CIT with Costa Rica's government-owned telecommunications company, the Instituto Costarricense de Electricidad

(“ICE”). From February 2000 through September 2004, Sapsizian passed more than \$2.5 million in improper payments through one of Alcatel CIT’s Costa Rican consulting firms to a director of ICE, who then shared the payments with a senior government official for whom the director served as an advisor. In August 2001, ICE awarded Alcatel CIT a mobile telephone contract worth \$149 million.

The U.S. court sentenced Sapsizian to thirty months in prison and three years of supervised release and ordered Sapsizian to forfeit \$261,500 in criminal proceeds.

French and Costa Rican authorities are also investigating Alcatel CIT’s conduct relating to its business with ICE. French authorities specifically are investigating Alcatel CIT’s use of consultants in Costa Rica. Costa Rican authorities and ICE instituted criminal, civil, and administrative proceedings regarding the improper payments. The Costa Rican Attorney General claimed damages for the loss of prestige to the nation of Costa Rica (characterized as “social damage”), and ICE claimed damages for the harm to its reputation (characterized as “moral damage”). Alcatel-Lucent France, as a successor to CIT, settled the civil charges brought by the Costa Rican Attorney General for \$10 million. ICE’s civil claim is still pending and ICE is seeking more than \$71 million in damages. ICE’s administrative case against Alcatel CIT seeks more than \$78 million in damages and to terminate the parties’ contract. Recently, in Miami, Florida, ICE filed a civil RICO lawsuit against Alcatel-Lucent seeking treble damages. A separate debarment proceeding against Alcatel CIT is stayed pending a resolution of the criminal cases.

- Taiwan

Taiwan’s Ministry of Justice investigated an Alcatel-Lucent subsidiary, Alcatel-Lucent Deutschland AG, and an Alcatel-Lucent affiliate (and Siemens distributor), Taisel, regarding allegations of bid-rigging and improper payments to officials surrounding Taiwan Railways’ awarding of an axle counter supply contract to Taisel in 2003. Alcatel-Lucent terminated Taisel’s president and an Alcatel-Lucent Deutschland director of international sales resigned, following an internal investigation by Alcatel-Lucent. In criminal proceedings from 2005 through 2009, Taiwanese courts acquitted and affirmed the acquittal of criminal charges brought against Taisel relating to the alleged scheme. Taisel’s former president and other individuals were, however, convicted for violating the Taiwanese Government Procurement Act. Alcatel’s financial reports caution that Taiwanese authorities may still be investigating other allegations in connection with the Taiwan Railways contract.

- Kenya

French authorities, as well as the SEC and DOJ, are investigating whether Alcatel CIT made improper payments, through a consultant, to government officials in Kenya regarding a supply contract. Alcatel-Lucent has cooperated with the French and U.S. investigations, including through the disclosure of the factual findings of an internal investigation.

- Other Locations

After Alcatel-Lucent provided the results of its internal investigation relating to Kenya to the U.S. and French authorities, French authorities requested information relating to payments by Alcatel-Lucent's subsidiaries in Nigeria.

Also, French authorities are investigating Alcatel-Lucent Submarine Networks ("ALSN"), the submarine cable subsidiary of Alcatel-Lucent, for corruption regarding a project for a submarine cable between Tahiti and Hawaii. ALSN was awarded the contract in 2007 by the French Polynesian telecom agency, Office des Postes & Télécommunications ("OPT"). French authorities have charged ALSN with benefitting from the favoritism of four OPT employees, whom French Authorities charged with aiding and abetting such favoritism. Alcatel-Lucent is conducting an internal investigation into this matter.

Charles Paul Edward Jumet & John W. Warwick

Charles Paul Edward Jumet and John W. Warwick pleaded guilty on November 13, 2009, and February 10, 2010, respectively, to conspiring to violate the FCPA by bribing Panamanian officials to obtain contracts with Panama's National Maritime Ports Authority ("APN"). Jumet also pleaded guilty to making a false statement to federal agents about the purpose of an \$18,000 payment to a Panamanian official, which Jumet had claimed was a campaign contribution.

On April 19, 2010, the U.S. district court for the Eastern District of Virginia sentenced Jumet to (i) more than seven years' imprisonment, consisting of five years for the FCPA conspiracy and 27 months for making the false statement to federal agents, to be served consecutively, (ii) three years' supervised release, and (iii) a \$15,000 fine. The DOJ's press release heralded Jumet's 87-month sentence as "the longest prison term imposed against an individual for violating the FCPA." On June 25, 2010, the court sentenced Warwick to 37 months' imprisonment and two years' supervised release. Warwick also agreed in his February 10, 2010 plea agreement to forfeit \$331,000, representing the proceeds of the bribery conspiracy.

In late 1996, Warwick and Jumet created two companies under the laws of Panama: the Ports Engineering Consultants Corporation ("PECC") and Overman de Panama, a subsidiary of the Virginia-based engineering firm Overman Associates. Warwick and Jumet served as the President and Vice-President, respectively, of PECC and both Overman entities.

With the assistance of APN's Administrator and Deputy Administrator, Warwick and Jumet submitted a proposal to privatize APN's engineering department. The submission proposed that Overman de Panama would provide APN's engineering services through PECC, and in January 1997, the APN Administrator awarded PECC a no-bid provisional contract to collect certain tariffs, maintain lighthouses and buoys, and provide other engineering services. By the end of 1997, APN had awarded PECC separate twenty-year concessions to (i) collect lighthouse and buoy tariffs and (ii) service lighthouses and buoys along waterways outside of the Panama Canal. According to the DOJ's press release, PECC received approximately \$18 million in revenue from these contracts between 1997 and 2000.

Warwick and Jumet used several means to make corrupt payments to Panamanian officials in exchange for these no-bid contracts. Warwick and Jumet allowed two shell corporations to hold ownership interests in PECC, which then made “dividend” payments to its shareholders. The first entity, a British Virgin Islands entity called Warmspell Holding Corporation (“Warmspell”), owned 30% of PECC and Warmspell’s corporate officers were the relatives of the APN Deputy Administrator (who later became the APN Administrator). A second entity, Soderville Corporation (“Soderville”), established in Panama and also owning 30% of PECC, was owned directly by the APN Administrator.

Jumet and Warwick admitted that Warmspell and Soderville were created for the purpose of “conceal[ing] the receipt of corrupt payments by Panamanian government officials.” In December 1997, PECC issued “dividend” payments of \$81,000 each to Warmspell and Soderville. Warwick and Jumet also provided a third government official, described in the DOJ’s charging documents as a “very high-ranking executive official of the Republic of Panama,” with an \$18,000 dividend issued to the unspecified “bearer” of the dividend check. This same high-ranking official also indirectly received portions of payments of unspecified amounts made to “El Portador.”

Although court documents do not specify the names of the above officials, Panamanian newspapers and the former Comptroller General of Panama have identified the three individuals as former APN Administrator Hugo Torrijos, former APN Deputy Administrator Ruben Reyna, and former President of Panama Ernesto Pérez Balladares, who held office from 1994 to 1999.

In 1999, Panama’s Comptroller General began investigating possible impropriety surrounding APN and PECC, and as a result, the Panamanian government made few payments to PECC from 1999 until 2003. In discussing his investigation with the media, the Comptroller General pointed to the \$18,000 check deposited by former President Balladares. At the time, both Balladares and Jumet asserted that the check was intended for Balladares’ reelection campaign, and Jumet later repeated this assertion to U.S. federal agents in January 2005. Due to a Panamanian court ruling that granted Balladares immunity, the Comptroller’s investigation ceased and government payments to PECC resumed.

Due to Jumet and Warwick’s U.S. settlements, Panamanian interest in the scandal has revived. As of January 2010, Panama’s Tribunal de Cuentas, which has jurisdiction over the misuse of public funds, has reopened the case and is investigating twenty-one individuals, including APN Administrator Torrijos and APN Deputy Administrator Reyna.

Due to his immunity, President Balladares is not a subject of the investigation. But Balladares was placed under house arrest on January 15, 2010, pending the outcome of an investigation of corruption and money laundering allegations unrelated to the PECC affair.

BAE Systems

In August 2007, BAE Systems plc (“BAES”), Europe’s largest defense contractor by sales and the fifth largest in the U.S., confirmed that the DOJ had opened a formal investigation in June 2007 of potential violations of U.S. anti-corruption laws. On March 1, 2010, BAES

pleaded guilty in U.S. district court to a criminal conspiracy to make false statements to the U.S. government regarding three subjects: (i) BAES's commitment to create and implement policies and procedures to ensure compliance with provisions of the FCPA and relevant provisions of the OECD Convention; (ii) BAES's failure to inform the U.S. government of material failures to comply with these undertakings; and (iii) BAES's disclosures and statements required by U.S. arms export regulations.

The DOJ did not charge BAES with violating the FCPA or conspiring to do so. But, rather than entering into a DPA with BAES, the DOJ required BAES to plead guilty to a criminal offense. BAES and the DOJ entered into a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), which requires the sentencing court to accept the parties' recommended sentence if it accepts the defendant's plea of guilty. On March 2, 2010, a U.S. district court accepted BAES's plea of guilty and, accordingly, sentenced BAES's to the parties' recommended three years of corporate probation and a fine of \$400 million. As conditions of corporate probation, BAES is required to engage an independent corporate monitor for three years and to implement and maintain an effective compliance program subject to U.S. approval.

On Friday February 5, 2010, the same day it announced its plea agreement with the DOJ, BAES announced that it had reached a settlement with the U.K.'s Serious Fraud Office ("SFO") that would require BAES to pay £30 million in connection with the long-running bribery probe of BAE's worldwide activities, to be split between a fine to the Crown Court and a charitable donation to benefit the people of Tanzania, whose officials had received payments from BAES. According to media reports, BAES's settlement with the SFO was expected to be submitted for U.K. court approval before August 2010.

BAES was not charged with bribery or corruption in either the U.S. or U.K., a disposition that could have prevented BAES from bidding on U.S. and European defense contracts. The U.S. plea agreement also specifically excluded any activities of BAES's wholly-owned U.S. subsidiary, BAE Systems, Inc., which is subject to a Special Security Agreement ("SSA") with the U. S. government restricting the amount of control BAES is able to exercise over BAE Systems, Inc. As part of its settlement with BAES, the SFO agreed not to pursue certain related investigations and ultimately dropped its prosecution of Count Alfons Mensdorff-Pouilly, a BAES agent who had been charged with conspiracy to corrupt.

Specific Allegations

The following summary of the specific U.S. allegations against BAES comes from the Statement of Offense included in BAES's plea agreement with the DOJ, unless otherwise noted. BAES stipulated to the truth and correctness of the Statement of Offense as part of its plea agreement and plea of guilty. Information regarding the SFO's settlement is from the SFO's February 5, 2010 press release, unless otherwise noted.

In 2000, BAES expanded its business in the U.S. through the acquisition of several U.S. defense companies. In response to U.S. national security concerns, BAES's CEO John Weston wrote a letter to the U.S. Secretary of Defense stating that BAES and its non-U.S. affiliates were

“committed to conducting business in compliance with the anti-bribery standards in the OECD Anti-Bribery Convention,” that BAES’s U.S. affiliates would comply with the FCPA, and that BAES’s non-U.S. affiliates would adopt compliance programs to ensure OECD compliance. Weston further stated that such compliance programs would include training, procedures, and internal controls “concerning payments to government officials and the use of agents.” At the time of this letter, BAES allegedly did not have and was not committed to the practices and standards represented to the Secretary of Defense.

On May 28, 2002, BAES reiterated these commitments in another letter to the U.S. Secretary of Defense. At the time of this letter, however, BAES had not created and was not intending to create sufficient mechanisms to ensure its non-U.S. affiliates were complying with applicable provisions of the FCPA and the OECD Convention. Additionally, BAES’s failure to disclose its actual and intended policies and procedure prevented the DOJ and the Department of Defense from investigating BAES’s practices and imposing remedial actions.

Despite its commitments to the Secretary of Defense, BAES regularly retained “marketing advisors” to assist in securing sales. BAES attempted to conceal some of these relationships and misrepresented the amount of oversight and scrutiny the company gave to substantial payments under these agreements. BAES established various offshore shell companies through which it paid these marketing advisors and encouraged some of the advisors to establish their own shell companies to receive the payments in an effort to conceal the relationships. Through one entity in the British Virgin Islands, BAES made payments of over £135 million and \$14 million to marketing advisors and agents without subjecting the payments to the level of internal scrutiny and review that BAES represented to the Secretary of Defense it would apply. These shell companies were formed to hide the name of the agent and how much the agent was compensated, to create obstacles for investigative authorities, and to circumvent laws of countries that do not allow agents or assist the agents in avoiding tax liability). BAES further failed to take adequate steps to ensure that its advisors and agents were compliant with the standards of the FCPA. For example, in many instances BAES had no adequate evidence that its advisors performed legitimate activities, and in others the due diligence material purportedly produced was designed to give the appearance that legitimate services were being provided but the material was not, in fact, useful to BAES.

Finally, beginning in 1993, BAES knowingly and willfully failed to identify commissions paid to third parties for assistance with arms sales, in violation of U.S. arms control regulations. Had these commissions been disclosed, the U.S. might not have approved the sales of certain defense articles.

BAES gained more than \$200 million from these false statements to the U.S. government.

- *Saudi Arabia*

Since the mid-1980s, BAES served as the prime contractor for the sale of fighter aircraft to the U.K. government that were then re-sold to Saudi Arabia pursuant to a series of agreements

between the two countries. Media reports suggest that these agreements have generated more than £43 billion in revenue for BAES.

At least one of these agreements identified “support services” that BAES was required to provide. BAES considered itself obligated by this provision to provide substantial benefits to one Saudi Arabian public official, who was in a position to exercise significant influence, and it did so through payment mechanisms in U.S. territory and elsewhere. These benefits included travel, security services, real estate, automobiles, and personal items, and one employee submitted to BAES more than \$5 million in invoices for such benefits between May 2001 and early 2002. BAES also concealed payments to advisors assisting with the fighter aircraft sales; in one case, BAES agreed to transfer more than £10 million and \$9 million to the Swiss bank account of a marketing advisor while knowing there was a high probability that the marketing advisor would transfer a portion of these funds to Saudi officials in order to influence the decision on these contracts. BAES failed to perform adequate due diligence on the payments, in contradiction of BAES’s commitments to the Secretary of Defense.

According to U.K. court documents and media reports, Britain’s Serious Fraud Office abruptly halted its investigation of BAES’s Saudi Arabia activities in December 2006 due to national security concerns after Saudi Arabia threatened to withdraw all cooperation on security and intelligence. Following the decision to halt the investigation, two anti-arms trade groups brought suit challenging the decision. In April 2008, Britain’s High Court condemned the decision to drop the investigation, but the Appellate Committee of the House of Lords sided with the U.K. government and ruled that the SFO Director was entitled to drop an investigation if, in his judgment, British lives are at risk.

- Czech Republic & Hungary

In 1999, both the Czech Republic and Hungary sought bids by major defense contractors for the sale of fighter jets. Ultimately, the two countries separately decided to lease Griphen fighter jets, produced by BAES, from the government of Sweden. BAES made payments of more than £19 million to various entities associated with an individual identified in the Information only as “Person A.” These payments were allegedly made even though BAES knew there was a high probability that part of the payments would be used to make improper payments in order for the bid processes to favor BAES. Additionally, BAES did not perform proper due diligence with respect to its relationship with entities associated with Person A, contradicting what the company had reported to the U.S. government. Finally, because U.S. defense materials were used in the jets, the government of Sweden was required to apply for and obtain arms export licenses from the U.S. for each contract. BAES’s failure to disclose the existence of payments to Person A caused Sweden to provide false information in its application submitted with the U.S. government.

- Tanzania

The SFO alleged that BAE sold Tanzania a £28 million air traffic control system and that one third of the payment had been used to pay bribes to government officials. BAES has

admitted to failing to keep accurate accounting records regarding payments made to the Tanzanian government in connection with the sale of an air traffic control system to Tanzania, a violation of Section 221 of the U.K.'s Companies Act of 1985.

Military and Law Enforcement Products Sting

On January 18, 2010, twenty-two individuals from sixteen different companies in the military and law enforcement products industry were arrested for FCPA violations in a first-of-its-kind undercover sting operation conducted by the FBI and the DOJ. All of the individuals were arrested on the same day, and all except for one were arrested in Las Vegas, where they were each attending a major industry conference and exposition, the Shooting, Hunting, Outdoor Trade Show and Conference (known as the "SHOT Show"). The other individual was arrested in Miami. The DOJ's prosecution of these individuals represents the single largest prosecution against individuals in the history of FCPA enforcement.

The arrests followed an undercover operation involving approximately 150 FBI agents and focusing on allegations of bribery in the military and law enforcement products industry. The companies associated with the charged individuals provide military and law enforcement equipment such as armored vehicles, weapons, body armor, ballistic plates, and various accessories. The defendants are charged with violations of, and a criminal conspiracy to violate, the anti-bribery provisions of the FCPA, aiding and abetting violations of the FCPA, and a money laundering conspiracy. Each FCPA-related violation carries a maximum sentence of five years and a fine of up to \$250,000 or twice any financial gain. Conspiracy to engage in money laundering carries substantial penalties which, depending on the specific object of the conspiracy, could be up to 20 years' imprisonment and a fine of up to \$500,000 or twice the value of the laundered proceeds, whichever greater. The DOJ also is seeking the forfeiture of any proceeds traceable to the FCPA-related offenses.

Together, these charges cover the waterfront of U.S. FCPA jurisdiction. Sixteen individuals are charged as domestic concerns because they are U.S. citizens. Four U.K. citizens and one Israeli citizen are charged as "other persons" subject to the FCPA for acts in U.S. territory. And one U.S. citizen is charged both as a domestic concern and for causing his employer, a U.S. issuer for the purposes of the FCPA, to commit an act in violation of the FCPA.

Assistant Attorney General Lanny Breuer indicated that this sting operation is only the beginning of the DOJ's use of traditional law enforcement techniques in FCPA investigations, stating that the DOJ is prepared "to bring all the innovations of our organized crime and drug war cases to the fight against white-collar criminals."

Specific Allegations

The DOJ alleges that the defendants each met with a former executive in the industry, identified in court documents as "Individual 1," and representatives of the Minister of Defense for an unnamed African country (which media reports indicate was Gabon). In actuality, the former executive was a person facing unrelated FCPA charges who had decided to cooperate with the DOJ and FBI as an undercover informant. Undercover FBI agents posed as a

representative of Gabon's Minister of Defense and as a procurement officer for Gabon's Ministry of Defense.

During these meetings, which took place in both Miami and Washington, D.C., the defendants were informed that a potential contract worth approximately \$15 million to provide equipment to the unnamed African country's Presidential Guard was available. The defendants allegedly agreed to a scheme in which they would provide the agent a 20% "commission" on the contract with the understanding that half of the "commission" would be passed along directly to the Minister of Defense, with the other half split between Individual 1 and the sales agent. The defendants allegedly planned to conceal the payments by overstating the contract value and providing two price quotes: one representing the actual cost of the goods, another representing the cost of the goods plus the 20% "commission."

The DOJ alleges that the defendants agreed to proceed in two phases. In Phase 1, the defendants were to fill a small order as a test run. The second phase would involve a larger, more complete order. The DOJ alleges several overt acts in furtherance of the conspiracies, including receiving payment during Phase 1 from a bank account purportedly held by the unnamed African country, filling the order, providing the faulty price quotations for Phase 1, providing the 20% commission to the sales agent's bank account for Phase 1, signing a purchase agreement for Phase 2, and using U.S. mails or means or instrumentalities of U.S. interstate commerce in furtherance of the FCPA violations.

Initially, the 22 individuals were charged in sixteen separate indictments. At a February 3, 2010, arraignment in U.S. district court, U.S. prosecutors announced that the DOJ believed the defendants were involved in one large, overriding conspiracy. Prosecutors claimed to possess documents, audio recordings, and video recordings that support this theory. According to media reports, among these materials is a video of all 22 defendants, Individual 1, and the FBI undercover agent posing as a representative of Gabon's Minister of Defense toasting to the success of the operation at a well-known restaurant in Washington, D.C. On April 19, 2010, the DOJ filed a single superseding indictment against all 22 defendants consistent with the single-conspiracy theory.

One of the defendants, Daniel Alvarez, is named in the superseding indictment filed regarding the other defendants but was also named in a March 5, 2010, superseding criminal information charging him with two counts of conspiracy to violate the FCPA and including a forfeiture count for the proceeds from the conspiracies. Although such a superseding information commonly precedes a plea agreement and cooperation with the government, as of the date of this Alert no plea agreement has been announced.

- *Richard Bistrong*

"Individual 1" is reported to be Richard T. Bistrong, a former executive of Armor Holdings, a U.S. issuer acquired by BAE Systems plc in 2007. One of the SHOT show defendants is Jonathan Spiller, the former CEO of Armor Holdings.

Bistrong himself is facing a criminal conspiracy allegation, in an information filed after the SHOT Show defendants' arrests, to violate the anti-bribery and books and records provisions of the FCPA and to export controlled goods without authorization. The allegations against Bistrong concern bribing foreign officials to acquire contracts to supply equipment to the United Nations and government agencies in Nigeria and the Netherlands.

In 2001, Bistrong allegedly hired a U.N. agent to assist Armor Holdings (referred to in the information as "Company A") in obtaining a contract to supply body armor to the U.N. peacekeeping forces. According to the information, from 2001-2006 Bistrong caused Armor Holdings to pay the agent \$200,000 in commissions, allegedly knowing that a portion of this would be passed on the U.N. procurement officials in return for inside information on competitors' bids on contracts worth approximately \$6 million. Specifically, the information alleges that the Bistrong provided the Agent with a blank pricing sheet, which the Agent filled in for Armor Holdings after learning from the procurement official the prices of the non-public bids submitted by competitors.

Also in 2001, Bistrong allegedly hired a Dutch agent to help Armor Holdings bid on a contract to supply pepper spray to the National Police Services Agency of the Netherlands ("KLPD"). According to the information, Bistrong caused Armor Holdings to pay the Dutch agent \$15,000 intended to be passed on to a Dutch Procurement Officer in return for the procurement officer using his influence to effect the tender for the contract to specify a type of pepper spray manufactured by Armor Holdings. Bistrong attempted to conceal these payments by arranging for the agent to issue an invoice for marketing services allegedly, but not actually performed. Armor Holdings earned \$2.4 million in revenues from the pepper spray contract.

In Nigeria, Bistrong allegedly instructed another employee to pay a bribe to an official of the Independent National Election Commission ("INEC") in exchange for INEC's purchase of fingerprint ink pads from Armor Holdings. In order to conceal these payments, Bistrong instructed the employee to arrange for the bribe to be paid to a company or intermediary, which would then pass the kickback along to the official. Despite making payment to a company designated by the official, Armor Holdings never received an order from INEC for the fingerprint pads.

In total, Bistrong allegedly was part of a conspiracy to keep off of Armor Holdings' books and records approximately \$4.4 million in payments to agents and other third-party intermediaries.

On January 23, 2010, *The New York Times* reported that Bistrong's lawyer and federal prosecutors were scheduled to have a public hearing on January 22, but the hearing was cancelled after the prosecutors and Bistrong's lawyer had private meeting with the court. If Bistrong were to cooperate against the SHOT Show defendants, that cooperation could affect the terms of any plea agreement between Bistrong and the U.S. and could also be the basis for a motion by the U.S. at Bistrong's eventual sentencing hearing for a downward departure under the advisory U.S. Sentencing Guidelines.

- Allied Defense Group

Allied Defense Group Inc. (“Allied”), a Virginia-based ammunition company, announced in its April 7, 2010, Annual Report for 2009 that it had received a subpoena from the DOJ related to the ongoing criminal investigation of one of the individuals involved in the sting – an employee of Allied’s subsidiary, Mecar USA (“Mecar”). According to the Annual Report, the individual’s alleged criminal conduct was done on behalf of a Decatur, Georgia company unrelated to either Mecar or Allied. Mecar fired the individual shortly after receiving the subpoena. Though Allied did not reveal the identity of the individual, the indictment of two individuals, John Gregory Godsey and Mark Frederick Morales, referenced their affiliation with a Decatur, Georgia company. Allied indicated that it would cooperate fully with the DOJ as well as launch its own internal investigation into the Mecar employee’s conduct.

In January 2010, Chemring Group PLC (“Chemring”) and Allied had reached a conditional agreement that Chemring would acquire Allied for \$59.2 million. In its Annual Report, Allied announced that it would postpone a shareholder meeting to vote on the sale. On June 24, 2010, Chemring announced that it could not complete the planned acquisition of Allied because “the DOJ has recently requested additional documents from [Allied] and indicated that it would be expanding its review.” Accordingly, Chemring has entered into a new agreement, subject to Allied shareholder and U.S. regulatory approval, to acquire Allied’s two principle operating units.

- Smith & Wesson

On July 1, 2010, Smith & Wesson Holding Corporation (“Smith & Wesson”) disclosed in its Annual Report that the DOJ and SEC were investigating the company for potential violations of the FCPA and federal securities laws. Smith & Wesson disclosed that it is the U.S. issuer mentioned above, that one of the SHOT-Show defendants was its Vice President in charge of sales to U.S. and international law enforcement agencies, and that it was served with a grand jury subpoena for documents. Smith & Wesson further disclosed that the SEC is conducting a “fact-finding inquiry” that “appears” to have been “triggered in part” by the DOJ’s FCPA investigation. Smith & Wesson stated that it is cooperating with the DOJ and SEC investigations and has undertaken a comprehensive review of its policies and procedures.

NATCO Group

On January 11, 2010, the SEC filed a settled civil enforcement action against NATCO Group, Inc. (“NATCO”), an oil and gas equipment manufacturer headquartered in Houston, Texas. NATCO was an “issuer” for the purposes of the FCPA until its purchase by Cameron International Corporation in November 2009.

The SEC alleged that NATCO violated the FCPA’s accounting provisions as a result of payments made by TEST Automation & Controls, Inc. (“TEST”), a wholly-owned NATCO subsidiary, in response to extortion by Kazakh officials. Without admitting or denying the

SEC's allegations, NATCO agreed to pay a \$65,000 civil penalty and consented to entry of a cease-and-desist order prohibiting further violations of the accounting provisions.

In June of 2005, TEST's branch office in Kazakhstan ("TEST Kazakhstan") won a contract to provide instrumentation and electrical services in that country. TEST Kazakhstan hired both Kazakh expatriates and local Kazakh employees to work on the contract.

In February and September 2007, Kazakh immigration prosecutors conducted audits of TEST Kazakhstan's compliance with immigration laws and claimed to have found that the Kazakh expatriates did not have proper documentation. The prosecutors threatened the expatriates with fines, incarceration, or deportation unless the prosecutors received cash fees of \$25,000 in February and \$20,000 in September. The SEC alleged that TEST Kazakhstan employees believed in good faith that the prosecutors' threats were genuine. According to the complaint, TEST senior management authorized the employees to make the cash payments and reimbursed the employees for the payments. TEST, however, recorded the payments as a salary advance and "visa fines," which the SEC alleged was not accurate. Additionally, the SEC alleged that TEST failed to describe accurately the payments to the banks involved and separately submitted false invoices totaling over \$80,000 to banks to reimburse a consultant, who had ties to the ministry issuing the visas. The cease and desist order notes that "[i]t is not known how the consultant used these funds, or to whom they were paid."

The Cease and Desist order lists several remedial measures that NATCO took upon discovering the conduct as part of an internal audit in late 2007, including (i) an internal investigation and self-reporting to the SEC; (ii) employee termination and disciplinary action; (iii) revisions to its agent form agreement; (iv) institution of new due diligence procedures for vetting and retaining third parties; (v) increased compliance staffing, including the creation of a Chief Compliance Officer position; (vi) participation in a non-profit organization relating to anti-bribery due diligence; (vii) increased training worldwide; (viii) additional investment in internal control software; and (ix) restructuring of its internal audit department. The SEC noted that NATCO expanded its review of TEST's operations to include those in Nigeria, Angola and China, areas described as having "historic FCPA concerns."

Because the FCPA imposes strict civil liability on issuer parents, such as NATCO during the relevant time period, for the books and records of wholly-owned foreign subsidiaries, it was no defense for NATCO that the payments were made in response to extortive threats against the Kazakh expatriates.

2009

UTStarcom

On December 31, 2009, UTStarcom Inc. ("UTStarcom"), a global telecommunications company based in Alameda, California, and whose stock trades on NASDAQ, resolved DOJ and SEC investigations into potential FCPA violations by its wholly-owned subsidiaries in China, Thailand, and Mongolia.

UTStarcom entered into a non-prosecution agreement with the DOJ and agreed to pay a monetary penalty of \$1.5 million. The DOJ stated that it agreed to a non-prosecution agreement because, in part, of UTStarcom's timely, voluntary, and complete disclosure of the violations, its thorough, "real-time" cooperation with the DOJ and the SEC, and the "extensive remedial efforts" it had already taken and will be taking. UTStarcom agreed to cooperate fully with any DOJ or SEC investigations arising out of the conduct underlying the agreement, to strengthen its compliance, bookkeeping, and internal accounting controls standard and procedures, and to provide periodic reports to the DOJ regarding its compliance with the non-prosecution agreement. The SEC also noted that in 2006, after learning of some of the improper payments described below, UTStarcom's audit committee conducted an internal investigation that eventually expanded to cover all of UTStarcom's operations worldwide. UTStarcom adopted new FCPA-related policies and procedures, hired additional finance and internal compliance personnel, improved its internal accounting controls, implemented FCPA training in its major offices worldwide, and terminated a former executive officer who allegedly knew of or authorized much of the improper conduct.

Without admitting or denying the SEC's allegations that it violated the anti-bribery and accounting provisions, UTStarcom consented to the entry of a final judgment requiring it to pay a \$1.5 million civil penalty and to file four annual reports and certifications with the SEC regarding its FCPA compliance. UTStarcom agreed that such annual reports would identify any reported or suspected anti-bribery violations, any material violations of the accounting provisions, all material changes to its FCPA-related policies and controls, all gifts, travel, and entertainment provided to foreign officials, and all payments to consultants or agents in connection with contracts or bids for contracts with majority foreign government-owned enterprises.

According to the civil complaint filed by the SEC and the facts set forth in the non-prosecution agreement's Statement of Facts -- the latter of which UTStarcom admitted, accepted, and acknowledged -- UTStarcom subsidiaries engaged in several improper practices in Asia including providing gifts, travel, and employment to employees of state-owned telecommunications companies as well as providing money to an agent knowing that part of the money would be passed on to government officials.

- Travel

At least since 2002, according to the non-prosecution agreement's Statement of Facts, UTStarcom China Co. Ltd. ("UTS-China") included a provision in initial sales contracts with government-controlled municipal and provincial telecommunications companies whereby UTStarcom would pay for these entities' employees to travel to the U.S. for purported training. Instead, the employees visited popular tourist destinations where UTStarcom had no facilities. Between 2002 and 2007, UTStarcom spend nearly \$7 million on approximately 225 such trips. Specifically regarding ten such initial contracts, UTStarcom s paid for and improperly accounted for approximately \$670,000 in expenses. The SEC further alleged that most of these trips lasted up to two weeks and cost \$5,000 per employee.

The SEC also alleged that UTStarcom paid for employees of Chinese government customers to attend executive training programs at U.S. universities. The programs were not specifically related to UTStarcom's products or business and instead covered general management topics. The SEC alleged that UTStarcom paid for all expenses related to the programs, including field trips to tourist destinations and cash allowances of up to \$3,000 per person, which totaled more than \$4 million between 2002 and 2004. UTStarcom allegedly recorded these expenses as marketing expenses. In 2002, UTStarcom's CEO and UTStarcom's Executive Vice President, the latter of whom also served as the CEO of UTS-China, approved a 2003 budget increase for these programs to provide a specific program for UTStarcom's biggest customer, a Chinese state-owned telecommunications company.

- Employment

According to the SEC, UTStarcom provided or offered full time employment in the U.S. to employees of government customers (or their families) in Thailand and China on at least 10 occasions. In at least three of these instances, UTStarcom allegedly provided benefits to individuals even though they never performed any work. To conceal their lack of work, fake performance reviews were prepared and kept in a personnel file and the payments were recorded as employee compensation. UTStarcom allegedly also sponsored U.S. permanent residency applications that falsely stated these three individuals would be full-time employees of UTStarcom in New Jersey, resulting in each of them receiving green cards.

- Gifts and Entertainment

The SEC alleged that, in 2004, in an attempt to expand UTStarcom business in Thailand, UTStarcom's general manager in Thailand allegedly spent nearly \$10,000 on French wine (including several rare bottles) as gifts to agents of the government customer with which UTStarcom had a contract under consideration. The manager also allegedly spent an additional \$13,000 in entertainment expenses in order to secure the same contract. These expenditures were approved by UTStarcom's Executive Vice President and CEO of UTS-China and reimbursed and recorded as marketing expenses by UTStarcom.

- Improper Consultant Payments

In 2005, in an effort to break into the telecommunications business in Mongolia, UTStarcom's Executive Vice President and CEO of UTS-China authorized a \$1.5 million payment to a Mongolian company pursuant to a consultancy agreement. The payment was recorded as a license fee; however, the license actually cost only \$50,000, and the company knew that at least a portion of additional money would be used to pay a Mongolian government official to help UTStarcom obtain a favorable ruling on a dispute over its Mongolian license. In 2007, the same UTStarcom executive authorized a \$200,000 payment to a Chinese company as part of a consulting agreement. The SEC alleged that this was, in fact, a sham consulting company and that the payment was simply part of an effort to obtain a contract from a government customer.

Bobby Benton & Pride International

In its 2007 Annual Report, and as updated through subsequent SEC filings, offshore drilling company Pride International, Inc. disclosed an internal investigation and voluntary disclosure to the DOJ and SEC regarding potential FCPA violations.

The disclosed potential violations involve less than \$1 million in payments to government officials in Venezuela and Mexico from 2003 through 2005, additional unspecified payments from 2002 through 2006 to government officials in Mexico, and less than \$2.5 million in payments from 2001 through 2006 to government officials in Saudi Arabia, Kazakhstan, Brazil, Nigeria, Libya, Angola, and the Republic of the Congo. Pride further disclosed the retirement of its Chief Operation Officer, as well as current management's and the Audit Committee's belief that senior operations management either were aware, or should have been, that improper payments were made or proposed to be made. In February 2010, Pride disclosed that it has accrued \$56.2 million in anticipation of possible resolutions with the DOJ and SEC.

On December 11, 2009, the SEC filed a civil complaint against Bobby Benton, Pride's former Vice President, Western Hemisphere Operations. The complaint alleges that Benton violated, and aided and abetted violations of, the FCPA's anti-bribery and accounting provisions. It also alleges that he violated Exchange Act Rule 13b2-2, which prohibits false statements or material omissions to accountants in connection with any audit, review, examination, or preparation of documents or reports to be filed with the SEC, and Exchange Act Rule 13b2-1, which prohibits the falsification or causing the falsification of any book, record, or account subject to the books and records provisions of the FCPA's accounting provisions. The SEC is seeking civil penalties, disgorgement, prejudgment interest, and injunctive relief to prevent future violations of the federal securities laws.

The SEC alleges the following facts in its complaint. Pride's former Country Manager in Venezuela bribed a Venezuelan official from approximately 2003 to 2005 to extend three drilling contracts. On February 12, 2005, Benton received a draft report from the Country Manager's replacement detailing the improper payments during an audit of Pride's vendors in Venezuela, but Benton deleted from the report all references to the payments. On February 16, 2005, Benton e-mailed the new manager regarding Benton's "cleaned up" version of the draft and advised, "As you continue to improve the Venezuela Vender [sic] Review audit, use the attached version to update. All other draft versions should be deleted." Benton's follow-up email ensured that his version of the action plan was the version submitted to Pride's internal and external auditors.

The SEC further alleged that Benton authorized a payment of \$10,000 to a third party in December 2004 while believing that this payment would be passed on to a Mexican customs official to secure lenient treatment of certain customs deficiencies identified during the inspection of a Pride vessel. The payment was made in cash through a representative of the customs official and was recorded falsely on Pride's books as an electricity maintenance expense. Also in December 2004, Benton became aware that one of Pride's customs agents had made a payment of approximately \$15,000 to a Mexican customs official to avoid delays during

the exportation process of a Pride rig from Mexico. After the payment was made, the customs agent submitted invoices to a Pride subsidiary in Mexico for “extra work” that had been performed during the export of the rig, and a Pride manager informed Benton by e-mail that “[n]ow we need to find out a way to justify the extra payment to customs.” The invoices were paid and falsely recorded on Pride Mexico’s books as payments for customs agency services.

Despite his knowledge and authorization of bribe payments and activities, Benton falsely signed certifications in connection with Pride’s 2004 and 2005 annual reports on March 3, 2005, and May 5, 2006, respectively, that stated that he had no knowledge of bribe payments and, regarding the May certification, that he had no knowledge of any other violations of the FCPA. According to the SEC, “[b]ut for Benton’s false statements, Pride’s management and internal and external auditors would have discovered the bribery schemes and the corresponding false books and records.”

In a June 10, 2010, joint motion to stay the civil proceedings, the parties disclosed that the SEC was considering an offer of settlement from Benton and that the SEC’s trial attorney was recommending the proposed settlement to the SEC. The court denied the motion to stay, and trial is still scheduled for June 2011.

Fernando Basurto, John O’Shea & ABB Ltd.

On November 18, 2009, U.S. authorities arrested John Joseph O’Shea on a November 16, 2009 indictment charging him with criminal conspiracy, twelve counts of violations of the FCPA’s anti-bribery provisions, four counts of money laundering, and obstruction of justice. The DOJ is seeking the forfeiture of more than \$2.9 million in criminal proceeds from the offenses and any money or property illegally laundered. In total, the indictment charges O’Shea with eighteen separate counts, which, if O’Shea is found guilty of each count and the court sentences him to consecutive sentences, carry a maximum jail term of 150 years. The charging documents and the DOJ’s press release identified O’Shea as the general manager of a Texas business unit (“Texas Business A”) of a U.S. subsidiary of a Swiss company.

Fernando Maya Basurto, a Mexican citizen and principal of an unnamed Mexican Company X, was alleged in a January 2009 criminal complaint to have illegally structured transactions to avoid triggering financial institutions’ reporting requirements. In June 2009, Basurto was indicted for the same offense; however, on November 16, 2009, Basurto agreed to cooperate fully with the U.S. and pled guilty to conspiring with O’Shea and others to violate the FCPA’s anti-bribery provisions, launder money, and obstruct justice.

The following factual summary is based on the allegations in the indictment against O’Shea and the facts to which Basurto has admitted in his plea agreement.

Texas Business A’s primary business involved providing electrical products and services to electrical utilities around the world, many of which are described a state-owned. Texas Business A worked with Mexican Company X on a commission basis to obtain contracts from Mexican governmental utilities, including Comisión Federal de Electricidad (“CFE”). O’Shea and Basurto allegedly conspired with a number of individuals and intermediary companies to

make illegal payments to various officials at CFE. In return, Texas Business A secured two contracts with CFE that generated revenues of over \$80 million. A number of different schemes were used to make and conceal the corrupt payments.

In or around December 1997, Texas Business A obtained the SITRACEN Contract from CFE to provide significant improvements to Mexico's electrical network system. The SITRACEN contract generated over \$44 million in revenue for Texas Business A. During the bidding process, certain CFE officials informed Basurto and O'Shea that in order to receive the contract, they would have to make corrupt payments. O'Shea arranged for these payments to be made in two ways. First, he authorized Texas Business A to make payments for the benefit of various CFE officials to an intermediary company that was incorporated in Panama and headquartered in Mexico. Second, O'Shea authorized Basurto and an individual identified as Co-Conspirator X, who was also a principal of Mexican Company X, to make payments to a particular CFE official by issuing checks to family members of this official.

In or around October 2003, O'Shea and Basurto conspired with Co-Conspirator X and CFE officials to ensure that Texas Business A received the Evergreen Contract, an extension of the earlier SITRACEN Contract, and that the contract contained certain terms that were favorable to Texas Business A. In return, Basurto and O'Shea agreed that the officials would receive 10% of the revenue generated by the Evergreen Contract. The Evergreen Contract generated over \$37 million in revenue for Texas Business A.

Over the course of the Evergreen Contract, Texas Business A allegedly utilized Basurto and Mexican Company X to funnel approximately \$1 million in bribes to various CFE officials. The co-conspirators referred to these payments as "payments to the Good Guys." In order to make these payments, O'Shea caused the wire transfer of funds from Texas Business A, often in a series of small transactions, to Basurto and his family members. Basurto then received instructions from a CFE official as to how and where the funds should be transferred. Basurto wired some of the funds to a Merrill Lynch brokerage account, a portion of which the CFE official then transferred to his brother, and a separate portion of which he transferred to the son-in-law of another official. The official also provided instructions to Basurto regarding the funds that were not sent to the Merrill Lynch account; these funds were used, among other things, for a \$20,000 cash payment to the official. The indictment further alleges that over \$29,000 was wired to the U.S. bank account of a military academy to pay for the tuition expenses of the son of a CFE official.

The conspirators attempted to conceal the corrupt nature of the payments by creating false invoices from two companies headquartered in Mexico. It is alleged that O'Shea, fully aware of the false nature and corrupt purposes of these invoices, approved their payment and had funds from Texas Business A wire-transferred to accounts in Germany and Mexico and held by intermediary companies in order to make the payments. The conspirators referred to these payments as a "Third World Tax."

Basurto and Co-Conspirator X received approximately 9% of the value of the SITRACEN and Evergreen Contracts for all of the services that they performed for Texas

Business A, both legitimate and illegal in nature. A portion of those commissions was also apparently used to make kickback payments to O'Shea. In order to keep the true nature of the kickback payments hidden, Basurto and Co-Conspirator X made them from a number of different bank accounts and to a number of different payees. These payees included O'Shea himself, his friends and family members, and his American Express credit card bill.

Upon discovering evidence of corrupt payments made by Texas Business A, the Swiss parent company conducted an internal investigation and voluntarily disclosed the potential violations to the DOJ, SEC, and Mexican authorities. In August 2004, the Swiss parent company terminated O'Shea's employment.

After O'Shea's termination, Basurto, O'Shea, and other conspirators attempted to conceal their actions and thereby obstruct the DOJ's investigation in a number of ways. Basurto and O'Shea worked with certain CFE Officials to create false, back-dated correspondence that was designed to show a legitimate history of business relationships between Texas Business A and the two Mexican intermediary companies. This correspondence also purported to justify the false invoices submitted by the Mexican intermediary companies as part of the "Third World Tax" scheme. The indictment cites to an email apparently sent by O'Shea that instructs Basurto to "never deliver or email electronic copies of any of these documents" for fear that the electronic versions' metadata would have revealed their true date of composition.

Basurto and certain CFE officials also created false work product and documentation relating to the work for which the false invoices purported to claim payment. They plagiarized a study that had been previously commissioned by CFE from legitimate outside consultants and represented the plagiarized study as being authored by one of the Mexican intermediary companies. These CFE officials also created documentation that indicated that the funds that had been transferred to the Merrill Lynch bank account as part of the "Good Guys" scheme were part of a legitimate real estate investment. Finally, O'Shea avoided meeting Basurto in particular locations and avoided using his personal telephone or work e-mail address to communicate with Basurto in an attempt to conceal the alleged conduct.

- *ABB Ltd.*

On November 23, 2009, a Forbes Magazine article quoted a spokesman of Swiss electrical engineering company ABB Ltd. as confirming that O'Shea was a former ABB employee who was fired in 2004. In July 2004, ABB and two subsidiaries had resolved DOJ and SEC FCPA investigations by paying a \$10.5 million criminal penalty, disgorging \$5.9 million in ill-gotten gains and prejudgment interest, and engaging an independent consultant to review ABB's internal controls. (Vetco International Ltd. subsequently acquired one of the subsidiaries, and this same subsidiary and three other Vetco International subsidiaries would later plead guilty to additional FCPA violations and paid more than \$30 million in combined criminal fines.)

On July 26, 2007, ABB announced that it voluntarily disclosed to the DOJ and SEC further suspected FCPA violations involving employees of ABB subsidiaries in Asia, South America, and Europe. In December 2008, ABB announced the accrual of an \$850 million total

charge for the expected resolutions of a European anti-competition investigation and the DOJ and SEC FCPA investigations.

AGCO

On September 30, 2009, AGCO Corporation (“AGCO”) and its subsidiaries, sellers of farm equipment and machinery, agreed to pay over \$20 million in criminal and civil penalties to resolve international investigations into kickbacks paid to the Iraqi government to obtain contracts under the U.N.’s Oil-for-Food Program (“OFFP”).

The SEC alleged that AGCO subsidiaries made approximately \$5.9 million in kickback payments to the government of Iraq that had the effect of diverting funds from the U.N.’s escrow account established to provide humanitarian goods and services to the Iraqi people. The SEC alleged that AGCO violated the FCPA’s accounting provisions by failing to keep accurate records of the kickbacks or to devise and maintain internal accounting controls to prevent and detect the kickbacks. The SEC identified AGCO Ltd. (based in England), AGCO Denmark A/S, and AGCO S.A. (based in France) as the offending subsidiaries, with AGCO Ltd. arranging the sales and kickbacks through AGCO Denmark A/S, AGCO S.A., and a third-party agent in Jordan. The SEC alleged that AGCO’s profits from the OFFP contracts were nearly \$14 million. Without admitting or denying the SEC’s allegations, AGCO disgorged these profits and agreed to pay \$2 million in prejudgment interest and a civil penalty of \$2.4 million.

The DOJ filed a criminal information charging only AGCO Ltd. with a conspiracy to commit wire fraud and to violate the FCPA’s books and records provisions and entered into a three-year deferred prosecution agreement (“DPA”) with AGCO. As part of the DPA, AGCO agreed to pay a \$1.6 million penalty and, if the DOJ were to initiate the prosecution deferred, that AGCO would not contest its responsibility for the acts described in an attached Statement of Facts relating to three AGCO Ltd. contracts. AGCO was required to implement a compliance and ethics program designed to prevent violations of applicable anti-corruption laws and to submit annual brief, written reports on its compliance progress and experience.

The same day that it resolved the SEC and DOJ investigations, AGCO agreed to resolve an investigation by the Danish State Prosecutor for Serious Economic Crime regarding two OFFP contracts that AGCO Denmark A/S executed. AGCO agreed to disgorge approximately \$630,000 in profits related to those contracts.

Specific Allegations

The following factual summary is based on the allegations in the SEC’s complaint, unless otherwise noted.

From 2000 to 2003, the Iraqi Ministry of Agriculture awarded 16 OFFP contracts to the three AGCO subsidiaries identified above. For three of these contracts, each executed by AGCO Ltd. and involving the sale of tractors and spare parts, AGCO subsidiaries paid the Iraqi government a total of over \$550,000 in kickbacks. The first contract totaled €2.2 million including an extra 14.05% to be used for kickbacks, the second totaled €10.9 million including

an extra 21% to be used for kickbacks, and the third contract totaled €4.8 million including an extra 13.47% to be used for kickbacks.

For all of its OFFP contracts, AGCO worked through a Jordanian agent who was paid through a mixture of fixed and variable commissions as well as legitimate after-sales service fees. For the contracts requiring kickbacks, the AGCO subsidiaries secretly inflated the contract price between 13 and 21 percent per contract before submitting the contracts to the UN for approval and payment under the OFFP. When the UN approved the payment, the Jordanian agent received the extra money in a separate account in a manner that made it appear as though the payment was a second after-sales commission, rather than an improper kickback. In its books and records, AGCO Ltd. mischaracterized the second account used to effect kickbacks as “Ministry Accruals.”

Yet this method of accounting did not hide the fact that the commission payments occasionally varied significantly from the percentages provided for in the agent’s contract or that the invoicing statements sometimes did not match the amounts actually paid. Indeed, several e-mails made public by the DOJ show that the scheme was known within the company. For example, after the first kickback was paid, the Jordanian agent emailed an AGCO Ltd. employee with details of the contract costs, noting that the “extra commission which you know” was a “third party expense” to be paid to the Iraqi “Ministry.” Regarding the second kickback, another AGCO Ltd. employee wrote to a colleague, “as these contracts were negotiated and signed by your good self in Baghdad...you would of course have a better understanding of the commercials of these contracts, ie you mention [sic] up to 30% kick backs to the ministry etc.”

AGCO also failed to impose adequate internal controls over its sales and marketing staff at AGCO Ltd., who were able to enter into contracts without review from either the legal or finance departments. AGCO Ltd. marketing staff members were even able to create accrual accounts -- such as the Ministry Accrual account used to pay the kickbacks -- without any oversight. Additionally, on at least two occasions, the Jordanian agent asked for and received money for “car payments” and these payments were made without any due diligence.

Both the SEC and DOJ expressly noted that they considered the prompt remedial acts taken by AGCO and AGCO’s cooperation in reaching the above dispositions. These efforts included a significant internal investigation and implementation of enhanced compliance procedures.

William J. Jefferson

On August 5, 2009, former congressman William J. Jefferson, the first elected official ever charged with violating the FCPA, was convicted on 11 of 16 counts of corruption, including conspiracy to violate the FCPA (albeit with a wrinkle described below), soliciting bribes, money laundering, honest services fraud, obstruction of justice, and racketeering. The jury found Jefferson guilty of soliciting and receiving hundreds of thousands of dollars in bribes for himself or his family members in the form of “consulting fees,” ownership interests in various businesses, shares of revenue or profit from companies he aided, and monthly fees or retainers.

On November 13, 2009, he was sentenced to 13 years in prison, far less than the 27 to 33 years requested by prosecutors.

Jefferson participated in numerous executed and attempted schemes involving telecommunications deals in Ghana and Nigeria, oil concessions in Equatorial Guinea, and satellite transmission contracts in Botswana, Equatorial Guinea and the Republic of Congo. In many of the schemes, Jefferson used his position and influence as a member of the U.S. House of Representatives to further the interests of businesses in which he owned a stake or that had agreed to pay him bribes.

Jefferson also faced a substantive charge of violating the FCPA, but was ultimately acquitted of that charge. The FCPA charge stemmed from Jefferson's alleged offer to bribe an official of the Nigerian state-owned telecommunications company Nitel in exchange for the official's assistance in obtaining telecommunications approvals on behalf of a Nigerian joint venture in which Jefferson held an interest. The indictment alleged that Jefferson offered \$500,000 as a "front-end" payment and a "back-end" payment of at least half of the profits of one of the joint venture companies to the official in exchange for the official's assistance in obtaining approvals that would have allowed the Nigerian joint venture to locate its equipment at Nitel's facilities and use Nitel's telephone lines. As part of the "front-end" payment, Jefferson promised to deliver \$100,000 in cash to the Nigerian official, which Lori Mody, a partner in the joint venture, provided to Jefferson. Several days later, on August 3, 2005, \$90,000 of the \$100,000 was discovered in the freezer in Jefferson's Washington, D.C. home during a raid by federal authorities.

The government's FCPA case was weakened when Mody did not testify. The judge instructed the jury that to convict Jefferson on the FCPA charge, they had to find that he had offered to bribe the Nigerian official or authorized such a bribe. Defense counsel argued that, as the \$90,000 had been found in the freezer, it could not have been used to bribe the Nigerian official and that Jefferson had not intended to use it so.

Jefferson was found guilty of a count of conspiracy, which included conspiracy to (i) solicit bribes, (ii) deprive citizens of honest services and (iii) violate the FCPA. The jury's verdict form did not require it to specify which conspiracy charges were proven. The guilty verdict, however, is recorded as an FCPA conspiracy charge under Count 1 of the indictment.

Nature's Sunshine Products, Inc., Douglas Faggioli and Craig D. Huff

On July 31, 2009, the SEC filed a settled enforcement action against Nature's Sunshine Products, Inc. ("NSP"), its Chief Executive Officer Douglas Faggioli and its former Chief Financial Officer Craig D. Huff for violations of the anti-bribery, books and records and internal controls provisions of the FCPA as well as antifraud and issuer reporting provisions of the Exchange Act. NSP is a Utah corporation that manufactures, among other things, vitamins and nutritional supplements. Without admitting or denying the allegations, NSP, Faggioli and Huff consented to final judgments enjoining them from future violations of the FCPA and the

Exchange Act. The judgment ordered NSP to pay a civil penalty of \$600,000 and Faggioli and Huff each to pay a civil penalty of \$25,000.

According to the SEC's Complaint, between 2000 and 2001, NSP's wholly-owned Brazilian subsidiary, Nature's Sunshine Produtos Naturais Ltda. ("NSP Brazil"), made over \$1 million in cash payments to customs brokers, some of which were later passed on to Brazilian customs officials. NSP recorded the payments as "importation advances." NSP Brazil began making the payments after the Brazilian governmental agency responsible for regulating nutritional products reclassified many NSP products as medicines, which led to a significant decline in NSP's sales in Brazil. As a consequence of the reclassification, NSP Brazil was required to register its products in order to legally import and sell them, but for several of its products was unable to obtain registration. From 2000 to 2003, NSP's sales in Brazil dropped from \$22 million to \$2.3 million. NSP Brazil thus paid the customs agents to facilitate the illegal importation of its products.

In December 2000, NSP Brazil's Operations Manager informed two NSP controllers, who were visiting NSP Brazil and had responsibility for maintaining NSP's books and records and preparing NSP's financial statements with respect to its foreign subsidiaries, including NSP Brazil, that he was concerned about the products NSP Brazil was importing because the company did not have the proper registrations. He told the controllers that, as a result of pressure from the Brazilian government, it was costing NSP Brazil 25% of the value of its product to find customs brokers willing to assist in the importation of the unregistered products. He also claimed to have informed NSP Brazil's General Manager about these issues but was told that NSP was aware of the problems. One of the controllers claimed to have informed a senior manager at NSP of the statements made to him by the operations manager.

In approximately November 2001, NSP Brazil hired a new controller who discovered entries reflecting approximately 80 cash payments, including payments to customs brokers in Brazil, for which no supporting documentation existed. Nevertheless, NSP accounted for the payments in its 2001 financial statements as if they were legitimate importation expenses. In 2002, in an effort to conceal the payments, NSP Brazil purchased fictitious supporting documents.

In its 2001 Form 10-K filed with the SEC in March 2002, NSP stated that it had experienced a significant decline in sales in Brazil, but failed to disclose any material information regarding the payments to customs brokers.

The SEC complaint alleges that in 2000 and 2001, Faggioli, as COO during the relevant period, and Huff, as CFO during the relevant period, failed to adequately supervise NSP personnel (i) to make and keep books and records at NSP in reasonable detail and (ii) in devising and maintaining a system of internal controls to provide reasonable assurance that the registration of NSP products sold in Brazil was adequately monitored. The complaint does not allege any personal knowledge or participation in any of improper payments on behalf of Faggioli and Huff. This represents the SEC's first use of "control person liability" in the FCPA context of which we are aware.

The Complaint alleges that NSP violated Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B) and 30A of the Exchange Act, and Rules 10b-5, 12b-20, 13a-1 and 13a-13, and that Faggioli and Huff violated Sections 13(b)(2)(A) and 13(b)(2)(B) as control persons pursuant to Section 20(a) of the Exchange Act.

In its statement, NSP indicated that it self-reported the results of its internal investigation to the SEC and the DOJ and “fully cooperated in the government investigations.”

Helmerich & Payne

On July 30, 2009, following a voluntary disclosure, Helmerich & Payne (“H&P”) — an oil-drilling company headquartered in Tulsa, Oklahoma and listed on the New York Stock Exchange — entered into agreements with the SEC and DOJ in connection with improper payments by H&P subsidiaries to customs officials in Argentina and Venezuela in relation to the shipment of drilling equipment parts. Under a cease and desist order with the SEC and a two-year non-prosecution agreement with the DOJ, H&P is required to pay approximately \$1.375 million in fines and profit disgorgement, implement rigorous internal controls and cooperate with the agencies.

H&P provides rigs, equipment, and personnel to national and international oil companies on a contract basis in the United States and South America. Between 2003 and 2008, two of H&P’s subsidiaries the financial results of which are components of the consolidated financial statements in H&P’s filings with the SEC, Helmerich & Payne (Argentina) Drilling Company (“H&P Argentina”) and Helmerich & Payne de Venezuela, C.A. (“H&P Venezuela”), made improper payments to government officials to skirt Argentine and Venezuelan customs laws. Both subsidiaries directed payments to officials through their customs brokers in order to facilitate imports and exports. H&P Argentina paid approximately \$166,000 to customs officials to permit the importation and exportation of its equipment without required licenses or on an expedited basis, and, in some instances, when Argentine law forbade such imports. H&P Venezuela paid nearly \$20,000 to customs officials to secure partial inspections or to import equipment not in compliance with local customs regulations. Together, the subsidiaries avoided through such payments over \$320,000 in expenses they would have otherwise incurred.

The subsidiaries falsely or misleadingly recorded the brokerage service payments in their books and records. H&P Argentina received and paid invoices from its customs broker that described the payments to customs officials as “additional assessments,” “extra costs,” or “extraordinary expenses.” Similarly, the improper payments that H&P Venezuela made were described on invoices as “urgent processing,” “urgent dispatch,” or “customs processing.”

H&P first learned of the improper payments during an FCPA training session. In early 2008, H&P designed and implemented stand alone FCPA policies and procedures, which included worldwide FCPA training for its key employees. (The company’s Corporate Code of Business Ethics had historically contained anti-bribery provisions.) During one such training session, an H&P employee volunteered information about the improper payments H&P Argentina was making. In response, H&P hired outside counsel and independent forensic

accountants to conduct an internal investigation of the subsidiaries' customs practices in Latin America.

Both the DOJ and SEC pointed to the company's voluntary disclosure of the improper payments as well as its prompt remedial actions as mitigating factors.

Avery Dennison Corporation

On July 28, 2009, the SEC filed two settled enforcement proceedings against Avery Dennison Corporation ("Avery"), a California-based company that manufactures, markets and sells a wide range of products such as adhesive materials, office products, labels and graphics imaging media, relating to attempted and actual payments and other benefits provided to Chinese government officials, payments made to customs officials in Indonesia and Pakistan and additional unspecified payments discovered in China. In a civil action filed in the U.S. District Court for the Central District of California, the SEC charged Avery with violations of the books and records and internal control provisions of the FCPA. Avery agreed to pay a civil penalty of \$200,000 in settlement. In the parallel administrative proceeding, the SEC ordered Avery to cease and desist its violations of the FCPA and to disgorge and pay pre-judgment interest totaling \$318,470.

According to the SEC complaint and administrative order, Avery's fourth-tier, wholly-owned subsidiary, Avery (China) Co. Ltd. ("Avery China"), sells reflective materials used in printing, on road signs and on emergency vehicles. From 2002 to 2005, Avery China's Reflectives Division paid or authorized payments of several kickbacks, sightseeing trips, and gifts to Chinese government officials, primarily officials of the Wuxi, Jiangsu Province Traffic Management Research Institute ("Wuxi Institute"). China's Ministry of Public Security sets safety standards that products used in road communications must meet. The Ministry is assisted by various institutes, including the Wuxi Institute, that help "formulate project plans, draft product and project specifications, and test[] pilot projects" and, as such, "could play an important role in awarding government contracts."

The benefits Avery provided to the Chinese officials took several forms. For example, in 2002 and 2005, Avery China managers offered sightseeing trips for a total of nine government officials collectively valued at nearly \$20,000 and submitted false or multiple reimbursement requests to conceal the true nature of the expenses. In January 2004, an Avery China sales manager accompanied four Wuxi Institute officials to a meeting and purchased each a pair of shoes with a combined value of approximately \$500. In May 2004, Avery China hired a former Wuxi Institute official because his wife, also a Wuxi Institute official was in charge of two projects that Avery China was pursuing.

In August 2004, Avery China's former national manager for the Reflectives Division offered or approved two attempted kickbacks to government entities. The first attempted kickback, which would have amounted to \$41,138, was in connection with two contracts awarded to Avery China, which the Reflectives China National Manager obtained by agreeing to increase the sales prices of the contracts artificially and then refund the amount back to the Wuxi

Institute with the understanding that at least a portion of the amount would be for the benefit of Wuxi officials. The scheme, however, was discovered by Avery's Asia Pacific region and the payment was never made. The second payment, which would have amounted to \$2,415, was designed to secure a sales contract with Henan Luqiao, which is described only as "a state-owned enterprise," was discovered by Avery China and was also never made.

In May and June 2005, however, a Reflectives Division sales manager agreed to pay a "commission" to a state-owned customer by having Avery China's distributor make the payment out of the distributor's profit margin. The sale was booked as a sale to the distributor and not to the ultimate customer and the distributor claimed to have paid \$24,752 out of its profit margin to the customer. The sale generated a net profit for Avery China of \$273,213, the amount the company was required to disgorge in the SEC administrative proceeding (in addition to \$45,257 in prejudgment interest).

After discovering the improper conduct in relation to the Wuxi Institute in September 2004, Avery conducted an internal review of the Reflectives Division and another Avery division in China before voluntarily approaching the SEC regarding the possible improper payments in 2005. The company subsequently discovered and self-reported additional instances of "possible improper payments" to customs officials in Indonesia by two companies that it acquired. The first series of payments were made by employees of an Indonesian contractor acquired by Avery, and involved payments of approximately \$100 each to three customs officials who regularly inspected the company's goods. Employees funded the payments by collecting petty cash disbursements in \$10 increments, which were recorded as travel expenses. These payments continued after Avery's acquisition of the contractor.

The company also discovered that employees of Paxar Corporation ("Paxar"), a publicly traded company that Avery acquired in June 2007, made illegal payments to customs and tax officials in Indonesia in order to overlook bonded zone regulations or obtain bonded zone licenses. A former Paxar general manager instructed employees to fabricate invoices to conceal the illegal payments, which amounted to \$5,000, and the conduct was reported to Avery by a whistleblower in September 2007. Through a series of internal reviews, including a "comprehensive FCPA review in ten high risk countries," Avery further discovered problematic payments in connection with the activities of Paxar Pakistan and Paxar China. The Paxar Pakistan payments, amounting to \$30,000, were made to customs officials through a customs broker. The SEC's cease and desist order does not provide details on the potentially problematic payments in China, aside from noting that they amounted to \$16,000.

United Industrial Corporation & Thomas Wurzel

On May 29, 2009, the SEC filed settled actions against United Industrial Corporation ("UIC"), an aerospace and defense systems provider, and the former president of one of its previously wholly-owned, indirect subsidiaries, ACL Technologies, Inc. ("ACL"). The settlements relate to allegations that former ACL president Thomas Wurzel authorized illicit payments to a foreign agent in connection with an Egyptian Air Force project which Wurzel knew or consciously disregarded the high probability that the agent would offer, provide or

promise at least a portion of to active Egyptian Air Force officials. Under the settled administrative proceeding against UIC, the company was ordered to cease and desist from future violations of the FCPA's anti-bribery, books and records and internal control provisions and was ordered to pay disgorgement and prejudgment interest of \$337,679.42. In the settled complaint against Wurzel, he consented to entry of a judgment enjoining him from violating the FCPA's anti-bribery and books and records provisions and from aiding and abetting violations of the FCPA's books and records provision, and agreed to pay a civil penalty of \$35,000.

According to the SEC, Wurzel employed a retired Egyptian Air Force general ("EAF Agent") in late 1996 to help ACL obtain contacts in connection with an Egyptian Air Force project to construct an F-16 combat aircraft depot as well as to provide, operate, and train Egyptian labor to use associated testing equipment ("Egyptian F-16 Depot Project"). ACL correspondence from the time indicated that ACL believed that the EAF Agent's status as a former general would be instrumental in influencing the "very small community of high-level military people," and Wurzel was aware that the EAF Agent had a personal relationship with at least one active official of the Egyptian Air Force.

Wurzel authorized monthly stipends to the EAF Agent of \$4,000 per month by at least December 1997, which rose to \$20,000 per month by March 1998. These payments were made without "any due diligence files" and, until March 1998, without a formal consulting agreement between ACL and the EAF Agent. The settlement documents indicate that ACL did not submit due diligence forms on the agent until 2002 despite company policy requiring such forms being instituted in 1999. The SEC also noted that the forms, when submitted, "were largely completed by the EAF Agent himself."

In October 1999, the United States Air Force awarded the Egyptian F-16 Depot Project to ACL as part of the U.S. Department of Defense's foreign military sale ("FMS") program, under which foreign governments purchase from the U.S. Government weapons, defense items, services and training through contracts typically fulfilled by private defense contractors. Under the FMS program, a foreign government has the potential to select a particular contractor through a "sole source" request, which the EAF did with respect to ACL. The F-16 Depot Project was originally valued at \$28 million with the potential for additional "add-on" contracts for ACL.

The EAF Agent's compensation after the 1999 contract was awarded took several forms. First, the retired general continued to act as ACL's "consultant," earning a monthly stipend of \$20,000 per month until mid-2001 when his consulting agreement expired. Second, Wurzel separately authorized the EAF Agent to act as the local labor subcontractor in connection with ACL's work on the Egyptian F-16 Depot Project. In this position, the EAF Agent was reimbursed for "program manager" expenses (among other things) that varied between \$4,300 and \$11,100 per month in exchange for his service in coordinating local labor subcontractors to assist with the project. Finally, payments continued to the EAF Agent even after the consultant agreement expired in mid-2001, through what the SEC described as "requests for additional funds in circumstances that strongly indicated they would be used to make illicit payments."

Wurzel had apparently promised to continue paying “the consultant fee either through the service contract or any other way.”

Wurzel authorized three types of illicit payments to the EAF agent between 2001 and 2002: (i) payments for labor subcontracting work that included a cushion out of which payments could be made; (ii) a \$100,000 advance for rental equipment and materials; and (iii) a payment of \$50,000 for marketing services. The SEC alleged that Wurzel made the improper payments to the EAF Agent to secure two “add-on” contracts: a Contract Engineering and Technical Services (“CETS”) contract and a surface treatment facility contract.

The CETS contract involved providing personnel for technical assistance at the air force base in Cairo where the F-16 depot was being constructed to allow EAF personnel to receive hands-on training to test and repair their aircraft. In December 2001, several months before the CETS project was officially awarded, the EAF Agent told Wurzel that ACL should expect to receive the contract soon because the agent had “succeeded to make the [Egyptian Air Force] give all the pressure on the USAF to finalize the sole source,” adding that it was “very important to start giving motivation that we discussed to give it before the year end.” Accordingly, the EAF Agent requested an advance of funds in addition to the compensation due under his local labor subcontracts. ACL wired \$114,000 to the EAF Agent against invoices for labor subcontract services within a week of the agent’s request.

In January 2002, the EAF Agent emailed a request for addition funds to “secure our team loyalty ... as you have started to have some doubts about ou[r] commitment with them.” Another email followed shortly thereafter thanking “God that our key persons are still on their positions till now” but noting that “[w]e should satisfy our people and really we can not do that from our resources as we used to do before.” The EAF Agent requested approximately \$171,000 for past due labor subcontract work, a separate \$300,000 advance payment, and a lump sum payout of half of his agreed upon 8% fee from the contract value. ACL wired the EAF Agent the requested fees in March 2002 for his labor subcontract work, but did not forward the additional requested fees.

In April 2002, however, the EAF Agent emailed another request to Wurzel for additional money “to motivate people and secure our business specially [*sic*] the **CETS**.” (Emphasis in original.) Wurzel responded the same day that ACL would advance payments to the agent, but that it would offset such payments against pending labor subcontract invoices. ACL received the official CETS award later in April 2002.

In June 2002, the EAF Agent requested additional payments in connection with the surface treatment facility contract. Wurzel initially responded by noting that ACL paid the EAF Agent \$40,000 per month for services under the CETS contract, which “will permit you to meet all of your obligations,” but also suggested that ACL could advance the EAF Agent another payment. The EAF Agent responded with a request for \$200,000 in past due labor subcontract invoices and an additional \$100,000 advance payment, noting that “[t]his could help us fulfil [*sic*] the commitment.”

Although there was no indication that the project required rental equipment or advance payments for other services, Wurzel told the EAF Agent to type an invoice that specified that “THIS INVOICE IS FOR ADVANCE PAYMENT OF RENTAL OF EQUIPMENT AND CONTRACTING OF MATERIAL AND SERVICES UNDER THE F-16 EAF DEPOT INTEGRATION CONTRACT.” (Capitalization in original.) The EAF Agent provided an invoice with the specified language, and a \$100,000 advance payment was approved by Wurzel, which a corporate UIC employee inaccurately recorded by ACL as a bona fide “material” expense for the Egyptian F-16 Depot Project.

The SEC further noted that Wurzel and the EAF Agent concocted a scheme by which the latter would “repay” the \$100,000 advance. Under the plan, the EAF Agent submitted false monthly labor subcontract invoices, which included a \$10,000 “credit” to ACL. To offset any real repayment of the advance, the EAF Agent’s expenses were inflated by at least the amount of the \$10,000 credit.

Over the next several months, the EAF Agent continued to make requests for additional payments that were necessary to “keep the momentum.” By the end of 2002, ACL had paid the EAF Agent \$50,000 against an invoice for marketing services despite the parties never having entered into a marketing agreement.

As a result of the above conduct, the SEC found that the parent company UIC lacked internal controls sufficient to detect or prevent these improper payments. The SEC noted that from 1997 through 2002, “ACL paid the EAF Agent in total approximately \$564,000 for consulting or marketing services without meaningful records detailing the services being provided.” The SEC also sharply criticized UIC’s legal department, noting that the EAF Agent was subject to insufficient due diligence and approved by the legal department despite the fact that the agent’s agreement with the company “did not contain FCPA provisions required by corporate policy” and “despite learning that ACL had already been using the EAF Agent without prior approval and that the EAF Agent’s existing agency agreement did not conform to UIC’s existing policies prohibiting contingent arrangements on government contracts.” The SEC noted that it considered UIC’s promptly undertaken remedial acts and cooperation in determining whether to accept the settlement offer.

Novo Nordisk

On May 11, 2009, Novo Nordisk, a Danish manufacturer of insulin, medicines and other pharmaceutical supplies whose American Depository Receipts (“ADRs”) trade on the New York Stock Exchange, entered into a deferred prosecution agreement with the Department of Justice and settled related charges with the SEC resulting from illegal kickbacks paid to the former Iraqi government in connection with the U.N. Oil-for-Food program (“OFFP”). As part of the three-year deferred prosecution agreement, Novo agreed to pay a \$9 million fine and cooperate fully with the DOJ’s ongoing OFFP investigation for conspiring to violate the FCPA’s books and records provision and to commit wire fraud. Under the SEC’s settlement, Novo agreed to pay over \$6 million in disgorgement of profits and prejudgment interest and a \$3,025,066 civil

penalty and is permanently enjoined from violating the FCPA's books and records and internal control provisions.

According to the criminal information, Novo paid over \$1.4 million in kickbacks to Kimadia, the Iraq State Company for the Importation and Distribution of Drugs and Medical Equipment, in connection with eleven different contracts. The SEC complaint also indicates that Novo authorized, but did not pay, illicit kickbacks valued at over \$1.3 million on two additional contracts.

According to the charging documents, in late 2000 or early 2001, a Kimadia import manager informed Novo's long-time Jordanian agent tasked with submitting bids on Novo's behalf that a 10% kickback would be required in order to obtain contracts under the OFFP. Novo's agent notified the general manager of Novo's Near East Office ("NEO," based in Jordan) and the business manager of Novo's Regional Office Near East ("RONE," based in Greece) of the demand. The request was raised internally to a Novo Senior Vice President and later to a Novo officer, who refused to comply. Despite this refusal, other Novo employees ultimately authorized the payments and agreed to increase the agent's commission from 10% to 20% to facilitate the illicit payments.

Novo made the payments in three ways: (i) by wiring money to the agent's bank account, who would then pass it on to Iraqi government accounts; (ii) by issuing bank guarantees to Kimadia; and (iii) by depositing money directly into Kimadia accounts. Novo improperly recorded these payments on its books and records as "commissions." The SEC also noted that Novo did not memorialize an increase in the agent's commission until nine months after the first commission payment was made.

In their releases announcing the settlement, both the DOJ and SEC acknowledged Novo's cooperation and remediation, with the DOJ noting that Novo conducted a "thorough review of the illicit payments and [implemented] enhanced compliance policies and procedures."

Latin Node Inc./eLandia International Inc.

On April 7, 2009, Latin Node, Inc. ("Latin Node"), a formerly privately-held telecommunications company headquartered in Miami, Florida, pleaded guilty to one count of violating the FCPA's anti-bribery provisions in connection with corrupt payments made to government officials in Honduras and Yemen. As part of its plea, Latin Node agreed to pay a \$2 million fine over 3 years. According to a spokesman, the fine will be paid by Latin Node's parent company, eLandia International Inc. ("eLandia").

In 2007, eLandia, a publicly traded global provider of information technology communications and other services, acquired an 80% stake in Latin Node. On September 14, 2007, eLandia disclosed that as part of its acquisition of Latin Node, it had discovered certain past payments by Latin Node to consultants in Central America that were made in the absence of adequate records and controls for a U.S. public company. eLandia initiated an investigation into the payments and began establishing a new system of internal legal and accounting controls. In its May 2008 Form 10-Q, eLandia reported that the preliminary investigation had revealed

certain pre-acquisition payments by Latin Node made in violation of the FCPA. eLandia subsequently reported the potential violations to the DOJ, SEC, and FBI and an investigation ensued. In its press release, the DOJ acknowledged that “resolution of the criminal investigation of Latin Node reflects, in large part, the actions of Latin Node’s corporate parent, eLandia,” including the fact that eLandia “voluntarily disclosed the unlawful conduct to the Department promptly upon discovering it; conducted an internal FCPA investigation; shared the factual results of that investigation with the Department; cooperated fully with the Department in its ongoing investigation; and took appropriate remedial action, including terminating senior Latin Node management with involvement in or knowledge of the violations.”

According to the criminal information, between March 2004 and June 2007 Latin Node paid or caused to be paid nearly \$1.1 million to foreign officials or third parties knowing that all or some of the payments would be used to bribe officials at the Honduran state-owned telecommunications company, Hondutel. The charging documents allege that Latin Node’s wholly-owned subsidiary, LN Comunicaciones, entered into a sham “consulting” agreement with a company called Servicios IP, S.A. (“Servicos”) nominally owned by two LN Comunicaciones employees. Servicios in turn entered into a sham “consulting” agreement with a company called AAA Telefonica (“AAA”), that was controlled by an individual believed to be a Hondutel official’s brother. Latin Node and LN Comunicaciones then made payments to Servicios knowing that some or a portion of those payments would be passed along to Hondutel officials, including a former official (identified as “Official A”) who “headed the evaluation committee responsible for awarding interconnection agreements with private telecommunications companies....” In June 2007, Latin Node hired Official A and made her responsible for business development in Latin America and the Caribbean.

According to the DOJ, approximately \$440,200 of the payments were made directly from Latin Node to the Honduran officials, while an additional \$141,000 Latin Node paid to its own employees while knowing that some or all of the funds would be passed on to government officials. In addition, Latin Node paid approximately \$517,689 to LN Comunicaciones, knowing that some or all of the funds would be passed on to government officials. Latin Node also agreed to pay two Hondutel employees to assist with the scheme by falsely calculating minutes in order to allow for a continued reduced rate.

From June 2005 to April 2006, Latin Node also made improper payments in connection with its business activities in Yemen. Beginning as early as 2004, Latin Node explored ways to enter the Yemeni market, and learned that an individual identified as Yemen Partner A (who is described as a dual United States and Egyptian citizen) had, through his own company, obtained an interconnection agreement with TeleYemen, the state-owned telecommunications company, at a favorable rate. Latin Node entered into a revenue sharing agreement with Yemen Partner A with the understanding that some or all of the money paid to Yemen Partner A would be passed to TeleYemen officials in exchange for continued favorable rates. Email communications revealed that Latin Node executives were aware that Yemen Partner A was making payments to TeleYemen officials and also had apparent connections to the son of Yemen’s president. The DOJ pointed out, however, that “[c]ourt documents do not allege or refer to evidence showing that the son of the Yemeni president received any payments from Latin Node. No foreign

government officials are the subjects of U.S. investigations in this matter.” According to court documents, Latin Node made over \$1.1 million in corrupt payments either directly to Yemeni officials or through Yemen Partner A with the understanding that the payment would go to Yemeni officials.

Control Components

On July 31, 2009, Control Components, Inc. (“Control Components”) pleaded guilty to FCPA and Travel Act violations in connection with a conspiracy to pay bribes to both foreign officials and officials of foreign and domestic private companies in order to secure contracts in over 30 countries. Control Components is a California-based company that manufactures and sells industrial service valves for use in nuclear, oil and gas, and power generation facilities, including to many state-owned entities worldwide. It is owned by IMI plc, a British company traded on the London Stock Exchange. Control Components was ordered to pay an \$18.2 million criminal fine, implement a compliance program and retain an independent compliance monitor for three years. It was also placed on three years organizational probation.

According to charging documents, the conspiracy began in approximately 1998 and lasted through 2007. From 2003-2007 alone, Control Components made 236 corrupt payments to foreign officials at state-owned entities in more than 30 countries including, but not limited to, China (Jiangsu Nuclear Power Corp., Guohua Electric Power, China Petroleum Materials and Equipment Corp., PetroChina, Dongfang Electric Corporation, China National Offshore Oil Corporation (“CNOOC”), Korea (KHNP), United Arab Emirates (National Petroleum Construction Company) and Malaysia (Petronas). On August 15, 2009, CNOOC issued a statement that none of its employees or officials received bribes from CCI.

During the 2003-2007 period, Control Components allegedly paid or caused to be paid \$4.9 million to foreign officials in violation of the anti-bribery provisions of the FCPA and another \$1.95 million in bribes to officers and employees at both domestic and foreign private companies located in California, China, Italy, Russia, and Texas in violation of the Travel Act. According to the DOJ, these payments resulted in net profits of \$46.5 million for Control Components.

The indictments and Control Components’ guilty plea are notable for the inclusion of charges that Control Components and the individuals violated the Travel Act by making corrupt payments to privately-owned customers in violation of California state law against commercial bribery. Such payments would not violate the FCPA’s anti-bribery provisions.

Control Components developed a sales practice of maintaining “friends-in-camp” (“FICs”) at the company’s customers and cultivating these relationships through “commission payments” to assist it in obtaining business. The FICs were often officers and employees of state-owned entities, and thus considered to be “foreign officials” within the meaning of the FCPA, who were in a position to direct contracts to Control Components or adjust technical specifications to favor the use of Control Components’ valves. The illegal kickbacks were often referred to by employees of Control Components as “flowers,” and were either (i) wired directly

to the FICs from the Control Components' Finance Department; (ii) made through company representative and sales staff; or (iii) made through third party "consultants" who acted as pass-through entities.

In addition to the illicit commission payments, the indictment alleges other violative conduct that the defendants apparently engaged in to assist in obtaining or retaining business. For example, the indictment alleges that the company (i) arranged for and provided overseas holidays to Disneyland and Las Vegas to officers and employees of state-owned and private entities under the guise of "training and inspection trips"; (ii) purchased extravagant vacations, including first-class airfare to Hawaii, five star hotel accommodations and other luxuries, for executives of state-owned and private customers; (iii) paid for the college tuition expenses of children of at least two executives of state-owned customers; (iv) hosted lavish sales events for current and potential state-owned and private customers; and (v) provided expensive gifts to officers and employees of state-owned and private customers.

The indictment also alleges that Control Components employees sought to, and did, frustrate an internal audit in 2004 into the company's commission payments. Among other things, the employees provided false information to the auditors, created false invoices and a spreadsheet in an attempt to mislead the auditors and instructed other employees not to use certain language in email communications that would potentially alert the auditors to the existence of the scheme.

- Individuals

Previously, on February 3, 2009, the former finance director of Control Components, Richard Morlok, pleaded guilty to one count of conspiracy to violate the FCPA in connection with his involvement in the scheme. Morlok's plea came less than a month after Mario Covino, the former director of worldwide factory sales for Control Components, pleaded guilty to one count of conspiring to violate the FCPA for his participation in the scheme.

As finance director, Morlok was responsible for both approving the commission payments and signing off on the wire transfers to FICs. While his plea relates specifically to one particular payment of almost \$58,000 to Korean company KHNP, Morlok has admitted to directing a total of approximately \$628,000 to foreign officials at state-owned companies between 2003 and 2006 that resulted in contracts worth approximately \$3.5 million.

On January 8, 2009, Mario Covino pleaded guilty to one count of conspiracy to violate the FCPA in connection with the scheme. Covino also allegedly facilitated and promoted the use of FICs and caused agents and employees of Control Components to make illegal payments of over \$1 million to employees of state-owned entities. The illegal kickbacks directed by Covino earned Control Components an estimated \$5 million. Further, Morlok and Covino admitted to hindering the internal audit discussed above. Covino and Morlok are set to be sentenced February 2011 and each face a maximum of 5 years in prison.

On April 8, 2009, six additional former executives of Control Components were charged in connection with the same course of conduct.

- Stuart Carson, the former chief executive officer, was charged with two counts of violating the FCPA and one count of conspiracy to violate the FCPA and Travel Act. According to the indictment, Carson was the architect of the “Friends-in-Camp” system Control Components employed. Between 2003 and 2007, Carson allegedly directed approximately \$4.3 million in corrupt payments to employees at state-owned entities and approximately \$1.8 million to officers and employees of private companies.
- Hong Carson, the wife of Stuart Carson and the former director of sales for China and Taiwan, was charged with five counts of violating the FCPA, one count of conspiracy to violate the FCPA and Travel Act and one count of destruction of records in connection with a matter within the jurisdiction of the U.S. department or agency. According to the indictment, between 2003 and 2007, Mrs. Carson directed approximately \$1 million in corrupt payments to employees at state-owned entities and approximately \$43,000 to officers and employees at private companies. In addition, just before her interview with attorneys hired by Control Components to conduct an internal investigation into the company’s commission payments, Mrs. Carson allegedly intentionally destroyed documents by tearing them up and flushing them down the toilet in a company restroom.
- Paul Cosgrove, a former executive vice president and the former director of worldwide sales, was charged with six counts of violating the FCPA, one count of violating the Travel Act and one count of conspiracy to violate the FCPA and Travel Act. According to the indictment, between 2003 and 2007, Cosgrove directed approximately \$1.9 million in corrupt payments to employees at state-owned entities and \$300,000 to officers and employees at private companies.
- David Edmonds, the former vice president of worldwide customer service, was charged with three counts of violating the FCPA, two counts of violating the Travel Act, and one count of conspiracy to violate the FCPA and Travel Act. According to the indictment, between 2003 and 2007, Edmonds directed approximately \$430,000 in corrupt payments to employees at state-owned entities and \$220,000 to officers and employees of private companies.
- Flavio Ricotti, the former vice-president and head of sales for Europe, Africa and the Middle East, was charged with one count of violating the FCPA, three counts of violating the Travel Act, and one count of conspiracy to violate the FCPA and Travel Act. According to the indictment, between 2003 and 2007, Ricotti directed approximately \$750,000 in corrupt payments to employees at state-owned entities and approximately \$380,000 to officers and employees of private companies. As a citizen of Italy, Ricotti is described as an “agent” of a “domestic concern,” Control Components, in the charging documents.

- Han Yong Kim, the former president of Control Component's Korean office, was charged with two counts of violating the FCPA, and one count of conspiracy to violate the FCPA and Travel Act. According to the indictment, between 2003 and 2007, Kim directed approximately \$200,000 in corrupt payments to employees at state-owned entities and approximately \$350,000 to officers and employees of private companies. As a citizen of Korea, Kim is described as an "agent" of a "domestic concern," Control Components, in the charging documents.

Each defendant is facing up to five years in prison and a fine of the greater of \$250,000 or twice the value gained on each conspiracy count and Travel Act count and five years in prison and a fine of the greater of \$100,000 or twice the value gained on each FCPA count. The destruction of records count against Hong Carson carries a maximum jail term of 20 years and a \$250,000 fine.

Mr. and Mrs. Carson, Cosgrove, and Edmonds filed a motion to dismiss two of the FCPA counts and one Travel Act count based on the five-year statute of limitations. The Government had asked for and received a tolling order in November 2008 on the premise that the grand jury investigation hinged on foreign discovery, specifically a request to Switzerland for assistance in obtaining certain documents. The four defendants contended, first, that the conduct underlying these three counts were unrelated to the documents produced by the Swiss discovery request and, second, that, in the case of the one of the counts, the tolling order was issued after the statute of limitations had already run. The court denied both claims. With regards to the first argument, the court held that the tolling order related to the general subject of the grand jury investigation and was not count-specific. Further, the court explained that the foreign discovery request need not yield essential documents for each count to uphold the tolling order, as so holding would place a prosecutor in the position of needing to "be clairvoyant to know whether his request would produce essential documents, and hence whether he had in fact secured an effective tolling order." With regards to the second argument, the court held that the effective date for statute of limitations purposes was not the date of the tolling order, but rather the date of the foreign discovery request.

The four defendants also asked the court to allow them to obtain discovery of Control Components' internal investigation, including the company's electronic database, through the DOJ, as opposed to through Control Components. They argued that Control Components' plea agreement gave the DOJ constructive possession of all of Control Components' records of foreign bribery, even those not actually possessed by the DOJ. The court disagreed and held that the Government only had to produce those materials of which it had physical possession.

The case against Control Components officials represents the largest multi-party indictment under the FCPA since its inception.

Jeffrey Tesler & Wojciech Chodan

On February 17, 2009, Jeffrey Tesler and Wojciech Chodan were indicted for their involvement in the Bonny Island, Nigeria bribery scheme described below involving KBR,

Halliburton and other entities that resulted in \$579 million in fines in February 2009 against KBR and Halliburton. The two men, both from England, were charged with one count of conspiracy to violate the FCPA and ten counts of violating the FCPA. The indictment also seeks forfeiture of over \$132 million in U.S. currency from the two defendants, and indicates that if, among other things, such currency has been “transferred or sold to or deposited with a third person” the U.S. will seek forfeiture of other assets up to \$132 million. If convicted on all counts, Tesler and Chodan each face up to 55 years in prison.

The London Metropolitan Police arrested Tesler, a lawyer, in London in March 2009 at the request of United States authorities. According to the charging document, Tesler, Chodan, KBR’s Albert Jack Stanley and other conspirators began discussions in 1994 among themselves and with Nigerian officials about how to structure bribe payments associated with contracts to build liquefied natural gas facilities at Bonny Island in Nigeria. In 1995, a Gibraltar corporation allegedly controlled by Tesler called Tri-Star Investments (“Tri-Star”) was hired for the purpose of paying bribes to Nigerian government officials. According to the indictment, Tri-Star, which the U.S. Government describes as an “agent” of the joint venture and all participating companies, was paid over \$130 million between 1995 and 2004. The complaint identifies eight payments, totaling just under \$19.6 million, that apparently were made from a joint venture-controlled bank account in Madeira, Portugal, through correspondent bank accounts in New York, New York to bank accounts in Switzerland and Monaco controlled by Tesler.

With respect to Chodan, the indictment alleges that he was a former employee and consultant of KBR’s U.K. subsidiary and allegedly participated in “cultural meetings” where he and co-conspirators discussed the use of Tesler and others, including a second agent identified as “Consulting Company B,” to pay bribes to Nigerian officials. Chodan apparently was a member of the board of one of the joint venture entities that entered into consulting agreements with Tesler and Consulting Company B that were used to facilitate the improper payments to Nigerian officials. The indictment identifies several occasions where Chodan communicated with Tesler and others about the specifics of the bribery scheme, including the structure of the payments and who would receive them. Chodan has not yet been apprehended and is facing an outstanding warrant for his arrest in the United States.

The DOJ has pursued the extradition of Tesler and Chodan on the FCPA charges. The case contains interesting jurisdictional issues, as both men are foreign citizens and neither was in the United States at any time relevant to the charged conduct. The indictment asserts jurisdiction by claiming the men were “agents” of a “domestic concern” (KBR) and that certain of the conduct in furtherance of the violations touched U.S. instrumentalities of interstate commerce. In addition to the payments noted above that were routed through U.S. correspondent banks, the complaint identifies two email communications between KBR personnel in the United States and Tesler and Chodan respectively. In one, the government alleges that a KBR salesperson emailed to Tesler details of the consulting agreements with Tri-Star and Consulting Company B, and details of a paid trip to the United States for a Nigerian official. The other email was apparently sent by Chodan to KBR officials in Houston and contained a draft release to French authorities investigating the Bonny Island project that included false statements as to Tesler’s role in assisting the joint venture.

Both Tesler and Chodan fought extradition to the United States. On November 23, 2009 at a hearing in London court, Tesler's attorney argued that extradition would be unfair as he also faces prosecution in Britain by the SFO and that the charged offense was against Nigeria rather than the U.S. A similar argument was made at Chodan's extradition hearing on February 22, 2010. On March 25, 2010, however, District Judge Caroline Tubbs, sitting at Westminster magistrates' court in London, ruled that Tesler's alleged crimes had "substantial connection" to the U.S. and ordered extradition. Tesler indicated he will appeal the ruling. On April 20, 2010, Judge Tubbs similarly ordered extradition for Chodan.

In its press release announcing the charges, the DOJ acknowledged the assistance of the Criminal Division's Office of International Affairs and also noted that "[s]ignificant assistance was provided by ... authorities in France, Italy, Switzerland and the United Kingdom, including in particular the Serious Fraud Office's Anti-Corruption Unit, the London Metropolitan Police and the City of London Police."

ITT

On February 11, 2009, New York-based conglomerate, ITT, settled civil charges with the SEC for violating the books and records and internal controls provisions of the FCPA in connection with improper payments made by its wholly-owned subsidiary, Nanjing Goulds Pumps Ltd. ("NGP"), to Chinese government officials. ITT agreed to pay more than \$1.4 million in disgorgement and prejudgment interest as well as a \$250,000 civil penalty.

According to the SEC Complaint, from 2001 to 2005, NGP, a part of ITT's Fluid Technology division, made approximately \$200,000 in illegal payments to employees of Chinese state-owned entities. Employees and agents of NGP made most of the payments, directly or indirectly, to employees of Design Institutes (some of which were state-owned entities) that assisted in planning large infrastructure projects in China.

The complaint alleges that the payments were inducements to the Design Institute employees to formulate request for proposals ("RFPs") that contained specifications that corresponded to the pumps manufactured by NGP. The Design Institute then evaluated NGP's response to the RFPs and made favorable recommendations to the state-owned entities responsible for the oversight and construction of the projects. In return, if NGP was granted the contract, it made kickback payments either directly or through third parties to the Design Institute employees. Direct payments to the Design Institute employees were sent via wire transfer to the employees' personal bank accounts or through checks made out to "cash." Alternatively, NGP paid inflated commissions to agents with the understanding that some of the commission would be passed on to the employees of the Design Institutes.

NGP improperly recorded the illegal payments, whether made directly or through an agent, as commission payments. These entries were eventually rolled into ITT's financial statements and contained in its filings with the SEC from 2001-2005.

ITT learned of the illicit payments in December 2005 when its Corporate Compliance Ombudsman received an anonymous tip from an NGP employee. The company began

investigating and determined that NGP employees had made illegal payments in connection with at least one contract for each of 32 different state-owned entities that were ITT customers from 2001-2005. Overall, the SEC asserts that illegal bribes paid by employees of NGP resulted in approximately \$1 million of profit for ITT. The SEC “considered that ITT self-reported, cooperated with the Commission’s investigation, and instituted subsequent remedial measures.”

KBR/Halliburton Company

On February 11, 2009, engineering and construction services provider Kellogg Brown & Root LLC (“KBR”), a subsidiary of KBR, Inc. (“KBR, Inc.”), pleaded guilty to a five-count criminal information for violations of the FCPA in connection with an alleged bribery scheme in Nigeria. Simultaneously, KBR, Inc. and its former parent company Halliburton Company (“Halliburton”) settled FCPA books and records and internal controls charges with the SEC. Combined, the companies will pay \$579 million in fines and disgorgement, the largest combined settlement for U.S. companies since the FCPA’s inception and the second-largest anti-corruption settlement in history. In total, as alleged, the bribery scheme involved over \$180 million worth of improper payments used to assist in obtaining or retaining engineering, procurement and construction (“EPC”) contracts valued at over \$6 billion to build liquefied natural gas (“LNG”) facilities on Bonny Island, Nigeria (the “Bonny Island project”).

Under the DOJ settlement, KBR will pay a \$402 million fine in eight installments over the next two years. Due to a prior agreement with its former subsidiary, Halliburton will indemnify KBR, Inc. for \$382 million of that amount, while KBR will pay the remaining \$20 million. KBR will also retain a compliance monitor for three years. In settling with the SEC, Halliburton agreed to be jointly and severally liable with KBR, Inc. and in turn pay \$177 million in disgorgement. Additionally, the SEC settlement requires Halliburton to retain an independent consultant for an initial review and a follow-up review a year later of its “anti-bribery and foreign agent internal controls and record-keeping policies.”

As described below, in September 2008, former KBR CEO Albert “Jack” Stanley pleaded guilty to charges of conspiracy to violate the FCPA and conspiracy to commit mail and wire fraud in connection with the same alleged bribery scheme and other misconduct. He faces up to ten years in prison. However, prosecutors have agreed to a sentence of seven years in prison and \$10.8 million in restitution.

2008

Fiat

On December 22, 2008, Italian vehicle and equipment manufacturer Fiat S.p.A. (“Fiat”), which had American Depository Receipts (“ADRs”) listed on the NYSE until November 2007, agreed to pay \$17.8 million in penalties and disgorgement to the DOJ and SEC to settle charges relating to approximately \$4.4 million in illegal kickbacks paid by three of Fiat’s direct and indirect subsidiaries between 2000 and 2002 in connection with the U.N. OFFP. The DOJ charged Fiat’s Italian subsidiaries Iveco S.p.A. (“Iveco”) and CNH Italia S.p.A. (“CNH Italia”) with conspiracy to commit wire fraud and to violate the books and records provisions of the

FCPA, and charged a third Fiat subsidiary, CNH France S.A. (“CNH France”), with conspiracy to commit wire fraud. Although the DOJ did not bring charges against Fiat itself, the company agreed to pay a \$7 million criminal penalty to the DOJ for the conduct of its subsidiaries and entered into a deferred prosecution agreement, which requires Fiat and its subsidiaries to cooperate with the DOJ and other law enforcement agencies in their investigations of the companies and their operations and to adopt or modify their anti-corruption controls, policies and procedures to include, among other things, (i) the assignment of one or more senior corporate officials to implement and oversee compliance measures, (ii) effective periodic anti-corruption training and required annual certifications for all directors and officers and, where appropriate, agents and business partners, and (iii) appropriate due diligence requirements governing the retention and oversight of agents and business partners.

In contrast to the DOJ, the SEC charged Fiat as well as another of its subsidiaries, CNH Global, a majority-owned Dutch company that owned CNH Italia and CNH France and which also had ADRs listed on the NYSE during the relevant period, with failure to maintain adequate internal controls in relation to the same payments. In settlement of these charges, Fiat agreed to pay \$3.6 million in civil penalties and \$7.2 million in disgorgement and interest.

According to the DOJ, in 2000-01, Iveco and a Lebanese company that acted as its agent and distributor paid approximately \$3.17 million in kickbacks to the Iraqi Government to obtain sixteen contracts worth approximately €1.9 million to supply various trucks and parts under the OFFP. First, on four contracts, Iveco with the Lebanese company acting as its agent inflated the price of the contracts by approximately 10% to 15% characterizing the increase as ASSFs to cover the costs of the kickbacks before submitting them to the U.N. for approval. Then, on twelve additional contracts and in an alleged effort to conceal the kickback payments, the Lebanese company acting as Iveco’s distributor engaged in the same practices. Similarly, in 2000-02, CNH Italia first directly and then indirectly through its Jordanian agent and distributor paid approximately \$1 million to obtain four contracts to supply agricultural equipment worth approximately €12 million, inflating the price of the contracts by 10% before obtaining U.N. approval. Iveco and CNH Italia improperly characterized the transactions in their books and records as “service and commission payments” or “service fees,” respectively; and at the end of Fiat’s fiscal year 2002, the books and records of the two subsidiaries, including the false characterizations of the kickbacks, were incorporated into the book and records of Fiat for the purposes of preparing Fiat’s year-end financial statements.

In 2001, CNH France caused its Lebanese distributor to pay approximately \$188,000 in kickbacks to obtain three contracts worth approximately €2.2 million with the Iraqi Ministry of Oil to supply construction vehicles and spare parts, also inflating the price of the contracts by 10% prior to approval. Apparently, CNH France’s books and records were not incorporated into Fiat’s and thus the DOJ only charged the subsidiary with conspiracy to commit wire fraud.³²

32 It would appear that CNH France’s books and records would have been incorporated into those of CNH Global, which, as noted, had ADRs listed on the NYSE. It is not clear why the DOJ did not charge CNH France with conspiracy to violate the FCPA’s books and records provisions on that basis, or why, contrary to the SEC, it did not charge CNH Global with any violations of the FCPA.

The SEC asserted that Fiat and CNH Global knew or were reckless in not knowing that kickbacks were paid in connection with these transactions, emphasizing that the Fiat subsidiary's altered their relationships with their agents/distributors "to conceal their involvement in the sales of its products to Iraq in which ASSF payments were made" and the "extent and duration of the improper ASSF payments." As a result, the SEC charged that Fiat and CNH Global failed to maintain adequate internal controls or properly maintain their books and records.

Siemens

On Monday, December 15, 2008, United States federal prosecutors and German regulators simultaneously ended their lengthy investigations into Siemens Aktiengesellschaft ("Siemens") and its worldwide operations by announcing settlements that included over \$1.3 billion in fines and disgorgement in connection with improper payments in Argentina, Bangladesh, China, Iraq, Israel, Mexico, Nigeria, Russia, Venezuela and Vietnam. Taking into account a previous settlement with the Munich Public Prosecutor's Office, Siemens has now incurred fines of over \$1.6 billion in connection with one of the most highly publicized and closely-watched international bribery investigations carried out to date.

Siemens, a German corporation with its executive offices in Munich, Germany, is one of the world's largest industrial and consumer products manufacturers. Through its operating entities and subsidiaries, Siemens engages in a variety of activities including developing, constructing, selling and servicing telecommunications equipment and systems; power generation, transmission, and distribution equipment and systems; transportation equipment and systems; medical equipment and systems; and industrial and traffic equipment and systems. Siemens employs over 428,000 people and operates in approximately 190 countries worldwide.

Prior to a recent reorganization, Siemens operated in thirteen principal business groups: Communications ("Com"), Siemens Business Services ("SBS"), Automation & Drives ("A&D"), Industrial Solutions and Services ("I&S"), Siemens Building Technologies ("SBT"), Power Generation ("PG"), Power Transmission and Distribution ("PTD"), Transportation Systems ("TS"), Siemens VDO Automotive ("SV"), Medical Solutions ("Med"), Osram Middle East, Siemens Financial Services ("SFS"), and Siemens Real Estate ("SRE"). Siemens became an "issuer" for purposes of the FCPA on March 12, 2001 when its American Depository Shares began trading on the NYSE.

In connection with the U.S. settlements, Siemens and three of its subsidiaries incurred total fines of \$800 million. Siemens was fined \$448,500,000 by the DOJ and three of its subsidiaries – Siemens Argentina, Siemens Bangladesh and Siemens Venezuela – were each fined \$500,000. Under its settlement with the SEC, Siemens was required to disgorge \$350 million. The U.S. settlements also require Siemens to implement a compliance monitor for a period of four years, and the company has chosen former German Finance Minister Dr. Theo Waigel as the first ever non-U.S. national to serve in that capacity. Siemens is also required to hire an "Independent U.S. Counsel" to counsel the monitor. Although the use of monitors has increased markedly in recent years, the four year term is the longest such term instituted in

connection with an FCPA settlement to date, and the dual monitor structure also appears to be novel.

The DOJ plea agreement charged Siemens with criminal violations of the FCPA's books and records and internal controls provisions, but did not include a claim that Siemens violated the FCPA's anti-bribery provisions. The DOJ charged two Siemens subsidiaries – Siemens Venezuela and Siemens Bangladesh – with conspiracy to violate the FCPA's anti-bribery and books and records provisions, while the third subsidiary – Siemens Argentina – was charged only with conspiracy to violate the statute's books and records provision. The SEC charged Siemens with violations of the FCPA's anti-bribery, books and records and internal controls provisions.

In its settlement with the Office of the Prosecutor General in Munich, Siemens agreed to pay a fine of €395 million (approximately \$540 million), marking the end of legal proceedings against the company (but perhaps not against individuals) in Germany. In October 2007, Siemens paid a fine of €201 million (approximately \$285 million) to the Office of the Prosecutor General in Munich for activities relating to the company's former Com group.

- *Historical Context*

In a break from past practice, the SEC and DOJ both provided significantly more detail regarding the historical context of Siemens's conduct. As the charging documents describe, Siemens traces its origins to the mid-1800's and has long been one of Germany's most successful conglomerates. Following World War II, the company was left with many of its international facilities destroyed and found it difficult to compete for business in developed, Western nations. As a result, according to the SEC, Siemens focused its attention on developing economies where "corrupt business practices were common."

The DOJ classified what it described as "Siemens' historical failure to maintain sufficient internal anti-corruption controls" into three periods — pre-1999, 1999-2004, and 2004-2006. The SEC used approximately the same classifications. Prior to 1999, at a time when Siemens was not listed on the NYSE and bribery was not only legal but tax deductible under German law, the government describes a period where bribery was commonplace at Siemens. The DOJ indicates that Siemens operated in a "largely unregulated environment" and conducted business in many countries where "corruption was endemic."

In 1999, the legal and regulatory environment in which Siemens operated began to change. In February 1999, the German law implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") came into force. As noted, the company became listed on the NYSE in March 2001. During this second period, Siemens took certain steps, such as the creation of a "paper program" against corruption, that the government characterized as largely ineffective at changing the company's past business practices. It established a new position for a Compliance Officer, yet the office was severely understaffed and the officer worked only part time on compliance issues. The company issued principles and recommendations, but not mandatory policies, for

agreements with business consultants. In addition, Siemens considered, yet rejected, the creation of a company-wide list of agents and consultants in order to review these relationships. Among the investigations that the company faced during this period was one by the Milan, Italy public prosecutor's office into €6 million in potentially improper payments by Siemens to the Italian energy company Enel. The DOJ underscored the fact that, in connection with the Enel investigation, a U.S. law firm informed Siemens that there was "ample basis for either the [SEC] or [DOJ] to start at least an informal investigation of the company's role in such a matter." Further, the DOJ emphasized that the U.S. law firm advised Siemens that U.S. enforcement officials would expect an internal investigation to take place, and suggested that Siemens immediately review and assure proper functioning of its FCPA compliance program, including disciplining any employees involved in wrongdoing.

During the third period, 2004-2006, the government alleges that members of senior management largely failed to respond to red flags that would have disclosed improper conduct. For example, the SEC notes that in the Fall of 2003, Siemens' outside auditor identified €4.12 million in cash that was brought to Nigeria by Com employees. A Siemens compliance attorney conducted a one-day investigation into the matter and no disciplinary action was taken against any of the involved employees, despite evidence that the event was not an isolated occurrence. The charging documents indicate that senior management failed to follow up on government investigations in numerous countries and failed to take appropriate disciplinary action against potentially culpable employees. Specifically, the DOJ asserted "[f]rom in or about 2006, in addition to learning of the corruption issues involving Siemens in Nigeria, Italy, Greece, Liechtenstein, and elsewhere, Siemens's senior management became aware of government investigations into corruption in Israel, Azerbaijan, Taiwan, and China. Nevertheless, Siemens ZV members and other senior management failed to adequately investigate or follow up on any of these issues." Throughout this period, the Siemens compliance apparatus lacked sufficient resources and was faced with an inherent conflict in its dual roles of defending the company against prosecution and preventing and punishing compliance breaches.

In November 2006, the Munich Public Prosecutor's Office conducted raids on multiple Siemens offices and homes of Siemens employees as part of an investigation of possible bribery of foreign public officials and falsification of corporate books and records. Shortly after the raids, Siemens disclosed to the DOJ and SEC potential violations of the FCPA and initiated a "sweeping global investigation."

The investigative efforts undertaken by outside counsel and forensic accountants resulted in over 1.5 million hours of billable time throughout 34 countries. The SEC and DOJ noted, in particular, (i) Siemens' use of an amnesty and leniency program to encourage cooperation with the internal investigation; (ii) the company's extensive document preservation, collection, testing and analyses, which the DOJ described as "exemplary" and "a model" for other companies seeking to cooperate with law enforcement; and (iii) its "extraordinary" reorganization and remediation efforts.

Reportedly, the internal investigation and related restructurings cost the company more than \$1 billion.

- Challenged Payments, Arrangements, and Conduct

The breadth and scope of the improper payments made by Siemens is matched only by the audacity of certain of the described conduct. Siemens is alleged to have made improper payments in connection with, among others, power plant projects in Israel; metro train and signaling device contracts in China; telecommunications projects in Nigeria; telephone service contracts in Bangladesh; identity card projects in Argentina; and medical device contracts in Vietnam, China and Russia. Siemens entities are also alleged to have made improper “after service sales fee” payments in connection with the Iraqi Oil for Food Program.

In total, the SEC alleges that Siemens made 4,283 improper payments worth over \$1.4 billion to government officials in order to obtain or retain business. The SEC also indicates that Siemens made 1,185 payments that were not subject to proper controls and were used in connection with either commercial bribery or embezzlement. On the fourteen categories of payment schemes detailed within the SEC’s complaint, Siemens is alleged to have earned over \$1.1 billion in profit.

Although by no means exhaustive of the company’s conduct, the schemes described below are illustrative of the type of activities attributed to the parent company that pervade government documents.

- Oil-for-Food Programme

Although Siemens’ conduct is much more pervasive than any associated with a previous Oil-for-Food Programme settlement, the DOJ requested that its settlements with Siemens and its three subsidiaries be filed as “related cases” to the DOJ’s other OFFP cases. According to charging documents, from 2000 through 2002, four Siemens entities – Siemens France, Siemens Turkey, Osram Middle East and GTT, each of which was wholly owned by Siemens or one of its subsidiaries – made improper “after service sales fee” payments totaling over \$1.7 million to obtain 42 contracts with Iraqi ministries that earned a gross profit of over \$38 million. The Siemens France, Siemens Turkey and GTT contracts were all with the Iraqi Ministry of Electricity, and each entity used agents to facilitate the payment of ASSFs equal to approximately 10% of the contract value through Jordanian banks. After the agent made the requisite payments, it would invoice the Siemens entity using sham invoices for “commissions.” In connection with the GTT contracts, GTT documents budgeted a commission of 20% for the agents the company used, understanding that half of that amount would be used to make the improper payments. In fact, after the war began in 2003, the U.N. requested that GTT decrease the value of its contracts by 10% to remove the ASSF component, but GTT nevertheless caused improper payments to be made by reimbursing its agents for kickbacks already paid. The Osram Middle East payments were to the Iraqi Ministry of Oil, and operated in a largely similar manner, with payments being facilitated through an agent. In all instances, the payments were improperly characterized on the relevant subsidiary’s books and records, which were incorporated into Siemens’s year-end financial statements.

- Nigeria

Siemens' former Com group (one of the company's largest) made approximately \$12.7 million in "suspicious" payments in connection with Nigerian projects. According to the SEC, \$4.5 million of those were paid as bribes in connection with four telecommunications projects with Nigerian government customers valued at over \$130 million. A high-ranking official of a Siemens Nigerian subsidiary estimated that corrupt payments between 2000 and 2001 commonly reached 15-30% of the contract value. Generally, these payments were documented in fictitious consulting agreements and were often hand-delivered in cash-packed suitcases. Requests for such "commissions" were forwarded from the Siemens subsidiary's CEO to Siemens' headquarters in Germany. Approximately \$2.8 million in bribes were routed through a bank in Maryland in the name of the wife of a former Nigerian Vice-President. The Vice-President's wife also served as the representative of a business consultant that entered into sham contracts with Siemens for "supply, installation, and commissioning" services that were never performed. In addition to the above payments, Siemens apparently purchased \$172,000 in watches for Nigerian officials believed to be the then-President and Vice President.

- Russia

The SEC describes two separate schemes involving Siemens' Russian operations. First, from 2004 to 2006, Siemens' Industrial Solutions and Services group and a regional Russian company known as OOO Siemens paid over \$740,000 in bribes to government officials in connection with a \$27 million traffic control system project in Moscow funded by the World Bank. Siemens paid a business consultant who simultaneously worked (at Siemens' recommendation) as a technical consultant for the quasi-governmental unit in charge of the project, the Moscow Project Implementation Unit ("MPIU"). Siemens proceeded to pay \$313,000 to three entities associated with the consultant, approximately \$140,000 of which the SEC claimed was in exchange for favorable treatment during the tender process. The consultant then utilized his position to (i) create tender specifications favorable to Siemens; (ii) provide tender documents to Siemens before their official publication; (iii) evaluate project bids in a way that ensured Siemens would be awarded the contract; and (iv) assist during the implementation phase of the contract. Siemens also colluded with a competitor who inflated its bid to ensure Siemens would win the contract. Siemens then hired the competitor at an inflated rate and also hired two of the competitor's consortium members as subcontractors on the project. Siemens paid approximately \$2.7 million to the two subcontractors on sham contracts, and used the subcontractors to funnel at least \$600,000 in payments to senior officials at the MPIU.

In a separate scheme involving Russia, Siemens' MED unit allegedly made over \$55 million in improper payments to a Dubai-based consultant between 2000 and 2007 in connection with medical equipment sales in Russia. The consultant was apparently used as an intermediary for bribes to government-owned customers, such as public hospitals, in Russia. In at least one instance – which consisted of over \$285,000 in payments being made in connection with a \$2.5 million contract – payments were routed through both the Dubai consultant and a second consultant registered in Des Moines, Iowa. The corruption was so pervasive within this unit that

senior Siemens officials estimated that up to 80% of the MED unit's business in Russia involved illicit payments.

- China

Siemens' Power Transmission and Distribution ("PTD") group paid approximately \$25 million in bribes to Chinese government officials in connection with two high voltage transmission lines projects worth a combined \$838 million. These payments were made through several intermediaries including a consulting firm controlled by a former Siemens employee and were paid to entities associated with a Chinese business consultant who held a U.S. passport and resided in the U.S. Siemens PTD managers in Germany were alleged to have approved the payments with the knowledge they would be shared with government officials.

- Israel

Siemens Power Generation ("Siemens PG") paid approximately \$20 million in bribes to a former Director of the Israel Electric Company, a state-owned business, in connection with four contracts to build and service power plants. The payments were routed through a company owned by the brother in-law of the CEO of Siemens' Israeli subsidiary. The brother in-law's company was in fact a clothing company based in Hong Kong. Yet, it was engaged to "identify and define sales opportunities, provide market intelligence," and support contract negotiations. Certain of the funds passed through U.S. bank accounts.

In addition to the above conduct, as noted above, the DOJ also entered into plea agreements with three Siemens subsidiaries – Siemens Venezuela, Siemens Bangladesh and Siemens Argentina. Siemens Venezuela and Siemens Bangladesh pleaded guilty to conspiracy to violate the FCPA's anti-bribery and books and records provisions. Siemens Argentina pleaded guilty to a single count of conspiracy to violate the FCPA's books and records provision. All three entities are described in charging documents as "person[s] other than an issuer or domestic concern," and thus were required to make "use of the mails or any means or instrumentality of interstate commerce or [] do any other act in furtherance of" prohibited conduct "while in the territory of the United States" to satisfy the FCPA's jurisdictional requirements.³³ It appears that the DOJ failed to charge Siemens Argentina with an anti-bribery violation because it was not (unlike in the case of Siemens Venezuela and Siemens Bangladesh) able to establish a sufficiently "strong nexus" between its alleged improper payments and the U.S. The conduct for which these entities were charged is summarized below.

33 According to DOJ guidance, the Department has stated that it takes an even more expansive view of the statutory language applicable to "person[s] other than an issuer or domestic concern." The DOJ has interpreted this provision as allowing for jurisdiction in circumstances where a non-U.S. party "causes an act to be done within the territory of the United States by any person acting as [the foreign] company's or national's agent." See U.S. Attorney's Criminal Resource Manual, § 1018, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm01018.htm (last visited June 4, 2010) (emphasis in original).

- Venezuela

Siemens Venezuela was a wholly-owned subsidiary headquartered in Caracas, Venezuela that contracted for and managed regional Siemens projects. Beginning around 1997, Siemens Venezuela became involved in bidding for two mass transit projects – the MetroMara and ValMetro projects. Beginning at least as early as 2001, Siemens Venezuela began making payments (estimated to total \$16.7 and \$18.7 million by the SEC and DOJ, respectively) to Venezuelan government officials in relation to the construction of the two metro transit systems that generated approximately \$642 million in revenue for Siemens. In its charging documents, the DOJ alleges several connections to the United States although it does not explicitly tie these connections to the improper conduct. For example, the DOJ indicates that a separate Siemens entity headquartered in Sacramento, California performed design and construction work on behalf of the contract. In addition, one of the agents used as a conduit for payments controlled four entities, three of which had offices in the U.S., and a consulting firm also used as a conduit was headquartered in Georgia.

By contrast, in describing the four different schemes used in connection with the Venezuela payments, the SEC includes additional details more specifically alleging ties to the U.S., at least in certain instances. The first involved off-book bank accounts in Panama and Miami controlled by two CEOs and two CFOs of Siemens' regional subsidiary, out of which payments to Venezuelan officials were made. One of the regional CFOs routinely destroyed account statements to cover up the scheme. The second scheme involved payments to U.S.-based entities controlled by a Siemens consultant known as a political “fixer” in Venezuela. The consultant, who provided no legitimate work, funneled the money to high-ranking government officials with influence over the projects. The third scheme, authorized by a former division CFO, involved using a Cyprus-based consultant as an intermediary. Siemens and the consultant entered into sham agreements purportedly related to other projects and the consultant used the money for bribes related to the ValMetro project. The final scheme involved sham agreements with a Dubai-based consultant, which purported to supply equipment. In fact, a separate company provided the equipment. When this consultant came under scrutiny during an investigation of Siemens' activities in Italy, the division CFO simply moved the contract to a separate Dubai-based consultant who continued the scam. According to the DOJ, the former President of Siemens Venezuela kept a hand written document that recorded payments through these various intermediaries.

- Bangladesh

Siemens Bangladesh was a wholly-owned subsidiary of Siemens headquartered in Dhaka, Bangladesh that was responsible for, among other things, contracting for and managing regional projects for Siemens. Beginning in 2000, Siemens Bangladesh became involved in bidding for a national cellular mobile telephone network for the Bangladeshi government known as the BTTP Project. The Bangladeshi government issued two initial tenders for the BTTP Project in 2000 and 2001. However, each of these tenders was cancelled. In April 2001, Siemens Bangladesh executed letters of authority granting two “consultants,” with which they had a fifteen year history of success, the authority to carry out “business promotion activities” with respect to the

BTTP Project. Siemens Bangladesh also entered into oral agreements with the consultants at this time to pay them 10% of the BTTP Project value. Beginning shortly thereafter, Siemens Bangladesh began making payments to the consultants, often through other Siemens entities or intermediaries. In December 2002, Siemens discovered that its bid for the third tender of the BTTP Project had been rejected on technical grounds. It enlisted the assistance of a third consultant, described by the DOJ as a dual U.S. and Bangladeshi citizen, to “rescue” it from this disqualification. Throughout the next several years, Siemens Bangladesh made payments, through intermediaries, to the three consultants knowing that all or part of the payments would be passed on to members of the Bangladeshi government evaluation committee or their relatives in order to obtain favorable treatment for Siemens’s bid. The DOJ states that “at least one payment to be made to each of these purported consultants” came from a United States bank account. The SEC noted that “[m]ost of the money paid to the business consultants was routed through correspondent accounts in the United States.” In addition, at one point, one of the consultants moved to the United States in 2004. Siemens Bangladesh continued to funnel payments through him but used a Hong Kong bank account instead, ostensibly to avoid a U.S. connection. In June 2004, Siemens was awarded a portion of the BTTP Project worth over \$40 million. Between May 2001 and August 2006, Siemens Bangladesh is alleged to have made over \$5.3 million in payments (the majority of which were through the three consultants) in connection with the Bangladeshi BTTP Project.

- Argentina

Siemens Argentina was a controlled (but apparently not wholly-owned) subsidiary of Siemens with its headquarters in Buenos Aires, Argentina that contracted for and managed regional projects for Siemens. Beginning in the 1990s, Siemens Argentina became involved in a national identity card project in Argentina valued at approximately \$1 billion. In February 1998, Siemens Argentina and its affiliates were awarded the national identity card project. Shortly thereafter, in September 1998, the Siemens subsidiary began making and promising payments to a “consulting group” with the understanding that these payments would be passed on to high-level Argentine officials with influence over the national identity card project. Regardless, in 2001, the national identity project was cancelled, resulting in disputes between Siemens Argentina, the Argentine government and the consulting group that Siemens was using to funnel improper payments. In response to claims by the Argentine consulting group for outstanding payments, Siemens Legal Department in Munich advised Siemens Argentina that payments to the Argentine consulting group were potentially problematic. Despite this advice, in July 2002, Siemens Argentina directed over \$5.2 million in payments to be made through a Uruguayan bank account based on a backdated invoice for purported consulting services in Chili and Uruguay that were never provided. These payments were made to partially offset the outstanding payments claimed by the Argentine consulting group.

In connection with the payment dispute, Siemens officials met with officials of the consulting group in the United States on at least one occasion. Despite the payments and attempts to negotiate a resolution, the consulting group brought an arbitration claim against Siemens Argentina, which settled in 2006 for \$8.8 million. An explicit condition of the settlement was that no information regarding the claims could be released to the public. In total,

Siemens Argentina is alleged to have paid or caused to be paid over \$15.7 million directly to entities controlled by members of the Argentine government; over \$35 million to the Argentine consulting group; and over \$54 million to other entities. The SEC claims, although it does not provide specifics, that certain payments were routed “through U.S. bank accounts based on fictitious invoices for non-existent services.” Notably, in February 2007, Siemens was awarded \$217 million in a separate, International Center for Settlement of Investment Disputes (“ICSID”) arbitration arising out of the national identity card project dispute with the Argentine government for its cancellation of the project. ICSID does not have jurisdiction over claims based on contracts obtained through corruption.

- Payment Mechanisms and Schemes

The improper payments (both described above and more generally) were made using a variety of mechanisms, including the following:

- Widespread Use of Business Consultants and Intermediaries: According to the SEC, Siemens paid over \$980 million to third parties (all but \$27.5 of which occurred before November 15, 2006) in order to funnel payments to government officials. Although many of these payments were ostensibly made under “consulting” agreements, in reality the entities to which they were made provided little or no service in return for the payments, but were rather used as conduits to make improper payments to foreign officials.
- Slush Funds: The SEC alleges that approximately \$211 million in improper payments were made through slush funds – bank accounts held in the name of present or former Siemens employees or shell companies.
- Cash: According to the SEC, Siemens employees were able to obtain large amounts of cash and cash equivalents that they could then use to pay government officials or intermediaries. The DOJ describes former Siemens telecommunications employees routinely filling up suitcases of cash from various cash desks – typically from the Siemens Real Estate group.
- Intercompany Accounts: Siemens was also able to mask payments by making them to accounts maintained in the name of unconsolidated Siemens entities around the world. The SEC alleges that Siemens used these internal accounts to funnel over \$16.2 million to third parties. A Siemens Corporate Finance Financial Analyst who raised concerns about these accounts in 2004 was promptly phased out of his job.
- Confidential Payment System: The DOJ indicates that at least one Siemens business unit used a confidential payment system that was outside of the normal accounts payable process and allowed for flexibility as to which project to charge for the payment. The DOJ alleges that over \$33 million was paid to business consultants and agents from 2001 through 2005 using the confidential system.

- Individual Charges

At least twelve individuals have been prosecuted by German authorities for their involvement in Siemens' misconduct as far back as 2007. So far, all have received probation or suspended sentences, as well as fines. Among them included Reinhard Siekazcek, who admitted to setting up slush funds while a manager at Siemens' ICN fixed-line telephone network division. Prosecutors alleged Siekazcek funneled money through various shell companies for use as bribes in order to secure various government and private contracts abroad over a period of years. Two of his assistants, Ernst Keil-von Jagemann and Wolfgang Rudolph, were later convicted of accessory to breach of trust. Keil-von Jagemann received two years of probation and a fine of €12,000, while Rudolph received 9 months of probation and was fined €20,000.

Most recently, on April 20, 2010, a Munich court found two former Siemens managers guilty of breach of trust and abetting bribery for their roles in the scandal. Michael Kutschenreuter, the former financial head of Siemens' telecommunication unit, received two years probation and a fine of €160,000. Hans-Werner Hartmann, the former head of accounting at the same unit, was given a suspended sentence of 18 months and ordered to pay €40,000 to charity. Kutschenreuter is the most senior Siemens executive to be found guilty of corruption; he admitted that he covered up slush funds and other corrupt practices by Siemens employees related to contracts in Nigeria and Russia.

Misao Hioki

On December 10, 2008, Misao Hioki, the former general manager of Bridgestone Corp.'s International Engineered Products ("IEP") Department, pleaded guilty to conspiracy to violate the Sherman Act and conspiracy to violate the FCPA. Hioki, a Japanese national, was charged for his role in a conspiracy to rig bids, fix prices and allocate market shares of sales of marine hoses in the United States and elsewhere and also for his role in a conspiracy to violate the FCPA by making corrupt payments to government officials in Latin America.

The plea results from a broader investigation into a bid-rigging, price-fixing and allocation conspiracy involving marine hose manufacturers and a consultant who acted as the coordinator of the cartel. Hioki was one of eight foreign executives arrested on May 2, 2007 in the United States following their participation in an alleged cartel meeting in Houston. He is the ninth individual to plead guilty in the hose-bid rigging investigation and first to plead guilty in the alleged FCPA conspiracy.

The DOJ charged that Hioki, along with his co-conspirators, negotiated with employees of government-owned businesses in Argentina, Brazil, Ecuador, Mexico and Venezuela to make corrupt payments in order to secure business for his company and its U.S. subsidiary. Hioki then approved the payments through local sales agents. The payments were coordinated through the U.S. subsidiary's offices in the United States. Hioki was sentenced to serve two years in jail and to pay an \$80,000 criminal fine.

Aibel Group Ltd.

On November 21, 2008, Aibel Group Ltd. (“Aibel Group”), a United Kingdom corporation, pleaded guilty to conspiring to violating the antibribery provisions of the FCPA in connection with allegedly corrupt payments in Nigeria. The company further admitted that it was not in compliance with a deferred prosecution agreement it had entered into with the DOJ in February 2007 regarding the same underlying conduct.

Aibel is owned by Herkules Private Equity Fund and Ferd Capital, both of Norway. They acquired the company in June 2007 from a private equity group led by Candover, 3i and JPMorgan Partners, which bought Vetco Gray UK Ltd. and its affiliate Aibel in July 2004 from ABB Oil & Gas. When its current Norwegian owners acquired Aibel, it was already subject to the deferred prosecution agreement. The new owners were required by the DOJ to ensure the company’s compliance with the terms of the deferred prosecution agreement after the acquisition.

Aibel Group agreed to pay a \$4.2 million criminal fine and to cooperate with the DOJ and other law enforcement agencies, including providing the DOJ with access to all Aibel Group directors, officers, employees, agents and consultants for interviews and testimony regarding the improper payments; providing copies of relevant documents and records relating to the improper payments; submitting written reports twelve and twenty-four months after the settlement date by its Norwegian counsel describing the company’s efforts to put in place controls and systems to comply with Norwegian and other applicable anti-bribery laws; and, if it determines that there is a reasonable basis to believe any of its subsidiaries, affiliates, officers, directors or employees have violated Norwegian criminal law, reporting such violations to the appropriate Norwegian authorities.

Beginning in February 2001, Aibel Group’s predecessor company Vetco Limited and several affiliated companies began providing engineering and procurement services and equipment for Nigeria’s first deepwater oil drilling operation, known as the Bonga Project. Aibel Group admitted to conspiring with others, most prominently, an unidentified international freight forwarding service (believed to be Panalpina), to make at least 378 corrupt payments between September 2002 and April 2005 totaling approximately \$2.1 million to Nigerian Customs officials in order to provide preferential customs clearance treatment for the Aibel Group’s shipments. The freight forwarding company’s relationship with Aibel Group was coordinated through an affiliated company’s Houston offices.

This marks the third time since July 2004 that entities affiliated with Aibel Group have pleaded guilty to violating the FCPA. As described further below, in 2004, Vetco Gray UK Ltd. and an affiliated company pleaded guilty to violating the FCPA by paying bribes to officials of Nigeria’s National Petroleum Investment Management Services. In February 2007, three wholly-owned subsidiaries of Vetco International Ltd., pleaded guilty to violating the antibribery provisions of the FCPA, resulting in a \$26 million criminal fine.

Shu Quan-Sheng

On November 17, 2008, Shu Quan-Sheng (“Shu”), a physicist in Newport News, Virginia, pleaded guilty to charges that he illegally exported space launch technical data and defense services to the People’s Republic of China and offered bribes to Chinese government officials. Shu, a native of China and a naturalized U.S. citizen, is the President, Secretary and Treasurer of AMAC International Inc. (“AMAC”), a high-tech company based in Newport News that also maintains offices in Beijing.

Shu pleaded guilty to a three-count criminal information. The first two counts alleged that Shu violated the Arms Export Control Act (“AECA”) by (i) providing the PRC with assistance in the design and development of a cryogenic fueling system for space launch vehicles from January 2003 through October 2007, and (ii) willfully exporting to the PRC controlled military technical data, in each instance without first obtaining the required export license or written approval from the State Department.

The third count alleged that Shu violated the FCPA when he offered, paid, promised and authorized the payment of bribes to officials of China’s 101st Research Institute, one of the research institutes that makes up the China Academy of Launch Vehicle Technology, to obtain for a French company that Shu represented a contract for the development of a 600 liter per hour liquid hydrogen tank system. In 2006, Shu allegedly offered “percentage points” worth a total of \$189,300 to PRC officials on three separate occasions. In January 2007, the \$4 million project was awarded to the French company. On April 7, 2009, Shu was sentenced to 51 months in prison.

Nexus Technologies, Inc

On September 4, 2008, a federal grand jury in the Eastern District of Pennsylvania returned an indictment charging Nexus Technologies, Inc. (“Nexus”) and four of its employees with one count of conspiracy to violate the FCPA and four substantive counts of violating, or aiding and abetting violations of, the FCPA. On September 5, 2008, the four individuals, Nam Nguyen (“Nam”), Joseph Lukas (“Lukas”), Kim Nguyen (“Kim”) and An Nguyen (“An”), were arrested in connection with the charges. Lukas pleaded guilty to violating and conspiring to violate the FCPA on June 29, 2009. On March 16, 2010, Nexus pleaded guilty to conspiracy, violations of the FCPA, violations of the Travel Act in connection with commercial bribes and money laundering. Also on March 16, Nam and An each pleaded guilty to conspiracy, a substantive FCPA violation, a violation of the Travel Act and money laundering, while Kim pleaded guilty to conspiracy, a substantive FCPA violation and money laundering.

Nexus, a Delaware company with offices in New Jersey, Pennsylvania and Vietnam, is an exporter of a variety of equipment, including underwater mapping equipment, bomb containment equipment, helicopter parts, chemical detectors, satellite communication parts and air tracking systems. The company purchases goods from United States vendors and resells them to customers in Vietnam that include the commercial arms of several government agencies, including the Vietnam Ministry of Tourism, the Ministry of Industry and the Ministry of Public

Safety. The indictment describes these entities as “departments, agencies, or instrumentalities of the Government of Vietnam” making their employees “foreign officials” for purposes of the FCPA.

Nam was the founder and president of Nexus, and was primarily responsible for finding and negotiating with the company’s Vietnam customers. Lukas was involved in a joint venture with Nexus until around 2005, and was responsible for overseeing the company’s New Jersey office and coordinating with potential United States vendors Kim and An were both Nexus employees, and were responsible for, among other things, identifying potential United States suppliers. In addition, Kim handled certain of Nexus’s finances, including money transfers, while An arranged for goods shipments from suppliers to freight forwarders and customers.

From about 1999 through May 2008, Nexus and the defendants made payments to Vietnam officials in order to obtain or retain contracts associated with a variety of products, including safety equipment, computer workstations and air traffic equipment. The payments were typically described as “commission” payments, and were improperly recorded in Nexus’s books and records as “subcontract fees” or “installment payments.” After negotiating a contract and payment arrangement with a Vietnamese customer, Nam instructed Nexus employees, including the defendants, to facilitate the payment by wire transfer from Nexus’s bank account in Philadelphia, Pennsylvania. The payments often were made to the Hong Kong bank account of an unaffiliated Hong Kong company in order to conceal the fact that they were intended for Vietnamese government officials. Nexus described the ultimate recipients as “supporters,” and used the payments not only to generate business but also to obtain confidential information and engage in bid rigging.

For example, on one occasion, in February 2004, Nexus entered into a contract with a commercial unit of the Ministry of Transport for over \$14,000 worth of computer workstations. In August 2004, Nam instructed Kim to send a commission payment through the Hong Kong company for the benefit of a foreign official connected with the contract. In an e-mail communication, Nam referenced the fact that the commercial agency could have purchased the same equipment cheaper from a local dealer, but was purchasing from Nexus because of its willingness to “add into the contract a fat markup for [the Vietnamese agency].” In total, Nexus and the Nguyens admitted to making over \$250,000 improper payments to Vietnamese officials to obtain or retain business between 1999 and 2008.

Nexus faces a maximum fine of \$27 million. Nam and An each face a maximum sentence of 35 years in prison. Kim faces a maximum sentence of 30 years in prison. Lukas faces up to 10 years in prison and a possible \$350,000 fine.

Albert Jack Stanley

On September 3, 2008, Albert “Jack” Stanley, former CEO and Chairman of KBR, pleaded guilty to two-count criminal information charging him with one count of conspiracy to violate the FCPA and one count of conspiracy to commit mail and wire fraud in connection with his participation in a bribery scheme related to the Bonny Island project in Nigeria. In a related

civil proceeding, Stanley agreed, without admitting or denying the SEC's allegations, to the entry of a final judgment enjoining him from violating the FCPA's anti-bribery, books and records and internal control provisions. Further, Stanley agreed to cooperate with law enforcement authorities in the ongoing investigations.

In addition to the FCPA anti-bribery, books and records and internal control charges related to the Nigeria bribery scheme underlying the KBR/Halliburton settlements, Stanley also pleaded guilty to conspiracy to commit mail and wire fraud in connection with a separate scheme involving a former Kellogg employee, described in the DOJ's criminal information as the "LNG Consultant." From around 1977 through 1988, the LNG Consultant was employed by Kellogg and responsible for LNG and other projects in the Middle East. Beginning in 1988, he left Kellogg and became a consultant for Kellogg and other firms.

Beginning around 1991 and continuing through 2004, Stanley and the LNG Consultant, using various corporate vehicles, allegedly entered into a series of lucrative contracts purportedly for consulting services in connection with LNG projects. In return for the consulting contracts, the LNG Consultant agreed to make "kickback" payments to bank accounts owned or controlled by Stanley worth millions of dollars. Over the course of the scheme, Stanley caused Kellogg and KBR to make payments of over \$68 million to the LNG Consultant. For his role in the scheme, Stanley received approximately \$10.8 million in kickbacks.

Under the DOJ plea agreement, Stanley faces as much as ten years in prison and a fine of twice his pecuniary gain for his actions, although prosecutors have agreed that a prison sentence of seven years "is the appropriate disposition of the case." In addition, Stanley is required to pay restitution to KBR in the amount of \$10.8 million to compensate for his kickback scheme with LNG Consultant. Sentencing is currently scheduled for September 23, 2010.

Con-Way, Inc.

On August 27, 2008, Con-Way, Inc. ("Con-Way"), a publicly-traded international freight transportation and logistics services company based in San Mateo, California, settled civil charges with the SEC for violating the FCPA's books and records and internal control provisions in connection with hundreds of small payments totaling over \$417,000 made by one of Con-Way's former subsidiaries to Philippine customs officials and to officials of several majority foreign-state owned airlines. Con-Way agreed to pay a \$300,000 fine to resolve the matter. In a related administrative proceeding, the SEC issued a settled cease-and-desist order against Con-Way in connection with the same payments.

Prior to 2004, Menlo Worldwide Forwarding, Inc. ("Menlo Forwarding"), a wholly-owned, United States subsidiary of Con-Way, held a 55% voting interest in Emery Transnational, a Philippines-based entity that was engaged in shipping and freight operations in the Philippines. During the relevant period, Con-Way was named CNF, Inc., and Menlo Forwarding was named Emery Air Freight Corporation. In 2004, Con-Way sold Menlo Forwarding and Emery Transnational to United Parcel Service of America, Inc.

According to the SEC, between 2000 and 2003, Emery Transnational made over \$244,000 in payments to officials at the Philippine Bureau of Customs and Philippine Economic Zone Area to influence various customs decisions. The payments were primarily used either to (i) induce the officials to violate customs regulations and allow Emery Transnational to store shipments longer than otherwise permitted, or (ii) settle disputes with customs officials or induce them to reduce or not impose otherwise legitimate fines. Emery Transnational employees made these payments from monies obtained by submitting cash advance requests that were not supported by receipts.

In addition, Emery Transnational made payments totaling at least \$173,000 to officials at fourteen state-owned airlines that did business in the Philippines either to (i) induce the airline officials to reserve space improperly for Emery Transnational on airplanes (“weight shipped” payments); or (ii) induce airline officials to under-weigh or consolidate shipments, thus lowering Emery Transnational’s shipping costs (“gain share” payments). Checks reflecting the amount of the improper payments were issued to Emery Transnational managers, who then distributed cash payments to the airline officials. According to the SEC, Emery Transnational did not identify the true nature of the payments to the customs and state-owned airline officials in its books and records.

The SEC determined that Con-Way and Menlo Forwarding exercised “little supervision or oversight over Emery Transnational.” The companies required only that Emery Transnational periodically report its net profits to Menlo Forwarding, from which Emery Transnational paid Menlo Forwarding an annual dividend of 55%. The companies (i) did not ask for or receive any additional financial information from Emery Transnational, or (ii) maintain or review the books of the Philippine company, which “should have reflected the illicit payments made to foreign officials.” In determining to accept Con-Way’s settlement offer, the SEC “considered the remedial acts undertaken by Con-Way and cooperation afforded the Commission staff.”

Faro Technologies, Inc.

On June 5, 2008, Faro Technologies, Inc. (“Faro”), a publicly-traded company specializing in computerized measurement devices and software, settled civil charges with the SEC for violating the FCPA’s anti-bribery, books and records and internal controls provisions in connection with improper payments to Chinese government officials. In the SEC proceeding, Faro agreed to cease and desist from future violations, hire an independent compliance monitor for a period of two years, and pay approximately \$1.85 million in disgorgement and prejudgment interest. In a related proceeding, Faro entered into a two-year non-prosecution agreement with the DOJ and agreed to pay a \$1.1 million criminal penalty.

According to the SEC, Faro began direct sales of its products in China in 2003 through its Chinese subsidiary, Faro Shanghai Co., Ltd. (“Faro China”), which was overseen by Faro’s Director of Asia-Pacific Sales, later identified as Oscar Meza. In May 2003, Faro hired a country sales manager to assist in selling its products. After receiving his employment contract, the country manager apparently asked if he could do business “the Chinese way.” Faro officers learned that this was a reference to paying kickbacks or providing other things of value in order

to induce sales of Faro products. After seeking an opinion into the legality of such payments under Chinese law, Faro officers orally instructed Meza and country manager not to make such payments.

In 2004, however, Meza began authorizing the country manager to make corrupt payments to employees of state-owned or controlled entities in China to secure business for Faro. These payments were known as “referral fees” and ranged up to 20-30% of the contract price. To conceal the payments, Meza instructed Faro China employees to alter account entries to remove any indication that the payments were going to Faro’s “customers.” In doing so, Meza stated that he “did not want to end up in jail” as a result of “this bribery.”

In February 2005, a new Faro officer e-mailed an article to Meza regarding another U.S. company being prosecuted for bribery in China and instructed Meza to have the article translated for Faro China’s employees. Rather than cease the payment scheme, however, Meza authorized the country manager to continue making payments through third-party intermediaries described as “distributors.” Faro China continued making the improper payments in such a manner until early 2006.

Faro’s Chinese subsidiary made over twenty improper payments totaling \$444,492 from which it generated a net profit of over \$1.4 million. The SEC complaint asserts that Faro lacked a system of internal controls appropriate to detect the improper payments and provided “no training or education to any of its employees, agents, or subsidiaries regarding the requirements of the FCPA” during the relevant time. Faro also improperly recorded the payments in its books and records, inaccurately describing them as legitimate “selling expenses.” Faro voluntarily disclosed the payments to the government.

Meza, a United States citizen who resides in Canada, agreed to pay a \$30,000 civil penalty and \$26,707 in disgorgement and prejudgment interest to settle an SEC enforcement action based on the same facts on August 28, 2009.

AGA Medical Corporation

On June 3, 2008, AGA Medical Corporation (“AGA”), a privately-held medical device manufacturer based in Minnesota, entered into a three-year deferred prosecution agreement with the DOJ relating to improper payments made to Chinese doctors employed by state-owned hospitals and a Chinese patent official, and agreed to pay a \$2 million criminal penalty. The DOJ filed a criminal information against AGA in the U.S. District Court for the District of Minnesota charging the company with one count of conspiracy to violate, and one count of violating, the FCPA.

According to the criminal information, from 1997 through 2005, a high-ranking officer and part owner of AGA, two AGA employees responsible for international sales, and AGA’s Chinese distributor agreed to pay kickbacks to physicians that made purchasing decisions for Chinese hospitals to induce them to purchase AGA’s products.

The payments apparently started after the distributor informed AGA that the hospitals were requesting a 10% “discount” on AGA’s products and the physicians were requesting a corresponding 10% “commission.” E-mail records indicated that AGA officials approved the payments and were kept apprised of the scheme’s progress and status. The criminal information does not provide a total dollar amount of payments to Chinese doctors, but states that as of 2001 over \$460,000 in such “commission” payments had been made. Although the criminal information indicates that AGA generated sales of approximately \$13.5 million during the relevant period, it does not specify what portion of these sales were linked to the improper conduct.

Further, according to the DOJ, between 2000 and 2002, AGA sought several patents in China, and a high-ranking AGA official agreed to make payments to a Chinese patent official through AGA’s Chinese distributor in order to have the patent applications expedited and approved. The criminal information indicates that at least \$20,000 in payments were made or agreed to in connection with AGA’s patent approvals.

The DOJ announced that it agreed to defer prosecution (and dismiss the criminal information after three years if AGA abides by the terms of the agreement) in recognition of AGA’s voluntary disclosure, thorough review of the improper payments, cooperation with the DOJ’s investigation, implementation of enhanced compliance policies and procedures, and engagement of an independent monitor.

Pacific Consolidated Industries LP (Leo Winston Smith and Martin Self)

On May 8, 2008, Martin Self, a partial owner and former president of Pacific Consolidated Industries (“PCI”), a private company that manufactured air separation units and nitrogen concentration trolleys for defense departments throughout the world, pleaded guilty to violating the FCPA’s anti-bribery provisions in connection with payments to a relative of a United Kingdom Ministry of Defense (“UK-MOD”) official in order to obtain contracts with the Royal Air Force valued at over \$11 million. Previously, on June 18, 2007, Leo Winston Smith, former executive vice president and director of sales of PCI, was arrested after being indicted by a federal grand jury in Santa Ana, California on April 25, 2007 in connection with the same scheme. On September 3, 2009, Smith pleaded guilty to charges of conspiracy to violate the FCPA and corruptly obstructing and impeding the due process of the internal revenue laws.

According to the charging documents, in or about October 1999, Self and Smith caused PCI to enter into a marketing agreement with the UK-MOD official’s relative. The marketing agreement provided for the relative to receive commission payments, from which he made payments to the UK-MOD official. The plea agreement with Self indicates that, beginning in late 1999, he “was aware of the high probability that the payments to the [r]elative were made for the purpose of obtaining and retaining the benefits of the UK-MOD contracts....” Despite such awareness, Self “failed to make a reasonable investigation of the true facts and deliberately avoided learning the true facts.” Between 1999 and 2002, Self and Smith caused over \$70,000 in payments to be made to the relative of the UK-MOD official through the bogus marketing agreement. In addition, Smith’s indictment indicates that beginning around 2002, Smith caused

approximately \$275,000 in payments to be made on behalf of the UK-MOD official for the purchase of a villa in Spain. In return, the UK-MOD official awarded a contract to PCI valued at approximately \$6 million, on which Smith received commissions of approximately \$500,000. The indictment alleges that Smith did not report these commissions on his 2003 United States tax returns.

On November 17, 2008, Self was sentenced to two years probation and fined \$20,000. Smith is awaiting sentencing.

In late 2003, after the alleged conduct, PCI was acquired by a group of investors and re-named Pacific Consolidated Industries, LLC (“PCI LLC”). PCI LLC discovered the payments in a post-acquisition audit and referred the matter to the DOJ.

Ramendra Basu

On April 22, 2008, former World Bank employee Ramendra Basu was sentenced to 15 months in prison, two years supervised release and 50 hours of community service for conspiring to steer World Bank contracts to consultants in exchange for kickbacks and assisting a contractor in bribing a foreign official in violation of the FCPA. Basu is a national of India and a permanent legal resident alien of the United States.

Basu pleaded guilty on December 17, 2002 and subsequently cooperated with U.S. and Swedish authorities. In September 1997, Basu left the World Bank to join a Swedish consulting firm. Three months later, in December 1997, Basu returned to the World Bank, where he continued to receive commissions from the consultant. Soon thereafter, the consultant was awarded three contracts by Basu’s co-conspirator, Gautam Sengupta, a World Bank Task Manager. In February 2002, Sengupta pleaded guilty to the same charges as Basu. In February 2006, he was sentenced to two months in prison and fined \$6,000.

Basu admitted that between 1997 and 2000, he conspired with the Swedish consultant and Sengupta to steer World Bank contracts for business in Ethiopia and Kenya to certain Swedish companies in exchange for \$127,000 in kickbacks. Basu also assisted the Swedish consultants in bribing a Kenyan government official by arranging for \$50,000 to be wire transferred to the official’s account. Basu pleaded guilty in 2002, but unsuccessfully attempted to withdraw his plea in 2006.

AB Volvo

On March 20, 2008, AB Volvo (“Volvo”), a Swedish transportation and construction equipment company, settled civil charges with the SEC for violating the FCPA’s books and records and internal controls provisions in connection with improper payments made under the Oil-for-Food Programme for Iraq from approximately 1999 to 2003. AB Volvo and two of its wholly-owned subsidiaries also entered into a deferred prosecution agreement with the DOJ for conspiracy to commit wire fraud and violate the FCPA’s books and records provisions. Under the agreements, Volvo agreed to pay over \$19.6 million in combined fines and penalties,

including over \$8.6 million in disgorgement and pre-judgment interest, a \$4 million civil penalty and a \$7 million criminal penalty.

During the OFFP, Volvo participated in the sale of trucks, construction equipment and spare parts to the Iraqi government through a French subsidiary, Renault Trucks SAS (“Renault”), and a Swedish subsidiary, Volvo Construction Equipment, AB (“VCE”). Between 1999 and 2003, Renault and VCE made or authorized nearly \$8.6 million in improper kickback payments in connection with approximately 35 contracts. Volvo’s total gain from contracts involving improper payments was nearly \$7.3 million.

According to the government, Renault entered into approximately 18 contracts with Iraqi ministries for specialty vehicles. Renault typically subcontracted out the body-building work associated with these contracts. Between November 2000 and July 2001, Renault devised a scheme whereby its subcontractors would inflate the price of their body-building work by approximately 10% and then pass this amount to the Iraqi government. Renault internal documents indicated that had Renault made the payments in its own name, “we would have been caught red-handed.” Renault made approximately \$5.1 million in improper payments in connection with these contracts and authorized an additional \$1.25 million.

According to the SEC, as early as 1999, VCE’s corporate predecessor, Volvo Construction Equipment International, AB (“VCEI”), made improper payments to Iraqi ministries in connection with OFFP contracts. VCEI made the payments through a Jordanian agent on two contracts with SOMO and one contract with the Ministry of Housing and Construction. VCEI, also through the agent, purchased a car for the Ministry of Housing and Construction. Collectively, the payments and cost of the car totaled over \$100,000.

After the imposition of ASSFs in 2000, VCEI and its distributors entered into five additional contracts that involved improper payments. In a November 2000 internal memo, VCEI employees noted that the ASSF demands were a “clear violation of the UN Embargo Rules.” VCEI sought counsel from the Swedish Embassy in Amman, Jordan. The embassy contacted the U.N. regarding the kickback demands, indicating that VCEI (which was not identified by name) had informed the embassy that it would refuse to sign the contract. Nevertheless, VCEI went forward with the transaction, which included the ASSF payments.

Initially, VCEI made the ASSF payments on its own behalf through its agent. Later, VCEI attempted to distance itself from the scheme by having the agent act as its distributor in Iraq. In this capacity, the agent would purchase vehicles from VCEI and re-sell the vehicles to the Iraqi government at an inflated price. VCEI knew that the agent was submitting inflated contracts and sold its products to the agent at a price that allowed the agent to make improper ASSF payments. When VCEI’s relationship with the Jordanian agent faltered, it began using a Tunisian distributor to facilitate the improper ASSF payments. In total, VCEI made or authorized over \$2.2 million in improper ASSF payments.

As a result of the “extent and duration” of the improper payments, the improper recording of those payments and Volvo management’s failure to detect the payments, the SEC determined

that Volvo violated the FCPA's internal controls provisions. The SEC specifically noted that "[a]lthough Volvo knew of endemic corruption problems in the Middle East, it appeared to take on faith, without adequate confirming steps, that its managers and employees were exercising their duties to manage and comply with compliance and control issues." The SEC also determined that Volvo failed to properly record in its books and records the improper payments, characterizing them instead as commission payments, body-building fees or costs of sales.

Flowserve Corporation

On February 21, 2008, Flowserve Corporation ("Flowserve"), a Texas-based supplier of oil, gas and chemical industry equipment, agreed to settle civil charges with the SEC for violating the FCPA's books and records and internal controls provisions in connection with illegal payments to Iraq under the OFFP. Flowserve and its wholly-owned French subsidiary Flowserve Pompes SAS ("Flowserve Pompes") also entered into a three-year deferred prosecution agreement with the DOJ charging Flowserve Pompes with conspiracy to violate the wire fraud statute and the FCPA's books and records provision. In total, Flowserve agreed to pay over \$10.5 million in fines and penalties, including over \$3.5 million in disgorgement and prejudgment interest, a \$3 million civil penalty and a \$4 million criminal fine. In Holland, Flowserve's Dutch subsidiary, Flowserve B.V., also agreed to enter into a criminal disposition with Dutch prosecutors and pay an undisclosed fine.

Flowserve participated in the OFFP through Flowserve Pompes and Flowserve B.V. According to the SEC's complaint, from 2001 to 2003, these subsidiaries entered into twenty sales contracts with Iraqi government entities that involved illegal surcharge payments. Flowserve Pompes and Flowserve B.V., with the assistance of Jordanian agents, made \$646,488 in improper surcharge payments and authorized an additional \$173,758 in such payments.

Flowserve Pompes entered into 19 contracts that included improper ASSF payments. The 10% surcharges were memorialized in a side letter to the Iraqi Ministry of Oil that described the charges as "engineering services, installation, and commissioning." The payments were made through a Jordanian agent by having the agent submit inflated invoices for reimbursement to Flowserve Pompes, and were recorded as if they were installation and service payments. The contract documents that Flowserve Pompes submitted to the U.N. omitted any reference to the ASSF payments, instead inflating the price of the equipment sold without discussing the price increase. The French subsidiary ultimately made \$604,651 in improper payments and authorized an additional \$173,758 in payments that were not ultimately made.

The SEC's complaint also charges Flowserve B.V. with making a \$41,836 kickback payment in connection with a contract to provide water pump parts to an Iraqi government-owned gas company. In August 2001, Flowserve B.V.'s agent advised the company that it was required to make a 10% kickback payment in connection with the contract, and expected to be reimbursed for such payment. Flowserve B.V. rejected a proposal to conceal the kickbacks by having the agent serve as a distributor and pay the ASSF out of his margin. Instead, Flowserve B.V.'s controller increased the cost of the purchase order and passed the difference to the agent. Flowserve B.V. agreed to, and ultimately did, pay the agent a "special project discount"

commission which covered the amount of the kickback and effectively doubled the agent's standard 10% commission to 20%.

The SEC charged that Flowserve failed to devise and maintain an effective system of internal controls sufficient to prevent or detect the transactions by its two subsidiaries. In addition, Flowserve violated the FCPA's books and records provisions by improperly recording payments to its agents as legitimate expenses.

Westinghouse

On February 14, 2008, Westinghouse Air Brake Technologies Corporation ("Wabtec") settled civil charges with the SEC for violating the FCPA's anti-bribery, books and records, and internal controls provisions in connection with improper payments made by Wabtec's fourth-tier, wholly-owned Indian subsidiary Pioneer Friction Limited ("Pioneer") to employees of India's state-controlled national railway system. In the SEC proceeding, Wabtec agreed to pay over \$288,000 in disgorgement and prejudgment interest and a civil penalty of \$87,000. Wabtec also entered into a three-year non-prosecution agreement with the DOJ relating to the same and other similar conduct. Under that agreement, Wabtec agreed to pay a \$300,000 fine, implement rigorous internal controls, undertake further remedial steps and continue to cooperate with the DOJ.

The Indian Ministry of Railroads ("MOR") controls the national railway system and is responsible for soliciting bids for various government contracts through the Indian Railway Board ("IRB"). Pioneer sells railway brake blocks to, among other customers, train car manufacturers owned or controlled by the Indian government. According to the SEC's complaint, from at least 2001 to 2005, Pioneer made more than \$137,400 in improper payments to employees of India's state-run railway system to induce them to consider or grant competitive bids for government contracts to Pioneer. In 2005, the IRB awarded Pioneer contracts that allowed it to realize profits of \$259,000.

In order to generate the cash required to make the payments, Pioneer directed "marketing agents" to submit invoices for services rendered. Marketing agents are companies that submit invoices and collect payments on behalf of other companies. Although the invoices indicated that payments were due for services rendered in connection with various railway projects, they were in fact fictitious and no such services were ever rendered. Once Pioneer paid the invoice, the "marketing agent" would return the cash to Pioneer minus a service fee that the agent kept for itself. Pioneer then used the cash to make the improper payments.

The SEC complaint indicates that Pioneer kept the cash generated from the false marketing agent invoices in a locked metal box and also kept separate records (that were not subject to annual audits) reflecting the improper payments. In addition, contrary to Indian law and Wabtec policy, Pioneer destroyed all records relating to the improper payments after a single year, leaving only records from 2005 available for review.

Although the DOJ agreement is based in part on the improper payments discussed in the SEC's complaint, the DOJ also noted that Pioneer made improper payments in order to

“schedule pre-shipping product inspections; obtain issuance of product delivery certificates; and curb what Pioneer considered to be excessive tax audits.” The DOJ noted that after discovering the payments, Wabtec engaged outside counsel to conduct an internal investigation, voluntarily reported its findings to, and cooperated fully with, the DOJ, and instituted remedial measures.

Gerald and Patricia Green

On January 16, 2008, Gerald and Patricia Green, co-owners of Film Festival Management, Inc. (“FFM”), were indicted on one count of conspiring to violate, and six counts of violating, the antibribery provisions of the FCPA. The indictment alleged that from 2002 to 2007, Mr. and Mrs. Green bribed a Thai government official in order to secure contracts to run the annual Bangkok International Film Festival (“Bangkok Film Festival”), which was funded and administered by the Tourism Authority of Thailand (“TAT”). On September 14, 2009, the Greens were convicted of conspiracy, violating the FCPA and money laundering. Patricia Green was also found guilty of falsely subscribing U.S. income tax returns in connection with this scheme.

The indictment alleged that, between 2002 and 2007, the Greens conspired to, and ultimately did, bribe a senior Thai government official, initially identified simply as the “Governor” and later revealed to have been Juthamas Siriwan, who was the senior government officer of the TAT from 2002 to 2006. The Governor also served as the president of the Bangkok Film Festival and, in this position, had the ability to select businesses to provide goods and services for the festival. According to the indictment, in 2002, Siriwan selected Mr. Green to run the 2003 Bangkok Film Festival. In return, Mr. Green apparently agreed to pay a percentage of the 2003 Bangkok Film Festival contract value to Siriwan. One of the Greens’ business entities made a \$30,000 payment to a United Kingdom bank account held by Siriwan’s daughter for the benefit of Siriwan.

According to the DOJ, the Greens were also selected to run the Bangkok Film Festival for 2004, 2005 and 2006, and made payments for Siriwan’s benefit in connection with these contracts. The payments typically ranged between 10-20% of the total amount of the Bangkok Film Festival contracts and were disguised in the Green entities’ books and records as “sales commissions.” The payments were primarily made by wire transfer to bank accounts in the United Kingdom, Singapore and the Isle of Jersey held by the daughter or a friend of Siriwan, although the Greens also made cash payments directly to Siriwan during her visits to Los Angeles.

The indictment asserted that the Greens took considerable efforts to hide their scheme, including moving money through several business entities, some with fraudulent addresses and telephone numbers. Because Siriwan was authorized to approve payments on behalf of the TAT up to a certain dollar amount, the Greens purposely sought contracts under different business names to create the appearance that the money was being paid to different entities. In reality, all the work related to the film festivals was managed by the same personnel out of the same Los Angeles-based office run by the Greens. In structuring the transactions in such a manner, the

Greens were able to avoid scrutiny into the large amounts of money being paid by the TAT to the Greens' business entities.

The government alleged that, in total, the Greens' business entities received over \$13.5 million from the TAT in connection with Bangkok Film Festival contracts between 2002 and 2007. During the prosecution, the government stated that the Greens paid at least \$1.8 million of that money to or for the benefit of Siriwan in order to obtain and retain the contracts.

The government expanded the initial indictment several times. In October 2008, a superseding indictment was filed that included the charges that Mrs. Green filed two false tax returns when she took deductions for "commissions" that were, in fact, bribes. Later, in March 2009, the government added obstruction of justice charges against Mr. Green. The government dismissed a substantive money laundering count prior to the case going to the jury. The jury was unable to reach a verdict on the obstruction of justice count against Gerald Green. In the pre-sentencing phase, the government asked that the sentence for Mr. Green, a 78-year-old who appeared in court with a small oxygen bottle, be adjusted upwards because of his role as the ringleader in the operation, and because he "repeatedly and blatantly perjured himself" in his trial. He could face a life sentence. Mrs. Green, 55, likely faces a sentence of 19-25 years.

In January 2010, Siriwan became one of the few foreign officials to be charged separately with corruption-related offenses in the United States. The DOJ also charged her daughter, Jittisopa "Jib" Siriwan, who was actively involved in the bribery scheme when she allegedly traveled to Singapore, the UK, and the Isle of Jersey to open bank accounts for the purpose of facilitating the Greens' bribery of her mother. The payments originated at accounts held by the Greens in West Hollywood, California. While the FCPA is not directly applicable to foreign officials, both mother and daughter could face up to 20 years in prison for charges including Conspiracy, Transporting Funds to Promote Unlawful Activity (bribery), and Aiding and Abetting. The indictment calls for the forfeiture of \$1.4 million from three existing bank accounts, plus all commissions, fees, proceeds, and a sum of money equal to the total amount of proceeds derived from each such offense.

2007

Lucent Technologies

On December 21, 2007, Lucent Technologies, Inc. ("Lucent") settled charges with the DOJ and the SEC for violating the FCPA's books and records and internal controls provisions in connection with its payment of more than \$10 million for over 300 trips by approximately 1,000 employees of Chinese state-owned or controlled telecommunications enterprises, which were either existing or prospective Lucent customers. In the SEC proceeding, without admitting or denying the allegations, Lucent consented to an injunction from violating the books and records and internal controls provisions, and agreed to pay a civil monetary penalty of \$1.5 million. Lucent also entered into a two-year non-prosecution agreement with the DOJ, which requires the company to pay a \$1 million criminal penalty and to adopt new or modify existing internal

controls, policies and procedures. The settlements concluded a multi-year investigation into Lucent's activities prior to its November 2006 merger with Alcatel SA.

According to the SEC and DOJ, the majority of the trips were ostensibly designed either to allow Chinese officials to inspect Lucent's factories in connection with a proposed sale ("pre-sale" trips) or train the officials regarding the use of Lucent's products in connection with ongoing contracts ("post-sale" trips). The SEC alleged that Lucent spent more than \$1 million on 55 "pre-sale" visits and more than \$9 million on 260 "post-sale" visits.

The settlement documents assert that despite the supposed business purpose for the trips, in fact, the Chinese officials spent little to no time visiting Lucent's facilities. Rather, the officials spent the majority of their time visiting popular tourists destinations, including Las Vegas, Disney World and the Grand Canyon.

For example, on one pre-sale trip in 2002, Lucent paid more than \$34,000 for the Deputy General Manager and Deputy Director of the Technical Department of a Chinese-government majority-owned telecommunications company to visit the United States. During the trip, the Chinese officials spent three days on business activities and more than five days on visits to Disney World and Hawaii. Internal documents associated with the trip indicated that Lucent employees considered the Deputy General Manager to be a "decision maker" and described the trip as an important opportunity to enhance Lucent's relationship with this individual prior to the award of an important project. According to the SEC, in October 2002, Lucent was awarded a portion of this project worth a reported \$428 million. The travel-related expenses associated with these "pre-sale" visits were recorded in Lucent's books and records in expense accounts designated for items such as international freight costs or "other services."

The "post-sale" trips were typically characterized as "factory inspections" or "training" visits. The factory inspections were initially intended as a way to demonstrate Lucent's technologies and products to its Chinese customers. Around 2001, however, Lucent began outsourcing (including to China) most of its manufacturing operations and factories, which left its customers with few facilities in the United States to visit. Nevertheless, Lucent continued to provide its customers with "factory inspection" trips to the United States and other locations. These trips cost between \$25,000 and \$55,000 per trip. Similarly, the "training" visits were designed to offer some training, but often included extensive sightseeing, entertainment and leisure activities. Among other things, Lucent provided its visitors with per diems, paid for them to visit tourist attractions and paid for them to travel from training locations to leisure locations. As with the pre-sale trips, Lucent improperly recorded the expenses associated with these visits in its books and records as, among other things, costs for "other services."

The SEC complaint asserts that Lucent lacked the internal controls to detect and prevent trips that contained a disproportionate amount of sightseeing and leisure, rather than business purposes, and improperly recorded many of the trips in its books. The complaint states that these violations occurred because "Lucent failed, for years, to properly train its officers and employees to understand and appreciate the nature and status of its customers in China in the context of the FCPA."

Akzo Nobel

On December 20, 2007, Akzo Nobel N.V. (“Akzo Nobel”), a Netherlands-based pharmaceutical company, settled a civil complaint with the SEC for violating the FCPA’s books and records and internal controls provisions in connection with improper After Service Sales Fee payments under the Oil-for-Food Programme. In the SEC action, Akzo Nobel agreed to disgorge over \$2.2 million in profits and pre-judgment interest, and pay a civil penalty of \$750,000.

In a related proceeding, Akzo Nobel entered into an unusual non-prosecution agreement with the DOJ contingent upon the resolution of a Dutch prosecution of Akzo Nobel’s subsidiary N.V. Organon (“Organon”). In the Dutch proceeding, Organon was expected to pay approximately €381,000. Under the non-prosecution agreement, if the Dutch proceeding was not successfully resolved, Akzo Nobel agreed to pay \$800,000 to the United States Treasury.

According to the SEC complaint, from 2000 to 2003, two of Akzo Nobel’s subsidiaries, Organon and Intervet International B.V. (“Intervet”), authorized and made \$279,491 in kickback payments in connection with pharmaceutical contracts entered into under the OFFP. During the OFFP, Intervet used two agents, Agent A and Agent B, who were paid jointly regardless of which agent secured the contract. Prior to August 2000, each agent received a 5% commission. After August 2000, their commissions were reduced to 2.5% due to pricing pressures.

In September 2000, Agent A informed Intervet that Iraqi officials were demanding an illegal surcharge in connection with an agreement that Agent A was negotiating, which Intervet refused to make. The agent indicated that he would “handle” the situation, and was witnessed by an Intervet employee handing an envelope to an Iraqi representative at a contract signing. Thereafter, Agent A requested reimbursement for his payment of the ASSF on Intervet’s behalf. Intervet agreed to revert to the pre-August 2000 arrangement under which the two agents received 5% commissions, half of which would then be passed on to the Iraqi government. Similarly, Organon made improper surcharge payments in connection with three contracts, all of which also involved Agent A. These surcharge payments were made by increasing the commission owed to Organon’s agent. Akzo Nobel’s total profits from contracts in which illegal ASSF payments were made amounted to more than \$1.6 million.

The SEC determined that Akzo Nobel violated the internal controls provisions based, in part, on the “extent and duration of the improper illicit payments made by [the] two Akzo Nobel subsidiaries and their agents” as well as “the failure of Akzo Nobel’s management to detect these irregularities.” In addition, by improperly recording the payments as legitimate commission payments, Akzo Nobel violated the FCPA’s books and records provision.

Chevron Corporation

On November 14, 2007, Chevron Corporation (“Chevron”) entered into a non-prosecution agreement with the DOJ and a separate agreement with the Office of Foreign Assets Control of the U.S. Department of the Treasury (“OFAC”) in connection with FCPA and related violations in connection with oil purchases the company made under the OFFP between April 2001 and May 2002. Chevron also settled civil charges with the SEC for violating the FCPA’s

books and records and internal controls provisions. In total, Chevron will pay \$30 million in fines and penalties, including a \$3 million civil penalty, \$25 million in disgorgement, and a \$2 million penalty to OFAC for violating sanctions against the former government of Iraq.

According to the SEC's complaint, in Fall 2000, the U.N. received reports of the Iraqi oil surcharge demands, and advised oil traders that it was illegal to make such payments. Chevron was notified as early as December 2000 that it was illegal to make the surcharge payments. In January 2001, Chevron instituted a company-wide policy prohibiting the payment of surcharges in connection with purchases of Iraqi oil. In April 2001, Chevron began purchasing Iraqi oil through third parties, and continued doing so through May 2002. In total, Chevron purchased approximately 78 million barrels of Iraqi crude oil under 36 contracts with third parties.

According to the SEC, despite the company's January 2001 policy, Chevron's traders entered into the third-party contracts with actual or constructive knowledge that the third parties were making illegal surcharge payments to Iraq. E-mail traffic appeared to show that traders were aware that the surcharges were being used to cover the cost of kickbacks to the Iraqi government. An Italian third-party, whose company on occasion sold oil to Chevron, stated that both the trader he dealt with at Chevron and the trader's superiors knew about the illegal surcharge demands. Moreover, Chevron's premiums to third parties shortly before the surcharge policy began typically ranged from \$0.25 to \$0.28 per barrel, whereas after the surcharge policy was put in place Chevron's premiums rose as high as \$0.53 per barrel and typically ranged from \$0.36 to \$0.495.

In addition, Chevron's policies required traders to obtain prior written approval for all proposed Iraqi oil purchases and charged management with reviewing each such proposed deal. Chevron's traders did not follow the policy and Chevron's management failed to ensure compliance. Furthermore, Chevron's management relied on its traders' representations regarding third-party sellers instead of properly inquiring into and considering the identity, experience and reputation of each third party seller. A credit check of one seller, whom Chevron used in two transactions, revealed that the seller was a "brass plate" company with no known assets, experience in the oil industry or actual operations.

Ultimately, Chevron, through its third-party contracts, made illegal surcharge payments of approximately \$20 million. In doing so, Chevron failed to implement a system of internal accounting controls sufficient to detect and prevent such payments. Chevron also improperly recorded the payments on its books and records, characterizing them simply as "premiums."

Ingersoll-Rand

On October 31, 2007, Ingersoll-Rand Company Limited ("Ingersoll-Rand"), a global, diversified industrial company, resolved fraud and FCPA charges with the DOJ and SEC in connection with illegal ASSF payments made by its subsidiaries to Iraqi officials under the OFFP. Ingersoll-Rand agreed to pay more than \$6.7 million in fines and penalties, including over \$2.2 million in disgorgement and prejudgment interest, a \$1.95 million civil penalty and a \$2.5 million criminal fine.

The SEC Complaint details corrupt practices of five European Ingersoll-Rand subsidiaries, ABG Allgemeine Baumaschinen-Gesellschaft mbH (“ABG”), Ingersoll-Rand Italiana, SpA (“I-R Italiana”), Thermo-King Ireland Limited (“Thermo King”), Ingersoll-Rand Benelux, N.V. (“I-R Benelux”), and Ingersoll-Rand World Trade Ltd. (“IRWT”). The DOJ filed separate criminal informations against Thermo King and against I-R Italiana.

Four of the European subsidiaries – ABG, I-R Italiana, Thermo-King and I-R Benelux – entered into 12 OFFP contracts that contained ASSF kickbacks. Under these contracts, the Ingersoll-Rand subsidiaries, along with their distributors and one contract partner, made approximately \$963,148 in ASSF payments and authorized approximately \$544,697 in additional payments.

ABG entered into six AFFP contracts that included improper ASSFs. Two of these contracts were entered into in November 2000 with the Mayoralty of Baghdad for road construction equipment and were negotiated by an ABG sales manager. Ingersoll-Rand’s New Jersey office was notified of the kickback scheme by an anonymous fax on November 27, 2000 and immediately began an investigation. After discussing the matter internally and with outside counsel, however, Ingersoll Rand attempted to go forward with the contracts by submitting them to the U.N. for approval with a short note indicating the 10% markup. The U.N. advised that the ASSFs were not allowed and the Baghdad Mayoralty ultimately refused to go through with the contracts. Despite being put on notice of the potential kickback scheme, ABG’s sales manager subsequently negotiated four further contracts including AFFP payments on ABG’s behalf on an indirect basis through distributors who resold the goods. The distributors made a combined \$228,059 in ASSF payments and authorized a further \$198,000 payment that was not made.

I-R Italiana entered into four OFFP contracts for large air compressors between November 2000 and May 2002 that included improper ASSF payments of approximately \$473,302. Three of the contracts were entered into directly between I-R Italiana and the Iraqi Oil Ministry, while the fourth was made through a Jordanian distributor. Payments under the first three contracts, which were entered into in November 2000, were justified by adding a fictitious line item to I-R Italiana’s purchase orders, and were made by having I-R Italiana’s Jordanian distributor issue false invoices for work that was not performed. The fourth contract, entered into in October 2001 between the Jordanian distributor and the Iraqi Oil Ministry, provided for I-R Italiana’s distributor to re-sell goods purchased from I-R Italiana at a 119% markup, from which it made improper ASSF payments.

In October 2000, Thermo King authorized one ASSF payment of \$53,919 to General Automobile and Machinery Trading Company (“GAMCO”), an Iraqi government-owned company, relating to spare parts for refrigerated trucks. The ASSF payment was reflected in a side agreement negotiated and signed by Thermo-King’s Regional Director. For reasons unrelated to the ASSF, the contract was ultimately denied by the U.N.

In June 2002, I-R Benelux entered into an agreement with a Jordanian third-party to sell 100 skid steer loaders and spare parts for resale to the Iraqi State Company for Agricultural Supplies. With I-R Benelux’s knowledge, the Jordanian company purchased and resold the

equipment through the OFFP at a 70% markup, making ASSF payments totaling \$260,787 in connection with the sales. At the time it entered into the contract, officials at Ingersoll Rand headquarters were aware, through the anonymous fax sent to its New Jersey headquarters, that Iraqi authorities were demanding illicit payments on OFFP contracts. Despite this awareness, Ingersoll Rand failed to perform adequate due diligence on the Jordanian entity.

In addition, in February 2002, I-R Italiana sponsored eight officials from the Iraqi Oil Ministry to spend two days touring a manufacturing facility in Italy. The Iraqi officials spent two additional days touring Florence at the company's expense and were provided \$8,000 in "pocket money." I-R Italiana's payment of holiday travel expenses and pocket money violated Ingersoll-Rand's internal policies. Ingersoll-Rand also failed to properly account for these payments, recording the payments as "cost of sales deferred."

The SEC and DOJ charged that Ingersoll-Rand failed to maintain an adequate system of internal controls to detect and prevent the payments and violated the books and records provisions of the FCPA by recording the payments as "sales deductions" and "other commissions." After discovering and investigating the illegal payments, Ingersoll-Rand conducted an internal review and terminated implicated employees. Ingersoll-Rand self-reported the results of the review to the government.

York International Corporation

On October 1, 2007, York International Corporation ("York"), a global provider of heating, air conditioning and refrigeration products that is now a subsidiary of Johnson Controls, entered into a three-year deferred prosecution agreement with the DOJ and settled civil charges with the SEC related to improper payments under the OFFP and other foreign corruption allegations. The SEC charged York with violations of the anti-bribery, books and records, and internal controls provisions of the FCPA. The DOJ charged York with conspiracy to violate, and violations of, the wire fraud statute and books and records provision of the FCPA. York agreed to pay over \$22 million in fines and penalties, which includes a \$10 million criminal fine, a \$2 million civil penalty, and disgorgement and pre-judgment interest of over \$10 million.

Under the Deferred Prosecution Agreement, the DOJ can request documents and information from York, but the company can assert the attorney-client privilege and refuse to provide the requested materials. Such a refusal could come at cost to York as the agreement goes on to state that "[i]n the event that York withholds access to the information, documents, records, facilities and/or employees of York, the Department may consider this fact in determining whether York has fully cooperated with the Department."

- ***OFFP Payments***

According to the charging documents, beginning in 1999, York's wholly-owned Dubai subsidiary, York Air Conditioning and Refrigeration FZE ("York FZE"), began participating in the OFFP. York FZE retained a Jordanian agent in connection with this activity and was able to obtain three contracts under the OFFP between March 1999 and April 2000 without making any

illicit payments. In September 2000, the agent informed York FZE that it had been awarded a fourth contract, which was for the sale of air conditioner compressors (“Compressor Contract”) to the Iraqi Ministry of Trade. Shortly thereafter, however, the agent informed York FZE that the Iraqi government was requiring the payment of ASSFs in connection with humanitarian contracts. The agent recommended that York FZE increase its bid on the Compressor Contract it had just been awarded.

The Regional Sales Manager of York’s Delaware subsidiary, York Air Conditioning and Refrigeration, Inc. (“YACR”), responded that YACR would not enter into contracts that did not comply with U.N. rules. That manager, however, transferred out of the office for reasons unrelated to the OFFP, at which time a Dubai-based Area Manager assumed his duties. In November 2000, the Dubai-based Area Manager met with YACR’s Vice President and General Manager for the Middle East and the agent, and agreed that the agent would be paid an inflated commission and pass such payments on to the Iraqi government to cover the ASSF for the Compressor Contract.

The agent subsequently made ASSF payments on York FZE’s behalf in connection with five additional OFFP contracts, typically by depositing funds in a Jordanian bank account designated by the Iraqi ministries. The inflated commission payments were recorded improperly in York’s books and records as “consultancy” payments. In total, the agent paid approximately \$647,110 in ASSF kickback payments on behalf of York FZE.

- Other International Bribery Schemes

According to the SEC and DOJ filings, from 2001 to 2006, various York foreign subsidiaries made over eight hundred improper payments totaling over \$7.5 million made to secure orders on approximately 774 commercial and government projects in the Middle East, India, China, Nigeria and Europe. According to the SEC, 302 of these projects involved government end-users, and York generated net profits of nearly \$9 million on contracts involving illicit payments.

The improper payments, referred to internally as “consultancy fees,” were made in three ways. First, complicit customer personnel would supply York employees with false invoices that York employees then used to obtain cash and distribute to individuals to secure contracts. Second, York employees directly wired money or sent checks to entities designated by customer personnel based on false invoices for purported consulting services. Finally, York sales personnel arranged for direct payments to be made to consulting firms or contractors designated by York’s customer in return for changing design specifications so that they would be more favorable to York.

Specifically,

- In the United Arab Emirates (“UAE”), YACR made thirteen improper payments in 2003 and 2004 totaling approximately \$550,000 in bribes to UAE officials to secure contracts in connection with the construction of a luxury hotel and

convention complex named the Conference Palace, built and owned by the Abu Dhabi government. The officials were members of the hotel Executive Committee. The committee was established by government decree and reported to the Ministry of Finance, and its members were appointed by the Crown Prince of Abu Dhabi. Approximately \$522,500 in payments in connection with the project were made through an unspecified intermediary while knowing that the intermediary would pass most of it on to the UAE officials. The payments were approved by the same YACR Vice President who approved the kickbacks under the OFFP and YACR's Dubai-based director of finance. York generated sales revenue of approximately \$3.7 million in connection with the luxury hotel project.

- York entities also made illicit payments in connection with a number of non-governmental Middle East projects. For example, in connection with an Abu Dhabi residential complex project, a YACR sales manager made a cash payment to an engineering consultant working for the end user to have the engineer submit design specifications that favored York equipment. To make the payment, the YACR sales manager arranged for a local contractor to generate a false invoice for \$2,000. The contractor returned \$1,900 of the resulting payment to the YACR sales manager, who passed it on to the engineering consultant. In another example, York Middle East, a business unit within York, made approximately \$977,000 in payments between 2000 and 2005 to a senior executive of a publicly-held UAE district cooling utility in order to secure future business with the cooling utility. The payments, which typically amounted to 7% of York's sales on cooling utility projects, were made to entities in Europe or the West Indies designated by the senior executive. The sales revenue associated with the district cooling utility payments was \$12.2 million.
- York's Indian subsidiary retained an agent to assist it in securing after-installation service contracts and to provide sales and marketing support in connection with equipment sold to the Indian Navy. An employee of the agent (who for a period of time was also employed by York India) admitted making routine payments to Indian Navy officials to secure business for York between 2000 and 2006. The payments were typically less than \$1,000, but over time amounted to approximately \$132,500 on 215 orders. The payments were made out of the nearly \$180,000 in commission payments made to the agent. York India generated revenue of \$2.4 million on contracts related to these payments.
- York's United Kingdom subsidiary, York United Kingdom ("York UK"), retained a Nigerian agent to provide site supervision and accommodations in connection with 2002 and 2005 contracts the subsidiary had with the NNPC. For each contract, the agent received a commission of approximately 30% of the contract value. A September 2002 e-mail from a principal of the agent to the York UK manager that signed the 2002 NNPC contract indicated that the commission payment was being shared with an NNPC official. A separate York UK manager who signed the second NNPC contract admitted that the agent's approximately

30% commission was unusually high. York UK has since terminated the agency relationship and ceased bidding on future NNPC contracts.

- Finally, from 2004 through 2006, York Refrigeration Marine (China) Ltd. (“YRMC”) made improper payments to agents and other individuals, including Chinese government personnel at government-owned ship yards, in connection with sales of refrigeration equipment to ship builders. The payments, which were described as commissions, sales and marketing expenses or gifts and entertainment expenses, lacked sufficient supporting documentation and were for nebulous and undocumented services. York’s local Hong Kong office approved the payments and processed them through the Danish subsidiary. In addition, in one instance, YRMC provided Chinese ship yard employees with electronics and laptop computers.

Monty Fu (Syncor)

On September 28, 2007, the SEC filed settled charges against Monty Fu, the founder and former chairman of Syncor International Corporation (“Syncor”), for failing to implement a sufficient system of internal accounting controls at Syncor and for aiding and abetting Syncor’s violations of the books and records and internal controls provisions of the FCPA, arising from improper commission payments and referral fees by Syncor’s wholly-owned Taiwanese subsidiary, Syncor Taiwan, to doctors employed by state-owned and private hospitals in Taiwan. Without admitting or denying wrongdoing, Fu consented to an injunction from violating and aiding and abetting further such violations, and agreed to pay a civil monetary penalty of \$75,000.

According to the SEC’s complaint, from 1985 through 1996, Syncor Taiwan’s business consisted primarily of selling radiopharmaceutical products and medical equipment to Taiwanese hospitals. Beginning in 1985, Syncor Taiwan began making “commission” payments to doctors at private and public hospitals to influence their purchasing decisions. The commissions typically ranged between 10-20% of the sales price of the Syncor product and took the form of cash payments delivered by Syncor Taiwan personnel.

In 1996, Syncor Taiwan began establishing medical imaging centers in Taiwan in conjunction with private and public hospitals which generated management fees for Syncor Taiwan. Around 1997, Syncor Taiwan began providing “commission” payments to doctors to prescribe medicine for, or purchase products to be used in, Syncor’s medical imaging centers. These payments were also typically in cash and were based on a percentage of the sales price. Also around 1997, Syncor Taiwan began paying doctors “referral fees” to induce the doctors to refer patients to the Syncor medical imaging centers. The referral fees again were in cash and typically represented between 3-5% of the fees that patients paid to the imaging center.

The magnitude of the payments during the relevant seventeen-year period averaged over \$30,000 per year from 1989 through 1993 and over \$170,000 per year from 1997 through the first half of 2002. Syncor Taiwan recorded both the commission and referral fee payments

improperly as “Advertising and Promotions” expenses, contrary to Syncor’s stated accounting policies and internal guidelines.

According to the SEC, at all relevant times, Fu was aware that Syncor was making the commission payments and referral fees. In 1994, an outside audit revealed the existence of certain of these practices, which prompted Syncor’s then-CEO to caution Fu on the propriety of making such payments. The SEC complaint asserts that the audit put Fu on actual or constructive notice that the payments were being improperly recorded in Syncor Taiwan’s books and records, which were then incorporated into Syncor’s books and records and filed with the SEC.

In light of the above conduct, the SEC determined that Syncor had insufficient internal controls to detect and prevent non-compliance with the FCPA by Syncor Taiwan. The SEC asserts that Fu, as a result of his various positions within Syncor, including founder of the company, creator of the Syncor Taiwan subsidiary and brother of the Taiwan country manager during the relevant period, had the authority to implement additional internal controls, but failed to do so. As a result, Fu was found to have knowingly failed to implement a system of internal accounting controls in violation of the Securities Exchange Act §13(b)(5) and Rule 13b2-1, and to have aided and abetted Syncor’s violations of the books and records and internal controls provisions of the FCPA.

Previously, in 2002, Syncor agreed to settle civil and administrative proceedings with the SEC arising out of related conduct. Syncor agreed to a \$500,000 civil penalty in connection with that settlement and was enjoined from future violations of the books and records and internal controls provisions of the FCPA. At that time, Syncor also settled related DOJ criminal charges by agreeing to pay a \$2 million criminal fine. On January 1, 2003, Syncor became a wholly-owned subsidiary of Cardinal Health, Inc.

Immucor

On September 27, 2007, Immucor, Inc. (“Immucor”) and Gioacchino De Chirico, its CEO, settled FCPA books and records and internal controls charges with the SEC. At that time, Immucor and de Chirico agreed to a cease and desist order enjoining them from committing future violations of those provisions of the FCPA. On October 2, 2007, de Chirico further consented to payment of a \$30,000 fine without admitting or denying the SEC’s allegations.

Immucor Italia S.p.A., a wholly-owned subsidiary of Immucor, sold blood-testing units to a hospital in Milan, Italy. In 2003, De Chirico allegedly arranged for the director of that hospital to chair a medical conference in Italy. Although the amount of compensation was never established, the hospital director requested, and De Chirico agreed, that payment would be made so as to allow the director to avoid Italian income taxes. In 2004, De Chirico allegedly initiated, via Immucor Italia, a payment of 13,500 Euros to the hospital director. Immucor Italia categorized the 2004 payment as overdue compensation for the October 2003 conference, but the payment allegedly was made in exchange for preferential treatment from the hospital director, who selected companies to fulfill supplies and equipment contracts. De Chirico later approved

an invoice that falsely described the payment as related to consulting services and Immucor recorded the payment as such.

As discussed below, immediately following Immucor's announcement of an SEC investigation into allegations of an improper payment under the FCPA, a shareholder class filed a complaint under §§ 10-b and 20(a) of the Exchange Act. In May 2007, Immucor agreed to settle the class action for \$2.5 million.

Bristow Group

On September 26, 2007, Bristow Group Inc. ("Bristow"), a Houston-based helicopter transportation and oil and gas production facilities operation company, settled FCPA anti-bribery, books and records, and internal controls provisions charges with the SEC relating to improper payments made by Bristow's Nigerian affiliate. Bristow, which self-reported the violations, consented to the entry of a cease-and-desist order, but the SEC imposed no fine or monetary penalty.

From at least 2003 through approximately the end of 2004, Bristow's subsidiary, AirLog International, Ltd. ("AirLog"), through its Nigerian affiliate, Pan African Airlines Nigeria Ltd. ("PAAN"), made at least \$423,000 in improper payments to tax officials in Delta and Lagos States, causing the officials to reduce the amount of PAAN's annual expatriate employment tax, known as the expatriate "Pay As You Earn" ("PAYE") tax. The payments were made with the knowledge and approval of senior employees of PAAN, and the release of funds for the payments was approved by at least one former senior officer of Bristow.

PAAN was responsible for paying an annual PAYE tax to the governments of the Nigerian states in which PAAN operated. At the end of each year, the state governments assessed the taxes based on the state government's predetermined, or "deemed," salaries and sent PAAN a demand letter. PAAN then negotiated with the tax officials to lower the amount assessed. In each instance, the PAYE tax demand was lowered and a separate cash payment for the tax officials was negotiated. Upon payment, the state governments provided PAAN with a receipt reflecting only the amount payable to the state government, not the payment to tax officials. Through the improper payments, Bristow avoided \$793,940 in taxes in Delta State and at least \$80,000 in taxes in Lagos State.

Bristow discovered the improper payments when its newly appointed Chief Executive Officer heard a comment at a company management meeting suggesting the possibility of improper payments to government officials. The CEO immediately brought the matter to the attention of the audit committee, which retained outside counsel to investigate. Bristow "promptly brought this matter to the Commission's staff's attention."

During its internal investigation, Bristow also discovered that PAAN and Bristow Helicopters (Nigeria), Ltd. ("Bristow Nigeria") — the Nigerian affiliate of Bristow Helicopters (International), Ltd. ("Bristow Helicopters") — underreported their payroll expenses to the Nigerian state governments. Neither Bristow Helicopters nor Bristow Nigeria is organized under the laws of the United States or is an issuer within the meaning of the securities laws, but their

financials are consolidated into Bristow's financials. As a result, Bristow's periodic reports filed with the SEC did not accurately reflect certain of the company's payroll-related expenses. Bristow ultimately restated its financial statements for the fiscal years 2000 through 2004 and the first three quarters of 2005 to correct this error.

Chandramowli Srinivasan (EDS)

On September 25, 2007, the SEC filed a settled civil action against Chandramowli Srinivasan, the founder and former president of management consulting firm A.T. Kearney Ltd. – India ("ATKI"), in connection with improper payments made to senior employees of partially state-owned enterprises in India between 2001 and 2003. At the time of the alleged offenses, ATKI was a unit of A.T. Kearney, Inc., a subsidiary of Texas-based information technology company Electronic Data Systems ("EDS"). Without admitting or denying the SEC's allegations, Srinivasan agreed to entry of a final judgment ordering him to pay a \$70,000 civil penalty and enjoining him from future violations of the FCPA's anti-bribery provisions and from knowingly falsifying books and records.

According to the SEC, between 2001 and 2003, two partially government-owned Indian companies retained ATKI for management consulting services. In 2001, the companies became dissatisfied with ATKI and threatened to cancel the contracts. At the time, the two Indian clients accounted for over three quarters of ATKI's revenue. To induce the companies not to cancel the contracts, Srinivasan agreed to, and ultimately did, make direct and indirect payments of cash, gifts and services to certain senior employees of the Indian companies. These payments totaled over \$720,000. As a result of the payments, the Indian companies did not cancel their contracts with ATKI, and one of the companies awarded ATKI two additional contracts in September 2002 and April 2003.

In order to fund the payments, Srinivasan and an ATKI contract accountant fabricated invoices that Srinivasan then signed and authorized, thus causing EDS to record the payments improperly in its books and records. EDS realized over \$7.5 million in revenue from the Indian companies after ATKI began paying the bribes.

Also on September 25, 2007, the SEC filed settled charges with EDS for violating the books and records provisions of the FCPA in connection with the improper payments made by Srinivasan. The SEC's settlement with EDS also included several unrelated, non-FCPA books and records violations. EDS consented to an SEC order requiring it to pay approximately \$490,000 in disgorgement and prejudgment interest and cease and desist from committing future books and records violations. In resolving the matter with EDS, the SEC noted that EDS discovered and reported Srinivasan's improper payments to the SEC in 2004.

Paradigm

On September 21, 2007, the DOJ entered into a non-prosecution agreement with Paradigm B.V. ("Paradigm"), a Dutch software solutions company serving the oil and gas industry, in connection with improper payments in Kazakhstan, China, Mexico, Nigeria, and Indonesia between 2002 and 2007. Paradigm was, at the time of the agreement, a private limited

liability company, which had maintained its principal place of business in Israel until July 2005 when it relocated to Houston, Texas (rendering Paradigm a “domestic concern” for purposes of the FCPA). Paradigm discovered the payments while conducting due diligence in preparation for listing on a U.S. stock exchange. Paradigm agreed to pay a \$1 million fine, implement new enhanced internal controls and retain outside counsel for eighteen months to review its compliance with the non-prosecution agreement.

According to the DOJ, in Kazakhstan, Paradigm was bidding on a contract for geological software in August 2005. An official of Kazakhstan’s national oil company, KazMunaiGas (“KMG”), recommended that Paradigm use a particular agent, ostensibly to assist it in the tender process. Paradigm agreed to use the agent, Frontera Holding S.A. (“Frontera”), a British West Indies company, without conducting any due diligence and without entering into a written contract. Following Paradigm’s award of the contract, it received an invoice from Frontera requesting payment of a “commission” of \$22,250, which Paradigm paid. The DOJ found that the documentary evidence indicating that Frontera prepared any tender documentation or performed any services to be “lacking.”

Paradigm conducted its business in China largely through a representative office (“Paradigm China”), which was responsible for software sales and post-contract support. In July 2006, Paradigm China entered into an agreement with a local agent, Tangshan Haitai Oil Technology Co Ltd. (“Tangshan”), in connection with an unspecified transaction with Zhonghai Petroleum (China) Co., Ltd. (“Zhonghai”), a subsidiary of the China National Offshore Oil Company (“CNOOC”). The agent agreement provided that Tangshan was to receive a 5% commission and contemplated that commission payments would be passed on to representatives of Zhonghai, with Paradigm China and Tangshan splitting the costs of these commissions equally. Although documentation did not exist to determine how many of these payments were made, Paradigm China’s country manager confirmed that at least once such payment was made.

Further, Paradigm China retained employees of state-owned oil companies as “internal consultants” and agreed to pay them in cash to evaluate Paradigm’s software. The payments to the officials were intended to induce the internal consultants to encourage their companies to purchase Paradigm’s products. Paradigm also paid these internal consultants “inspection” and “acceptance” fees of between \$100-200 at or around the time of business negotiations and after Paradigm’s products were delivered and installed. Finally, Paradigm China paid for “training” trips for internal consultants and other employees of state-owned companies and provided them with airfare, hotel, meals, gifts, cash per diems, and entertainment (including sightseeing and cash for shopping). Paradigm was unable to document the total amount of payments made to the internal consultants or for such training trips.

In 2004, Paradigm acquired a Mexican entity, AGI Mexicana S.A. de C.V. (“Paradigm Mexico”), and entered into a subcontract with the Mexican Bureau of Geophysical Contracting (“BGP”). Paradigm Mexico was to perform services in connection with BGP’s contract with Pemex, the Mexican national oil company. Paradigm Mexico used the services of an agent in connection with this contract without entering into a written agreement. The agent requested \$206,698 in commission payments to be paid through five different entities. Paradigm Mexico

failed to conduct any due diligence on the agent or the entities through which payment was requested. Paradigm Mexico paid certain of the agent's invoices. When new senior management learned of the payments, however, the payments were halted. The agent sued Paradigm Mexico in Mexican court, but Paradigm prevailed in the suit.

Further, Paradigm Mexico spent approximately \$22,000 on trips and entertainment for a Pemex decision maker in connection with the BGP contract and a second subcontract with a U.S. oil services company, including a \$12,000 trip to Napa Valley that coincided with the Pemex official's birthday. Around the time of the second contract, Paradigm also acquiesced to a demand to hire the Pemex official's brother as a driver (who did perform some driving duties after being retained). Finally, Paradigm Mexico leased a house from the wife of a separate tender official of a Pemex subsidiary in close proximity to the signing of a third contract between Paradigm Mexico and the Pemex subsidiary. The house was used by Paradigm Mexico's staff, and the rental fee "appears to have been fair market value." The Pemex decision maker on the first two contracts was also the "responsible official" for this third contract.

In 2003, Paradigm's Nigerian subsidiary proposed entering into a joint venture with Integrated Data Services Limited ("IDSL"), the "services arm" subsidiary of the NNPC. Paradigm Nigeria hired an agent to assist in its Nigerian operations and, after submitting its bid for the joint venture, amended the agent's contract to provide a commission in the event the joint venture bid was successful. A meeting between Paradigm officials and IDSL concerning the proposed joint venture took place in Houston in 2003. In May 2005, former Paradigm executives agreed to make between \$100,000 and \$200,000 of corrupt payments through its agent to unidentified Nigerian politicians in order to win the joint venture contract. When Paradigm learned it had not received the contract, it terminated the agency relationship.

Paradigm's Indonesian subsidiary conducted business through an agent, exclusively so from April 2004 through January 2007. In 2003, employees of Pertamina, Indonesia's national oil company, requested funds for the purpose of obtaining or retaining business. The agent was involved in making the payments. The frequency and amount of these payments could not be determined from available documentation, but Paradigm's regional controller confirmed that at least one such improper payment had been made.

The DOJ emphasized that it agreed not to prosecute Paradigm or its subsidiaries and affiliates as a result of this wide-range of corrupt practices (assuming Paradigm's compliance with its obligations under the non-prosecution agreement) because Paradigm "had conducted an investigation through outside counsel, voluntarily disclosed its findings to the Justice Department, cooperated fully with the Department and instituted extensive remedial compliance measures" – which the DOJ described as "significant mitigating factors."

The compliance measures to which Paradigm agreed to address deficiencies in its internal controls, policies and procedures in preparation of its listing on a United States exchange as a public company, included (i) promulgation of a compliance code designed to reduce the prospect of FCPA violations that would apply to all Paradigm directors, officers, employees and, where appropriate, third parties such as agents, consultants and joint venture partners operating on

Paradigm's behalf internationally; (ii) the assignment of responsibility to one or more senior corporate official(s) for implementation and oversight of compliance with these policies; (iii) periodic FCPA training for all directors, officers, employees, agents and business partners and annual certification by those parties of compliance with Paradigm's compliance policies and procedures; and (iv) appropriate due diligence pertaining the retention and oversight of agents and business partners.

Textron

On August 21 and 23, 2007, Textron Inc. ("Textron"), a global, multi-industry company based in Providence, Rhode Island, entered into a non-prosecution agreement with the DOJ and settled FCPA books and records and internal control provisions charges with the SEC relating to improper payments made by two of Textron's fifth-tier, French subsidiaries in connection with the OFFP and improper payments and failed due diligence by those and other Textron subsidiaries in the United Arab Emirates ("UAE"), Bangladesh, Indonesia, Egypt, and India.

In total, Textron will pay over \$4.5 million dollars to settle the charges. Specifically, according to the terms of the SEC settlement, Textron is required to disgorge \$2,284,579 in profits, plus approximately \$450,461 in pre-judgment interest, and to pay a civil penalty of \$800,000. Textron will also pay a \$1,150,000 fine pursuant to the non-prosecution agreement with the DOJ.

Further, Textron agreed to cooperate with the government in its ongoing investigation and to strengthen its FCPA compliance program, including (i) extending the application of its FCPA policies to "all directors, officers, employees, and, where appropriate, business partners, including agents, consultants, representatives, distributors, teaming partners, joint venture partners and other parties acting on behalf of Textron in a foreign jurisdiction," (ii) adopting and implementing "corporate procedures designed to ensure that Textron exercises due care to assure that substantial discretionary authority is not delegated to individuals whom Textron knows, or should know through the exercise of due diligence, have a propensity to engage in illegal or improper activities,"³⁴ and (iii) ensuring that senior corporate officials retain responsibility for the implementation and oversight of the FCPA compliance program and report directly to the Audit Committee of the Textron Board of Directors.

From 2001 through 2003, two of Textron's French subsidiaries, which Textron acquired in 1999, made approximately \$650,539 in kickback payments in connection with the sale of humanitarian goods to Iraq.

According to the SEC complaint and DOJ non-prosecution agreement, starting in the middle of 2000, the Textron subsidiaries, with the assistance of Lebanese and Jordanian consulting firms, inflated three OFFP contracts with the Iraqi Ministry of Oil and ten contracts with the Iraqi Ministry of Industry and Minerals to include the cost of secret ASSF payments. In violation of Textron's compliance policies, neither consulting firm was retained through a

34 This element is borrowed from the Federal Sentencing Guidelines; *see* U.S. Sentencing Guidelines Manual § 8B2.1(b)(3).

written contract. With the knowledge and approval of management officials of the Textron subsidiaries, the consultants made the ASSF payments to Iraqi accounts outside of the U.N. Oil for Food Escrow Account and were then reimbursed by the Textron subsidiaries. The payments were recorded as “consultation” or “commission” fees.

In addition, Textron’s internal investigation of the Oil for Food payments revealed that between 2001 and 2005, various companies within Textron’s industrial segment, known as its “David Brown” subsidiaries, made improper payments of \$114,995 to secure thirty-six contracts in the UAE, Bangladesh, Indonesia, Egypt, and India. For most of these payments, the government appears to have evidence that the funds were provided either directly or indirectly to foreign officials. However, the FCPA charge stemming from the Indonesia payments rests on the fact that Textron cannot show that the funds it provided a local representative were not funneled to a government official.

Specifically, the SEC complaint alleges that David Brown Union Pump engaged a local representative to sell spare parts to Pertamina, an Indonesian governmental entity. The total contract price for the transaction was \$321,171, with approximately \$149,000 allocated to after-sales services. “Thus, almost half of the contract value was for after-sales services, which was highly unusual.” In January 2002, David Brown Union Pump paid the representative \$149,822, including a commission of \$17,250 and the remainder allocated to after-sales service fees. The representative paid approximately \$10,000 to a procurement official at Pertamina to help sponsor a golf tournament, with very little documentation to show what the representative did with the remainder of the funds allocated to after-sales services.

In describing the company’s failure to maintain adequate internal controls sufficient to prevent or detect the above violations, the SEC complaint notes that that despite the “endemic corruption problems in the Middle East,” Textron failed to take “adequate confirming steps” to ensure that the managers and employees of its subsidiaries “were exercising their duties to manage and comply with compliance issues.”

The SEC Litigation Release indicates that the “Commission considered the remedial acts promptly undertaken by Textron, which self-reported, and cooperation afforded the Commission staff in its continuing investigation.”

Delta & Pine Land Company

On July 25 and 26, 2007, the SEC filed two settled enforcement proceedings charging Delta & Pine Land Company (“Delta & Pine”), a Mississippi-based company engaged in the production of cottonseed, and its subsidiary, Turk Deltapine, Inc. (“Turk Deltapine”), with violations of the FCPA. On July 25, 2007, the Commission filed a federal lawsuit charging the companies with violating the anti-bribery and books and records and internal controls provisions of the FCPA. On July 26, 2007, the SEC issued an administrative order finding that Delta & Pine violated the books and records and internal controls provisions and that Turk Deltapine violated the anti-bribery provisions of the FCPA. In the lawsuit, the companies agreed to pay jointly and severally a \$300,000 penalty. In the administrative proceeding, the companies agreed

to cease and desist from further FCPA violations and Delta & Pine agreed to retain an independent consultant to review and make recommendations concerning the company's FCPA compliance policies and procedures and submit such report to the SEC.

In both the federal court complaint and the administrative order, the SEC charged that, from 2001 to 2006, Turk Deltapine made payments of approximately \$43,000 to officials of the Turkish Ministry of Agricultural and Rural Affairs in order to obtain governmental reports and certifications that were necessary for Turk Deltapine to obtain, retain, and operate its business in Turkey. Specifically, Turk Deltapine regularly paid provincial government officials to issue inspection reports and quality control certifications without undertaking their required inspections and procedures. The payments included cash, travel expenses, air conditioners, computers, office furniture, and refrigerators.

The complaint and order note that upon learning of the payments in 2004, Delta & Pine failed to receive all the pertinent facts from Turk Deltapine employees and, rather than halting the payments, arranged for the payments to be made by a chemical company supplier that was reimbursed for its payments and granted a ten percent handling fee. An internal Delta & Pine document noted that there were "no effective controls put in place to monitor this process."

Baker Hughes

On April 26, 2007, Baker Hughes Inc. settled charges with the SEC and DOJ relating to improper payments to two agents associated with its business in Kazakhstan and for failed due diligence in connection with payments made in Nigeria, Angola, Indonesia, Russia, Uzbekistan, and Kazakhstan. Baker Hughes was also penalized for violating a 2001 SEC cease and desist order requiring the company to comply with the books and records and internal controls provisions of the FCPA.

Combined, the SEC and DOJ settlements resulted in fines and penalties totaling \$44 million, the largest monetary sanction imposed in an FCPA case up to that time. The settlement is composed of over \$23 million in disgorgement and a \$10 million penalty to the SEC, along with an \$11 million criminal fine imposed by the DOJ. Under the terms of the SEC and DOJ resolutions, Baker Hughes is required to retain a monitor for three years to review and assess the company's compliance program and monitor its implementation of and compliance with new internal policies and procedures.

With regard to the Kazakhstan payments, Baker Hughes admitted that it hired an agent at the behest of a representative of Kazakhstan's former national oil company (Kazakhoil) in connection with Baker Hughes' efforts to secure subcontracting work on the Karachaganak oil field, although Baker Hughes had already been unofficially informed that it had won the contract and the agent had done nothing to assist Baker Hughes in preparing its bid. A Baker Hughes official apparently believed that if Baker Hughes did not hire the agent it would lose the subcontracting work as well as future business in Kazakhstan.

The agency agreement called for Baker Hughes to pay a commission of 2% on revenues from the Karachaganak project. From May 2001 through November 2003, Baker Hughes made

27 commission payments totaling approximately \$4.1 million to the agent (approximately \$1.8 million was made by Baker Hughes on behalf of subcontractors). Baker Hughes was also charged with pressuring one of its subcontractors to make a \$20,000 payment to the same agent in connection with an unrelated contract.

Separately, from 1998 to 1999, a Baker Hughes subsidiary also made payments to another agent, FT Corp., at the direction of a high-ranking executive of KazTransOil (the national oil transportation operator in Kazakhstan). Despite already having an agent for the project in question, the Baker Hughes subsidiary hired FT Corp. after the contract award was delayed for fear that it would not be awarded the chemical contract with KazTransOil. In doing so, it failed to conduct sufficient due diligence and its agency agreement contained no FCPA representations. In December 1998, an employee of Baker Hughes' subsidiary learned that the FT Corp. representative was also a high-ranking KazTransOil executive. Nevertheless, payments were made until April 1999, with FT Corp. receiving commissions via a Swiss bank account of approximately \$1.05 million.

In addition to settling charges relating to the above improper payments, Baker Hughes also settled charges stemming from allegations that it improperly recorded items in its books and records, and failed to implement sufficient internal controls, relating to its business in several countries. In each instance, the government found Baker Hughes to have violated these requirements — even though there is no finding that illegal payments (which, in one instance, was only \$9,000) were in fact made — because Baker Hughes failed to conduct sufficient due diligence to determine whether the payments were provided to government officials. In other words, the SEC found violations not after proof was adduced that Baker Hughes made corrupt payments to foreign government officials, but rather from the company's inability to know that payments *were not* being passed on to government officials — effectively shifting the burden onto companies to prove that payments were not made to government officials when no or inadequate due diligence is conducted.

For example, between 1998 and 2004, a Baker Hughes subsidiary made payments to an agent (“N Corp.”) totaling nearly \$5.3 million in connection with N Corp.'s assistance in selling products to customers in Kazakhstan, Russia, and Uzbekistan. Prior to 2002, there was no written agreement with N Corp., and the agreement eventually entered into in 2002 did not contain the full FCPA provisions required by Baker Hughes' FCPA policies and procedures. In addition, N Corp. made it through Baker Hughes' revised due diligence procedures, including review by outside counsel hired to assist with agent re-certifications.

Baker Hughes self-reported its violations to the DOJ and the SEC. In its sentencing memorandum, the DOJ highlighted the company's “exceptional” cooperation. In addition to self-reporting, Baker Hughes terminated employees and agents it believed to be involved in the corrupt payments and spent \$50 million on an internal investigation of its activities in twelve countries. The investigation included independent analysis of financial records by forensic accountants, review by outside counsel of tens of millions of pages of electronic data, hundreds of interviews and the formation of a blue ribbon panel to advise the company on its dealings with the government that included the late Alan Levenson, former director of the SEC's division of

corporation finance, Stanley Sporkin, retired federal district judge and ex-director of the SEC's division of enforcement, and James Doty, former general counsel to the SEC. Baker Hughes met repeatedly with the DOJ in the course of its investigation, made its employees available for interviews, and provided a "full and lengthy report of all findings." These efforts led to a \$27 million reduction in fines under the sentencing guidelines and avoided a potential criminal trial and the prospect of Baker Hughes being disbarred from government contracts or losing export licenses.

On May 4, 2007 and May 15, 2007, The Sheetmetal Workers' National Pension Fund and Chris Larson, respectively, instituted shareholder derivative lawsuits against Baker Hughes, certain current and former Baker Hughes officers and members of the Board of Directors related, in part, to the FCPA violations. On August 17, 2007, the Alaska Plumbing and Pipefitting Industry Pension Trust instituted a similar lawsuit, and on June 6, 2008, the Midwestern Teamsters Pension Trust Fund and Oppenheim Kapitalanlagegesellschaft Mbh also instituted a shareholder derivative lawsuit. On May 15, 2008, the consolidated complaint of the Sheetmetal Workers' National Pension Fund and The Alaska Plumbing and Pipefitting Industry Pension Trust was dismissed for lack of subject matter jurisdiction. The lawsuit brought by Larson was dismissed on September 15, 2008. The lawsuit brought by the Midwestern Teamsters Pension Trust Fund and Oppenheim Kapitalanlagegesellschaft Mbh was dismissed on May 26, 2009. These cases are discussed *infra*.

Dow Chemical Company

On February 13, 2007, the SEC filed a settled civil action against Dow Chemical Company ("Dow") for violations of the books and records and internal controls provisions of the FCPA related to payments made by DE-Nocil Crop Protection Ltd ("DE-Nocil"), a fifth-tier Dow subsidiary headquartered in Mumbai, India, to federal and state officials in connection with the company's agro-chemical products. Without admitting or denying wrongdoing, Dow consented to pay a civil monetary penalty of \$325,000 and to the entry of a cease-and-desist order.

The SEC's complaint alleged that from 1996 through 2001, DE-Nocil made a series of improper payments to Indian government officials totaling approximately \$200,000, none of which were properly recorded in DE-Nocil's books. Specifically, the complaint alleged that DE-Nocil, made approximately \$39,700 in improper payments to an official in India's Central Insecticides Board ("CIB") to expedite the registration of three of the company's products. Most of these payments were made to contractors, which added fictitious charges to their bills or issued false invoices to DE-Nocil. The contractors then disbursed the funds to the CIB official at DE-Nocil's direction.

In addition, DE-Nocil allegedly "routinely used money from petty cash to pay" various state officials, including state inspectors. The complaint states that these inspectors could prevent the sale of DE-Nocil's products by falsely claiming that a company's product samples were misbranded or mislabeled, which carried significant potential penalties. Rather than face the false accusations and suspension of sales, DE-Nocil made the payments from petty cash. The

complaint recognized that other companies commonly made such payments as well and noted that, although the payments were small in amount — “well under \$100” — they “were numerous and frequent.” Dow estimated that DE-Nocil made \$87,400 in such payments between 1996 and 2001.

Finally, DE-Nocil allegedly made estimated improper payments of \$37,600 in gifts, travel and entertainment to various officials, \$19,000 to government business officials, \$11,800 to sales tax officials, \$3,700 to excise tax officials, and \$1,500 to customs officials.

In reaching its settlement with Dow, the SEC took into account, among other things, (i) the fact that Dow had conducted an internal investigation of DE-Nocil and, upon completion, self-reported to the SEC; (ii) Dow’s remedial efforts, including employee disciplinary actions; (iii) its retention of an independent auditor to conduct a forensic audit of DE-Nocil’s books and records; (iv) the company’s improved FCPA compliance training and a restructuring of its global compliance program; (v) its decision to join a non-profit association specializing in anti-bribery due diligence; and (vi) its hiring of an independent consultant to review and assess its FCPA compliance program.

El Paso Corporation

On February 7, 2007, the SEC filed settled charges against The El Paso Corporation (“El Paso”) for violations of the books and records and internal controls provisions of the FCPA arising from improper surcharge payments that El Paso and its predecessor-in-interest, The Coastal Corporation (“Coastal”), made in connection with the Iraqi OFFP. Without admitting or denying wrongdoing, El Paso consented to an injunction from violating the books and records and internal controls provisions, and to pay a civil monetary penalty of \$2.25 million. On the same date, El Paso settled charges of wire fraud and engaging in prohibited transactions with the government of Iraq, agreeing to forfeit approximately \$5.5 million to the U.S. Government.³⁵

Coastal had longstanding ties with the Iraqi government. The company received the first Oil for Food contract in 1996. The complaint alleges that Coastal first received a demand for an improper payment in Fall 2000 from a SOMO official, who insisted that Coastal pay an additional \$.10 surcharge per barrel on all future oil purchases under an existing Coastal contract. A consultant and former Coastal official arranged to make the surcharge payment, which amounted to over \$200,000, in two installments to an Iraqi-controlled Jordanian bank account in 2001 and 2002. Coastal then refused to pay any additional demanded surcharges and did not enter into further direct contracts with SOMO.

However, Coastal, which in January 2001 merged with a wholly-owned El Paso subsidiary, continued to purchase Iraqi crude oil indirectly through third parties. The complaint alleges that based on its past experience, trade press and communications with those third parties, El Paso knew or was reckless in not knowing that illegal surcharges were being paid in connection with that oil and that the third parties were passing the surcharges back to El Paso in

³⁵ The SEC and DOJ inconsistently describe the fine as a disgorgement of profits and the value of the illegal surcharges, respectively.

premiums. The complaint further asserts that recorded conversations of the company's oil traders demonstrated the company's knowledge of the surcharge demand. For example, in one taped call, an El Paso official reminded an El Paso trader of past conversations with SOMO officials regarding the surcharges in which "they told us – blatantly – that we would have to pay."

In or around 2001, El Paso inserted a provision in some of its third-party Iraqi oil purchase contracts requiring its contract partners to represent that they had "made no surcharge or other payment to SOMO" outside the Oil for Food Escrow Account. The complaint asserts that the representations were false, that El Paso officials did not conduct sufficient due diligence to assure themselves that illegal surcharges were not being paid, and that recorded conversations demonstrated that El Paso knew that the contract provision was ineffectual. For example, in at least one conversation, a third party indicated that he was willing to make the illegal surcharge payments and sign a false certification denying that any illegal surcharge was paid.

The complaint asserts that between June 2001 and 2002, surcharge payments of approximately \$5.5 million were paid in connection with these transactions and that El Paso generated approximately \$5.5 million in net profit off the transactions.

On October 1, 2007, Oscar Wyatt Jr., the former chairman of Coastal, pleaded guilty to one count of conspiracy to commit wire fraud in connection with the OFFP. The U.S. Government accused him of paying millions in illegal surcharges directly to Iraqi officials in return for oil allocations from 2000 to 2002. On November 28, 2007, a final judgment was entered sentencing Wyatt to one year and one day imprisonment and ordering him to forfeit over \$11 million.

Vetco International Ltd.

On February 6, 2007, the DOJ settled cases against three wholly-owned subsidiaries of Vetco International Ltd. and entered into a non-prosecution agreement with a fourth subsidiary. The companies admitted that they violated, and conspired to violate, the FCPA in connection with over 350 indirect payments totaling approximately \$2.1 million made through an international freight forwarding company (since reported to be Panalpina World Transport Holding Ltd. ("Panalpina")) to employees of the Nigerian Customs Service between September 2002 and April 2005.

The payments were designed to attain preferential treatment in the customs-clearing process for the companies' deepwater oil drilling equipment in connection with the Bonga Project, Nigeria's first deepwater oil drilling project. The Vetco companies made three types of improper payments through the freight forwarder — at least 338 "express courier" payments totaling over \$2 million designed to expedite the customs clearance of Vetco shipments, at least 19 "interventions" totaling almost \$60,000 to "resolve" problems or violations that arose in connection with Vetco shipments, and at least 21 "evacuations" totaling almost \$75,000 when shipments that were urgently needed were delayed in customs because of the failure to pay customs duties or other documentation irregularities. The complaints underlying the settled

proceeding suggest that a payment designed to “secure an improper” advantage, whether or not it actually assisted in obtaining or retaining business, can serve as a basis for an FCPA anti-bribery violation, conflating the statutory elements identified above as (vi) and (vii).

The Vetco subsidiaries agreed to pay a total of \$26 million in fines, then the largest criminal fine in an FCPA prosecution to that date. This was the second time that one of the subsidiaries, Vetco Gray UK, pleaded guilty to violating the FCPA. In 2004, Vetco Gray UK (under a different name) and an affiliated company pleaded guilty to paying more than \$1 million in bribes to officials of National Petroleum Investment Management Services (“NAPIMS”), a Nigerian government agency that approves potential bidders for contract work on oil exploration projects. Subsequently, Vetco Gray UK was renamed and acquired by a group of private equity-backed entities. In anticipation of that acquisition, the acquirers obtained an FCPA Advisory Opinion that indicated that the DOJ intended to take no action in connection with the acquisition based, in part, on the acquirers’ pledge to institute and implement a vigorous FCPA compliance system for the acquired company.³⁶ In calculating the fine against Vetco Gray UK, which totaled \$12 million of the \$26 million in fines, the DOJ “took into account” Vetco Gray UK’s prior violation and the failure of the acquirers, in fact, to institute an effective FCPA compliance system.

In addition to the fines, Vetco International Ltd. agreed, among other things, (i) to a partial waiver of the attorney-client privilege by providing all memoranda of interviews by inside or outside counsel or any other consultant or agent in relation to its internal investigation of the improper payments; (ii) to the appointment of a monitor, mutually acceptable to Vetco International Ltd. and the DOJ, to review and evaluate over a period of three years its and the Vetco subsidiaries’ internal accounting and compliance controls and recordkeeping procedures as they relate to the books and records and anti-bribery provisions of the FCPA; (iii) to institute and implement robust FCPA compliance systems, including regular FCPA training for, and annual certifications by, all directors, officers and employees, agents and business partners of the subsidiaries; and (iv) to conduct “compliance reviews” of thirty-one countries in which the Vetco companies do business, all existing or proposed joint ventures, and various acquisitions made since 2004.

The SEC has not instituted a related enforcement action. On February 23, 2007, GE purchased the Vetco entities and thus is bound by the Vetco plea agreements.

As noted above, in November 2008, Aibel Group (successor to Vetco Limited) pleaded guilty to violating the FCPA and admitted that it was not in compliance with the 2007 deferred prosecution agreement.

James H. Giffen

In April 2003, the Department of Justice indicted James H. Giffen for allegedly making more than \$78 million in improper payments to government officials in Kazakhstan. The indictment also charged J. Bryan Williams with tax evasion in connection with a \$2 million

³⁶ See FCPA Opinion Release 2004-02 (July 12, 2004).

payment he received after securing valuable oil rights for his then-employer, Mobil Oil.³⁷ Despite the fact that the indictment was handed down nearly six years ago, the prosecution against Giffen continues.

According to the indictment, Giffen was the Chairman of the Board, Chief Executive Officer and principal shareholder of Mercator Corporation, a New York-based merchant bank. Giffen and Mercator represented the Kazakh government in connection with a series of large oil and gas rights negotiations. Giffen held the title of counselor to the President, and he and Mercator provided advice on strategic planning, investment priorities, and attracting foreign investment to the Kazakh government. Giffen was also awarded success fees in exchange for helping broker some large oil and gas right deals between United States oil companies and the Kazakh government.

The DOJ alleged that between 1995 and 2000, Giffen caused at least four United States oil companies — Mobil Oil, Texaco, Amoco and Phillips Petroleum — to make payments into escrow accounts in connection with some of Kazakhstan’s most lucrative oil and gas projects, in particular, the Tengiz and Karachaganak projects. Then, through a series of sham transactions with two Swiss banks, Giffen was able to divert these payments into secret Swiss bank accounts beneficially held for two Kazakh government officials. For example, in 1996, Mobil Oil purchased a 25% stake in the large Tengiz oil field in Kazakhstan and agreed to pay Giffen the success fee he was owed by the Kazakh government for helping to broker the deal. Giffen diverted \$22 million of this fee into secret Swiss bank accounts and made unlawful payments to two government officials out of the accounts. From 1995 through 2000, he diverted over \$70 million of funds in such a manner, and is alleged to have made approximately \$78 million in improper payments to at least two Kazakh officials during the relevant time period.

In total, Giffen was charged with 13 violations of the FCPA, 8 counts of wire fraud, 1 count of mail fraud, 35 counts of money laundering, 3 counts of filing a false tax return, and 1 count of conspiracy to commit money laundering, mail and wire fraud, and to violate the FCPA.

Giffen’s response has been novel, if nothing else. Within a year of his indictment, Giffen sought discovery in support of a possible public authority defense, claiming that, by its actions, the United States government effectively authorized his conduct. The discovery requests, sustained over government objection, triggered the Classified Information Procedures Act (“CIPA”),³⁸ which governs the handling of classified information in federal cases. As a result, there has followed a complicated knot of discovery tie-ups, including *in camera* judicial reviews of classified documents and the government’s unsuccessful interlocutory appeal of the District Court’s denial of its motion *in limine* to preclude Giffen from presenting a public authority

37 Williams settled the charges in June 2003. He was sentenced to three years and ten months in prison, and ordered to pay a \$25,000 fine and more than \$3.5 million in restitution.

38 18 U.S.C. App. § 3.

(\$400 million), Daimler (\$185 million), ENI and Snamprogetti (\$365 million), and Technip (\$338 million), and a settlement in principle with Alcatel-Lucent (\$137 million).

Meanwhile, U.S. companies and individuals face an increasingly aggressive enforcement environment in other jurisdictions where they do business. For example, the new U.K. Bribery Act, which is scheduled to go into effect in April 2011, has very broad jurisdictional provisions that can reach any entity that carries on a business, or part of a business, in the U.K., even if the underlying conduct does not have any substantive connection to the U.K. This is particularly significant because the new U.K. Act is in some ways more stringent than even the FCPA. The U.K. Act, for example, creates a new strict liability corporate offense for failure to prevent bribery. Under this provision, a company can be guilty of a crime where an “associated person” such as a commercial agent engages in bribery, even if employees of the company had no knowledge of the agent’s conduct. The U.K. Act does, however, provide for an affirmative defense if the company can demonstrate that it had in place “adequate procedures” to prevent the bribery. This strict liability scheme, with its affirmative defense, makes it all the more essential that any company doing business in the U.K. has a state-of-the-art anti-corruption compliance program.

The United Kingdom is far from alone in increasing its enforcement efforts. As but one more example, an investigating magistrate in France, a country previously considered to be behind the international anti-bribery enforcement curve, opened a formal investigation into oil giant Total in connection with Oil-for-Food related allegations stemming from an investigation first launched in 2002.

To the extent that international anti-corruption enforcement was once viewed as an exclusively American endeavor, recent developments demonstrate that perspective to be out of date at best. At a May 31, 2010 speech to the OECD in Paris, Attorney General Holder lauded the international community’s efforts at fighting corruption, stating that “none of the progress the United States has made would have been possible without the long-term cooperation of our law enforcement partners around the globe.”

This Alert discusses these anti-corruption developments and many others. After the Table of Contents, this Alert begins with a summary and analysis of certain critical enforcement trends and lessons to be learned from the settlements and other related developments. Following that summary and analysis are (i) a review of focus issues; (ii) brief discussion of the statutory requirements of, and penalties under, the FCPA; (iii) a description of FCPA settlements and criminal matters from 2005 to early 2010 in reverse chronological order; (iv) a discussion of other FCPA and related developments; and (v) a summary of each DOJ Review and Opinion Procedure Release issued from 1980-present.

Hughes Hubbard wishes to thank the following members of its Anti-Corruption and Internal Investigations Practice Group for preparing this Alert: Kevin T. Abikoff, John F. Wood, Benjamin S. Britz, Bryan J. Sillaman and Michael H. Huneke.

The SEC settlement documents describe two types of kickbacks paid by SSI to the general managers of its Chinese scrap metal customers. First, SSI paid a “standard” kickback of between \$3,000 to \$6,000 per shipment from the revenue earned on the sale. The second type of kickback involved the Chinese general managers overpaying SSI for the steel purchase. SSI would then pay a “refund” or “rebate” directly to the general managers for the overpaid amount, usually ranging from \$3,000 to \$15,000. SSI made these payments possible by creating secret SSI Korea bank accounts, and at least one senior SSI official was aware of and authorized wire transfers to the secret bank accounts.

According to SEC documents, SSI Korea also acted as a commission-receiving broker for Japanese scrap metal sales in China. Japanese companies also provided SSI Korea with funds to make improper payments to managers of the government-owned Chinese steel mills. To conceal the improper payments, SSI falsely described those payments as “sales commissions,” “commission(s) to the customer,” “refunds,” or “rebates” in SSI’s books and records, resulting in further violations of the FCPA’s books and records provisions.

In addition to paying bribes to government-owned steel mills, SSI also paid bribes to managers of privately owned steel mills in China and South Korea to induce them to purchase scrap metal from SSI. Again, SSI falsely described the payments as “commissions” and “refunds” in its books and records. The SEC’s inclusion of these charges is significant as these payments involve private parties and not foreign officials or government-owned entities as is typical of most FCPA violations. These charges underscore that even illicit transactions not involving foreign officials might nonetheless result in FCPA violations, especially when coupled with false entries in a company’s books and records.

The illicit transactions described above also resulted in SEC charges against two SSI senior officials, the former SSI Chairman and CEO and the Executive Vice President of SSI International. As part of its settlement with the SEC, SSI undertook to retain an independent compliance consultant to review and evaluate SSI’s internal controls, record-keeping, and financial reporting policies. Further, SSI agreed to pay approximately \$15 million in combined fees and penalties.

- *Si Chan Wooh*

On Friday, June 29, 2007, Si Chan Wooh, former senior officer of SSI International pleaded guilty to conspiring to violate the anti-bribery provisions of the FCPA in connection with the improper payments made by SSI to government officials in China. As part of his guilty plea, Wooh agreed to cooperate with the DOJ’s ongoing investigation. Without admitting or denying wrongdoing, Wooh settled related charges with the SEC, consenting to an injunction prohibiting him from future violations of the FCPA’s anti-bribery provisions and from aiding and abetting violations of the books and records provisions. The settlement with the SEC required Wooh to pay approximately \$16,000 in disgorgement and interest and a \$25,000 civil penalty.

Wooh was Executive Vice President for SSI International from February 2000 through October 2004, and President from October 2004 through September 2006. Based on the increased revenue that Schnitzer generated from sales involving improper payments, Wooh received a bonus of \$14,819.38.

- Robert W. Philip

On December 13, 2007, the SEC filed settled charges against Robert W. Philip, former Chairman and CEO of SSI for violating the FCPA's anti-bribery provisions and for knowingly circumventing SSI's internal controls or knowingly falsifying SSI's books and records. Philip also was charged with aiding and abetting SSI's books and records and internal controls violations in connection with the above conduct. Without admitting or denying the allegations, Philip agreed to an order enjoining him from future violations of the FCPA and to disgorge approximately \$169,863 in bonuses, pay approximately \$16,536 in prejudgment interest, and pay a \$75,000 civil penalty.

The SEC alleged that, in addition to authorizing the payment of bribes and directing that the payments be misreported in SSI's books, Philip neglected to educate SSI staff about the requirements of the FCPA and failed to establish a program to monitor its employees, agents and subsidiaries for compliance with the Act. In so doing, Philip aided and abetted SSI's violations of the FCPA's internal controls provisions.

Willbros Group, Inc. & Jim Bob Brown

On September 14, 2006, Jim Bob Brown, a former executive of Willbros Group Inc. ("Willbros Group"), an international oil and gas pipeline company with headquarters in Tulsa, Oklahoma prior to 2000 when it moved them to Houston, Texas, pleaded guilty to violations of the anti-bribery provisions of the FCPA in connection with conspiring with others to bribe Nigerian and Ecuadorian government officials. On that same day, the SEC filed a civil action related to the same conduct, alleging civil violations of the FCPA and of the Exchange Act. Without admitting or denying the allegations in the complaint, Brown consented to the entry of a judgment that permanently enjoins him from future violations of these provisions. The Court will determine, at a later date upon motion by the SEC, whether to order Brown to pay a civil penalty.

Among other things, Brown's plea agreement indicates that he "loaned" a suitcase filled with \$1 million in cash to a Nigerian national with the intent that it be passed on to Nigerian officials. Brown was sentenced on January 29, 2010 to 12 months and one day in prison. The judge ordered Brown to serve two years of supervised release after his prison term and pay a fine of \$1,000 per month while he is on supervised release.

On May 14, 2008, Willbros Group and four of its former employees settled civil charges with the SEC for violating the FCPA's anti-bribery, books and records and internal controls provisions in connection with the payment of bribes to officials in Nigeria and Ecuador, and for violating the anti-fraud provisions of the Securities Act (Section 17(a)) and Exchange Act

(Section 10(b) and Rule 10b-5 thereunder) in connection with a fraudulent scheme to reduce taxes in Bolivia. The SEC settlement requires Willbros Group to pay \$10.3 million in disgorgement and prejudgment interest and also contained civil penalties for certain of the former employees (discussed further below).

In a related proceeding, Willbros Group and its subsidiary Willbros International Inc. (“Willbros International”) entered into a deferred prosecution agreement with the DOJ in which they agreed to pay a \$22 million criminal penalty and engage an independent monitor for three years in connection with the Nigerian and Ecuadorian bribery schemes. In connection with the deferred prosecution agreement, Willbros Group and Willbros International agreed to a limited waiver of attorney-client privilege, applicable to the DOJ only, and agreed to implement a compliance and ethics program designed to prevent further violations of the FCPA.

- *Nigeria*

Beginning in at least 2003, Willbros Group, acting primarily through three operating subsidiaries, sought to obtain two significant Nigerian contracts: (i) the onshore Eastern Gas Gathering Systems (“EGGS”) project, which was divided into Phases I and II; and (ii) an offshore pipeline contract. The EGGS and offshore pipeline projects were run by separate joint-ventures, both of which were majority-owned by the Nigerian National Petroleum Corporation (“NNPC”) and were operated by subsidiaries of major international oil companies. The SEC’s complaint asserts that Willbros Group and its subsidiaries paid over \$6 million in bribes in connection with these projects, from which Willbros Group realized approximately \$8.9 million in net profits.

Willbros West Africa, Inc. (“Willbros West Africa”) formed a consortium with the subsidiary of a German engineering and construction firm to bid on the EGGS project. According to the SEC’s complaint, in late 2003, while Willbros West Africa was bidding on Phase I of the project, Willbros International’s then president (who is not named in the complaint, but was later identified as James K. Tillery) and Jason Steph, Willbros International’s onshore general manager in Nigeria, devised a scheme with employees of Willbros West Africa’s joint venture partner to make payments to Nigerian officials, a Nigerian political party and an official in the executive branch of Nigeria’s federal government to obtain some or all of the EGGS work. The SEC’s complaint states that the then president caused Willbros West Africa to enter into a series of “consultancy agreements” that called for 3% of the contract revenues to be paid out to a consultant. Certain of Willbros Group’s employees, including Steph, were allegedly aware that the consultant intended to use the money paid to him under the “consultancy agreement” to bribe Nigerian officials. In July and August 2004, after approval by the NNPC and its subsidiary, the National Petroleum Investment Management Services (“NAPIMS”), the Willbros West Africa consortium executed contracts with the EGGS joint venture operator for portions of the EGGS Phase I project.

In January 2005, Tillery resigned and the company’s audit committee began an internal investigation into allegations of unrelated tax improprieties. When the internal investigation expanded to include Willbros Group’s Nigerian operations, the “consulting” agreement was

canceled and payments ceased. When Steph and Brown learned that cutting off the payments could jeopardize Willbros International's opportunity to seek a contract for Phase II of the EGGS project, they engaged a second consultant and agreed to pay \$1.85 million to cover the outstanding "commitments" to the Nigerian officials. To come up with the \$1.85 million, Brown caused Willbros West Africa to borrow \$1 million from its consortium partner and Steph borrowed \$500,000 on behalf of a separate Willbros Nigerian subsidiary from a Nigerian gas and oil company to cover the payments to Nigerian officials. In addition, Steph directed the withdrawal of \$350,000 from a Willbros petty cash account for the same purpose. These funds were transferred to the second consultant for payment to Nigerian officials.

As with the EGGS project, Willbros Group, through Tillery, agreed to pay at least \$4 million in bribes to Nigerian officials in connection with the offshore pipeline contract. According to the DOJ and SEC, by October 2004, some of these payments had been made, although an exact amount is not indicated.

Finally, the SEC's complaint asserts that between the early 1990s and 2005, Willbros Group employees abused petty cash accounts to pay Nigerian tax officials to reduce tax obligations and to pay officials within the Nigerian judicial system to obtain favorable treatment in pending court cases. To facilitate the improper payments, certain Willbros Group employees used fictitious invoices to inflate the amount of cash needed in the petty cash accounts. Ultimately, at least \$300,000 of petty cash was used to make these types of improper payments.

- Ecuador

According to the SEC and DOJ, in late 2003, the then president of Willbros International instructed an Ecuador-based employee to pursue business opportunities in that country. The employee advised Brown, who was supervising the company's business in Ecuador, that Willbros Servicios Obras y Sistemas S.A. ("Willbros Ecuador") could obtain a \$3 million contract (the "Santo Domingo project") by making a \$300,000 payment to officials of Petroecuador, a government-owned oil-and-gas company. Brown approved the request, which required \$150,000 to be paid upfront and \$150,000 to follow after the completion of the project. After making this agreement, Willbros Ecuador received a letter of intent for the Santo Domingo project, and the company made the first \$150,000 payment.

While the Santo Domingo project was ongoing, however, the relevant officials at PetroEcuador were replaced. Both the original officials and the incoming officials insisted on receiving payments, and Brown and Tillery authorized the Ecuador employee to broker a deal. Brown attended the meeting with the Ecuadorian officials as well, where it was agreed that the company would pay the former officials \$90,000 and the new officials \$165,000. As a result of this agreement, Willbros retained the Santo Domingo project, which ultimately generated \$3.4 million in revenue for the company, and was awarded a second project. When the bribes relating to the second project were discovered in 2005, Willbros Group relinquished the project.

Willbros Group falsely characterized the payments made to the Ecuadorian officials as "consulting expenses," "platform expenses," and "prepaid expenses" in its books and records.

- Bolivia

According to the SEC complaint, Willbros Group, through certain of its former employees, further engaged in a fraudulent scheme to minimize the tax obligation of the company's Bolivian subsidiary, Willbros Transandina.

In late 2001, the subsidiary was awarded a contract to complete a pipeline as part of a joint venture. Willbros Transandina was required to pay 13% of its receipts for the project as a value added tax ("VAT"). It was, however, allowed to offset the taxes to a certain extent by the VAT it paid to its vendors. Tillery and others thus orchestrated a scheme whereby Willbros Transandina falsely inflated the VAT it owed to vendors through a series of fictitious transactions and invoices.

Similarly, Tillery directed accounting personnel to materially understate the amount of Foreign Withholding Taxes that Willbros Group owed as a foreign company doing business in Bolivia.

- Individuals

In addition to its action against Willbros Group, the SEC settled charges against several Willbros employees. Steph was charged with violating the FCPA's anti-bribery provisions, knowingly circumventing Willbros Group's internal controls or knowingly falsifying its books and records, and aiding and abetting Willbros Group's FCPA violations as a result of his role in the fraudulent payments made to Nigerian government officials. Steph will pay a civil penalty in connection with the judgment that has yet to be determined. On November 5, 2007, Steph pleaded guilty in a parallel proceeding brought by the DOJ. Steph was sentenced on January 28, 2010 to 15 months in prison. In addition to the prison sentence, the judge ordered Steph to serve two years of supervised release following his prison term and to pay a \$2,000 fine.

Gerald Jansen, a former employee of Willbros International who served as an Administrator and General Manager in Nigeria and allegedly routinely approved the payment of invoices out of petty cash which he knew were false and which were used to make payments to Nigerian tax and court officials, was charged with knowingly circumventing Willbros Group's internal controls or knowingly falsifying its books and records, and with aiding and abetting Willbros Group's violations of the FCPA's anti-bribery, books and records and internal controls provisions. Jansen was ordered to pay a civil penalty of \$30,000. The DOJ has not taken action against Jansen.

Like Jansen, Lloyd Biggers, a former employee of Willbros International who allegedly knowingly procured false invoices used to make payments to Nigerian tax and court officials, was charged with knowingly circumventing Willbros Group's internal controls or knowingly falsifying its books and records, and with aiding and abetting Willbros Group's violations of the anti-bribery and books and records provisions. Biggers consented to a permanent injunction against such future violations. Biggers was not ordered to pay a civil penalty, and the DOJ has not taken action against Biggers.

Carlos Galvez, a former employee of Willbros International who worked in Bolivia and used fictitious invoices to prepare false tax returns and other records, was charged with knowingly circumventing Willbros Group's internal controls or knowingly falsifying its books and records, and with aiding and abetting Willbros Group's violations of the Securities Exchange Act Section 10(b), and the Exchange Act's books and records and internal controls provisions. Galvez was ordered to pay a civil penalty of \$35,000. The DOJ has not taken action against Galvez.

Subsequently, on December 19, 2008, Tillery and Paul G. Novak, a former Willbros International consultant, were charged in an indictment unsealed in U.S. District Court in Houston with conspiring to make more than \$6 million in corrupt payments to Nigerian and Ecuadorian government officials as part of the schemes described above. The indictment was unsealed after Novak was arrested on arrival at George Bush Intercontinental Airport in Houston from South Africa after his U.S. passport was revoked. Tillery remains at large. Tillery faces one count of conspiracy to violate the FCPA, two counts of violating the FCPA in connection with the authorization of specific corrupt payments, and one count of conspiring to launder the bribe payments through phony consulting companies controlled by Novak. On November 12, 2009, Novak pleaded guilty to one count of conspiracy to violate the FCPA and one count of violating the FCPA in connection with the payments authorized in the EGGGS projects in Nigeria. He is scheduled to be sentenced on July 9, 2010.

ITXC

On September 6, 2006, Yaw Osei Amoako, ITXC's former regional manager, pleaded guilty to criminal allegations of violations of the FCPA's anti-bribery provisions in connection with his payment of approximately \$266,000 in bribes to employees of a foreign state-owned telecommunications carrier. On August 1, 2007 Amoako was sentenced to 18 months in prison for conspiring to violate the FCPA and the Travel Act. He was further required to pay \$7,500 in fines and serve two years of supervised release. Additionally, on July 25, 2007 Amoako was required to pay \$188,453 in disgorgement and pre-judgment interest in the settlement of the SEC's civil action under the FCPA. Amoako was accused of taking kickbacks for some of the bribes he paid to foreign officials.

On July 25, 2007, former ITXC Vice-President Steven J. Ott and former ITXC Managing Director Roger Michael Young pleaded guilty to conspiring to violate the FCPA and the Travel Act in connection with corrupt payments to foreign telecommunications officials in Africa. On July 21, 2008, Ott was sentenced to five years probation, including six months at a community corrections center and six months of home confinement. He was also fined \$10,000. On September 2, 2008, Young was sentenced to five years probation, including three months at a community corrections center and three months of home confinement. He was also fined \$7,000.

In 2000, Amoako, at the direction of Ott and Young, traveled to Africa and hired a former senior official of the state-owned Nigerian telecommunication company ("Nitel") to represent ITXC in connection with ITXC's bid for a Nitel contract. The strategy failed,

however, in that the former Nitel official irritated the current Nitel decision-makers and failed to secure the contract for ITXC.

In 2002, in connection with another competitive bid, Amoako, with Ott's and Young's approval, entered into an agency agreement with the then-Nitel Deputy General Manager in exchange for his assistance in awarding the contract to ITXC. In return, they promised him a "retainer" in the form of a percentage of profits from any contract that ITXC secured. The contract was awarded to ITXC and Ott, Young and Amoako negotiated and/or approved over \$166,000 in payments to the agent. ITXC earned profits of \$1,136,618 million on the contract.

From August 2001 to May 2004, Ott, Young and Amoako entered into, or attempted to enter into, similar agency agreements with employees of state-owned telecommunications companies in Rwanda, Senegal, Ghana and Mali in order to induce these employees to misuse their positions to assist ITXC in securing contracts. For example, Amoako, at the direction of Ott and Young, arranged for ITXC to pay over \$26,000 to an employee of Rwandatel, the wholly-owned government telephone company of Rwanda, in order to negotiate favorable terms for an ITXC contract. ITXC entered into an agreement that provided for the agent to receive \$0.01 for each minute of phone traffic that ITXC completed to Rwanda, Burundi and Uganda even though the agent was providing no legitimate services in connection with the contract. Ultimately, ITXC realized \$217,418 in profits on the Rwandatel contract.

In total, ITXC made over \$267,000 in wire transfers to officials of the Nigerian, Rwandan and Senegalese telecommunications companies and ITXC obtained contracts with these carriers that generated profits of over \$11.5 million. In addition to his participation in the above schemes, Amoako received a \$50,000 kickback from the scheme in Nigeria and embezzled \$100,411 from ITXC in connection with the bribery in Senegal.

In May 2004, ITXC merged with Teleglobe International Holdings Ltd. ("Teleglobe"), and in February 2006 Teleglobe was acquired by Videsh Sanchar Nigam Limited ("VSNL").

John Samson, John Munro, Ian Campbell and John Whelan

On July 5, 2006, John Samson, John Munro, Ian Campbell and John Whelan all agreed to settle FCPA charges against them without admitting or denying SEC allegations that they bribed Nigerian officials to obtain oil contracts. Sampson, who allegedly profited personally, agreed to pay a \$50,000 civil penalty plus \$64,675 in disgorgement. Munro, Campbell and Whelan each agreed to pay \$40,000 in civil penalties.

All four men were employees of various Vetco companies, all of which were subsidiaries of ABB Ltd. A Swiss corporation traded on the New York Stock Exchange, ABB provides power and automation technologies to industrial clients. It has numerous subsidiaries and conducts business in 100 countries.

Sampson (former West Africa regional sales manager for Vetco Grey Nigeria), Munro (former senior vice president of operations for Vetco Grey U.K.), Campbell (former vice president of finance for Vetco Grey U.K.), and Whelan (former vice president of sales for Vetco

Grey U.S.) allegedly paid bribes to secure a \$180 million contract to provide equipment for an offshore drilling project in Nigeria's Bonga Oil Field.

The Nigerian agency responsible for overseeing oil exploration ("NAPIMS") had already selected ABB as one of several finalists for the contract. Sampson, Munro, Campbell and Whelan collaborated to pay approximately \$1 million to NAPIMS officials between 1999 and 2001 to obtain confidential information on competitors' bids, and to secure the deal for ABB. ABB was awarded the contract in 2001.

The men paid NAPIMS officials \$800,000 funneled through a Nigerian "consultant" disguised with invoices for fake consulting work. The money passed through several U.S. bank accounts. Sampson took \$50,000 of this money in kickbacks from one of the NAPIMS officials he was bribing. Munro and Campbell handled the logistics of wiring the bribe money as well as creating the counterfeit invoices for nonexistent consulting services.

Additional bribes were made in the form of gifts and cash to NAPIMS officials visiting the United States. Whelan used a corporate credit card to pay for meals, accommodations, and other perks exceeding \$176,000. Because the four men conspired to create fake business records to camouflage bribes as legitimate expenditures, they violated the books and records provisions of the FCPA in addition to its anti-bribery provisions.

ABB had already faced FCPA sanctions in July 2004 totaling \$5.9 million. In 2007 and 2008, it would later become the subject of additional DOJ and SEC investigations into possible FCPA violations in the Middle East, Asia, South America, Europe, and in the now-defunct UN Iraq Oil-for-Food Programme.

Additional discussion on the FCPA investigations and settlements involving Vetco International, its various subsidiaries, and payments made to the Nigerian Customs Service between 2002 and 2005 can be found *supra*. The Vetco companies are no longer subsidiaries of ABB; in February 2007, GE bought the Vetco entities and is now bound to the Vetco settlement agreements.

Statoil

On October 11, 2006, Statoil, ASA ("Statoil"), Norway's largest oil and gas corporation, entered into a three-year Deferred Prosecution Agreement ("Agreement") with the DOJ relating to an agreement to pay \$15.2 million in bribes, of which \$5.2 million was actually paid, to an Iranian official to secure a deal on one of the largest oil and gas fields in the world, Iran's South Pars field. Statoil admitted violating the anti-bribery and books and records provisions of the FCPA, and agreed to pay a \$10.5 million penalty, to appoint an independent compliance consultant, and to cooperate fully with the DOJ and the SEC. In a separate agreement with the SEC, Statoil also agreed to pay \$10.5 million disgorgement. After their own investigation, Norwegian regulators assessed a corporate fine of approximately \$3.2 million that will be subtracted from the U.S. fines.

Statoil has American Depository Shares listed on the New York Stock Exchange, making it an issuer under the FCPA. In announcing the deferred prosecution agreement, the head of the DOJ's Criminal Division emphasized that even though Statoil is a foreign issuer, the FCPA "applies to foreign and domestic public companies alike, where the company's stock trades on American exchanges."

CEO Olav Fjell, Executive Vice President Richard Hubbard, and Board Chairman Leif Terje Loeddesoel all resigned in the wake of the charges. Hubbard was also fined another \$30,000 by Norwegian regulators.

According to the Agreement, Statoil angled to position itself to develop oil and gas in Iran's South Pars Field, as well as to lay the groundwork for future deals in Iran. Statoil identified a key player as their gateway to Iranian business: an Iranian official who was not only the advisor to the Iranian Oil Minister, but also the son of a former President of Iran.

Working through a London-owned third-party intermediary consulting company located in the Turks & Caicos Islands (Horton Investments, Ltd.), Statoil entered into a "consulting contract" with the Iranian official. Statoil agreed to pay an initial \$5.2 million bribe recorded as a "consulting fee" followed by ten annual \$1 million payments. The contract was executed, the \$5.2 million bribe was paid, and Statoil was awarded the South Pars Project. The bribes were made with the knowledge of Statoil's CEO.

The DOJ chastised Statoil's senior management for their handling of the issue once it became known. When an internal Statoil investigation brought the bribes to the attention of the Chairman of the Board, "instead of taking up the matter," he asked for further investigation and told the investigators to discuss the matter with the CEO. The CEO ordered that no further payments be made, but, against the investigators' recommendations, he refused to terminate the contract or otherwise address concerns raised by the investigators.

In September 2003, the Norwegian press reported on Statoil's Iranian bribes; the Chairman, CEO, and Executive VP all resigned, and the SEC promptly announced its own investigation.

The SEC and DOJ commended Statoil for its complete cooperation. Not only did the company promptly produce all requested documents and encourage employees to cooperate by paying travel expenses and attorneys fees, it also voluntarily produced documents protected by attorney-client privilege. The Board took substantial steps to ensure future compliance, including internal investigations into other transactions, implementation of a broad remedial plan with new procedures and training, new procedures to report corruption directly to the Board's Audit Committee, and an anonymous employee tip hotline.

Faheem Mousa Abdel Salam

On August 4, 2006, Faheem Mousa Abdel Salam, a naturalized U.S. citizen from Michigan living and working as a translator for a civilian contractor in Baghdad, pleaded guilty to one count of violating the FCPA. Salam was prosecuted for trying to bribe a senior Iraqi

police official in order to induce the official to purchase a high-end map printer and 1,000 armored vests in a transaction unrelated to Salam's role as a translator. In February 2007, Salam was sentenced to three years in prison for his conduct.

According to charging documents, in mid-December 2005, a high-ranking Iraqi Ministry of Interior official introduced Salam to a senior official of the Iraqi police force and indicated that doing business with Salam could be "beneficial." During the discussion between Salam and the police official, Salam apparently offered the official a "gift" of approximately \$60,000 to facilitate the sale of the printer and armored vests for over \$1 million. The sale was to be made through a multinational agency – the Civilian Police Assistance Training Team ("CPATT") – that oversaw, among other things, the procurement activities of the Iraqi police force. In a subsequent January 2, 2006 telephone call, Salam lowered the price of the printer and vests to \$800,000, and as a result lowered the proposed "gift" to the police official to \$50,000. Following this telephone call, the police official contacted U.S. authorities with the Office of Special Inspector General for Iraq Reconstruction ("SIGIR"), who began an investigation into Salam's alleged conduct.

During their investigation, SIGIR officials monitored telephone calls and emails between Salam and the confidential police informant. In addition, a SIGIR agent posed as a CPATT procurement official, and met with Salam to discuss the proposed transaction. During these meetings, Salam offered the undercover "procurement officer" a bribe of between \$28,000 and \$35,000 for his efforts in finalizing the deal. In a February 2006 email, Salam abruptly, and without explanation, indicated that he would not be able to go forward with the transaction. He was arrested upon his return to the U.S. at Dulles International Airport on March 23, 2006.

Oil States International

On April 27, 2006, Oil States International, Inc. ("Oil States") entered into a settlement with the SEC without admitting or denying any of the SEC's FCPA books and records and internal controls allegations regarding business conducted in Venezuela through one of Oil States' wholly-owned subsidiaries. The SEC alleged that the subsidiary passed approximately \$348,000 in bribes to Venezuelan government employees. The settlement included a cease-and-desist order from future violations of the FCPA books and records and internal controls provisions, but did not include disgorgement or monetary fines.

Oil States is a Delaware corporation, traded on the NYSE, with corporate headquarters in Houston, Texas. Although it also caters to niche markets like top-secret noise-reduction technology for U.S. Navy submarines, Oil States primarily provides full spectrum products and services for the worldwide oil and gas industry, both onshore and offshore. One of its wholly-owned subsidiaries is Hydraulic Well Control, LLC ("HWC"), which operates specially-designed oil rigs and provides related services. Headquartered in Louisiana, HWC does business around the world, and has an office in Venezuela ("HWC Venezuela"). HWC's Venezuelan operations provided approximately 1% of Oil States' revenues during the relevant period.

In Venezuela, HWC operated in partnership with an energy company owned by the government of Venezuela, *Petróleos de Venezuela, S.A.* (“PDVSA”). In 2000, HWC hired a local “consultant” to facilitate day-to-day operations between HWC and PDVSA. Oil States and HWC did not investigate the background of the consultant, nor did they provide FCPA training. In addition, although HWC did have FCPA policies in place, the written contract with the consultant failed to mention FCPA compliance.

The alleged violations occurred in two phases. In December 2003, employees of the government-owned PDVSA approached the consultant about a “kickback” scheme in which the consultant would over-bill HWC for his consulting services and “kickback” the extra money to the PDVSA employees. The plan also included HWC over-charging PDVSA for “lost rig time” on jobs. The PDVSA employees were capable of delaying or stopping HWC’s work if HWC did not acquiesce to the scheme. Indeed, after learning about it, three HWC employees went along with the kickback scheme: the consultant inflated the bills, the HWC employees incorporated the falsified information into the company’s books and records, and an undetermined amount of improper payments were made to the PDVSA employees. The consultant billed HWC approximately \$200,000 for his services, and HWC billed PDVSA approximately \$401,000 for rig time. Because lost rig time is difficult to assess even in the best of circumstances, and because of the difficulties inherent in retrospective investigation of falsified documentation, it was not possible for the SEC to determine exactly how much money flowed to the Venezuelan government employees.

The second phase of the fraud began in March 2004, when the PDVSA employees who had instigated the bribery decided to change tactics. Instead of exaggerating rig time, the PDVSA employees told the consultant to continue to over-bill HWC for “gel,” an important material used to manage viscosity and to protect cores by minimizing their contact with drilling fluid. The consultant and the HWC employees agreed to over-bill HWC for gel, and to pass on the proceeds to the PDVSA employees as a bribe. During this phase, the consultant charged HWC and was paid over \$400,000 for his consulting services, some of which was passed on to the PDVSA employees as bribes. HWC also charged PDVSA nearly \$350,000 for gel. The true amount of gel used is unknown. As in the first phase of the fraud, it is impossible to determine the exact amount of money illicitly paid to the PDVSA employees.

The scheme was discovered in December 2004 by senior HWC managers in the U.S. as they were preparing the following year’s budget. Noticing an “unexplained narrowing” of HWC Venezuela’s profits, the managers immediately investigated and uncovered the payments. HWC managers promptly reported the illicit activity to Oil States management, which in turn immediately reported it up to Oil States’ Audit Committee.

Oil States conducted an internal investigation and found no evidence that any U.S. employees of Oil States or HWC had knowledge of or were complicit in the Venezuelan kickback scheme. The Venezuelan consultant was dismissed, as were two complicit employees of HWC Venezuela. Oil States corrected its books and records, repaid PDVSA for improper charges, and reported the scheme in its next public filing. Oil States also strengthened its compliance program, provided the full results of its internal investigation to the SEC and DOJ,

and cooperated fully with the investigation subsequently conducted by SEC staff. In the SEC administrative proceeding, which was limited to a cease-and-desist order and did not include a fine, the SEC “considered the remedial acts promptly undertaken by [Oil States] and cooperation afforded the [SEC] staff.” This case illustrates the breadth of the FCPA’s books and records provisions, as Oil States was held responsible for HWC’s improper recording of the payments as ordinary business expenses, even though HWC’s Venezuela operations consisted of only 1% of Oil States’ revenues and no U.S. employees were involved in the wrongful conduct.

David M. Pillor (InVision)

On August 15, 2006, the SEC settled FCPA charges against David M. Pillor, former Senior Vice President for Sales and Marketing and Board member of InVision Technologies, Inc. (“InVision”) based on his conduct in connection with payments made by InVision’s third party sales agents or distributors to government officials in China, Thailand, and the Philippines. The SEC alleged that Pillor, as head of the company’s sales department, failed to establish and maintain sufficient internal systems and controls to prevent FCPA violations, and that he indirectly caused the falsification of InVision books and records. Without admitting or denying the allegations, Pillor agreed to pay \$65,000 in civil penalties.

Previously, in December 2004, InVision entered into a 2-year non-prosecution agreement with the DOJ for violating the FCPA’s books and records provision in connection with the same conduct. In the non-prosecution agreement, InVision agreed to accept responsibility for the misconduct, pay an \$800,000 fine, adopt enhanced internal controls, and continue to cooperate with government investigators. Also in December 2004, InVision was acquired by General Electric, and now does business under the name GE InVision. On February 14, 2005, GE InVision settled SEC charges based on the same underlying facts, without admitting or denying the SEC’s claims. As part of the SEC settlement, GE InVision agreed to pay \$589,000 in disgorgement plus an additional \$500,000 civil fine. Although the conduct alleged in charging documents occurred prior to GE’s acquisition of InVision, GE was responsible for ensuring InVision’s compliance with the terms of its agreement.

InVision was, and GE InVision remains, a U.S. corporation that manufactures explosive detection equipment used in airports. In his position as Senior Vice President for Sales and Marketing, Pillor oversaw the company’s sales department and, according to the SEC, “had the authority to ensure that InVision’s sales staff complied with the FCPA.” In conducting its foreign sales, InVision relied both on internal regional sales managers who reported directly to Pillor and local sales agents and distributors, typically foreign nationals, familiar with sales practices in various regions. According to the SEC, Pillor failed to implement sufficient internal controls to ensure that its sales staff and third parties acting on its behalf complied with the FCPA. For example, the SEC notes that “InVision primarily relied on introductions by other American companies [when selecting agents and distributors], and conducted few, if any, background checks of its own.” InVision further failed to properly monitor or oversee the conduct of its staff and third party representatives to ensure that they were not engaging in improper conduct on the company’s behalf. In particular, the charging documents highlight activities in three countries – China, Philippines and Thailand.

In November 2002, InVision agreed to sell (through its Chinese distributor) two explosive detection devices to China's Guangzhou airport, which was owned and controlled by the Chinese government. Due to export license issues, InVision was late delivering the explosive detection equipment, and the distributor informed InVision that the Chinese government would exercise its right to impose financial penalties for late delivery. The distributor informed an InVision regional sales manager that intended to offer free trips and other "unspecified compensation" to airport officials to avoid the late delivery penalties. The regional manager alluded to such conduct in email messages to Pillor, but he did not respond or acknowledge receipt of such messages.

When InVision finally delivered its product to the distributor, the distributor sought \$200,000 in reimbursement for costs incurred in connection with the delay. Pillor discussed the request with other members of InVision's management, and agreed to pay the distributor \$95,000. The distributor sent InVision a one-page invoice for various additional "costs." Pillor did not inquire further into these costs or seek additional documentation to support them, and submitted the invoice to InVision's finance department for payment. Payment was made despite InVision being "aware of a high probability that the distributor intended to use part of the funds to pay for airport officials' travel expenses in order to avoid the imposition of the financial penalty for InVision's law delivery." It was further recorded improper as a legitimate cost of goods sold.

With respect to the Philippines, in November 2001, InVision agreed to sell two explosive detection devices to an airport. Despite having previously retained a third party sales agent in the Philippines, InVision made the sale through a subcontractor. Afterwards, the sales agent sought a commission under the terms of its previous agreement, and suggested to a regional sales manager that it would use such commission to provide gifts or cash to Filipino government officials to assist with future InVision sales. The SEC's complaint alleges that some of the agent's messages were sent to Pillor, but he failed to respond. Pillor ultimately agreed to pay the agent a commission of \$108,000, which was less than the agreed upon percentage because the sale was made directly to the subcontractor. The payment was recorded as a legitimate sales commission despite the company's awareness of the high probability that at least part of it would be used to influence Filipino officials.

Beginning in 2002, InVision began competing for the right to sell explosive detection machines in Thailand, and hired a distributor to "act as InVision's primary representative to the [Thai] airport corporation and the associated Thai government agencies." Between 2003 and 2004, the Thai distributor informed an InVision regional sales manager that it intended to make payments to Thai officials to influence their decisions. As in China and the Philippines, email messages to Pillor alluded to these intentions, but were never acknowledged or responded to. In April 2004, InVision agreed to sell, through its distributor, 26 machines for over \$35.8 million. Although the transaction was later suspended, the company was aware, at the time it entered into the agreement, that its distributor intended to make improper payments out of its profits on the sale.

Above all, the InVision and Pillor settlements highlight the importance of exercising vigilance over third party relationships, be they with sales agents, distributors or subcontractors. The SEC's February 2005 charging documents note, among other things, that although InVision's standard third party agreements contained a clause prohibiting violations of the FCPA, "InVision provided no formal training or education to its employees...or its sales agents and distributors regarding the requirements of the FCPA." It also notes that it did not "have a regular practice of periodically updating background checks or other information regarding foreign agents and distributors" which could have assisted in detecting or deterring such violations.

Tyco

On April 17, 2006, Tyco International, Ltd. ("Tyco"), a diversified manufacturing and service company headquartered in Bermuda, consented to a final judgment with the SEC on multiple counts of securities violations, including approximately \$1 billion in accounting fraud. Part of the SEC's complaint alleged that, on at least one occasion, Tyco employees made unlawful payments to foreign officials to obtain business for Tyco in violation of the FCPA. Additionally, in an attempt to conceal the illicit payments, false entries were made to Tyco's books and records in violation of the FCPA's books and records provisions. Although providing few details on the specific nature of the illicit payments, the SEC complaint concludes that the payments were made possible by Tyco's failure to implement procedures sufficient to prevent and detect FCPA misconduct. As part of the settlement for securities laws violations and FCPA violations by Tyco and its subsidiaries, Tyco agreed to pay a \$50 million civil penalty.

From 1996 to mid-2002, Tyco acquired over 700 companies worldwide in an effort to become a global, diversified manufacturing and service conglomerate. This aggressive acquisition campaign resulted in a widespread and decentralized corporate structure with over 1000 individual business units reporting to the Tyco corporate office. Until 2003, Tyco did not have an FCPA compliance program, FCPA employee training, or an internal control system to prevent or detect FCPA violations. The SEC complaint stressed that Tyco's failure to implement FCPA control, education, and compliance programs enabled FCPA violations by Tyco subsidiaries in both Brazil and South Korea.

- *Earth Tech Brazil*

In 1998, despite its own due diligence investigation uncovering systemic bribery and corruption in the Brazilian construction industry, Tyco bought a Brazilian engineering firm and renamed it Earth Tech Brazil Ltda. ("Earth Tech"). As a newly acquired subsidiary reporting to Tyco's corporate offices, Earth Tech constructed and operated water, sewage, and irrigation systems for Brazilian government entities.

According to the SEC complaint, between 1999 and 2002 Earth Tech employees in Brazil repeatedly paid money to various Brazilian officials for the purpose of obtaining business in the construction and operation of municipal water and wastewater systems. The illegal payments were widespread, and the SEC complaint estimates that over 60% of Tyco's projects between

1999 and 2002 involved paying bribes to Brazilian officials. Specifically, Earth Tech made payments to Brazilian lobbyists with full knowledge that all or a portion of these payments would be given to Brazilian officials for the purposes of obtaining work for Earth Tech. The complaint asserts that Earth Tech executives based in California routinely participated in communications discussing bribes to Brazilian officials. In order to obtain the funds for the illicit payments and entertainment provided to Brazilian officials, various Earth Tech employees created false invoices from companies they owned. On other occasions, lobbyists submitted inflated invoices to procure the funds needed for the bribes.

- *Dong Bang*

In 1999, Tyco acquired a South Korean fire protection services company called Dong Bang Industrial Co. Ltd. (“Dong Bang”). Again, Tyco’s own due diligence investigation revealed a systemic culture of corruption and the prevalence of bribes to government officials in the South Korean contracting market.

The SEC complaint charged that from 1999 to 2002 Dong Bang executives paid cash bribes and provided entertainment to various South Korean government officials to help obtain contracting work on government-controlled projects. Specifically, the complaint reveals that Dong Bang’s former president spent \$32,000 entertaining several South Korean government officials in order to obtain business for Dong Bang. In addition, the complaint asserts that Dong Bang’s former president also regularly entertained the South Korean Minister of Construction and Finance as well as a South Korean military general for the purpose of obtaining business for Dong Bang. Another payment of \$7,500 was allegedly made to an employee of a government-owned and operated nuclear power plant to obtain contracting work at the facility.

Dong Bang further violated the FCPA’s accounting rules by creating fictitious payroll accounts. To finance some of the improper payments, Dong Bang disguised bribes as payments to fictitious employees, but then wired the cash directly to executives for use as bribery and entertainment expenses.

Richard John Novak

On March 22, 2006, Richard John Novak pleaded guilty to one count of violating the FCPA and another count of conspiring to violate the FCPA and commit wire and mail fraud. On October 2, 2008, Novak was placed on three years probation and ordered to perform 300 hours of community service.

From August 1999, until August 2005, Novak and seven others operated a “diploma mill” that sold (i) fraudulent academic products, including high school, college and graduate-level degrees, (ii) fabricated academic transcripts and (iii) “Professorships.” They also sold counterfeit diplomas and academic products purporting to be from legitimate academic institutions, including the University of Maryland and George Washington University.

Beginning in 2002, Novak attempted to gain accreditation for several of the diploma mill universities in Liberia. In doing so, Novak was solicited for a bribe by the Liberian Consul at the

Liberian Embassy in Washington, DC. Acting at the direction of the diploma mill's co-owner, Dixie Ellen Randock, Novak proceeded to pay bribes in excess of \$43,000, including travel expenses to Ghana, to several Liberian government officials in order to obtain accreditation for Saint Regis University, Robertstown University, and James Monroe University, and to induce Liberian officials to issue letters and other documents to third parties falsely representing that Saint Regis University was properly accredited by Liberia. Between October 2002 and September 2004, approximately \$19,200 was wired from an account controlled by Dixie Ellen Randock and her husband Steven Karl Randock, Sr., to a bank account in Maryland in the name of the Liberian Consul. Dixie Ellen Randock and Steven Karl Randock, Sr. previously were each sentenced to 36 months in prison followed by three years of court supervision on non-FCPA charges.

2005

Micrus Corporation

On February 28, 2005, the privately-held California-based Micrus Corporation and its Swiss subsidiary Micrus S.A. (together, "Micrus") entered into a two-year non-prosecution agreement with the DOJ to resolve potential FCPA violations. Under that agreement, the DOJ required Micrus to accept responsibility for its misconduct and that of its employees, cooperate with the DOJ's investigation, adopt an FCPA compliance policy, retain an independent FCPA monitor for three years, and pay a monetary penalty of \$450,000.

Following the voluntary disclosure, the DOJ investigation revealed that the medical device manufacturer made more than \$105,000 in improper payments through its officers, employees, agents and salespeople to doctors employed at public hospitals in France, Germany, Spain, and Turkey. In return for these payments, the hospitals purchased the company's embolic coils—medical devices that allow for minimally invasive treatments of brain aneurysms responsible for strokes. Micrus disguised these payments in its books and records as stock options, honorariums, and commissions. Micrus paid additional disbursements totaling \$250,000 to public hospital doctors in foreign countries, but failed to obtain the administrative and legal approvals required under the laws of those countries.

This case highlights the DOJ's continuing pattern of construing the term "foreign official" broadly to include even relatively low level employees of state agencies and state-owned institutions. As this agreement shows, the DOJ may consider doctors employed at publicly owned and operated hospitals in foreign countries as "foreign officials."

The non-prosecution agreement imposed an independent monitor. The independent monitor filed the final report with the DOJ in May 2008. By July 2008, the DOJ confirmed that the monitorship had concluded.

Titan Corporation

On March 1, 2005, The Titan Corporation ("Titan") agreed to pay combined civil and criminal penalties of over \$28 million, which at the time constituted the largest combined FCPA

civil and criminal penalty ever imposed. The penalties included \$13 million in criminal fines resulting from a plea agreement with the DOJ and \$15.5 million in disgorgement and prejudgment interest as part of Titan's settlement with the SEC. Under the agreements, Titan was also required to retain an independent consultant and to adopt and implement the consultant's recommendations regarding the company's FCPA compliance and procedures.

In announcing the plea agreement and settlement, U.S. attorney Carol C. Lam stressed that the size of the penalties evinced "the severity and scope of the misconduct." Along with other violations, Titan — a "Top 100 Defense Contractor" with annual sales to the Department of Defense topping \$1 billion — funneled over \$2 million to the electoral campaign of the then-incumbent Benin president through its in-country agent, falsely recorded such payments in its books and records, and failed to maintain any semblance of a formal company-wide FCPA policy, compliance program, or due diligence procedures.

In Benin, Titan partnered with the national postal and telecommunications agency to modernize the country's communications infrastructure by building, installing and testing a national satellite-linked phone network. To facilitate the project, Titan employed an agent whom the company referred to as "the business advisor" and "personal ambassador" to the President of Benin. From 1999 to 2001, Titan paid this agent \$3.5 million. Approximately \$2 million from these payments directly funded the then-incumbent President's re-election campaign, including reimbursing the agent for t-shirts featuring the President's face and voting instructions, which were handed out to the electorate prior to the elections. In return, the Benin agency increased Titan's management fee from five to twenty percent. From 1999 to 2001, Titan reported over \$98 million in revenues from this project.

Particularly troubling to the SEC was the manner in which Titan paid its Benin agent. First, Titan wired payment for the agent's initial invoice — which totaled \$400,000 to compensate for a litany of work purportedly completed within the first week of signing the consulting agreement — to a bank account held under the name of the agent's relative. Titan wired payments totaling \$1.5 million to the agent's offshore accounts in Monaco and Paris. And between 2000 and 2001, Titan made several payments to the agent in cash totaling approximately \$1.3 million, including payments made by checks addressed to Titan employees, which were cashed and passed along to the agent.

Second, both the SEC and DOJ placed particular emphasis on Titan's lack of FCPA controls. In particular, the agencies noted that Titan had failed to undertake any meaningful due diligence on its agent's "background, qualifications, other employment, or relationships with foreign government officials either before or after he was engaged," and that the company failed to implement FCPA compliance programs or procedures, other than requiring employees to sign an annual statement that they were familiar with and would adhere to the provisions of the FCPA. In summary, the SEC stated that "[d]espite utilizing over 120 agents and consultants in over 60 countries, Titan never had a formal company-wide FCPA policy, failed to implement an FCPA compliance program, disregarded or circumvented the limited FCPA policies and procedures in effect, failed to maintain sufficient due diligence files on its foreign agents, and failed to have meaningful oversight over its foreign agents."

Titan faced a host of other FCPA-related charges relating to misconduct such as: (i) making undocumented payments to three additional Benin consultants for a total of \$1.35 million, (ii) purchasing a \$1,900 pair of earrings as a gift for the president's wife, (iii) paying travel expenses for a government agency director, (iv) paying \$17,000 to an official at the World Bank in cash or by wire transfer to his wife's account to accommodate his request that Titan not document his payments, (v) systematically and grossly under-reporting "commission" payments to its agents in Bangladesh, Nepal, and Sri Lanka, and (vi) providing falsified documents to the governments of those countries, as well as to the United States.

In addition to the need for due diligence and FCPA controls, this case highlights the importance of responding adequately to red flags. In 2002, Titan's independent Benin auditor discussed in writing its inability to issue an opinion for the previous two years due to flaws in record keeping and \$1.8 million in "missing cash." Beginning in 2001, Titan's external auditor, Arthur Anderson, also warned of an internal policy and oversight vacuum, and of the danger in continuing to operate with "no accounting system set up in the company." Additionally, senior Titan officers and executives were made aware of two written allegations that Titan employees in Benin were falsifying invoices and paying bribes. The SEC specifically noted Titan's failure to vet or investigate any of these issues and allegations.

In addition to Titan's criminal and civil fines, Steven Head — the former president and CEO of Titan-subsiary Titan Africa — was charged in the Southern District of California with one count of falsifying the books, records, and accounts of an issuer of securities. He pleaded guilty to the charge and was sentenced on September 28, 2007 to six months imprisonment, three years supervised release, and a \$5,000 fine.

On September 15, 2003, Titan entered into an agreement to be acquired by Lockheed Martin Corporation. On June 25, 2004, Lockheed terminated the agreement. As part of the merger agreement, Titan had affirmatively represented that, to its knowledge, it had not violated the FCPA. Although the merger agreement itself was not prepared as a disclosure document, the FCPA representation was later publicly disclosed and disseminated in Titan's proxy statement. On March 1, 2005, the same day that it announced the filing of the settled enforcement action, the SEC issued a Report of Investigation Pursuant to Section 21(a) of the Exchange Act to make clear that materially false or misleading representations in merger and other contractual agreements can be actionable under the Exchange Act when those representations are repeated in disclosures to investors.⁴¹

41 Section 21(a) of the Exchange Act authorizes the SEC to investigate "whether any person has violated, is violating, or is about to violate" the federal securities laws, and "publish information concerning such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of" the federal securities laws. As the SEC points out, the issuance of the 21(a) Report on Titan does not allege a violation of the disclosure provisions by Titan, but was made rather to "highlight the important principle that disclosures regarding material contractual terms such as representations may be actionable by the Commission."

Robert E. Thomson & James C. Reilly (HealthSouth)

On May 20, 2005, the DOJ suffered a rare FCPA loss after an Alabama jury acquitted two HealthSouth executives of falsifying the company's books, records and accounts. Robert Thomson (former COO of HealthSouth's In-Patient Division) and James Reilly (former vice president of legal services) had been indicted the previous year for violations of the Travel Act and the FCPA relating to the company's efforts to win a healthcare services contract in Saudi Arabia.

The DOJ alleged that the large healthcare services corporation had engaged in a fraudulent scheme to secure a contract with a Saudi Arabian foundation to provide staffing and management services for a 450-bed hospital in Saudi Arabia that the foundation operated. The DOJ claimed in its indictment that HealthSouth allegedly agreed to pay the director of the Saudi Arabian foundation an annual \$500,000 fee for five years under a bogus consulting contract through an affiliate entity in Australia. The indictment charged Thomson and Reilly with falsifying HealthSouth's books, records and accounts to reflect the \$500,000 annual fee as a consulting contract, as well as with violations of the Travel Act.

Prior to that indictment, two former HealthSouth vice presidents had pleaded guilty to related charges. Former HealthSouth vice president Vincent Nico had pleaded guilty to wire fraud and had agreed to forfeit over \$1 million in ill-gotten gains, including direct personal kickbacks from the Saudi foundation director. Another former HealthSouth vice president, Thomas Carman, admitted to making a false statement to the FBI during the agency investigation of the scheme.

Thomson and Reilly, however, exercised their right to a jury trial. On May 20, 2005, a jury acquitted the two defendants of all charges.

DPC (Tianjin) Co. Ltd

On May 20, 2005, the DOJ and SEC settled charges with the Los Angeles-based Diagnostic Products Corporation ("DPC") and its Chinese subsidiary, DPC (Tianjin) Co. Ltd. ("DPC Tianjin"). In the criminal case, the subsidiary, DPC Tianjin, pleaded guilty to violating the FCPA in connection with payments made in China and agreed to adopt internal compliance measures, cooperate with the government investigations, have an independent compliance expert for three years, and pay a criminal penalty of \$2 million. Simultaneously, the parent company, DPC, settled with the SEC, agreeing to disgorge \$2.8 million in profits and prejudgment interest.

DPC, a California-based worldwide manufacturer and provider of medical diagnostic test systems, established DPC Tianjin (originally named DePu Biotechnological & Medical Products Inc.) as a joint venture with a local Chinese government entity in 1991. While DPC initially owned 90% of the joint venture, it acquired complete ownership in 1997. Like many of DPC's foreign subsidiaries, DPC Tianjin sold its parent's diagnostic test systems and related test kits in-country. Its customers were primarily state-owned hospitals.

From 1991 to 2002, DPC Tianjin routinely made improper “commission” payments to laboratory workers and physicians who controlled purchasing decisions in the state-owned Chinese hospitals. These “commissions” were percentages (usually 3% to 10%) of sales to the hospitals and totaled approximately \$1.6 million. DPC Tianjin employees hand-delivered packets of cash or wired the money to the hospital personnel. DPC Tianjin earned approximately \$2 million in profits from sales that involved the improper payments.

In addition to the FCPA anti-bribery provisions, DPC Tianjin also violated the books and records provisions by recording the illicit payments as legitimate sales expenses. DPC Tianjin’s general manager prepared and forwarded the company’s financial records to DPC, accounting for the bribes as “selling expenses.” It was not until DPC Tianjin’s auditors raised Chinese tax issues regarding the illicit payments that the subsidiary discussed the payments with DPC.

Shortly after discovering the nature of the payments, DPC instructed DPC Tianjin to stop all such payments, took remedial measures, revised its code of ethics and compliance procedures, and established an FCPA compliance program. The SEC specifically noted its consideration of DPC’s remedial efforts in determining to accept the settlement offer.

The DPC settlements illustrate the broad jurisdictional reach of the FCPA, particularly with respect to the conduct of non-U.S. subsidiaries. The DOJ charging documents describe DPC Tianjin as an “agent” of DPC, and the SEC specifically notes that “[p]ublic companies are responsible for ensuring that their foreign subsidiaries comply with Sections 13(b)(2)(A) and (B), and 30A of the Exchange Act.” The DPC case also reinforces the need for swift remedial measures, highlights the FCPA risks that foreign subsidiaries pose to their U.S. parent corporations, and demonstrates how broadly the DOJ and SEC construe “foreign officials.” Here, as with the Micrus Corporation case (above), the employees and doctors who received payments worked for foreign state-owned hospitals.

Victor Kozeny, Frederic Bourke, Jr. and David Pinkerton

In May 2005, the DOJ indicted Victor Kozeny, Frederic Bourke Jr. and David Pinkerton in connection with a scheme to bribe Azeri government officials in an attempt to ensure that those officials would privatize the State Oil Company of Azerbaijan (“SOCAR”) and that the defendants’ investment consortium would gain a controlling interest in SOCAR. Kozeny controlled two investment companies, Oily Rock Ltd. and Minaret Ltd., which participated in a privatization program in Azerbaijan. The privatization program enabled Azeri citizens to use free government-issued vouchers to bid for shares of state-owned companies that were being privatized. Foreigners were permitted to participate in the privatization program and own vouchers if they purchased a government-issued “option” for each voucher.

Kozeny, through Oily Rock and Minaret, sought to acquire large amounts of these vouchers in order to gain control of SOCAR upon its privatization and profit significantly by reselling the controlling interest in the private market. Bourke, a co-founder of handbag company Dooney & Bourke, invested approximately \$8 million in Oily Rock on behalf of himself and family members and friends. American International Group (“AIG”) invested

approximately \$15 million under a co-investment agreement with Oily Rock and Minaret. Pinkerton, who was in charge of AIG's private equity group, supervised AIG's investment.

The indictment alleged that, beginning in 1997, Kozeny, acting by himself and also as an agent for Bourke and Pinkerton, paid or caused to be paid more than \$11 million in bribes to Azeri government officials to secure a controlling stake in SOCAR. The officials included a senior official of the Azeri government, a senior official of SOCAR, and two senior officials at the Azeri government organization that administered the voucher program. The alleged violations included a promise to transfer two-thirds of Oily Rock's and Minaret's vouchers to the government officials, a \$300 million stock transfer to the government officials, several million dollars in cash payments, and travel, shopping and luxury expenditures paid for by Oily Rock and Minaret. The 27-count indictment alleged 12 violations of the FCPA, 7 violations of the Travel Act, 4 money laundering violations, 1 false statement count for each individual (3 total), and 1 count of conspiracy to violate the FCPA and Travel Act.

On June 21, 2007, the Honorable Shira A. Scheindlin of the U.S. District Court for the Southern District of New York dismissed the FCPA criminal accounts against Bourke and Pinkerton (and almost all of the remaining counts as well) as time-barred by the five-year statute of limitations period in 18 U.S.C. § 3282. Judge Scheindlin explained that the "majority of the conduct" charged in the Indictment occurred between March and July 1998, and that the five-year statute of limitations therefore would have run before the Indictment was returned on May 12, 2005.

On July 16, 2007, Judge Scheindlin reversed her decision as to three of the dismissed counts, accepting the government's position that those counts alleged conduct within the limitations period.⁴² On August 21, 2007, the DOJ filed an appeal of the dismissal of the remaining counts with the Second Circuit.

The corresponding charges against Kozeny were not dismissed, as his extradition from the Bahamas was still pending at the time of the decision. On October 24, 2007, the Supreme Court of the Bahamas ruled that Kozeny could not be extradited as the grounds for extradition were insufficient and the United States had abused the court process in its handling of the extradition hearing. The prosecution appealed and, on January 26, 2010 the Bahamas Court of Appeals affirmed the denial of extradition. The Czech Republic is also apparently seeking extradition of Kozeny.

On July 2, 2008, the prosecution filed a *nolle prosequi* motion, which is an application to discontinue the criminal charges, because "further prosecution of David Pinkerton in this case would not be in the interest of justice." Judge Scheindlin granted the government's motion.

Meanwhile, the case against Bourke continued. On October 21, 2008, Judge Scheindlin rejected a proposed jury instruction from Bourke that would have allowed a local law defense that the payments were lawful under the laws of Azerbaijan. Under Azerbaijan law, the

⁴² The three counts were (i) conspiracy by Bourke and Pinkerton to violate the FCPA and Travel Act; (ii) a substantive FCPA violation by Bourke; and (iii) money laundering conspiracy by Bourke and Pinkerton.

payments ceased to be punishable once they were reported to the country's president. Judge Scheindlin determined that the fact that the payments were not punishable was insufficient to meet the local law defense provided under the FCPA, as the payments were still unlawful, even if no punishment was available. "It is inaccurate to suggest that the payment itself suddenly became 'lawful' – on the contrary, the *payment* was unlawful, though the *payer* is relieved of responsibility for it," Judge Scheindlin wrote.

On July 10, 2009, a federal jury convicted Bourke of conspiring to violate the FCPA and the Travel Act, and of making false statements to the FBI. During the trial, the government presented testimony from Thomas Farrell and Hans Bodmer, individuals who had previously pleaded guilty to charges related to the underlying facts, and who testified that they had discussed the illicit arrangements in detail with Bourke. The Assistant U.S. Attorney stressed in closing that Bourke "didn't ask any of his lawyers to do due diligence." On October 13, 2009, Judge Scheindlin rejected Bourke's motion for acquittal or a new trial. Among other arguments, Bourke had contended that the jury was improperly instructed as to the conscious avoidance doctrine. Bourke argued that the jury instructions suggested that Bourke could be convicted based on mere negligence in not uncovering the facts of the Kozeny's activities. But Judge Scheindlin rejected this argument, pointing out both that the jury instructions specifically instructed the jury that negligence was insufficient for a conviction and that a factual predicate existed for a finding that Bourke had actively avoided learning that the payments were illegal. In November 2009, Bourke was sentenced to one year and one day and fined \$1 million. He is free on bail pending appeal.

In related matters, Clayton Lewis, a former employee of the hedge fund Omega Advisors, Inc. ("Omega") which invested more than \$100 million with Kozeny in 1998, pleaded guilty in February 2004 to violating and conspiring to violate the FCPA. Lewis, Omega's prime contact with Kozeny, admitted that he knew of Kozeny's scheme prior to investing Omega's funds. In July 2007, Omega settled with the government, entering into a non-prosecution agreement with the DOJ, agreeing to a civil forfeiture of \$500,000 and to continue cooperating with the DOJ's investigation.

David Kay and Douglas Murphy

In December 2001, David Kay and Douglas Murphy were indicted on 12 counts of violating the FCPA in connection with payments made to Haitian officials to lower the customs import charges and taxes owed by their employer, American Rice, Inc. ("ARI"). Specifically, among other measures to avoid the customs duties and taxes, Murphy and Kay underreported imports and paid customs officials to accept the underreporting. ARI discovered these practices, which were considered "business as usual" in Haiti, in preparing for a civil lawsuit and self-reported them to government regulators.

The district court dismissed the indictment, holding that the statutory language "to obtain or retain business" did not encompass payments to lower customs duties and taxes. In February 2004, the Fifth Circuit Court of Appeals reversed the district court, holding that improper payments geared towards securing an improper advantage over competitors, *e.g.*, through lower

customs duties and sales taxes, were at least potentially designed to obtain or retain business and therefore might fall within the statute's scope. The Court reasoned as follows:

Avoiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that the business is otherwise legally obligated to expend. And this, in turn, enables it to take any number of actions to the disadvantage of competitors. Bribing foreign officials to lower taxes and customs duties certainly *can* provide an unfair advantage over competitors and thereby be of assistance to the payor in obtaining or retaining business.

The Fifth Circuit remanded the case for the district court to determine whether the government could adduce sufficient evidence to prove that the alleged bribes in question were intended to lower the company's cost of doing business in Haiti "enough to have a sufficient nexus to garnering business there or to maintaining or increasing business operations" already there "so as to come within the scope of the business nexus element."

In February 2005, a jury convicted Kay and Murphy on 12 FCPA bribery counts and a related conspiracy count, and the court sentenced Kay to 37 months imprisonment and Murphy to 63 months. Both defendants appealed their convictions and sentences. One of the critical questions on appeal was whether the district court properly instructed the jury on the *mens rea* element of an offense under the FCPA when it failed to inform them that the FCPA has both "willfulness" and "corruptly" elements. The government asserted that the jury charge's invocation of the word "corruptly" was sufficient, while the defense argued that a distinct willfulness charge was necessary for the jury to make the required *mens rea* determination. The defendants further asserted that the Government had failed to prove that they had used the mails or instrumentalities of interstate commerce — specifically, shipping documents underreporting the amount of rice being shipped — "in furtherance" of the alleged bribes. Rather, they argued, the Government had showed only that the bribes they paid "cleared the way" for acceptance of the shipping documents, not the other way around.

On October 24, 2007, the Fifth Circuit issued its decision upholding the convictions and the disputed jury instructions. In doing so, the court discussed the *mens rea* requirement under the FCPA and determined that while a defendant "must have known that the act was in some way *wrong*" they are not required to know that their activity violates the FCPA in order to be found guilty. The court determined that the jury instruction encompassed this *mens rea* requirement by defining a "corrupt" act as one "done voluntarily and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means." The court also rejected the defendants' "in furtherance" argument, concluding that there was sufficient evidence for a jury to conclude that the shipping documents had been used "in furtherance" of the bribes, as there was testimony to the effect that the amount of a bribe paid to a customs official was calculated by comparing the invoice listing the accurate amount of rice being shipped and the false shipping documents underreporting that amount.

In a January 10, 2008 decision, the Fifth Circuit denied defendants' motion for a rehearing *en banc*. On October 6, 2008, the U.S. Supreme Court denied the defendants' writ of certiorari, effectively ending the litigation in this matter.

Monsanto

On January 6, 2005, Monsanto Company ("Monsanto") settled actions with the SEC and DOJ in connection with illicit payments to Indonesian government officials. In the SEC actions, without admitting or denying the allegations, Monsanto consented to the entry of a final judgment in district court imposing a \$500,000 civil fine as well as an administrative order requiring it to cease and desist from future FCPA violations. Monsanto also entered into a three-year deferred prosecution agreement with the DOJ under which the company agreed to accept responsibility for the conduct of its employees, pay a \$1 million fine, continue to cooperate with the DOJ and SEC investigations, and adopt internal compliance measures, which would be monitored by a newly appointed independent compliance expert.

According to the SEC complaint and DOJ papers filed with the district court for the District of Columbia, Monsanto made and improperly recorded an illegal payment of \$50,000 to a senior Indonesian official in an attempt to receive more favorable treatment of the products that the company develops and markets. These products include genetically modified organisms ("GMO"), which are controversial in Indonesia and other countries.

To increase acceptance of its products, Monsanto hired a consultant to represent it in Indonesia. The consultant, which the SEC complaint notes also represented other U.S. companies working in Indonesia, worked closely with the former Government Affairs Director for Asia for Monsanto, Charles Martin, in lobbying the Indonesian government for legislation favorable to Monsanto and monitoring Indonesian legislation that could affect Monsanto's interests. Martin and the consultant had some early success: in February 2001, they secured limited approval from the Indonesian government to allow farmers to grow genetically modified cotton.

Later that year, however, the Indonesian Ministry of Environment issued a decree requiring an environmental impact assessment for biotechnology products such as the genetically modified cotton. The decree presented a significant obstacle to Monsanto in its efforts to market the genetically modified cotton and other similar products.

Martin and the consultant unsuccessfully lobbied a senior environment official to remove the unfavorable language. In late 2001, Martin told the consultant to "incentivize" the senior official by making a \$50,000 payment. Martin directed the consultant to generate false invoices to cover the payment, which Martin approved and took steps to ensure that Monsanto paid. In February 2002, the consultant made the payment to the official. Despite the payment, however, the senior official failed to remove the unfavorable language from the decree. Martin settled separately with the SEC in March 2007.

The SEC complaint also states that Monsanto inaccurately recorded approximately \$700,000 of illegal or questionable payments made to at least 140 current and former Indonesian

government officials and their family members over a five-year period beginning in 1997. According to the complaint, Monsanto affiliates in Indonesia established numerous nominee companies (without the knowledge of Monsanto), which it would over-invoice to inflate sales of its pesticide products in order to siphon payments to government officials.

Monsanto discovered the irregularities in March 2001, and following an internal investigation, notified the SEC of the illegal or questionable payments. The SEC noted its consideration of Monsanto's cooperation in determining to accept the settlement offer.

In furtherance of Monsanto's deferred prosecution with the DOJ, an independent counsel began a three-year review of the company's internal compliance measures in March 2005. On March 5, 2008, following a DOJ motion to dismiss, the U.S. District Court for the District of Columbia entered an agreed order dismissing the charges with prejudice.

- *Charles Martin*

On March 6, 2007, the SEC filed a settled complaint against Martin. Martin consented, without admitting or denying wrongdoing, to an injunction prohibiting him from future violations of the FCPA's anti-bribery provisions and from aiding and abetting violations of the FCPA's books and records and internal controls provisions. The settlement requires Martin to pay a civil monetary penalty of \$30,000.

OTHER FCPA AND RELATED DEVELOPMENTS

In addition to the numerous settlements and criminal matters discussed above, there have been a number of significant developments related to the FCPA, including important civil litigation, significant proposed legislation (both in the U.S. and abroad) and bribery-related criminal prosecutions abroad. Certain of these developments are discussed herein.

FCPA-Related Civil Litigation

The FCPA currently does not create a private cause of action (but see discussion regarding recent legislation *infra*). There has, however, been a proliferation of FCPA-related civil litigation since late 2006. These suits have taken seven forms: (i) lawsuits by foreign governments; (ii) shareholder derivative suits; (iii) securities claims; (iv) commercial actions between business partners; (v) tort claims by damaged parties; (vi) whistleblower complaints; and (vii) suits against former employees.

- Lawsuits by Foreign Governments

On June 27, 2008, the Iraqi government filed suit in the United States District Court for the Southern District of New York against over 90 corporations (almost 50 parent companies and over 40 of their affiliates) and two individuals alleging, among others, Racketeering Influenced Corrupt Organizations (“RICO”), common law fraud and breach of fiduciary duty claims based on allegations of bribery in connection with the Oil for Food program (“OFFP”). Each of the companies discussed above in connection with the OFFP settlements (or one of their affiliates) — AGCO, Novo Nordisk, Fiat, Siemens, AB Volvo, Flowserve, Akzo Nobel, Chevron, Ingersoll-Rand, York, Textron and El Paso — is named in the complaint, along with numerous other companies, many of which are known to be under investigation by the DOJ and/or SEC.

The Iraqi government asserts claims both directly and as *parens patriae* on behalf of the Iraqi people. In addition to any factually-specific defenses the defendant companies may have, the companies as a group will likely have substantial defenses both to the direct and *parens patriae* claims. With regard to the former, as the complaint concedes, the Iraqi government under Saddam Hussein required companies to make improper payments to the Iraqi government to participate in the OFFP. As a recipient of the alleged bribes, Iraq typically would not have standing to assert claims based on those payments. Iraq will likely argue that the bribes were demanded by the Saddam Hussein regime and that the current elected government is not responsible for, or bound by, the Hussein regime’s actions. There is, however, a long line of precedent that “changes in the government or the internal policy of a state do not as a rule affect its position in international law.... [T]hrough the government changes, the nation remains, with rights and obligations unimpaired.”⁴³ Indeed, in *Kalasho v. Republic of Iraq*, No. 06-11030, 2007 WL 2683553, at * 5-6 (E.D. Mich. Sept. 7, 2007), the magistrate judge relied on this

43 *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396, 401 (2d Cir. 1927); see also *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 731 F. Supp. 619, 621 (S.D.N.Y. 1990); *Restatement (Third) of Foreign Relations Law of the United States* § 208(a).

principle in recommending that a default judgment be entered against the current Iraqi government based on alleged injuries the plaintiff suffered at the hands of the Hussein government. The district court rejected the magistrate's recommendation on other grounds, but did not question the notion that the current Iraqi government stands in the shoes of the Hussein regime.

Although there is less precedent addressing this issue, courts have also rejected the argument that a foreign state has *parens patriae* standing (a special species of standing accorded to governments of the States of the United States in certain circumstances) to bring suits in a U.S. court on behalf of its citizens, unless there is a clear indication by the Supreme Court, the Executive Branch or Congress to grant such standing under the circumstances presented.⁴⁴ The Supreme Court has never held that (or addressed the question whether) a foreign state has *parens patriae* standing under any circumstances. Thus, the relevant inquiry for the lower courts will be whether any of the potentially relevant statutes or treaties indicates that the Executive Branch or Congress intended to confer such standing on Iraq to bring suit based on allegations of bribery under the OFFP, which may be a difficult hurdle to clear.

On October 15, 2008, the Republic of Iraq moved to extend the period in which they had to complete service of process under Federal Rule of Civil Procedure 4(m), which was set to expire on October 25, 2008. According to the motion, the Republic of Iraq "has been unable to obtain much of Iraq's own documents," which it claims are in the possession of the United Nations and possibly U.S. government departments. Counsel for the Republic of Iraq indicated that the requisite U.N. approval to obtain or access potentially relevant documents could take an additional three months from the date of the motion. The motion indicates that without "the underlying contractual and related documents" it would be difficult to ensure that the proper defendants are served. U.S. District Judge Gerard E. Lynch (now of the Second Circuit Court of Appeals) extended the period to complete service until November 27, 2009. On January 15, 2010, defendants filed a motion to dismiss arguing, *inter alia*, that Iraq lacks standing, that its own conduct bars its claims, that its claims are time-barred, and lack of subject matter jurisdiction.

Similar to the Iraq suit, on February 28, 2008, Bahrain's state-owned steel company, Aluminum Bahrain ("Alba"), filed suit in federal court in Pittsburgh against Alcoa (formerly "Aluminum Company of America"), seeking over \$1 billion in damages. Alba alleges that, over a period of 15 years, Alcoa has engaged in conduct such as overcharging, fraud, and bribery of Bahraini officials. Alba's suit is also based on common law fraud and the RICO Act. The suit arose out of an internal investigation by the Bahraini government designed to uncover corruption in state owned companies. The suit quickly caught the attention of the Department of Justice, which intervened in late March 2008. Alba's civil suit has since been stayed pending the DOJ's investigation into the allegations against Alcoa. On April 6, 2010, the *Wall Street Journal* reported that U.S. and U.K. authorities were investigating the activities of Alcoa's agent in Bahrain, Victor Dahdaleh, a Canadian citizen who lives in London and who is suspected of

⁴⁴ See *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 335-43 (1st Cir. 2000); *State of Sao Paulo v. American Tobacco Co.*, 919 A.2d 1116, 1121-22 (Del. 2007).

bribing Alba officials. The report indicates that prosecutors have obtained financial records they believe show that a company controlled by Dahdaleh made millions of dollars in payments to the personal bank account of a former Alba senior executive between 2001 and 2005. Alba and Alcoa representatives indicated they are cooperating with authorities, however the DOJ and SFO have yet to comment on the matter, as is standard during ongoing investigations.

Alba filed a second, similar suit on December 18, 2009, in the Southern District of Texas, against the Sojitz Corporation and its American subsidiary, also based on common law fraud and the RICO Act. Here, Alba alleges a 12-year scheme in which Sojitz's two predecessor entities paid over \$14 million in bribes to two Alba employees in exchange for unauthorized discounted prices. The suit seeks compensatory damages of \$31 million, plus punitive damages and costs. Unlike the Alcoa suit, the Sojitz complaint was filed several months after the DOJ began an investigation into the bribes alleged therein. In May 2010, the DOJ intervened and sought a stay in the Sojitz action.

- *Derivative Actions*

On May 6, 2008, an ironworkers' pension fund filed a shareholders' derivative action in federal court against certain current and former Alcoa officers and directors based on the alleged bribes to Bahraini government officials. On May 20, 2008, plaintiffs filed a motion for a temporary restraining order and preliminary injunction enjoining "conflicted" Alcoa directors from participating in any decisions relating to the company's response to the DOJ investigation. U.S. District Judge Donetta W. Ambrose denied plaintiff's motion for a temporary restraining order on May 27, 2008, and subsequently dismissed the complaint against the defendant directors on July 9, 2008 for plaintiffs' failure to make a requisite pre-suit demand on the directors. With the July 9, 2008 dismissal, Judge Ambrose also denied plaintiff's motion for a preliminary injunction against the defendant directors.

Similarly, on May 14, 2009, a police and firefighter pension fund filed a shareholders' derivative action in the Harris County state court in Texas against current and former officers of Halliburton and its former subsidiary Kellogg, Brown & Root, Inc., based in part on the alleged scheme to bribe Nigerian officials, which plaintiffs allege was "orchestrated at KBR's highest levels." The defendants removed the case to federal court, but on September 8, 2009, Judge Vanessa Gilmore of the Southern District of Texas remanded the case back to state court without opinion.

Alcoa and KBR are far from the only companies facing shareholder derivative suits stemming from conduct alleged to violate the FCPA. Others such as Faro, Chevron and BAE face or faced similar suits, each alleging that the officers and directors of the company breached their fiduciary duties by authorizing and/or permitting bribes to be paid to foreign officials.⁴⁵ In December 2009, the United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal of a derivative claim against current and former directors of BAE by the city of

⁴⁵ On October 14, 2009, a shareholder in Pride, International Inc. filed a derivative suit in Harris County, Texas state court based on alleged "years of systemic violations of the FCPA. Although this complaint has attracted notice from legal commentary, the plaintiff filed a notice of non-suit later the same day.

Harper Woods (Michigan) Employees' Retirement System by applying English law holding that the company, not the shareholders was the proper plaintiff.

In May 2009, a Houston federal district court judge dismissed a shareholder derivative suit against current and former officers and directors of Baker Hughes. The suit alleged that directors and officers of Baker Hughes, which settled FCPA charges with the DOJ and SEC in 2007, breached their fiduciary duty by failing to address the FCPA problems. Following the recommendation of a magistrate, Judge Vanessa Gilmore dismissed the charges on procedural grounds.

In its motion to dismiss the claims, Baker Hughes argued that the plaintiffs had failed to first demand that the board of directors bring the suit, a requirement in shareholder derivative suits. Plaintiffs responded by arguing that a majority of the board members could not impartially consider the request, making any request futile. Judge Gilmore confirmed the findings of the Magistrate that the plaintiffs failed to show that the Baker Hughes board of directors could not impartially evaluate their lawsuit.

The Magistrate rejected the four main arguments by the Plaintiffs that the board was not disinterested: (i) the Board had shown it was not impartial by not already bringing the suit; (ii) the Board would essentially be suing themselves; (iii) the Defendants' conduct was egregious on its face; and (iv) the Board members "have entangling financial alliances, interests, and dependencies." First, the magistrate held that the simple fact that the Board had not yet brought a suit was not sufficient to relieve the Plaintiffs of their duty to make the demand. Second, the Magistrate agreed with the Defendants that the Plaintiffs had failed to demonstrate that Board members were subject to a "substantial likelihood of liability," as opposed to a mere threat of liability. Third, Plaintiffs failed to allege any facts to support the contention that the conduct of the Defendants was egregious and that each member had benefited from the conduct. Finally, according to the Magistrate, simply listing the affiliations of the Board members, without more, was insufficient to demonstrate that they were not disinterested. Therefore, the Magistrate recommended that Judge Gilmore dismiss the claims for the Plaintiffs' failure to demand that the board bring the suit. This is the third time that a suit by Baker Hughes shareholders based on the FCPA charges has failed. As described above, in 2007 Baker Hughes settled FCPA charges with the DOJ and SEC for a total of \$44 million, including \$23 million in disgorgement, stemming from improper payments to officials in Angola, Nigeria, India, Kazakhstan, Russia, and Uzbekistan.

On January 11, 2010, a Delaware Chancery Court dismissed a derivative action against officers of the Dow Chemical Company, in part because the complaint admitted that the board of directors had enacted anticorruption compliance programs. Dow was depending on cash generated by a joint venture with the Kuwait Petrochemicals Industries Company ("KPIC"), a state-owned entity, to fund a separate transaction, the acquisition of the Rohm and Haas Company ("R&H"). The Kuwaiti government rescinded its regulatory approval of the joint venture and Dow was not able to fund the R&H acquisition, prompting R&H to file suit against Dow seeking specific performance. Subsequent articles in the Kuwaiti press suggested that the approval of the joint venture with KPIC had been rescinded based on suspicions of bribery.

Plaintiffs, among other things, sought to hold the directors liable on the theory that they acted in bad faith and consciously disregarded their fiduciary oversight duties in connection with bribery allegations. The Court rejected the argument that the board was not able to exercise its disinterested business judgment, and thus no demand on the board was required, because their alleged failure of oversight subjected them to a substantial likelihood of personal liability. The Court concluded that the Plaintiffs had failed to allege that the defendant board members knew of the alleged bribery, rejecting the argument that because Dow had previously acknowledged improper payments “by different members of members of management, in a different country (Kuwait), and for a different transaction (pesticide registration), the board should have suspected similar conduct by different members of management, in a different country, in an unrelated transaction.” The Court furthermore noted that plaintiffs could not allege that the board “utterly failed” to conduct proper oversight, while admitting that the board had corporate governance procedures in place without an allegation that the board deliberately failed to monitor such procedures.

- Securities Suits

Several companies face securities suits, either as stand alone actions or as companions to derivative suits. On December 3, 2009, a shareholder of Siemens AG filed a class action in the Eastern District of New York claiming that Siemens committed securities fraud by misrepresenting the scope and magnitude of the corruption discovered by multiple ongoing investigations, which eventually led to settlement payments totaling over \$1.6 billion (discussed *supra*). The proposed class period begins several months after multiple public disclosures that Siemens was under investigation for specific instances of bribery and would be conducting its own broad internal probe. The complaint alleges that Siemens made material misrepresentations in that it never altered its earnings outlook in response to its investigations, and company officers stated that the ongoing investigations and legal consequences would have no material impact on Siemens’ earnings outlook.

Previously, on July 23, 2009, four related investment companies filed suit in the United States District Court for the Southern District of Texas against a holding company of the Panalpina Group (“Panalpina”), claiming that Panalpina artificially inflated its stock price through misrepresentations regarding the company’s payment of bribes to customs agents in Nigeria, discussed more fully *infra*. The funds, which together own approximately 5% of Panalpina, did not bring the suit as a class action, but claim that Panalpina’s stock lost 78% of its value during the relevant timeframe. Panalpina is headquartered in Switzerland and is traded on the Swiss Exchange, though the complaint alleges that it has “substantial operations” in Texas and made use of the mails and means and instrumentalities of interstate commerce in conducting the alleged fraud. The suit also names as defendants Panalpina’s former Chairman of the Board, former President and CEO, current CEO, and an investment fund which owned 100% of Panalpina prior to its 2005 initial public offering.

On December 31, 2005, Titan Corporation (“Titan”) settled a securities class action, in which the plaintiffs alleged that (i) Titan had failed to disclose that foreign consultants for Titan had made improper payments to foreign government officials in violation of the FCPA and Titan

had improperly recorded such payments in its books and records; and (ii) as a result, the company was unable to enter into a definitive merger agreement with Lockheed Martin, despite both shareholder and regulatory approval of the planned merger. The court granted class certification simultaneously to approving the \$61.5 million settlement.

In late 2006 and 2007, two federal district courts denied motions to dismiss class action securities complaints relating to alleged misstatements regarding FCPA issues brought under Section 10b and 20(a) of the Exchange Act. In both *In re Immucor Inc. Sec. Litig.*, No. 1:05-CV-2276-WSD, 2006 U.S. Dist. LEXIS 72335 (N.D. Georgia, Oct. 4, 2006), and *In re Nature's Sunshine Products Sec. Litig.*, 486 F. Supp. 2d 1301 (D. Utah, May 21, 2007), the plaintiffs allege that the defendant companies had made misleading statements in their SEC filings and elsewhere relating to improper payments of which the companies were aware. The *Nature's Sunshine* plaintiffs allege that in the company's 2005 Sarbanes Oxley certifications, the CEO falsely asserted that he was unaware of fraud involving management or employees exercising significant control over financial reporting when he himself had made illegal payments under the FCPA. The *Immucor* plaintiffs similarly alleged that the company had issued nine false or misleading statements that understated the scope and gravity of investigations into corrupt activities by the company's subsidiaries in Italy and misrepresented the strength of the company's internal control mechanisms, when, in fact, Immucor was aware of criminal activity dating back as far as 1998.

Immucor settled in May 2007 for \$2.5 million., and *Nature's Sunshine* settled in September 2009 for \$6 million.. Willbros Group settled its FCPA-related class action suit for \$10.5 million on February 15, 2007. The class action, filed in May 2005, had alleged violations of Sections 10b-5 and 20(a) of the Exchange Act, including that the company's conduct artificially inflated the company's stock price, enabled the company to complete a \$70 million offering of Convertible Senior Notes and enter into a \$150 million credit agreement, and allowed insiders to reap more than \$7 million in proceeds through stock sales.

Faro Technologies also entered into a Memorandum of Understanding to settle a class action suit for \$6.875 million on February 26, 2008, and the settlement was approved on October 3, 2008. The suit had claimed that the company was overstating sales, understating the cost of goods sold, and concealing its overstatement of profit margins through violations of the FCPA, which were disclosed in 2006 and ultimately led to Faro's settlement with the SEC in 2008 described *supra*. The complaint had further alleged that the "company's internal controls were woefully inadequate and, in many respects, virtually nonexistent."

- *Civil Actions Brought by Business Partners*

There are several recent suits falling into the category of FCPA civil actions brought by business partners. On April 9, 2008, a Denver-based oil company, the Grynberg Production Corporation ("Grynberg"), filed suit in the U.S. District Court for the District of Columbia against BP Plc ("BP"), StatoilHydro ASA ("Statoil"), British Gas, and several executives at these companies. Grynberg began partnering with the defendant corporations in 1990 with the goal of capitalizing on the growing oil market in Kazakhstan. Grynberg's complaint asserts RICO,

common law fraud, theft, and breach of constructive trust claims based on the allegation that BP, Statoil, and British Gas without Grynberg's knowledge, used nearly \$12 million dollars from the partnership to bribe Kazakh officials. Jack Grynberg, founder and CEO of the company, has publicly asserted that one of the primary motivations for filing the complaint was to distance himself and his company from any potential FCPA violations by his joint venture partners. On November 12, 2008, U.S. District Judge John D. Bates granted a motion by defendants BP and Statoil to compel arbitration and dismissed plaintiffs' complaint against BP, Statoil and the individual BP defendants without prejudice. Grynberg has since taken the case abroad, filing a complaint dated December 2, 2009 with the European Commission against BP and seven other companies in the oil industry. The complaint alleges civil and criminal fraud, conspiracy, and interference with economic opportunity, including violations of the antitrust and unfair trade provisions of Articles 81 and 82 of the European Community Treaty.

On March 24, 2008, Ohio-based Argo-Tech Corporation ("Argo-Tech"), a manufacturer of, among other things, high performance aerospace engine fuel pumps and systems and a subsidiary of Eaton Corporation, filed suit against its Japanese distributor, the Yamada Corporation ("Yamada"), and Yamada's subsidiary, Upsilon International Corporation ("Upsilon"), in the U.S. District Court for the Northern District of Ohio, seeking compensatory damages for Yamada's breach of contract and a declaratory judgment that would allow Argo-Tech to terminate its distributorship agreement with Yamada due to alleged contractual violations, including breach of provisions requiring Yamada and its personnel to (i) "obey the letter and spirit" of the FCPA and any similar local laws and (ii) comply with Argo-Tech's policy against giving bribes, kickbacks or any benefits to customer personnel – apparently even in contexts unrelated to Argo-Tech's business. The case grows out of the Japanese government's prosecution of a former Yamada executive, Motonoba Miyazaki. The Japanese government's investigation has already led to the arrests of Miyazaki, a former Vice Minister of Defense, and his wife on suspicion of engaging in bribery and other misconduct.

On March 26, 2008, Yamada and Upsilon brought a countersuit against Argo-Tech in the Northern District of California, asserting that Argo-Tech was in breach of the contract for anticipatory repudiation of the distributorship agreement and seeking a declaration that Argo-Tech does not have a lawful basis to terminate the agreement. Yamada's suit also seeks compensatory damages, which it estimates at over \$5 million in gross profits per year for the entire term of the agreement through 2044. On July 10, 2008, Argo-Tech moved to consolidate the cases, and the parties reached an undisclosed settlement in November 2009.

On October 21, 2008, the Dubai-based company Supreme Fuels (a subsidiary of the Swiss company Supreme Foodservice AG) filed suit in the U.S. District Court for the Southern District of Florida against Harry Sargeant, Finance Chairman of the Republican Party of Florida, International Oil Trading Company ("IOTC"), International Oil Trade Center ("IOTC Jordan"), and Mustafa Abu-Naba'a asserting multiple claims, including a RICO Act claim based on an alleged bribery scheme in violation of the FCPA and other statutes.

The suit alleges a conspiracy beginning in 2004 to bribe key Jordanian government officials to ensure that the defendants would be the sole recipients of more than one billion dollars worth of U.S. Government contracts for the supply of fuels to the U.S. military in Iraq.

Supreme Fuels alleges that the bribes ensured that IOTC would be the only bidder permitted to obtain a Letter of Authorization (“LOA”) from the Jordanian government, a necessary prerequisite to qualify as an eligible bidder for the U.S. Government contracts in question. The complaint asserts that Sargeant and IOTC allegedly formed a Jordanian subsidiary, IOTC Jordan, granting a one-third interest in the company to Mohammad Anwar Farid Al-Saleh, a Jordanian who is married to a half sister of the King of Jordan. Al-Saleh, in turn, used his influence with the royal family and Jordanian government on behalf of IOTC. IOTC also is alleged to have made “regular payments” to Jordanian officials, based on a per-ton fee for the fuel supplied by IOTC under the contract, in exchange for the LOA. Other bidders were unable to compete without the Letter of Authorization, despite submitting better-priced bids, granting IOTC an effective monopoly, which Sargeant allegedly leveraged into better contract prices for IOTC.

On December 18, 2009, the District Court granted in part and denied in part defendants’ motion to dismiss. The court granted the motion as to Abu-Naba’a on grounds of insufficiency of process and lack of personal jurisdiction. With regards to jurisdiction, the court noted that Abu-Naba’a’s only alleged contacts with Florida were his activities forming and operating IOTC, which the court deemed “well short of establishing ‘substantial and not isolated activity in Florida’” under the Florida long-arm statute. Similarly, the court determined that Abu-Naba’a’s activities on behalf of IOTC were not sufficient for specific jurisdiction because he was not transacting business in the state “on his own accord.” The court, however, permitted discovery on the issue of personal jurisdiction. Defendants also filed a motion to dismiss for forum non conveniens, arguing that the claim was more properly heard in Jordan. The court dismissed the motion, however, finding that Jordan would be an inadequate forum because, under Jordanian law, antitrust and corruption claims must be brought by a public prosecutor, not an individual.

Representative Henry Waxman (D-CA), the Chairman of the Committee on Oversight and Government Reform, recently wrote a letter to Defense Secretary Gates asking him to investigate Sargeant and IOTC in connection with overcharges for fuel deliveries to the U.S. military in Iraq arising out of the same alleged scheme, which the letter describes as “a reprehensible form of war profiteering.” Representative Waxman’s letter notes that, as a result of IOTC’s effective monopoly on fuel shipments through Jordan, IOTC doubled the profit margin realized by KBR when it held the same contract.

Al-Saleh has also sued Sargeant and one of his partners in Florida state court alleging that they “conspired to swindle [Al-Saleh] out of one-third of the profits from the group’s valuable contracts with the Government of the United States.”

In a somewhat different context, in its February 18, 2009 Form 10-K, eLandia International Inc. (“eLandia”) disclosed the status of pending contractual claims it brought against the previous owner of Latin Node resulting from the failure to disclose the pre-

acquisition FCPA violations. As described above, on April 7, 2009, Latin Node, Inc. pleaded guilty to one count of violating the FCPA's anti-bribery provisions in connection with corrupt payments to government officials in Honduras and Yemen. Latin Node's parent company, eLandia, will pay the \$2 million fine associated with the guilty plea.

On June 27, 2008, eLandia filed an action against Jorge Granados and Retail Americas VoIP, LLC ("RAV") in the 11th Judicial Circuit in Miami-Dade County, Florida. The action asserted claims for contractual indemnification, breach of contract, breach of the obligation of good faith and fair dealing, fraud, fraudulent inducement, unjust enrichment, and specific performance. The claims arose from a transaction where eLandia purchased 80% of the equity of Latin Node from RAV for \$20 million pursuant to a preferred stock purchase agreement. According to eLandia's claims, Jorge Granados and RAV failed to disclose as part of the preferred stock purchase agreement that Latin Node had made payments to various third parties in violation of the FCPA and that one of Latin Node's vendors claimed that it was owed \$4.4 million.

According to eLandia's Form 10-K, on February 12, 2009, eLandia entered into a Settlement Agreement with Jorge Granados and RAV pursuant to which (i) the 375,000 shares of eLandia's common stock were returned by the escrow agent and cancelled; (ii) eLandia exchanged mutual general releases with Jorge Granados and RAV; (iii) Jorge Granados resigned as a director of Latin Node, Inc. and as a manager of RAV; and (iv) Jorge Granados agreed to be subject to certain non-competition, non-solicitation and non-disclosure covenants. The action was dismissed on March 13, 2009.

- Tort Actions

One of the more unusual bribery-related claims arose on January 2, 2009, when a group of plaintiffs described as "persons injured and close family members or representatives of persons killed or injured in suicide bombings and other shockingly intentional egregious acts of international terror, torture, extra-judicial killing, genocidal conduct and crimes against humanity and who are citizens of Israel, the United States, and various other countries" filed suit in District Court for the District of Columbia against Oscar S. Wyatt, Jr., NuCoastal Corporation, NuCoastal Trading Co., S.A., El Paso Energy Corporation, Bayoil (USA), Inc., David B. Chalmers, Jr. and Bayoil Supply & Trading Limited, alleging that the defendants' participation in the Iraqi Oil-for-Food Programme "provided illegal, financial and material support for known terrorists including directly providing funding and support to Saddam Hussein," who, in turn, provided support to various terrorist organizations, including Hamas. On November 19, 2009, Judge Henry H. Kennedy, Jr., granted the defendants' motion to transfer the case to the Southern District of Texas, Houston Division.

The suit alleges that defendants "knew or should have known that Saddam and the Saddam Regime were known terrorists and had committed widely publicized crimes against humanity, acts of genocide, torture and terrorism." The complaint further alleges that defendants knew or should have known acts of terror committed by various terrorist organizations, and that by "providing material support to known terrorist organizations, including Saddam and the

Saddam Regime, Defendants consciously disregarded a substantial and unjustifiable risk to the lives and safety of others.” In addition to reciting facts largely similar to those contained in previous El Paso and Wyatt charging documents, the complaint recounts a litany of terrorist acts performed by various terrorist organizations that apparently received financial support from Iraq. The plaintiffs likely face significant challenges in proving causation, but the case demonstrates the continued creativity of plaintiffs seeking retribution from those engaged in alleged corrupt activities, particularly those related to the Oil-for-Food scandal.

- Whistleblower Complaints

In January 2009, General Electric (“GE”) settled litigation against Adriena Koeck, former in-house counsel for GE, who claimed she was fired for reporting a potential FCPA violation to her superiors. GE had sued Koeck for wrongfully disclosing confidential company information and Koeck countersued claiming she was terminated for whistleblower activity protected by Sarbanes-Oxley (“SOX”).

According to Koeck’s SOX retaliation complaint, shortly after joining GE as the lead attorney for Latin America at its Consumer and Industrial Division, Koeck received a news article describing a “bribing club” in Brazil and including as members both GE and a GE Brazilian joint venture. According to the article, the corporations participating in the club met regularly to discuss how much each would pay in bribes and which corporations would be awarded which public sector contracts out of Brazil. Some reports alleged more than \$20 million in illegal payments were made to as many as 150 government officials through this arrangement. A few months later, an ombudsman complaint was filed with the GE legal department about the situation. That complaint alleged that certain sales people for the joint venture were paid inflated salaries with the expectation that they would use the extra money for bribes. Koeck claimed that she was instructed not to pursue the matter further. When she continued to follow up on this as well as an alleged tax fraud scheme orchestrated by a commercial sales manager, she was terminated. In June 2008, the Department of Labor dismissed Koeck’s SOX retaliation complaint as untimely.

Also in June 2008, GE sued Koeck in federal court for wrongfully disclosing confidential and privileged company information including emails, memos and legal opinions. Koeck claimed that the information was not covered by attorney-client privilege and she countersued for illegal retaliation for whistleblower activity. In October 2008, the district court dismissed Koeck’s counter-claims.

Koeck subsequently joined a settlement of a gender discrimination class action suit against GE and, in doing so, waived any former claims against the company. GE then agreed to withdraw its complaint that Koeck wrongfully disclosed information. In January 2009, Koeck and GE signed a joint stipulation of dismissal with regard to their litigation. GE has maintained that Koeck’s allegations are without merit. While the information in the SOX retaliation complaint has been given to the DOJ Fraud Section, the DOJ has yet to comment on the matter.

On October 19, 2009, the court dismissed another whistleblower action for lack of subject matter jurisdiction. Kimberly Lebron had filed a complaint against AIG, Inc., alleging retaliatory termination in violation of SOX. Lebron, who worked as an attorney, was terminated several weeks after airing concerns to AIG's anti-corruption officer of paid-for travel potentially in violation of the FCPA. Judge Shira Scheindlin dismissed the case for procedural reasons, as Lebron failed to file a timely appeal from her OSHA denial.

- *Suits Against Former Employees*

Increasingly, companies facing FCPA investigations or charges are bringing suits against the employees who allegedly caused the FCPA violations seeking monetary damages the company may have incurred as a result of the employee misconduct.

Most prominently, in late 2009, Siemens agreed to settle potential claims against two former CEOs and nine other former executives for alleged breaches of organizational and supervisory duties relating to the massive bribery scandal discussed above. The two former CEOs, Heinrich von Pierer, who ran the company from 1992-2005, and his successor, Klaus Kleinfeld, while denying any wrongdoing, will pay €5 million and €2 million in their respective settlements. Other former board members who have reached a settlement with Siemens include Uriel Sharef, who agreed to pay €4 million, Juergen Radomski and Johannes Feldmayer, who each agreed to pay €3 million, former Chairman Karl Hermann, who agreed to pay €1 million, and Klaus Wucherer, Rudi Lamprecht, and Edward Krubasik, who each settled for €500,000. Still pending are potential agreements with former management board member Thomas Ganswindt and former Chief Financial Officer Heniz-Joachim Neubuerger. None of Siemens' claims was filed in a U.S. court.

In December 2008, Willbros International, a subsidiary of Willbros Group, filed suit in the United States District Court for the Southern District of Texas against three former employees, James Kenneth Tillery, Paul G. Novak, and David Ross, and companies under their control, Hydrodive International, Ltd. and Hydrodive Nigeria, Ltd (collectively "Hydrodive"). Willbros claimed that the defendants usurped corporate opportunities, engaged in self-dealing transactions, arranged for and paid bribes to government officials in Nigeria and elsewhere, and participated in illegal tax schemes.

The complaint alleges that Tillery, who served for Willbros International both as Executive Vice President and later President, directed Willbros International to retain and pay Hydrodive despite the fact that Hydrodive did not perform any actual services for Willbros International. The company alleged that Hydrodive was instead a front used by Tillery and Novak to embezzle money. Furthermore, the complaint claims that Hydrodive was used to make corrupt payments to foreign officials in Nigeria, causing Willbros to violate the FCPA. Willbros also alleges that Tillery had ownership interests in several business, including Hydrodive, which he did not disclose to Willbros. According to the complaint, Ross, the principal agent of Hydrodive, along with Tillery and Novak, arranged for Willbros funds to be secretly transferred to Hydrodive over a three-year period. The complaint states that the defendants participated in the concealment of Tillery and Novak's ownership in Hydrodive and as a result profited from the

breach of fiduciary duty. In a status report filed on February 2, 2010, Willbros stated that it had served Novak with discovery requests for information regarding the last known addresses of the remaining defendants, including Tillery, who, as discussed above, is currently a fugitive.

Foreign Investigations

Hewlett-Packard

On April 14, 2010, Russian authorities, acting at the behest of German prosecutors, raided the Moscow offices of California-based PC giant Hewlett-Packard Co. (“HP”) as part of an investigation into whether HP paid approximately €8 million in bribes between 2004 and 2008 to win a €5 million contract to supply computer equipment to the prosecutor general of the Russian federation, the office that handles many criminal investigations in Russia including many corruption cases. On April 16, 2010, the *Wall Street Journal* reported that the DOJ and SEC were also investigating the matter. An HP spokesperson indicated that the company was cooperating with German, Russian, and U.S. authorities.

In December 2009, German authorities arrested, and later released on bail, one current and two former executives of the company: Hilmar Lorenz, the former head of sales in Russia; Kenneth Willett, an American who served as the head of a German HP unit that dealt with sales in Europe, Africa and the Middle East; and Paeivi Tiippana, who preceded Willett in the same role.

German prosecutors indicated the investigation began in 2007 after a tax auditor discovered that €2 million had been paid to a small computer company, ProSoft Krippner, in Leipzig for services in Moscow and became suspicious of size of the transaction. Prosecutors are investigating whether money was funneled through ProSoft Krippner and two other German entities that sold HP equipment. The three companies are believed to have used the funds to pay false invoices to shell companies and bank accounts in Austria, Belize, Britain, Latvia, Lithuania, New Zealand, Switzerland, the British Virgin Islands, and the United States in exchange for commissions from HP. The ultimate beneficiaries of the shell companies have not been identified.

Under German criminal law, charges cannot be brought against juridical persons such as HP, only against natural persons. However, a court could order the seizure of illicit profits if the company is found to be the beneficiary of a crime.

Total

On February 27, 2010, a French investigating magistrate placed Total under formal investigation on bribery charges relating to the Iraq Oil-for-Food Programme (“OFFP”). Several Total employees were previously placed under investigation. In September 2009, the Paris Prosecutor’s Office recommended dropping the charges against Total employees who had been indicted, including Total’s current CEO. In France, prosecutors make the initial decision to open a judicial investigation and then, in specific circumstances, refer the case to the investigating

magistrate, who supervises further investigation. At this point, the magistrate has the power to decide whether to pursue a case.

Rather than dismiss the charges against the Total employees, the current magistrate (who recently succeeded the original magistrate) opened the formal investigation against the company itself, effectively provided himself more time to investigate the case. The result was front-page news in the French press. *Les Echos*, a prominent French daily financial and business publication, stated people close to the group called the new judge's decision "surprising, even extravagant," given the prosecutor's 2009 recommendation to dismiss the individual charges, and given that the previous magistrate chose not to indict the company when presented with the same body of evidence.

Total revealed the new indictment in its 2009 Annual Report submitted to the SEC as Form 20-F on April 1, 2010, in which Total characterized the charges as "bribery charges as well as complicity and influence peddling." While the decision to indict the company itself marks a potential expansion of an eight-year-old investigation, Total attempted to downplay the development. Taking aim at the front-page *Les Echos* article that ran under the headline "Total at the Center of a New Case," Total issued a press release titled "Clarification: Not a New Case." The release pointedly asserted that "Contrary to what was published this morning in a daily French newspaper, this is not a new case." Total stressed that that its new indictment comes eight years after the initial investigation was opened, three years after it closed, several months after the original charges were recommended dropped and "with no new elements having been uncovered." Total also reiterated that it has "never...been sued for compensation by the proceedings entered into by Iraq against the numerous companies concerned by the Oil for Food program."

Mabey & Johnson

On July 10, 2009, Mabey & Johnson, a privately-owned U.K. company that specializes in bridge building, pleaded guilty in Westminster Magistrates Court to charges of conspiracy to corrupt in relation to its activities in Ghana and Jamaica and charges of paying kickbacks in connection with the United Nations Oil-For-Food Programme in Iraq. The guilty plea came after an internal investigation led to a voluntary disclosure by Mabey & Johnson regarding corrupt activities in Jamaica and Ghana. Mabey & Johnson also disclosed information regarding corruption in Angola, Bangladesh, Mozambique, and Madagascar, but the SFO decided not to pursue charges related to those activities. The prosecution is significant because it marked the U.K.'s first successful prosecution of a company for corrupt practices in overseas contracts and for breaching a United Nations embargo on trade with Iraq.

Mabey & Johnson was sentenced on September 25, 2009 and received a £6.6 million fine. The fine included £4.6 million in criminal penalties comprised of £750,000 each for bribes paid in Ghana and Jamaica, £2 million for breach of the U.N. sanctions relating to the Oil-For-Food program, and a confiscation order for £1.1 million. Additionally, Mabey & Johnson was ordered to pay £2 million in reparations and costs, including £658,000 to be paid to Ghana, £139,000 to be paid to Jamaica, and £618,000 to be paid to Iraq. Further, the company replaced

five of the eight members of its board of directors and implemented a comprehensive compliance program. Mabey & Johnson is required to submit its compliance program to the review of a SFO-approved independent monitor. On January 14, 2010, the *Financial Times* reported that David Mabey, the former head of Mabey & Johnson, will be prosecuted by the SFO on two charges of false accounting in addition to violating international sanctions.

The Prosecution Opening Note referencing the allegations in Jamaica and Ghana stated that, “it is ... beyond reasonable argument that unless properly monitored and controlled, the employment of local agents and payment of commissions is a corruption ‘red flag’ exposing the company to risk. What it may provide is a convenient smokescreen to deny corporate or individual knowledge of arrangements conducted overseas.”

The Prosecution Opening Note also contains an Appendix including a “non-exhaustive list of the factors which the Director of the SFO takes into account when considering whether to investigate and prosecute allegations of overseas corruption by United Kingdom based companies and individuals.” This list includes the imposition of a “monitoring system to ensure absolute compliance with U.K. law....” In this regard, the SFO notes that in appropriate circumstances it will “seek to follow the model provided by the United States of America’s [FCPA].”

- *Iraq*

Mabey & Johnson was allegedly involved in providing funds to the Iraqi government in order to obtain a contract valued in excess of €4.2 million as part of the United Nations Oil-Food-Food Programme discussed above. The kickbacks, 10% of the total contract value, were paid in two separate installments to Jordanian bank accounts and exactly reflected the kickback sum that was required by the Iraqi government. The payments were made through Upper Gulf Agencies, Mabey & Johnson’s agent in Iraq.

- *Jamaica*

According to the Prosecution Opening Note, Mabey & Johnson paid bribes to Jamaican officials, through agents, in order to secure contracts for the building of bridges. The SFO contends that Mabey & Johnson knew that the appointed agents were hired to facilitate corruption. Although Mabey & Johnson denied this contention, it acknowledged that there was a risk that payments might be passed on as bribes.

The SFO alleged that bribes were paid by Deryck A. Gibson, an agent of Mabey & Johnson, to Joseph Uriah Hibbert with the authorization of Mabey & Johnson directors to secure projects and increase project costs. Hibbert served as the Jamaican Chief Technical Director of the Ministry of Transport and Works from November 1993 until October 2000 and had a longstanding relationship with Mabey & Johnson dating back to 1993. While in this position, Hibbert held delegated powers to act on behalf of the Permanent Secretary of the Ministry, which included the ability to enter into financial commitments when there was a vacancy in the Secretary of the Ministry position. During this period, Hibbert received payments of

£100,134.62 from Mabey & Johnson. Payments from Mabey & Johnson to Gibson were originally paid into accounts under Gibson's own name, but later were made to an offshore vehicle.

The primary project at issue was the Priority Flyover Program, known as the "Jamaica 1" contract. In February 1999, Mabey & Johnson entered into a joint venture with Kier International Ltd. for implementation of the Jamaica 1 contract after a presentation was made to the Jamaican Ministry of Transport. Hibbert approached Gibson to make a bid which Hibbert later approved. The contract was valued at £13.9 million but later increased in value to £14,900,000 seemingly as a result of bribes paid to Hibbert. The alleged bribes were paid to Hibbert through commissions paid to Mabey & Johnson agent, Gibson, which were set at an inflated 12.5% rate. In addition to payments made directly to Hibbert, payments were also made to Hibbert's niece and funeral expenses were covered for Hibbert's mother.

- Ghana

According to the Prosecution Opening Note, Mabey & Johnson paid commission to agents in relation to business it won through the Ghana Development Fund ("GDF"). This fund was to be used for the development of business in Ghana but in actuality was used as a slush fund for Mabey & Johnson to pay bribes. A number of individuals were involved in making and receiving corrupt payments out of the GDF. Consequently, bribes made during the relevant period totaled £470,792.60 which resulted in Mabey & Johnson receiving the award of three principal contracts. These contracts were Priority Bridge Programme Number 1, worth £14.5 million, Priority Bridge Programme Number 2, worth around £8 million, and the Feeder Roads Project, worth £3.5 million. Many of the illicit payments were distributed to members of the Ghanaian Government including Dr. Ato Quarshie, the Minister of Roads and Highways. Mabey & Johnson accepted that in creating and making payments from the GDF, its executives facilitated corruption on behalf of the company and that its executives were in corrupt relationships with public officials in order to affect Mabey & Johnson's affairs.

Alstom

In March 2010, French industrial giant Alstom's offices in the U.K. were searched. News sources reported that three Alstom UK directors were questioned and released. A statement posted on the Alstom website indicated that the U.K. officials were apparently executing search warrants at the request of the Swiss government, which is conducting an investigation of Alstom, and that Alstom is cooperating with the British authorities. Alstom has formally denied any wrongdoing in regard to the Swiss investigation. On May 26, 2010, Alstom disclosed that certain companies and/or current and former employees have been or are currently being investigated with respect to alleged illegal payments in various countries, and that these investigations may result in fines, exclusion from public tenders, and third-party actions. Alstom also disclosed an investigation by the World Bank and the European Investment Bank concerning one case of alleged illegal payments. On May 26, 2009, Alstom disclosed that the investigations of current and former employees included investigations by Swiss and French authorities in connection with alleged cases of corruption.

Developments in China

Chinese authorities have begun aggressively enforcing anti-bribery laws, including taking action against foreign citizens. On August 12, 2009, the Chinese government arrested four employees of mining conglomerate Rio Tinto, with headquarters in both the United Kingdom and Australia, on allegations of commercial bribery and trade secrets infringement. Among those detained was Stern Hu, a naturalized Australian executive in charge of iron ore operations in China.

The Chinese government initially detained Stern and his colleagues in early July 2009 on suspicion of bribery and state secrets violations, alleging that the four employees on Rio Tinto's iron ore sales team had bribed steel-mill operators for access to confidential documents relating to iron ore price discussions, thus granting Rio Tinto an edge during such discussions and damaging China's economic security.

On March 29, 2010, all four employees were convicted in Chinese court of accepting bribes and stealing state secrets. The individuals were sentenced to between seven and fourteen years in prison. Hu was sentenced to ten years and fined 1 million yuan.

In August 2009, the former head of the company that owns Beijing's international airport was executed following his conviction on charges of accepting nearly \$4 million in bribes and embezzling another \$12 million between 1995 to 2003. In July 2009, China handed down a suspended death sentence to Chen Tonghai, the former chairman of the state-run oil refiner Sinopec. According to Xinhau reports, Chen accepted \$28.7 million in bribes from 1999 to June 2007. Although the death sentence was consistent with Chinese law for bribery charges involving such large sums of money, Chen received a two-year suspension of the sentence after confessing to the crimes, returning the bribes, and cooperating with authorities on other cases.

Discussing the government's enhanced anti-corruption campaign, the Beijing No. 2 Intermediate People's Court stated, "For corrupt officials, no matter what power they have, what positions they hold, they will be seriously punished if they violate the law."

In an effort to control corruption, China recently passed a 52-point ethics code. The code restricts ways in which party members can use their influence to benefit their relatives, friends, and associates. It states that they cannot use their influence to help interested parties with employment, business, or trading. Additionally, the code focuses on restricting party member's spending on buildings, cars, and travel. These guidelines partially come as a result of public outcry to blatant corruption and overspending.

International Guidance and Developments

World Bank Group Guidance on Doing Business in Nigeria

On May 20, 2008, the World Bank and the International Finance Corporation (collectively, the "World Bank Group") issued a report entitled "Doing Business in Nigeria

2008.”⁴⁶ The “Doing Business” series of reports are an effort by the World Bank Group to provide “objective measures of business regulations and their enforcement” across 178 countries as well as at the city and regional level. Generally speaking, the “Doing Business” reports measure how government regulations enhance or restrain business activity. The report compares nations and sub-national regions against each other on various business regulatory measures in the hopes that such comparisons will prompt reform and generate best practices among various nations and regions.

“Doing Business in Nigeria 2008” is the first sub-national report on Sub-Saharan Africa, which reflects Nigeria’s importance as an investment target. It also notes the country’s continued struggle to battle corruption and economic inefficiencies. The report examines 10 Nigerian states⁴⁷ and Abuja Federal Capital Territory, and compares them with each other as well as with 178 worldwide economies. The study focuses on four factors: (i) starting a business; (ii) dealing with licenses; (iii) registering property; and (iv) enforcing contracts. In addition to its analyses, the report provides helpful lists of procedures that companies can use as guidelines when starting a business, dealing with licenses or registering property in the country.

The report found that, as a whole, Nigeria ranks 108 out of 178 economies for ease of doing business. By comparison, the United States ranked third. Although improved business registration and building permit processes made it easier to do business in Nigeria since the World Bank Group issued its last report, more vigorous improvements by other developing nations have hindered Nigeria’s overall ranking. Among the ten Nigerian states and Abuja, it was deemed easiest to do business in Kaduna and most difficult to do business in Ogun (by comparison, Abuja ranks second and Lagos ranks eighth). The most difficult business process throughout Nigeria involves the registration of property, where Nigeria as a whole ranks 173rd.

In the context of addressing these discrete aspects of the Nigerian business environment, the report notes that difficult business environments can push legitimate entrepreneurs into the underground economy, a consequence it describes as “a serious problem in Nigeria.” One overarching theme of the report is that inefficient or inconsistent business practices allow for corruption to flourish. By highlighting these inefficiencies and inconsistencies, the World Bank Group hopes to prompt reform and illuminate best practices, thus raising the Nigerian business environment as a whole. Until such reforms are made, however, Nigeria will likely face continued pervasive corruption, particularly in light of the potential for outsized investment returns this emerging economy has to offer through natural resource development.

World Bank Department of Institutional Integrity

In April 2008, the World Bank Group’s Department of Institutional Integrity (“INT”) for the first time publicly released a redacted report detailing the results of its investigation into

46 The report notes that while the report is a product of the World Bank Group staff, it does not necessarily reflect the views of the Executive Directors of the World Bank or the governments they represent. Moreover, the World Bank Group does not guarantee the accuracy of the information contained in the report.

47 The ten Nigerian states analyzed were Abia, Anambra, Bauchi, Cross River, Enugu, Kaduna, Kano, Lagos, Ogun and Sokoto.

allegations of fraud and corruption in connection with a World Bank-funded project, specifically, contracts issued under an Emergency Demobilization and Reintegration Project (the “EDRP”) in the Democratic Republic of Congo (“DRC”). The purpose of the EDRP is to finance the demobilization, reinsertion and reintegration of ex-military combatants into civilian life. Several DRC government agencies were created to implement the project, including one known as CONADER that was responsible for procurement.

The investigation was launched after the World Bank learned of corruption allegations from several persons directly or indirectly involved in the implementation of the EDRP. On the basis of several witness interviews and the review of a “large amount of project documentation, including contracts and payment data,” the World Bank identified, among other potential improprieties, three instances of corruption in connection with EDRP contracts. In the first, the World Bank found that two companies were involved in the bribing of a CONADER official to receive a computer equipment and servicing contract valued at over \$900,000. The first company (referred to as “Company B”) submitted the bid for the contract, which was between \$300,000 and \$450,000 higher than those of the competing bidders and just below the CONADER project official’s internal cost estimate for the project. CONADER awarded the contract to Company B and, before receiving a no-objection letter as required by World Bank regulations, Company B immediately began to perform its contractual duties.

Company B also approached a second company (referred to as “Company A”) as a potential partner in the project. Company A demanded a meeting with CONADER officials to confirm that the contract had actually been awarded. In the subsequent meeting with the CONADER official, the official demanded the payment of a bribe, and Company B acknowledged that it had promised a portion of the profits from the contract to CONADER. Company A officials, with the knowledge of Company B officials, then wired \$20,000 to the bank account of a friend of the CONADER official. The World Bank subsequently cancelled the contract.

In another instance, the INT concluded that CONADER issued numerous small contracts for security services to a single company, rather than awarding a single large contract valued at over \$1.1 million, in order to avoid World Bank procurement thresholds requiring competitive tender and World Bank approval. Similarly, the INT determined that CONADER had split contracts with another company relating to air transportation services into four separate agreements so as to fall below the World Bank threshold despite there being no legitimate economic rationale for so dividing the contracts and despite the fact that, under an agreement between the World Food Program (“WFP”) and CONADER, WFP had responsibility for entering into transportation-related agreements. The report does not indicate what sanction, if any, was imposed as a result of these practices.

The INT traces its origins to 1996, when the World Bank Group’s then-President James Wolfensohn announced the beginning of a fight against the “cancer of corruption” in his annual report address. In 1997, the World Bank’s Board of Executive Directors adopted an anti-corruption strategy based on four pillars: (i) to prevent fraud and corruption in Bank-financed projects; (ii) to assist countries that ask for help in fighting corruption; (iii) to “mainstream” the

Bank's corruption concerns directly into country analysis and lending decisions; and (iv) to join the broader international effort against corruption. In 1999, the World Bank formed the Anti-Corruption and Fraud Investigations Unit, which later merged with its Business Ethics Office to become the INT. The INT is responsible for investigating "allegations of fraud, corruption, coercion, collusion, and obstructive practices related to World Bank Group-financed projects."

The INT is responsible for investigating both allegations of fraud by third parties ("external") and World Bank employees ("internal"). Sanctionable offenses for external parties include kickbacks, bribes, accounting fraud and overcharging, misuse of project assets and misrepresentation of qualifications during the bidding process. Sanctionable offenses for internal parties also include corruption-related offenses, but extend to allegations of workplace misconduct, such as sexual harassment, abuse of authority and retaliation. The World Bank further sanctions "obstructive" practices, such as destruction of documents or intimidation of witnesses in connection with an investigation.

The INT relies on three primary methods for detecting and investigating corruption allegations. First, the World Bank has established a Fraud and Corruption Hotline whereby individuals can submit complaints related to corruption, fraud or misconduct. According to the World Bank, these complaints are typically resolved within five months of being received.

Second, the INT has instituted a Voluntary Disclosure Program ("VDP") to "encourage[] firms who have engaged in fraudulent or corrupt practices in relation to Bank-financed projects to cease misconduct for good, and to fully disclose the details of those practices." Under the VDP's Terms and Conditions, participating firms are required to, among other things, conduct a thorough internal review to ensure that they are reporting all potentially relevant instances of misconduct, make changes to their existing compliance programs as requested by the World Bank, and hire an independent compliance monitor to conduct three annual comprehensive reviews into the entity's adherence to the VDP Terms and Conditions. In exchange for their voluntary disclosure (and adherence to the Terms and Conditions), the World Bank will agree not to debar the entity from future participation in World Bank projects, and will make an effort to keep their identity confidential.

Third, the INT has implemented a Detailed Implementation Review ("DIR") program that is "a proactive diagnostic tool for assessing the risk of fraud, corruption, and mismanagement in World Bank-financed projects." The INT apparently uses data mining, reviews project documentation, and uses other forensic techniques to determine if indicia of fraud exist in connection with World Bank projects. The DIRs are specifically intended to detect (and prompt investigation into) instances of potential fraud in the absence of any prior allegations or evidence of wrongful activity.

After the INT conducts an investigation into potential wrongdoing, it recommends sanctions based on whether the alleged misconduct is internal or external. If the allegations concern an external party, the sanctions process involves two steps. First, the INT sends its findings to the Evaluation and Suspension Officer, who determines whether the INT has sufficient evidence to support a finding that the party more likely than not engaged in a

sanctionable practice. If the evidence is deemed sufficient, the Evaluation and Suspension Officer informs the subject party, which is permitted to appeal to the World Bank's Sanctions Board. Sanctions for external misconduct include letters of reprimand, restitution and temporary or permanent disbarment. The World Bank publishes on its website a list of debarred firms and individuals, which as of February 2009, contained approximately 120 names. If the conduct involves a World Bank employee, the INT submits its findings to the World Bank's Vice President of Human Resources to determine what, if any, sanction is appropriate, including up to termination and a permanent bar from re-hire at the World Bank.

A September 2007 Independent Panel Review of the INT led by former Federal Reserve Chairman Paul Volcker made a critical assessment of the INT, noting that despite some successes and a dedicated staff, the INT faced "serious operational issues and severe strains in relations with some [World Bank] Operations units," which has contributed to some "counterproductive relations between the Bank and borrowers and funding partners." The Independent Panel Review issued numerous recommendations aimed at strengthening the INT's anti-corruption efforts. Among other things, the Review recommended certain organizational changes within the INT, such as a direct reporting line from the head of the INT to the World Bank President and the formation of an internal consulting unit to work with the Bank's operational units to develop protections against corruption and assist with education and training. The Independent Panel Review also recommended that the INT act with greater transparency, both within the World Bank organization and with respect to its investigatory findings generally.

By publicly releasing the results of its investigation into the EDRP project in Congo, INT appears to be attempting to implement, at least in part, the transparency recommendations of the Independent Panel Review and may be signaling that it will adopt a more robust, results-oriented approach to investigating allegations of corruption and fraud going forward. In fact, INT has since released redacted reports with respect to projects in Armenia, the Philippines and Honduras as well.

In addition, the World Bank Group has taken several recent steps to improve its corruption related investigatory protocol. For example, on February 18, 2006, leaders of the World Bank Group, the International Monetary Fund ("IMF") and several regional development organizations agreed to establish a "Joint International Financial Institution Anti-Corruption Task Force to work towards a consistent and harmonized approach to combat corruption in the activities and operations of the member institutions." The purpose of the Task Force was to more effectively combat corruption in connection with projects undertaken or financed by the various organizations.

Transparency International 2009 Progress Report

On June 23, 2009, Transparency International ("TI") released its 2009 Progress Report regarding anti-corruption enforcement activity under the Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Report is most significant for the attention it casts upon

worldwide anti-corruption enforcement efforts and its call for increased enforcement in many OECD countries.

The OECD Convention currently has 38 signatory countries, and efforts under it are an important bell-weather for the global investigatory and enforcement environment. The Report notes that the number of countries with active or moderate enforcement has increased from eight to fifteen in the last five years. The Report criticizes the uneven enforcement among signatories to the OECD Convention and calls for increased enforcement. For example, the Report notes that Germany and the United States each has more than one hundred cases, while some OECD signatories have few or none. TI observed that the U.S. has increasingly focused on investigations of foreign corporations, as evidenced by the fact that 13 of the 29 new investigations by the U.S. Government in 2007 involved foreign corporations. The Report noted that U.S. and German authorities announced on the same day that Siemens would pay fines to the two jurisdictions totaling approximately \$1.3 billion.

TI classifies four countries – Germany, Norway, Switzerland and the United States – as “active” enforcers, meaning that they were among the 11 largest exporters in the world, have at least ten major cases, initiated at least three major cases in the last three years, and concluded at least three major cases with substantial sanctions. The report classifies another eleven countries as “moderate” enforcers, meaning that they have at least one major case, as well as other active investigations. These are: Belgium, Denmark, Finland, France, Italy, Japan, South Korea, the Netherlands, Spain, Sweden, and the United Kingdom. The report criticized 21 other countries as having little or no enforcement.

According to the Report, the primary cause of under-enforcement is lack of political will, which manifests itself in the obstruction of investigations and failure to fund and staff enforcement efforts. To increase political will, and to address additional obstacles posed by poor international cooperation, TI calls on the OECD Secretary-General, the OECD Council at the Ministerial Level, the OECD Working Group on Bribery, and the signatory governments to embrace several recommendations. Most notably, the Report:

- Calls upon the Secretary-General to meet with the Justice Ministers of governments with little or no enforcement mechanisms in place;
- Encourages governments to assign specialized staff to investigate and prosecute foreign bribery cases;
- Asks the Ministerial to reaffirm that exceptions in the name of national security (such as those invoked by the British Government in the BAE investigation) violate Article 5 of the OECD Convention;
- Asks the Working Group to close potential loopholes in the Convention and in national implementing legislation such as payments to political parties, lack of corporate criminal liability and private-to-private corruption;

- Calls upon the four “active” enforcing countries to pressure their peers to commit to enforcement of the Convention; and
- Encourages China, India and Russia to sign the Convention so that all major exporters play by the same rules.

While the U.S. has long been the leader in enforcing anti-corruption laws, other developed nations have become increasingly aggressive in recent years. TI recognizes that enforcement has increased over the past five years, and calls for further acceleration of enforcement efforts. The Report seeks to pressure the OECD and its member states to adopt broader anti-bribery legislation and to enforce it more vigorously and with fewer exceptions and safe-havens. The Report is likely to result in increased attention to anti-corruption enforcement among OECD nations.

Russian Anti-Corruption Legislation

On January 10, 2009, three new interconnected laws regarding corruption came into force in Russia. Federal Laws No. 273-FZ, 274-FZ and 280-FZ (collectively the “Legislation”) significantly expanded and revised Russia’s criminal code to address bribery and corruption of public officials. The Legislation defines corruption as (i) an abuse of an official position, (ii) giving or receiving a bribe, (iii) misuse of power, (iv) commercial bribery, or (v) any other illegal use of a civil post contrary to the lawful interests of society and the state in pursuit of a benefit in the form of money, valuables, other property or services, other proprietary rights for himself or third persons or illegal provision of such opportunities to other individuals. It further includes performance of actions mentioned above in the name of, or on behalf of, a government entity.

The Legislation applies to both Russian and foreign citizens. Furthermore, if the organization, preparation and performance of a corruption offense is done on behalf of or in the interest of a juridical person (such as a corporation), whether foreign or domestic, that juridical person can be held responsible.

The Legislation, however, is silent on the issue of applicability to bribery of foreign officials. Its emphasis is on bribery of Russian officials. Furthermore, the bulk of the Legislation relates to the activities of Russian government officials, not private individuals or companies. For instance, it requires disclosure by government officials of their assets and income, and provides model disclosure forms.

The Legislation provides significant detail on the responsibilities and prohibitions it places on government officials. As an example, under the Legislation, public officials may only accept gifts worth up to 3,000 rubles (approximately \$84.00 or €67,00). Such specific prohibitions are notable in contrast with the often amorphous definitions of other anti-bribery laws, such as the “facilitation payments” currently allowed under FCPA and OECD Convention.

United States Regulatory Guidance and Developments

Senate PSI Report

On February 4, 2010, the United States Senate Permanent Subcommittee on Investigations released a joint Majority and Minority Staff Report entitled “Keeping Foreign Corruption Out of the United States: Four Case Histories” (“PSI Report”). The 325-page Report illustrates through four case studies how Politically Exposed Persons (“PEPs”) have used the services of U.S. institutions (like banks and universities) and U.S. professionals (like lawyers, realtors, and escrow agents) to circumvent anti-money laundering (“AML”) and anti-corruption safeguards to bring large amounts of suspect funds into the United States. The Report argues these four case studies “demonstrate the need for the United States to strengthen its PEP controls to prevent corrupt foreign officials, their relatives and associates from using U.S. professionals and financial institutions to conceal, protect, and utilize their ill gotten gains.” In asserting its cause, the Report is replete with sensational details of lavish expenses, hip hop stars and other audacious activity, apparently aimed at helping the Report generate as much attention as possible. It also highlights the increasingly diverse forums in which corruption concerns are surfacing.

The four case studies each detail certain aspects of suspect financial transactions of PEPs in Equatorial Guinea, Gabon, Nigeria and Angola, respectively. The first case study examines how the former President of Equatorial Guinea’s son, Teodoro Obiang, used lawyers, realtors, escrow agents, and wire transfer systems to bring suspect funds into the United States. The second case study, which examines former President Omar Bongo of Gabon, shows how President Bongo brought suspect funds into the United States by using bank accounts belonging to lobbyists, family members, and U.S. Trusts. The third case study examines the dealings of Jennifer Douglas, the wife of former Nigerian Vice President Atiku Abubakar, and illustrates how a PEP can transfer large sums of money into the United States using offshore companies. The final case study involves various questionable actors in Angola, including notorious arms dealer Pierre Falcone and an Angolan central banker with the Angolan National Bank (BNA). The Angolan transactions illustrate a theme common to all four case studies, namely the exploitation of poor PEP controls in the banking sector to bypass AML safeguards.

The PSI Report has seemingly generated immediate activity. Since its release, Angolan authorities have arrested approximately 20 BNA employees related to the embezzlement of over \$130 million from the central bank of Angola, which, from the timing of the arrests, appears unusually coincidental given some of the conduct described in the Senate Report.

The Report notes that receiving the proceeds of foreign corruption was made a U.S. money laundering offense under the 2001 Patriot Act, but that certain loopholes and exemptions have been systematically exploited. Among its official recommendations, the Report urges that Patriot Act exemptions for real estate and escrow agents be repealed, that new AML rules be made to apply to law firms and lawyers, and that U.S. shell corporations should be required to disclose the names of beneficial owners. The Report emphasizes the role that U.S. banks played in looking the other way while allowing suspect funds to enter the country, and proposes new

laws and Treasury Department rules to strengthen screening procedures related to PEPs and to require regular reviews of PEP account activity.

- Equatorial Guinea

The Report explains how Teodoro Nguema Obiang Mangue (“Obiang”), the son of the President of Equatorial Guinea (E.G.), used American professionals and wire transfer systems to move over \$110 million into the United States. Among other things, Obiang fancied himself a record producer, and set up one of his California shell companies, Sweet Pink Inc., with his rapper/actress-girlfriend Eve listed as president of the shell company. Despite Obiang’s status as a PEP from a high-risk country, the report highlights a dizzying array of lucrative transactions, including the sale of a \$7.7 million Los Angeles home, the purchase of a \$30 million Malibu mansion, and millions of dollars spent on luxury vehicles, high-end fashion and other expenses all financed by wire transfers from Equatorial Guinea. In one instance, Obiang tried to purchase a \$38.5 million Gulfstream jet through an Oklahoma escrow agent. After the agent refused to move forward without more information on the funding source, Obiang found a second, less-curious agent to complete the transaction. In a period of only two months, Obiang transacted a flurry of fourteen wire transfers to move over \$73 million into the United States, which he used to purchase the Malibu mansion and Gulfstream jet. Remarkably, these mid-2006 transfers took place only two years after a 2004 Senate Subcommittee on Investigations Report⁴⁸ that described in detail how E.G. officials, including Obiang, had moved suspect funds through Riggs Bank.

Among other things, the report details how two U.S. lawyers (one of whom accompanied Obiang to a party at the Playboy Mansion) facilitated Mr. Obiang’s fund transfers into accounts at six different banks, including Bank of America and Citibank. The lawyers opened bank accounts for shell companies, while either failing to disclose or actively hiding the identity and PEP status of the beneficiary owners of the shell companies. The attorneys also used their own attorney-client and law office accounts as *de facto* checking accounts for shell companies. For example, in one series of transactions, Obiang wired over \$3.1 million to an attorney-client bank belonging to his lawyer, who then incorporated a shell company and opened accounts in the shell company’s name at Bank of America. Bank of America performed no due diligence, even though Obiang’s name appeared as the sole signatory for one account. Within days, the attorney wrote checks to fund the new accounts with the \$3.1 million that had been wired to him from E.G., and another \$6.5 million would be deposited in these accounts over the next year. Payment by payment, the Report details how suspect money from these accounts was then used for expenses relating to Obiang’s housekeeping expenses, including large payments to Ferrari of Beverly Hills, Lamborghini of Beverly Hills, Dolce & Gabbana, GlobalJet Corp., and to purchase Persian rugs, a Bang & Olufsen home theater system, and a concert grand piano.

⁴⁸ “Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act: Case Study Involving Riggs Bank,” Minority Staff of the Permanent Subcommittee on Investigations, July 15, 2004. Regulatory and enforcement actions related to this highly-publicized 2004 report produced a \$16 million criminal fine, a \$25 million civil fine, tougher oversight of AML bank procedures by federal regulators, and eventually, the sale and disappearance of Riggs Bank.

- Gabon

The Report examines how Former President Omar Bongo of Gabon was able to transfer large amounts of suspect funds into the United States between 2003 and 2007 using a lobbyist, his daughter and his daughter-in-law. American banks involved were largely ignorant of their clients' PEP status and failed to conduct enhanced monitoring or due diligence. Former President Bongo was able accomplish many of these transactions between 2000 and 2007 despite having already been the focus of a 1999 U.S. Senate hearing that showed how he had used offshore shell companies to move over \$100 million through accounts at Citibank Private Bank.

A Washington, D.C. lobbyist, Jeffery Birrell, incorporated entities and established bank accounts in Virginia into which then-President Bongo wired over \$18 million from Gabon. Birrell then used \$1.2 million to purchase and transport to Gabon six U.S.-built vehicles, including two armored H2 Hummers, two stretch H2 Hummer limousines (one armored, one unarmored), a Cadillac and a Jeep, plus three mobile electric countermeasure (ECM) units for the President's vehicles. Birrell also obtained U.S. government permission to buy six C-130 military planes from Saudi Arabia, which would otherwise have violated the U.S. International Traffic in Arms Regulations (ITAR). An entity in Gabon transferred over \$17 million to one of Birrell's Virginia LLCs to purchase the planes. After six trips to Saudi Arabia related to the negotiations, the C-130 sales fell through, and Birrell immediately redistributed most of the money intended for the aircraft purchase: he wired \$9.2 million of that money to a Malta account in the name of then-President Bongo, another \$4.2 million to one of the President's senior advisors' accounts in Brussels and Paris ("to feed starving refugees in Mali and Niger"), and another \$1 million to consultants' bank accounts in Brussels and Monaco.

Former President Bongo also used his daughter Yamilee Bongo-Astier as a conduit to funnel money into the United States. Bongo-Astier is a Canadian citizen who has lived in New York City since at least 2000, where she was a student at NYU and then the Parsons School of Design. As an unemployed student, she first opened an account at HSBC in September 2000 with \$118,000 using her Canadian passport and without disclosing the identity of her father. Over the course of 18 months beginning in 2002, she made periodic cash deposits of about \$50,000 each, and one cash deposit of \$107,600. Only when she received a \$180,000 wire transfer from Gabon did the bank begin to ask questions, and learn of her PEP status three years after she first opened her accounts. Bongo-Astier used some of her funds to purchase cars at her father's request, including two Lincoln Town Cars for the Gabon delegation in New York.

Although HSBC closed her accounts, Bongo-Astier immediately repeated the process at Commerce Bank, which took two years to discover her PEP status. In the meantime, as an unemployed student, Bongo-Astier walked into the bank seven times with cash deposits ranging from \$35,000 to \$90,000 each, and received wire transfers from accounts in Haiti, Paris, London, Toronto, and Monaco totaling over \$250,000. When the bank finally questioned these transactions, she openly discussed her father, and stated that he gave her cash gifts whenever he came to NY for official business. The bank applied additional scrutiny after she asked for assistance counting cash in one of her safety deposit boxes, which the bank manager discovered was filled with exactly \$1 million in "all \$100 bills in sealed/bar coded bags like would come in

from the fed.” When asked, she explained that the money was a gift from her father to help her purchase a \$2 million New York condo. The Report states, “[e]ven after discovering this hidden cash, learning that her father had brought it into the United States without declaring it to government authorities as required by law, and acknowledging that the President was under investigation in France for possibly embezzling public funds and using those funds to purchase real estate, the bank’s Enhanced Due Diligence Oversight director insisted that the bank had ‘not definitely found anything solid that would preclude our continuing [the] relationship.’” Nonetheless, Commerce Bank soon decided to close the accounts, but before the accounts were closed, President Bongo wired nearly \$1 million to his daughter—perhaps to complete the purchase of the New York condo. The transaction was reversed because the bank had already frozen her accounts.

When Commerce Bank finally closed her accounts, Bongo-Astier promptly repeated the process a third time by opening new accounts at JP Morgan Chase, again with her Canadian passport and without revealing her PEP status. Still without a stated occupation, her accounts maintained a balance between \$300,000 and \$500,000 and in July 2009 she received a wire transfer of \$341,000. JP Morgan did not discover her PEP status until contacted by the U.S. Senate Subcommittee in connection with the preparation of this Report.

Finally, the Report discusses Former President Bongo’s daughter-in-law Inge Lynn Collins, who is married to (but estranged from) the current President of Gabon, who has since taken a second wife. While she was still with the current President, he was serving as Gabon’s Defense Minister, and she received large transfers from Gabon to a Trust she had established in California, the proceeds of which supported their lavish lifestyle in the United States between 2000 and 2003. Despite her husband’s position, they spent significant time in the United States and France in addition to Gabon. During part of that time, they rented a lavish Hollywood home from Sean “Puff-Daddy/P-Diddy/Diddy” Combs for \$25,000 per month. Collins also considered purchasing a home in California but, in the premier episode of the VH1 series “Really Rich Real Estate” in which a realtor showed her a prospective property, she stated that she found the \$25 million Malibu Broad Beach mansion “lacks grandeur.” She was able to maintain trust accounts at HSBC and at Fidelity Investments for years and move over \$2 million from Gabon into the United States before the banks discovered her PEP status. HSBC subsequently closed her checking and savings accounts. Her account at Fidelity was a mutual fund investment account in the name of her Trust, which she used as a *de facto* checking account to disburse nearly \$1 million from 2000-2002 while avoiding AML procedures that applied to normal checking accounts. (Collins’ scheme would not work today because mutual fund accounts have been required to conduct Due Diligence since June 2003.) Fidelity Investments—which learned of her PEP status only when first contacted by the U.S. Senate PSI in regard to this Report—has allowed the account to remain open in light of the *de minimus* balance and scant activity since 2007.

- Nigeria

Jennifer Douglas, a U.S. citizen and wife of the former Vice President of Nigeria Atiku Abubakar, is a former Nigerian television journalist who dated Abubakar in the 1980s before

moving to the United States and marrying another man. That first marriage ended in divorce, and Douglas reestablished a relationship with Abubakar, who began to spend significant time with her in the United States, and the couple was “officially married” in 2003. From 2000 to 2007, she opened more than 30 bank accounts to help her husband import over \$40 million in suspect funds into the United States, mostly from offshore corporations. As discussed below, the money included \$2 million in bribes related to the Siemens scandal. She used some of the money to fund an extravagant lifestyle in the United States, including monthly credit card bills ranging from \$10,000 to \$90,000. The transfers also included \$14 million wired to the American University in Washington, D.C. related to the establishment and development of the new American University of Nigeria, which Douglas helped found. The University accepted all transfers without asking questions, and when one of her banks closed an account for suspicious offshore wire transfers, Douglas’ U.S. lawyer helped her open new accounts to facilitate further transactions.

Atiku Abubakar derives much of his wealth from his co-ownership of a powerful Nigerian company called Intels, which he owns along with Italian Billionaire Gabriele Volpi. Intels is one of Nigeria’s largest oil services companies, operating oil terminals and oil services ports in Nigeria, Angola, Equatorial Guinea, Gabon, and elsewhere, with hundreds of millions of dollars in revenues. In 1996, Nigeria’s then-President Abacha seized Abubakar’s Intels shares, but the Report indicates that Volpi maintained a gentlemen’s agreement to restore Abubakar’s ownership when politics allowed. When President Abacha died in 1998, Volpi lived up to the gentlemen’s agreement. When Mr. Abubakar became Vice President of Nigeria in 1999, he placed his 16% ownership of Intels into a Blind Trust, and named one of Volpi’s companies, a Panamanian corporation called Orleans Invest Holdings Ltd (“Orleans”), as the Trustee. In 2003, the Blind Trust swapped its Intels ownership for an equivalent ownership in Orleans, so that the Blind Trust became part owner of its own Trustee, and Orleans thereby gained a 16% ownership of Intels. Then, in October 2003, the Abubakar Blind Trust acquired a new Trustee, a one-day old Nigerian shell company called Guernsey Trust Company Nigeria Ltd. (“Guernsey”). Guernsey’s three beneficial owners are Volpi, a Nigerian banker, and a Nigerian lawyer. From 2003 to 2008, Guernsey (operating the Abubakar Blind Trust) transferred over \$10 million to the United States, with \$7 million going to Douglas’ private accounts, \$2.1 million to a lawyer’s accounts, and \$900,000 to American University.

While Douglas denies receiving bribes from Siemens, part of the German company’s December 2008 guilty plea includes the bribes paid to Douglas. From 2001 to 2003, Siemens transferred \$1.772 million into Douglas’ personal accounts at Citibank. Siemens also claims to have made another wire transfer to her at another bank, and to have given an additional \$2 million in cash to Douglas or to two other companies she beneficially owned, “J.E. Douglas Steradian Co. UK L” and “Peniel Inc. UK Ltd.” The Senate PSI Report also notes that Abubakar was associated with the events surrounding the August 2009 conviction of U.S. Congressman William Jefferson, who was arrested after an undercover investigation and the discovery of \$90,000 in his home freezer. At Jefferson’s trial, a videotape was played in which the Congressman referenced Abubakar while seeking bribe money for himself. However, no evidence was ever introduced to suggest that Abubakar sought or offered a bribe in relation to the Jefferson scandal.

From 2000 to 2008, Douglas used her network of accounts to receive over \$40 million in suspect funds into accounts in her name, or in the name of the Jennifer Douglas Abubakar Family Trust or the Gede Foundation, both of which she controlled. The majority of these funds were transferred from offshore corporations in Germany, Nigeria, Panama, the British Virgin Islands, and Switzerland, including payments from companies called LetsGo, Guernsey Trust Company, and Sima Holding Payments. Volpi is the key beneficial owner of all three of these entities, leading the Senate PSI Report to intimate that Volpi—along with Atiku Abubakar—was likely behind most of these payments.

- Angola

The Report illustrates how two Angolan PEPs and a third Angolan bank have exploited weak AML and PEP safeguards to access the U.S. financial system. The first PEP, Pierre Falcone, was a close associate of a former President of Angola and is a known arms dealer who has been imprisoned previously in France, and who has been convicted subsequently in France of new charges related to arms dealing, tax fraud, and money laundering. The Report shows how Falcone used a network of shell companies, personal and family accounts to move millions of dollars in suspect funds into the United States. For example, Bank of America maintained almost 30 Falcone accounts from 1989 to 2007, and did not consider his accounts high risk even after learning of his arms dealing conviction and imprisonment.

Separately, the PSI Report also details how a \$7 billion private Angolan bank, Banco Africano de Investimentos (“BAI”), has provided Angolan PEPs with access to myriad U.S. financial services. While its ownership structure is somewhat opaque, BAI’s largest shareholder is Sonangol, the Angola state-owned oil company, and the bank caters to wealthy Angolans involved in the oil and diamond industries, as well as to Angolan government officials. BAI used its accounts with HSBC in New York (“HSBC-NY”) to provide money transfer services, currency exchanges and credit cards in U.S. Dollars for its clients, many of whom are PEPs. For example, through HSBC-NY, BAI issued U.S. Dollar credit cards to significant PEPs in the Angolan government, including the President and his son-in-law, the Governor of the Central Bank, Ministers of Defense and Oil, and Sonangol executives.

BAI’s first president was Dr. Aguinaldo Jaime, who left BAI to become head of the Angolan central bank, Banco Nacional de Angola (“BNA”). The Report explains how Dr. Jaime, as Angola’s central banker, attempted four times to transfer \$50 million in government funds into private accounts in the United States. In the first attempt, Dr. Jaime ordered \$50 million transferred from the BNA account at Citibank London to a Bank of America account in California in his own name. Bank of America became suspicious of a central banker transferring \$50 million of public funds into a private account, and cancelled the transaction. In his second attempt, Dr. Jaime asked Citibank London to transfer \$50 million to HSBC in London, and then asked HSBC in London to purchase \$50 million in U.S. Treasury bills for a BNA account with HSBC in New York. As a final step, Dr. Jaime asked HSBC-NY to transfer the \$50 million in Treasury bills to a personal Wells Fargo securities account in the name of a California attorney who also owns a Nevada-based LLC. While HSBC was apparently undisturbed by the transaction, Wells Fargo became suspicious, returned the \$50 million, and closed the California

attorney's account. Undaunted, the Angolan central banker tried a third time to transfer the \$50 million into personal hands, this time by asking HSBC-NY to transfer the \$50 million into the same California attorney's law office bank account. HSBC tried to complete this request, but had incorrect information and could not accomplish the transfer. Refusing to admit defeat, Dr. Jaime tried a fourth time and suggested that HSBC-NY keep the \$50 million in Treasury bills in New York, but give him a "safekeeping receipt" that he could use as a transferable financial instrument. HSBC agreed again, but ultimately never provided the transferable instrument. Before Dr. Jaime could try a fifth time to shift \$50 million of Angolan central bank assets into private hands, he took a new job as Assistant to the Prime Minister of Angola, and later became Deputy Prime Minister. Under new leadership, the Angolan central bank ordered HSBC-NY to sell the Treasury bills and transfer the \$50 million back to its account at Citibank London.

The four aborted \$50 million transfers by the Angolan central banker, plus broad concerns about corruption in Angola, prompted Citibank not only to close all accounts with the Angolan Central Bank, but also to close all accounts with Angolan officials and to entirely withdraw from Angola. In contrast, the Report highlights that HSBC continues to provide services to the Angolan Central Bank.

Two weeks after the Senate Report was published, Angolan authorities arrested approximately 20 Angolans for corruption offenses in connection with the embezzlement of \$137 million from the Angolan National Bank (BNA). The link between these arrests and the Senate Report is as yet uncertain, but the timing of these events suggests the underlying conduct may be related. Angolan authorities state that they have successfully recovered \$98 million and several luxury cars such as BMWs, Bentleys and Porsches, in addition to \$15 million seized in Portugal. On February 18, the Angolan Attorney General, Joao Maria Sousa, explained that "low level employees of the National Bank and of the Finance Ministry are suspected of having transferred funds between September and November 2009 to several countries such as Portugal, Germany, China, Dubai, Austria, Switzerland, Cayman Islands and US." News sources indicate that rumors about the involvement of government officials are increasing and government ministers may be interviewed by the police. Angolan Attorney General Sousa has warned that "anyone could be interviewed within the frame of this investigation."

SEC Enforcement Unit and New Initiatives

On August 5, 2009, the SEC's new Director of Enforcement, Robert Khuzami, announced that the agency will increase its enforcement efforts under the FCPA and will create a specialized unit focusing on FCPA enforcement. In his remarks to the New York City Bar regarding his first 100 days as enforcement director, Khuzami announced that his plan for more vibrant enforcement of the securities laws includes the introduction of five national, specialized units "dedicated to particular highly specialized and complex areas of securities law." In addition to the FCPA unit, he announced the creation of create units focusing on Asset Management, Market Abuse, Structured and New Products, and Municipal Securities and Public Pensions. Khuzami explained that the specialized units will "permit us to be more proactive in deciding on an informed basis where to focus our investigations, as opposed to being more reactive to public information or the vast number of undifferentiated tips we receive. It will also

enable us to attack problems systematically, swiftly and thoroughly on an industry-wide basis where appropriate.” Each unit will be headed by a Unit Chief and will be staffed nationwide by people in the Division with experience in the specialty. On January 13, 2010, each of the new unit heads were announced.

In his New York City Bar speech, Khuzami pledged that the FCPA unit “will focus on new and proactive approaches to identifying violations” of the FCPA. He explained that while the SEC has already “been active in this area, more needs to be done, including being more proactive in investigations, working more closely with our foreign counterparts, and taking a more global approach to these violations.”

Khuzami also announced several new initiatives of note. In addition to structural changes to re-deploy many branch chiefs from management positions to investigatory positions, he announced that the Commission had approved an order that delegates to the Enforcement Division Director authority to issue subpoenas and formal orders of investigation. Khuzami, in turn, intends to further delegate that authority to senior officers in the Enforcement Division in order to “move our cases more quickly and to free up time and resources to take on new matters with greater urgency and impact.”

He also announced several initiatives designed to foster greater cooperation by individuals in SEC investigations. First, he indicated the Enforcement Division would set standards to evaluate cooperation by individuals to complement the standards for corporations announced in the Seaboard case in 2001. Second, the Enforcement Division would implement an expedited process under which the Enforcement Division Director is delegated the authority to submit immunity requests to the DOJ. Third, the Enforcement Division would explore ways to provide witnesses oral assurance at the early stage of investigations that the SEC does not intend to bring charges against them. Fourth, the Enforcement Division would suggest that the SEC enter into Deferred Prosecution Agreements similar to those utilized by the DOJ. Khuzami made clear that the purpose of these tools is to reward extraordinary cooperation, and not to be “lenient for the sake of being lenient” nor to reward people “for simply complying with routine or expected requests.”

The revised Enforcement Manual released on January 13, 2010 incorporates much of Khuzami’s promised innovations and reforms. Among other things, the Enforcement Manual reiterates the general principles of corporate cooperation set forth in the 2001 Seaboard Report, reformulating the four basic components of cooperation as follows:

- Self-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top;
- Self-reporting of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins and consequences of the misconduct, and promptly, completely and effectively disclosing the misconduct to the public, to regulatory agencies, and to self-regulatory organizations;

- Remediation, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected; and
- Cooperation with law enforcement authorities, including providing the Commission staff with all information relevant violations and the company's remedial efforts.

In addition, the Enforcement Manual went beyond the guidance set forth in Seaboard and detailed additional tools for use in connection with cooperation by corporate entities. The Commission also set forth guidance on how to address cooperation by individuals.

- Individual Standard

The Enforcement Manual is the SEC's first statement on how it will assess and grant cooperation credit for individuals. Under the new policy, credit is offered individuals based on four factors: (i) the assistance provided by the individual in the investigation, including both the nature and value of the assistance; (ii) the importance of the underlying matter; (iii) the societal interest in holding the individual accountable; and (iv) the personal and professional profile of the cooperating individual.

- Immunity

The Enforcement Manual provides for a process by which, where an individual is unwilling to testify or cooperate, the SEC may request immunity grants from the DOJ "in appropriate circumstances." Requests may be made by the Director of the Division of Enforcement or senior officers without approval from the SEC Commissioners. The grant of immunity will be cold comfort to many recipients, however, as it will protect them only from criminal prosecution, not from the SEC.

- Oral Assurances

The Enforcement Manual provides that the Assistant Directors (with supervisory approval) may provide oral assurances to individuals or companies against which the Enforcement Division does not anticipate recommending an enforcement action. The Enforcement Manual also encourages the use of proffer agreements, which may provide that statements made by a person, on a specific date, may not be used against that individual in subsequent proceedings.

- Deferred, Non-Prosecution, and Cooperation Agreements

The Enforcement Manual also provides for Deferred Prosecution Agreements and Non-Prosecution Agreements similar to those used by the DOJ. Such agreements must be approved by the SEC Commissioners, and the Enforcement Manual sets out suggested terms for each. In addition, the Enforcement Manual contemplates the use of a new tool, Cooperation Agreements. Cooperation Agreements contemplate the Enforcement Division agreeing to recommend to the SEC that a potentially cooperating entity receive cooperation credit, and in certain

circumstances, agreeing to make specific enforcement recommendations. Most strikingly, the Enforcement Manual contemplates the SEC potentially sending Cooperation Letters to courts and prosecutors describing the cooperating entity's efforts.

Dodd-Frank Act

On July 15, 2010, Congress passed and presented to President Obama its highly ambitious financial reform act (the "Dodd-Frank Act"). Among the over 2300 pages of legislation lies a provision that mandates a financial reward for whistleblowers of securities violations, creating a significant incentive for any employee to step forward and report a violation of the FCPA. As described below, this incentive could have profound implications with respect to FCPA compliance and enforcement.

The provision mandates a reward of 10-30% of any money the government collects from an enforcement action based on information received from the whistleblower or whistleblowers resulting in sanctions (including fines, disgorgement, and interest) against the company in excess of \$1,000,000. The information must be "original," meaning it is derived from the independent knowledge of the whistleblower and not otherwise known to the SEC. The whistleblower(s) is also entitled to be rewarded for related actions that stem from the information provided, including actions brought by the DOJ.

The exact amount of the reward will be left to the discretion of the SEC and will be based on criteria including the significance of the information provided and the degree of assistance provided by the whistleblower.⁴⁹ A reward will not be available for any whistleblower who is convicted of a criminal violation related to the enforcement action. However, the Dodd-Frank Act does not specify any other limit as to the whistleblower's involvement in the conduct that led to the violation. At least theoretically, therefore, the whistleblower could be an employee who was directly involved in the improper behavior, assuming the individual is able to avoid criminal conviction for his or her role. The SEC will have 270 days to issue regulations implementing the whistleblower program after Presidential signature.

It is not difficult to see that the amounts potentially available to would-be whistleblowers would be enticing. In 2008, Siemens A.G. settled FCPA related actions with the DOJ and SEC for \$800 million. A settlement that large could result in a reward to a whistleblower of up to \$240 million. In 2009, Halliburton settled with the DOJ and SEC for \$579 million, a fine that could have resulted in a whistleblower reward of almost \$174 million.

Similar systems have previously been adopted for whistleblowers in tax cases and False Claims Act cases and have been largely successful because of the high stakes involved. The *qui tam* provisions of the False Claims Act have resulted in the recovery of billions of dollars from companies that have defrauded the U.S. government. Based on that success, the Tax Relief and Healthcare Act of 2006 implemented a similar IRS and Treasury Department system for rewarding whistleblowers of tax fraud. The amount of money involved in tax recovery cases can

⁴⁹ The decision of the SEC can be appealed to the appropriate United States Court of Appeals.

reach into the hundreds of millions, creating a similarly high incentive for potential whistleblowers.

This whistleblower provision could forever change the environment of FCPA enforcement and compliance. The increasing amounts involved in FCPA actions may create incentives for whistleblowers that should ensure that this reward system is every bit as successful as the systems in place under the False Claims Act and the Internal Revenue Code.

Foreign Business Bribery Prohibition Act of 2009 (H.R. 6188; H.R. 2152)

On June 4, 2008, Congressman Edwin Perlmutter introduced H.R. 6188, the Foreign Business Bribery Prohibition Act of 2008. H.R. 6188 was not brought to a vote in 2008, and was subsequently reintroduced in 2009 as H.R. 2152, The Foreign Business Bribery Act of 2009 (the “Act”). The Act has been referred to the House Committee on Energy and Commerce and the House Judiciary Committee.

The Act would “authorize certain private rights of action under the Foreign Corrupt Practices Act of 1977 for violations by foreign concerns that damage domestic businesses.” The Act would create a limited private right of action by a United States issuer, domestic concern or person against a “foreign concern” (defined as “any person other than” a U.S. issuer, domestic concern or person) that violates the FCPA. To recover damages, the plaintiff would be required to show that the defendant’s conduct both (i) prevented the plaintiff from obtaining or retaining business, and (ii) assisted the foreign concern in obtaining or retaining such business. The bill would allow plaintiffs to seek recovery, in the form of treble damages, for either the amount of business lost due to the foreign company’s alleged violation or the amount of business gained by the foreign company because of its alleged violation. A defendant would be permitted to assert the affirmative defenses available under the FCPA (*e.g.*, that the payment was lawful under the foreign country’s laws or was a reasonable and bona fide promotion expense) and facilitation payments would also be excluded from coverage.

The Act raises a myriad of potential jurisdictional issues. For example, to fall within the FCPA’s jurisdictional requirements, a foreign concern must “corruptly [] make use of the [United States] mails or any means or instrumentality of interstate commerce or [] do any other act in furtherance of” a prohibited payment. Similar language in the domestic mail and wire fraud statutes has been expansively interpreted by the courts such that a use of the mails or wires that is even tangentially linked to the underlying fraudulent conduct is sufficient for jurisdictional purposes. Moreover, DOJ guidance indicates that the department interprets the FCPA’s jurisdictional language over foreign concerns to cover instances where a foreign concern merely “causes an act to be done within the territory of the United States,” although the DOJ acknowledges that this jurisdictional interpretation has yet to be reviewed by a court.

Such broad interpretation within the context of a private right of action under the FCPA would undoubtedly raise potentially difficult issues concerning the extraterritorial application of U.S. laws.

Filip Principles Update

On August 28, 2008, Deputy Attorney General Mark R. Filip released revised guidelines concerning the Principles of Federal Prosecution of Business Organizations (the “Filip Principles”). The Filip Principles replace previously issued guidelines by Deputy Attorney General Paul J. McNulty (the “McNulty Memorandum”) and the other memoranda on which the McNulty Memorandum was based.⁵⁰ The Filip Principles, along with predecessor memoranda issued by previous Deputy Attorneys General, provide insight into the current tenor of the Justice Department, which, like many governmental organizations, evolves with time. The current state of the guidelines are of utmost importance to business organizations, their counsel and other interested parties in determining not only the most appropriate course of conduct when companies are faced with evidence or allegations of wrongdoing but also in determining how to structure compliance programs generally.

Perhaps the most widely anticipated aspect of the revised principles concerns the treatment of attorney-client privilege and work product protection in the context of assessing a company’s cooperation. While of utmost importance (and discussed in more detail below), the Filip Principles also highlight the more fundamental concept of whether or not a company is required to self disclose potential wrongdoing, and emphasize the importance of self-review and remediation, including in situations where a decision is reached not to make a self disclosure. At base, the Filip Principles make clear that while companies are not required to self disclose potential misconduct, companies are expected to conduct thorough internal reviews aimed at discovering and properly remediating any wrongdoing. Doing so through counsel can have the added benefit of conferring attorney-client privilege and/or work product protection on certain information learned during the course of the investigation.

- *Overview of Prosecutorial Factors*

Before assessing the differences between the Filip Principles and the McNulty Memorandum, it is helpful to note briefly the factors that prosecutors are expected to take into account when “conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements” with companies. The nine factors are as follows: (i) the nature and seriousness of the offense, including the risk of harm to the public and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime; (ii) the pervasiveness of wrongdoing within the corporation, including the complicity in, or condoning of, the wrongdoing by corporate management; (iii) the corporation’s history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it; (iv) the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents; (v) the existence and effectiveness of the corporation’s pre-existing compliance program; (vi) the corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay

⁵⁰ For a more complete discussion of the Filip Principles and its predecessors, please consult the published treatise, Abikoff, *Corporate Governance: Avoiding and Responding to Misconduct*, Chapter 8 (Law Journal-Seminars Press, first published July 2007 and updated semi-annually since).

restitution, and to cooperate with the relevant government agencies; (vii) collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution; (viii) the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and (ix) the adequacy of remedies such as civil or regulatory enforcement actions.

These factors are, of course, not exclusive, and may be weighted differently by prosecutors depending on the particular facts of the investigation, but they are illustrative of the calculus that should go into the prosecutor's decision on whether or not to criminally charge a corporation (or enter into alternatives) and, if so, the extent of those charges.

- *The Value of Cooperation*

The Filip Principles can be read to diverge from the McNulty Memorandum in the value of cooperation and what may or may not be considered in assessing a company's cooperation. The decision of whether or not to cooperate with federal prosecutors is one of the most difficult decisions that a corporation confronted with evidence or allegations of misconduct can face. In order to make the decision in the most informed manner, it is necessary to conduct a thorough review and evaluation of the particular factual circumstances at issue.

The Filip Principles seek to provide clarity to the business community on what it means to cooperate and the impact of that action on the ultimate decision to prosecute the company. It states that:

[S]o long as the corporation timely discloses relevant facts about the putative misconduct, the corporation may receive due credit for such cooperation, regardless of whether it chooses to waive privilege or work product protection in the process. Likewise, a corporation that does not disclose the relevant facts about the alleged misconduct – for whatever reason – typically should not be entitled to receive credit for cooperation. . . . [T]he government cannot compel, and the corporation has no obligation to make, such disclosures. . . . [A] corporation's failure to provide relevant information does not mean the corporation will be indicted. It simply means that the corporation will not be entitled to mitigating credit for cooperation. (footnotes omitted)

The Filip Principles make clear that there exist favorable aspects of cooperation for the government and, potentially, other stakeholders (such as shareholders and employees). For example, the government is often able to conserve resources and avoid delays by having the company cooperate, and similarly a company may be able to avoid serious reputational harm and move more quickly past a potentially difficult time. Nevertheless, as revised, the Filip Principles also make clear that a determination of whether to cooperate, including self disclosing wrongful conduct, is a business decision and is not required, albeit with the consequence that the ability to seek mitigation may be impaired.

- *Impact on Attorney-Client Privilege and Work Product Protection*

The Filip Principles explicitly indicate that, “waiving the attorney-client and work product protections has never been a prerequisite under the Department’s prosecution guidelines for a corporation to be viewed as cooperative.” The Filip Principles make clear that although a corporation is always free to waive such protections on its own, federal prosecutors need *facts*, not privileged information, to advance their law enforcement goals. For this reason, the Filip Principles state that, “prosecutors should not ask for such waivers and are directed not to do so.”⁵¹

The Filip Principles state that the most valuable type of information for prosecutors, and indeed what will ultimately determine whether or not a corporation receives cooperation credit, is the disclosure of factual information. The guidelines recognize that the process of collecting relevant factual information can take many forms, including through an internal investigation conducted by attorneys. Properly conducting an investigation in such a manner may confer attorney-client or work product protection on certain aspects of the investigation, a factor that a company should closely consider when determining how to structure their investigation. For example, the Filip Principles state that, “corporate personnel are typically interviewed during an internal investigation. If the interviews are conducted by counsel for the corporation, certain notes and memoranda generated from the interviews may be subject, at least in part, to the protections of attorney-client privilege and/or attorney work product.” Cooperation credit is not predicated on turning over these items, but rather depends on whether or not the company has disclosed certain of the factual information obtained in connection with those interviews. It is therefore crucial that a company wishing to retain the benefits of the attorney-client and work product protections appropriately structure such reviews, including ensuring that they are conducted through qualified counsel.

The SEC followed suit, initially prohibiting its staff from requesting work-product or attorney client waivers. The Commission later revised its position, and the current Enforcement Manual, dated January 13, 2010 instructs that the “staff should not ask a party to waive the attorney-client privilege or work product protection without prior approval of the Director or Deputy Director.”

On February 13, 2009, Sen. Arlen Specter introduced a bill that would enact many of these internal policies into law. If passed, the bill would prevent federal agents and attorneys from requesting waivers of the attorney-client privilege or attorney work product doctrine. The bill would also forbid the agents and attorneys from offering or threatening any rewards or adverse consequences to an organization or its current or former employees, officers, directors, or agents for opting to waive or not waive those privileges. As of the date of this publication, the bill has not moved past its initial referral to the judiciary committee. Similar bills in 2008 and 2007 were unsuccessful.

⁵¹ Two well-recognized exceptions to this general rule exist. The first is when a company asserts an “advice-of-counsel” defense, and the second is when the communications are made in furtherance of a crime or fraud.

- Attorney's Fees and Joint Defense Agreements

The Filip Principles also make clear that, when assessing cooperation, prosecutors are not to take into account whether a corporation is paying or advancing attorneys' fees for an employee, nor may they request a corporation not to do so. The participation by a corporation in a joint defense agreement is also not to be taken into account when assessing cooperation. Of course, the Filip Principles indicate that, to the extent such joint defense agreements prevent the disclosure of relevant factual information, this may be taken into account when assessing a company's cooperation. To this end, it is advisable that companies considering joint defense agreements craft them in a manner that provides appropriate flexibility.

- Emphasis on Appropriate Remediation

In keeping with past guidance, the Filip Principles also place emphasis on taking appropriate remedial measures, including the discipline or termination of employees who may be culpable of misconduct. They state that, "[a] corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur." Recognizing the difficulty associated with making adverse personnel decisions, the Filip Principles indicate that "[a]lthough corporations need to be fair to their employees, they must also be committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees."

- Take-Aways

Key guidance to be gleaned from the Filip Principles include:

- No General Duty to Self Disclose: The Filip Principles make clear that companies do not have a general duty to self disclose evidence or allegations of wrongdoing. Doing so may be considered when assessing whether or not a company cooperated with federal prosecutors, but it is not required.
- Importance of Properly Conducting a Self-Review: The Filip Principles highlight the importance of conducting a thorough self-review, particularly for companies that choose not to self disclose. A thorough investigation allows companies to fully understand the nature and extent of the potential wrongdoing, and may serve as a means by which the company can not only remediate issues that are discovered (retroactively and proactively) but also can communicate relevant factual information to federal prosecutors should it decide to cooperate with authorities. Additionally, structuring a review through counsel may provide attorney-client and work product protections to information that would not receive such protections if company personnel conducted the review.
- Appropriate Remediation Expected: Federal prosecutors expect that companies will take appropriate remedial action after becoming aware of evidence or

allegations of misconduct, including possible termination of culpable employees. Such actions send a clear message that misconduct will not be tolerated.

- *Attorney-Client Privilege and Work Product Implications:* The Filip Principles reinforce the fundamental importance of the attorney-client privilege and work product protection and make clear that waiver of such protections will not be considered when assessing a company's cooperation.
- *Recognition of Non-Prosecution and Deferred Prosecution Agreements:* The Filip Principles recognize that non-prosecution and deferred prosecution agreements may be a suitable "third option, besides a criminal indictment, on the one hand, and a declination, on the other." This recognition reflects an increase in such agreements in recent years, particularly in the context of certain enforcement activity, such as that associated with the FCPA.

United States Investigations, Disclosures and Related Prosecutions of Note

Chiquita Prosecution

On March 19, 2007, Chiquita Brands International Inc. ("Chiquita") pleaded guilty to one count of engaging in transactions with a specially designated global terrorist organization. Under the terms of the written plea agreement, Chiquita was required to pay a \$25 million criminal fine, implement and maintain an effective compliance and ethics program, and received five years of probation. This judgment was formally entered on September 24, 2007.

The plea agreement arises from payments that Chiquita made to the right-wing terrorist organization Autodefensas Unidas de Colombia ("AUC") from 1997 through February 2004. The factual proffer underlying the plea agreement indicates that from 1989 to 1997, Chiquita also made payments to left-wing terrorist organizations Fuerzas Armadas Revolucionarias de Colombia ("FARC") and Ejercito de Liberacion Nacional ("ELN"). In its self-disclosure, Chiquita represented that it made the payments under threat of violence and that refusal to make the payments would have forced Chiquita to withdraw from Colombia, where it has operated for more than a century. Chiquita is reported to have made over \$49 million in payments between 2001 and 2004 alone.

On April 24, 2003, Roderick Hills, then-head of Chiquita's Audit Committee and former Chairman of the SEC, approached Michael Chertoff, then Assistant Attorney General and later Secretary of Homeland Security, to self-report the payments and seek the government's advice on how to proceed. Chiquita officials claim that Chertoff and , subsequently, other DOJ officials recognized the difficult position in which the company found itself, noted larger ramifications for U.S. interests if the corporate giant pulled out of Colombia overnight and did not instruct Chiquita to halt the payments. Thus, although outside counsel advised Chiquita in writing on September 8, 2003 that "[DOJ] officials have been unwilling to give assurances or guarantees of non-prosecution; in fact, officials have repeatedly stated that they view the circumstances presented as a technical violation and cannot endorse current or future payments," Chiquita continued to pay the AUC throughout 2003 and early 2004.

According to press reports, a federal grand jury was convened to consider indictment against Hills and other high-level Chiquita officials for their approval of the payments. The DOJ, however, announced in September 2007 that, as a matter of prosecutorial discretion, it would not pursue the charges against the Chiquita officials.

Although the Chiquita case does not directly implicate the FCPA, it raises difficult issues regarding when and under what circumstances a company should self-report and underscores the fact that, even in extreme circumstances such as those Chiquita faced, the government is unlikely to accept the argument that public policy or other broader circumstances might excuse or mitigate a company's illegal practices.

ERHC Energy

In May 2006, the FBI, at the direction of the Department of Justice, executed a search warrant at the offices of ERHC Energy, a small, relatively unknown Houston company that obtained valuable oil and gas rights in Sao Tome and Principe in connection with development of offshore oil licenses in the Joint Development Zone ("JDZ") operated by the two countries. Chrome Oil Services Ltd., a company owned or controlled by Nigerian businessman Emeka Offor, owns a controlling stake in ERHC. Offor's connections to Nigerian government officials as well as allegations that he made improper payments to secure ERHC's interest in the JDZ have been widely reported in the press and were the subject of a Report of the Sao Tome Attorney General that was released to the public in December 2005. On August 17, 2007, Offor resigned as chairman of ERHC, but stated that he remained committed to his investment in the company.

The DOJ has not yet issued an indictment in the matter against ERHC or any of its principals. The SEC, however, filed a subpoena enforcement action on June 1, 2007 against O.J. Chidolue for his failure to produce documents and appear for testimony in connection with the SEC's formal investigation into ERHC. Chidolue, a Houston attorney, is counsel for Chrome Energy (parent company to Chrome Oil Services Ltd.) and was at one time the Secretary and director of another Chrome entity. Chidolue and the SEC agreed that Chidolue would provide documents by June 29, 2007 and testify on July 18, 2007. However, Chidolue initially produced only a single document and is negotiating with the SEC regarding the scope of his production. On August 24, 2007, the SEC filed notice dismissing its Application for an Order to Show Cause and Order Requiring Obedience to Subpoena Duces Tecum against Chidolue, which appears to be the last activity in the docket relating to the matter.

Additionally, on July 5, 2007, the Senate Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs issued a subpoena to ERHC requiring ERHC to produce documents in connection with its acquisition of oil and gas interests in the Gulf of Guinea. In 2004, the same subcommittee issued a report evaluating the effectiveness of the anti-money laundering provisions of the Patriot Act, using Riggs Bank ("Riggs") as a case history.

Among other things, the 2004 Riggs report implicated six American oil companies — ExxonMobil, Devon Energy, ChevronTexaco, Amerada Hess, Vanco Energy, and Marathon Oil — which had made large payments into Riggs accounts controlled by government officials of Equatorial Guinean and their relatives. The report uncovered that the American companies had engaged in numerous potentially corrupt transactions with Equatorial Guinean officials, including (i) leasing and purchasing land from government officials and their families, often at high rates; (ii) providing funds for the Equatorial Guinean Embassy in Washington and the Permanent Mission to the United Nations in New York, including funding the Embassy’s medical insurance and social security payments; (iii) paying educational expenses for children of government officials; (iv) purchasing services from companies owned by Equatorial Guinea officials, including security firms and labor providers; and (v) forming joint ventures with companies owned by the Equatorial Guinea government or government officials.

ERHC’s most recent Form 10-k/A, filed on January 28, 2010, simply states that, “The Company anticipates that these [DOJ, SEC, and Senate Subcommittee] investigations may be lengthy and do not know when they will conclude. If violations are found, the Company may be subject to criminal, civil and/or administrative sanctions, including substantial fines, and the resolution or disposition of these matters could have a material adverse effect on its business, prospects, operations, financial condition and cash flows.”

Customs Investigations

On July 20, 2007, fifteen oil and gas services companies met with the DOJ as part of an ongoing criminal investigation of activities of Panalpina (which, according to reports, is the freight forwarding company involved in the Vetco matter discussed above) and of potentially improper payments to customs officials in Nigeria and elsewhere. On July 24, 2007, Panalpina announced its own internal investigation and that its U.S. subsidiary had been asked by the DOJ to provide documents relating to activities in Nigeria, Kazakhstan, and Saudi Arabia. According to press reports, the SEC has also instituted a civil investigation into the matter. On September 20, 2007, Panalpina announced that it had suspended offering its services in Nigeria.

Cameron International, ENSCO International, Global Industries, GlobalSantaFe Corporation (now part of Transocean), Nabors Industries, Inc., Noble Corporation, Parker Drilling Company, Pride International, Royal Dutch Shell, Schlumberger, Tidewater, Inc. and Transocean each has disclosed in their public filings internal investigations into the legality of activities undertaken by local agents and affiliates in dealing with customs authorities. All but Nabors indicated that the inquiries relate at least in part to Nigeria and/or Panalpina. On August 14, 2007, Transocean announced it had widened its internal inquiry beyond Panalpina to include the FCPA compliance of one of Transocean’s customs agents in Nigeria. On October 4, 2007, Tidewater announced that it had determined that other aspects of its international operations outside of Nigeria merited FCPA review.

At least four of these companies, Global Industries, GlobalSantaFe, Noble, and Tidewater, attended the July 20, 2007 meeting with the DOJ. The eleven other participants have not been disclosed.

Tidewater announced in its May 30, 2008 Form 10-K that special counsel had substantially completed its review. Tidewater has also announced that it has entered into agreements with the DOJ and SEC tolling certain statutes of limitations through at least June 15, 2010; Cameron also disclosed that it has entered into agreements with the two agencies to extend the statute of limitations. In its February 26, 2010 Form 10-K, Cameron stated that its investigation by special counsel had been completed and that the company is waiting for the agencies to commence discussions regarding the ultimate disposition of this matter. Cameron has also entered into tolling agreements with the agencies.

Noble announced in its June 30, 2008 Form 10-Q that its independent outside counsel recently had made a presentation of the results of its investigation to the DOJ and the SEC. Although the SEC and DOJ had begun reviewing the results, Noble stated that neither agency had indicated whether it planned on taking any action or requesting further investigation. In the company's February 26, 2010 Form 10-K, Noble further added that the company probably will have to pay an amount to settle this matter with the DOJ and SEC. As it is not in a position to estimate any potential liability that may result, it has not made any accrual in its consolidated financial statements at December 31, 2009.

In addition to its providing the DOJ with requested information on its relationship with certain freight forwarders, Pride International disclosed in its June 30, 2008 Form 10-Q that it may have made less than \$2.5 million in improper payments to government officials in Saudi Arabia, Kazakhstan, Brazil, Nigeria, Libya, Angola, and the Republic of the Congo to clear rigs and other equipment through customs or to resolve other customs disputes. The company also disclosed that it may have made third-party payments with the intent that they be transferred to a government official in India to resolve a customs dispute in that country. On February 19, 2010, Pride announced via press release that, in the fourth quarter of 2009, it had accrued \$56.2 million in anticipation of potential fines, penalties, and disgorgement that may arise as a result of the resolution of matters pending with the DOJ and SEC concerning the alleged improper payments, discussed more fully above.

In its February 26, 2010 Form 10-K, Global Industries announced that at a January 6, 2010 meeting with the SEC and DOJ and in a confirmatory letter, the staff of the SEC informed the company that it had completed its investigation and did not intend to recommend any enforcement action by the Commission or impose any fines or penalties against Global Industries. The staff of the DOJ explained that it had also concluded its investigation and would not be taking any further action or impose any fines or penalties against the company.

Medical Device Investigations

In recent years, there have been several noteworthy enforcement actions against medical industry companies, as well as disclosures in companies' periodic filings that suggest possible future enforcement activity. As noted above, on June 3, 2008, privately-held medical device manufacturer AGA entered into a three-year deferred prosecution agreement with the DOJ relating to improper payments made to doctors employed by state-owned hospitals and other officials in China. The following is a brief summary of select company disclosures that have not yet led to settled enforcement actions.

- *Biomet Inc., Stryker Corp., Zimmer Holdings Inc., Smith & Nephew PLC and Medtronic Inc.*: The SEC is investigating possible violations of the FCPA by Biomet Inc., Stryker Corp., Zimmer Holdings Inc., Smith & Nephew PLC and Medtronic Inc. In September and October 2007, the companies made announcements about the SEC's action and denied any violations. The companies make replacement implants for knees, hips and the spine and control most of the U.S. market. Zimmer, Stryker, Medtronic and Smith & Nephew are public companies, while Biomet is owned by Blackstone Group, Goldman Sachs Capital Partners, KKR and TPG Capital.

In 2007, all but Medtronic entered into deferred prosecution agreements with the DOJ relating to the alleged payment of kickbacks to induce U.S. (but not foreign) doctors to buy their products. Depuy Orthopedics (part of Johnson & Johnson) also joined the settlement. Biomet, Zimmer, Smith & Nephew and Depuy paid penalties of \$310 million in aggregate. Stryker paid no fine.

- *Covidien Limited*: Covidien Limited ("Covidien") is an entity that separated from Tyco International Limited ("Tyco") in June 2007, and owns the former healthcare businesses of Tyco. According to its February 11, 2008 Form 10-Q, Tyco received and responded to various allegations that Tyco subsidiaries (some of which are now part of Covidien) made improper payments. During 2005, Tyco reported to the DOJ and the SEC the investigative steps and remedial measures that it had taken in response to the allegations. According to the 10-Q, the internal review revealed that some business practices may not comply with FCPA requirements.
- *Bristol Myers Squibb*: According to Bristol Myers's February 22, 2008 Form 10-K, in October 2004, the SEC notified Bristol Myers that it was conducting an informal inquiry into the activities of certain of Bristol Myers' German pharmaceutical subsidiaries. That inquiry became formal in October 2006. The SEC's inquiry encompasses matters currently under investigation by the German prosecutor in Munich, Germany.
- *Johnson & Johnson*: According to Johnson & Johnson's May 7, 2008 Form 10-Q, in February 2007, Johnson & Johnson voluntarily disclosed to the DOJ and the SEC that foreign subsidiaries are believed to have made improper payments in connection with the sale of medical devices in two "small-market" countries. The 10-Q further indicates that, in the course of the disclosure process, other potential FCPA violations in other markets have been disclosed to the agencies.

On December 1, 2009, Robert John Dougall, the former Vice President of Market Development of Johnson & Johnson's U.K. subsidiary DePuy International Limited ("DPI"), appeared before the City of Westminster Magistrates' Court in response to an SFO summons alleging conspiracy to corrupt contrary to the Criminal Law Act 1977. U.K. authorities alleged that Dougall conspired to provide inducements to medical professionals working in the Greek public healthcare system in relation to the supply of orthopedic products between February 2002 and December 2005. Dougall eventually pleaded guilty and was sentenced to one year in prison.

- *Wright Medical Group*: According to its June 10, 2008 Form 8-K, Wright Medical Group, Inc. (“Wright Medical”) became the latest medical device company to disclose that its “principal operating subsidiary, Wright Medical Technology, Inc., had received a letter from the SEC informing us that it is conducting an informal investigation regarding potential violations of the FCPA in the sale of medical devices in a number of foreign countries by companies in the medical device industry.” According to Wright Medical’s filing, it “understand[s] that several other medical device companies have received similar letters...[and] intend[s] to fully cooperate with this informal investigation.” In its May 2010 Form 10-Q, Wright Medical disclosed that the SEC had informed the company that it had concluded its investigation and did not intend to take an enforcement action
- *Simcere Pharmaceutical Group and Mindray Medical International Limited*: Simcere Pharmaceutical Group (“Simcere”) and Mindray Medical International Limited, both based in the Cayman Islands, included statements in their June 24, 2008 and June 30, 2008 Form 20-F Annual Reports that they had “limited ability to manage the activities of” their distributors and/or third-party marketing firms related to the sale and promotion of their medical products in China, particularly the procurement decisions of hospitals. Simcere’s disclosure additionally noted that Chinese laws “regarding what types of payments to promote or sell our products are impermissible are not always clear.”

DOJ ADVISORY OPINIONS

As originally passed in 1977, the FCPA contained no mechanism through which companies faced with questions about the appropriateness of certain conduct could obtain guidance from federal regulators. This changed in 1980 when, at the direction of President Carter, the DOJ instituted a review procedure aimed at providing guidance to entities subject to the FCPA. As initially instituted, the review procedure only indicated that the DOJ would make a “reasonable effort” to respond to inquiries within thirty days, and provided the DOJ with freedom to either (i) state its enforcement position, (ii) decline to state its enforcement position, or (iii) “take such other position or action as it considers appropriate.” Concern also existed that the DOJ and SEC would arrive at different interpretations as to the propriety of particular conduct. However, in 1981, the SEC issued a statement indicating that it would not commence an enforcement action against a company that received a favorable DOJ review letter.

In 1988, amendments to the FCPA created a procedure for the Attorney General to issue guidelines and require the DOJ to institute an updated opinion procedure process. A 1992 rule issued by the DOJ established a formal advisory opinion process under which public companies and domestic concerns have been able to obtain an opinion as to whether future conduct would violate the FCPA’s anti-bribery provisions. Under the revised procedures, companies may seek guidance on actual – not hypothetical – conduct so long as the request is “specific” and “all relevant and material information bearing on the conduct...and on the circumstances of the prospective conduct” is described. If the DOJ approves the conduct, there is a rebuttable presumption that the conduct as described in the request does not violate the FCPA.

Traditionally, DOJ Opinion Releases contain language indicating that the opinion has “no binding application to any party which did not join in the Request, and can be relied upon by the requestor only to the extent that the disclosure of facts and circumstances in its request is accurate and complete and remains accurate and complete.” In DOJ Opinion Procedure Release 08-02, however, the Department specifically referred to prior Opinion Release 01-01 as “precedent,” suggesting that the guidance offered in the Opinion Releases may arguably be given greater weight by regulators than the traditional caveat language suggests. In addition, recent Opinion Releases have addressed increasingly complex transactions and factual circumstances, particularly in the mergers and acquisition context.

Summarized below are all of the DOJ Review and Opinion Procedure Releases issued to date.

Opinion Procedure Releases

DOJ Review Procedure Release 80-01

On October 29, 1980, the DOJ issued its first ever Review Procedure Release (later to be called Opinion Procedure Releases) in response to a request by an American law firm that sought to do business in an unnamed foreign country. The law firm had sought to establish a fund, amounting to approximately \$10,000 per annum, for the American education and support of two

adopted children of an elderly and “semi-invalid” honorary foreign official of the same country in which the firm sought to do business.

The foreign official’s duties were described as “ceremonial,” such that he was not in a position to make substantive decisions on behalf of the foreign government. The natural parents of the two children were also employees of the foreign government, but they too were described as being “not in a position to make or to influence official decisions that would in any way benefit either the law firm or any corporations which may contribute to the education fund.” In issuing no-action comfort, the DOJ noted that there had been no suggestion of any preferential treatment as a result of the proposed fund, nor had the firm obtained or retained (and did not expect to obtain or retain) any business as a result of its actions.

DOJ Review Procedure Release 80-02

Also on October 29, 1980, the DOJ issued Review Procedure Release 80-02, addressing a request by the American firm Castle & Cooke and two of its subsidiaries about a potential run for political office by the employee of one of its subsidiaries in a foreign country. The employee, who had worked for the subsidiary for ten years, was approached by a political party in the foreign country about running for office, and desired to retain his employment with the subsidiary during his campaign and while serving in office if elected. According to the Release, the employee’s duties with the subsidiary did not involve any sort of advocacy work before the foreign government, and his continued employment by the corporation would be fully disclosed to the political party, the electorate and the foreign government.

In providing no-action relief, the request indicates that the employee would, if elected, refrain from participating in any legislative or other governmental action that would directly affect the corporation and his salary would be based on the amount of time he actually worked for the corporation. According to the Release, the government position is essentially part time and it is common for legislators to hold outside employment. Finally, the Release notes that local counsel opined that the arrangement, as structured, did not violate local conflict of interest or other laws.

DOJ Review Procedure Release 80-03

In a somewhat unique Release, the DOJ, also on October 29, 1980, released Review Procedure Release 80-03 in response to the submission by a domestic concern of a proposed contract with an attorney domiciled and functioning in West Africa. The original request contained merely a cover letter and a copy of the proposed contract, which apparently referenced the FCPA twice. First, the contract indicated that the attorney represented that he was not, and during the course of the contract would not be, a foreign official. The contract also expressly prohibited, with language that tracked the statute, payments that would violate the FCPA. The DOJ sought, pursuant to Section 50.18(g) of the Review Procedure, additional information about the attorney’s background and qualifications, including potential “[g]overnment connections, his relationship with the domestic concern, the nature of the African business, particular performance expectations and pending projects of special interest in Africa....”

The Release indicates that neither the original request (consisting of the contract and cover letter) nor the results of the DOJ's follow-up questions revealed anything that would cause concern about the application of the FCPA to the arrangement. The DOJ stated that "[i]f in fact there was a reasonable concern, a mere contract provision, without other affirmative precautionary steps, would not be sufficient" to avoid a possible violation of the statute. Although there lacked any reasonable concern, based on the facts as then known, about the application or possible violation of the FCPA, the DOJ "declined to respond to this Review Request by stating whether or not it will take an enforcement action" as it deemed review of a contract not to be appropriate use of the Review Procedure.

DOJ Review Procedure Release 80-04

On October 29, 1980, the DOJ provided no-action comfort to a joint request by the Lockheed Corporation ("Lockheed") and the Olayan Group ("Olayan"), a Saudi Arabian trading, services and investment organization. Lockheed and Olayan represented that they intended to enter into agreements with each other for the purpose of entering into prospective business transactions with the Saudi Arabian government and the Saudi Arabian Airlines Corporation (known as "Saudia"). The Release indicates that Suliman S. Olayan, the Chairman of Olayan, was also an outside director of Saudia.

The Release indicates that Olayan would disclose the relationship between Olayan and Lockheed to the Saudia board, and would abstain from voting on any decisions affecting Lockheed or its subsidiaries. In addition, Olayan would not use his position on the Saudia board to influence acts or decisions of the Saudi government (including departments, agencies or instrumentalities such as Saudia) on Lockheed's behalf. The Release indicates that Olayan devotes an insubstantial amount of his business activity to his position on the Saudia board, and he holds no other position within the Saudi government (in fact, the release indicates that board positions such as Olayan's are reserved for individuals considered under Saudi law *not* to be civil servants.) Further, Olayan was to receive confirmation from the Director General of Saudia that his position as a director did not make him an officer of Saudia and that he had no authority to act on Saudia's behalf (other than to vote on matters before the Board.) Finally, the Release indicates that his activities with Lockheed on behalf of Olayan and his directorship did not violate the laws of Saudi Arabia.

DOJ Review Procedure Release 81-01

On November 25, 1981, the DOJ issued Review Procedure Release 81-01 in response to a joint request by the Bechtel Group ("Bechtel") and the SGV Group ("SGV"), described as "a multinational organization headquartered in the Republic of the Philippines and comprised of separate member firms in ten Asian nations and Saudi Arabia which provide auditing, management consulting, project management and tax advisory services."

According to the release, Bechtel had already known the principals of SGV for a number of years at the time of the Release, and SGV had served, since 1977, as a business consultant on Bechtel's behalf in the Philippines. The Release indicates that the previous relationship had been

successful, both in terms of the level of service provided and the professionalism, integrity and ethics shown by SGV. Bechtel and SGV had proposed to enter into contractual relationships whereby SGV would provide various services to Bechtel, and these relationships apparently raised concern about the application of the FCPA. The Release states that both requestors were familiar with the FCPA and its prohibitions on improper payments to foreign officials.

In selecting SGV as its proposed consultant, Bechtel apparently considered several factors, which may be viewed as instructive for other entities considering third party relationships. Among the factors considered were (i) the number of years the firm has been operating; (ii) the size of the firm in both manpower and geographic reach; (iii) the substantial probability of the firm's continued growth; (iv) the number and reputation of its clientele; (v) the qualifications of its professional staff; (vi) the presence of technical experts and specialists on staff; (vii) the adequacy of its support staff; and (viii) the firm's familiarity with and adherence to the principles embodied in the FCPA.

The Release spells out a number of representations that Bechtel and SGV made in order to ultimately gain no-action comfort from the DOJ. First, the parties agreed that all payments would be made by check or bank transfer, with no payments made by cash or with bearer instruments. In addition, payments would only be made to SGV member firms (or officers or employees of such), and would be made to the Philippines unless Bechtel received written instructions to make payment to a location in which a member firm provided services to Bechtel.

SGV represented that none of its partners, owners, principals, and staff members were government officials, officer, representatives or political party candidates, and that no part of its compensation would be used for any purpose that would violate the FCPA or the law of any jurisdiction in which it performed services. Bechtel represented that it would not request of SGV any service that would or might be considered to be a violation of such laws.

In addition, SGV indicated that it would provide the opinion of Philippine legal counsel stating that SGV did not need further authorization from the Philippine government to perform the services enumerated in the agreement, and that the proposed arrangement itself, including the payment of travel expenses as contemplated therein, did not violate Philippine law. SGV also indicated that it would provide to Bechtel similar local legal opinions in other jurisdictions in which it could provide services prior to it actually doing so.

The Release also specifies restrictions on the use of third parties in connection with the Bechtel-SGV arrangement. For instance, the agreement was said to restrain SGV from assigning any portion of its rights to a third party and from obligating Bechtel to a third party with which SGV has made an agreement or may direct payments without Bechtel's prior written consent. In addition, unless otherwise approved by Bechtel in writing, only SGV partners, principals and staff members could perform work on Bechtel's behalf. Both parties agreed that it was their intent in placing conditions such as these on the arrangement that neither party (or their representatives) could authorize payments to foreign officials potentially violative of the FCPA. The arrangement also apparently indicated that SGV was to make Bechtel's general counsel

immediately aware of any request by a Bechtel employee that might constitute a violation of the FCPA.

SGV had agreed that full disclosure of the existence and terms of its agreement with Bechtel, including compensation provisions, could be made at any time and for any reason to whomever Bechtel's general counsel determine has a legitimate reason to know such terms, including the government of any country where Bechtel is performing services, the U.S. Government or Bechtel clients.

Under the agreement, reimbursements of expenses (for travel, gifts and entertainment), were governed by strict guidelines generally requiring Bechtel's prior approval and confirmation that the expenditures complied with local laws and custom and were directly related to a legitimate business purpose. Entertainment or meal expenses for Bechtel's clients or prospective clients would only be reimbursed without prior approval if the expenses occurs on the same day as a substantial business meeting. Bechtel would only reimburse SGV for gifts or other tangible items given without its prior approval if (i) the gift was permitted under local law; (ii) its ceremonial value exceeded its intrinsic value; (iii) it did not exceed \$500 per person; and (iv) it was generally accepted in local custom as acceptable for such gifts from private business persons in the country.

The proposed agreement also contained audit and termination provisions. For example, all compensation and expenditure reimbursements were subject to audit by Bechtel, and Bechtel indicated that it intended to audit SGV's expenses and invoices when deemed appropriate based on (i) the amount paid in relation to the total payments under the agreement; (ii) the nature of the expense; (iii) the SGV services rendered during the period; and (iv) the Bechtel customers or potential customers with whom SGV had contact. In addition, should either party have a good faith belief that the other party had breached the terms of the agreement, it would be entitled to terminate the agreement without further liability or obligation. Actions that might constitute a violation of the FCPA by either party would result in automatic termination.

DOJ Review Procedure Release 81-02

On December 11, 1981, the DOJ issued Review Procedure Release 81-02, which provided no-action comfort to Iowa Beef Packers, Inc. ("IBP") in response to its proposed intention to furnish samples of beef products to the officials of the former Soviet Union in an effort to promote sales in that region. The samples, which in total amounted to around 700 pounds with an estimated value of less than \$2,000, were to be provided to officials of the former Soviet Ministry of Foreign Trade ("MVT"), the agency responsible for purchasing such products. According to IBP, sales of packaged beef products to the Soviet government would be in minimum amounts of 40,000 pounds each.

The Release indicates that the individual samples, which would not exceed \$250 each, were intended not for the personal use of the MVT officials, but rather for the inspection, testing and sampling of the product and to make the MVT officials aware of the product's quality. In addition, it was not the intent of IBP to provide the samples to the MVT officials in their

personal capacity, but rather as representatives of the government agency responsible for purchasing such products. The Release further states that the Soviet government had been informed of the intended provision of samples to the MVT officials.

DOJ Review Procedure Release 82-01

On January 27, 1982, the DOJ issued Review Procedure Release 82-01, which provided no-action comfort to the Department of Agriculture of the State of Missouri (“Missouri DOA”). Missouri DOA proposed to host a delegation of approximately ten representatives, including representatives of Mexican government agencies and instrumentalities (such as a state-owned bank) and members of the Mexican private sector, for a series of meetings between Mexican officials and representatives of Missouri agriculture business and other business organizations, to promote sales of Missouri agricultural products in Mexico.

Missouri DOA proposed to pay for the expenses of the Mexican delegation, including lodging, meals, entertainment, and travel within Missouri. In the event that the Mexican officials inadvertently paid these expenses themselves, Missouri DOA intended to reimburse the delegation members directly. The Release states that all these expenses were to be paid from Missouri DOA funds and contributions from private individuals within the state. The Release also indicates that Missouri business representatives would likely provide the Mexican officials with samples of Missouri products, such as Missouri cheeses or other items of “minimal value.”

DOJ Review Procedure Release 82-02

On February 18, 1982, the DOJ issued Review Procedure 82-02, in response to a joint-request submitted by Ransom F. Shoup & Company (“Shoup, Inc.”), a Pennsylvania closely held corporation in the business of selling, repairing, and designing voting machines, and Frederick I. Ogirri, a citizen of Nigeria and temporary employee of the United States Consulate of Nigeria. The Release states that Shoup, Inc. had a contract with the Federal Election Commission of Nigeria (“Fedeco”), an independent commission of Nigeria, to design and sell voting machines.

According to the requestors’ representations, Shoup, Inc. would pay Ogirri 1% “finder’s fee” on all contracts with Nigeria and other West African governments for a period of ten years. The fee was payment for Ogirri’s advice to Shoup, Inc. regarding the marketability of voting machines in Nigeria, the customs, protocol, and business practices of Nigeria, and his help in introducing Shoup, Inc. to a business agent in Nigeria. These activities did not relate to Ogirri’s duties at the Consulate. Under the law of Nigeria, as supported by a legal opinion submitted by the requestors, Ogirri was not regarded as a civil servant or staff member of the Federal Ministry of External Affairs in Nigeria, and that his relationship with Shoup, Inc. did not violate Nigerian conflict of interest laws.

The Release notes that Ogirri represented that he had no influence with the Nigerian government and that he did not use any influence to assist Shoup, Inc. in obtaining its contract with Fedeco. Ogirri indicated that his work at the Consulate was ministerial and clerical in nature, stating that he was only responsible for gathering newspaper articles and maintaining a library, and that the Consulate paid him a bi-weekly wage of \$300.

In determining that it would not take enforcement action, the Release noted a number of factors. Ogirri and Shoup, Inc. agreed that no payments would be made to government officials and all payments to Ogirri would be made in the United States. Moreover, both parties would keep records and verify every six months that no FCPA violations had occurred. The contract would be void if a violation did occur. Lastly, the requestors agreed that the relationship and the fee would be disclosed to Fedeco.

DOJ Review Procedure Release 82-03

In Review Procedure Release 82-03, dated April 22, 1982, the DOJ provided no-action protection to a Delaware corporation that sought to do business with a government department of the former Federal Socialist Republic of Yugoslavia (“FSRY”). The government department was principally responsible for Yugoslav military procurement. The company proposed to hire a sub-unit of the department to handle duties normally handled by commercial sales agents, having been advised by a senior officials of the government sub-unit that such an arrangement was required by Yugoslav law.

According to the Release, the agreement would require the company to pay the government subunit a percentage of the total contract price of the pending defense acquisition, as well as a percentage of each subsequent purchase made by the government procurement department or any other customer in the FSRY. The company proposed to include the identity of the commission agent and all commission fees in the written agency agreement, while also requiring that all fees be paid directly in the FSRY. The contemporaneous purchase contract was also to include a reference to the agency agreement. The requestor further represented that no individual government official was to benefit personally from the arrangement.

DOJ Review Procedure Release 82-04

On November 11, 1982, the DOJ responded to a request from Thompson & Green Machinery Company, Inc. (“T&G”), in connection with an agency agreement T&G made with a foreign businessman.

T&G sought to compensate the businessman whom it had hired and used as an agent in connection with the sale of a generator in a foreign country. The agreement required T&G to pay the businessman a commission for his efforts and stated that no part of the fee could be used by the businessman to pay a commission or fee, directly or indirectly, to a third party. The agreement also referenced the FCPA prohibition on providing anything of value to employees or officials of foreign governments.

T&G later learned that the businessman was in fact the brother of an employee of the foreign government to which T&G sold the generator. After making this discovery, T&G obtained affidavits from the businessman and his brother that pledged adherence with the anti-bribery provisions of the FCPA. T&G further represented that payment was to be made by check or bank transfer in the country where services were rendered, and the company would require the businessman to comply with all applicable currency control laws of the foreign country. The DOJ deemed these precautions sufficient to merit no-action comfort.

DOJ Review Procedure Release 83-01

On May 12, 1983, the DOJ granted no-action comfort to a California corporation that sought to use a Sudanese corporation as its sales agent. The Sudanese corporation was an autonomous legal entity whose head was appointed by the President of Sudan, and was primarily in the business of disseminating national and international news and developing a communications network. The company was also a member of a trade group composed of entities from several countries in the same general business as the Sudanese corporation. Within its operating parameters, the Sudanese company was permitted to act as an agent for foreign companies.

The California corporation represented that it wished to sell its equipment to commercial and governmental customers in Sudan and other countries associated with the trade group. The Sudanese corporation was to act as the California corporation's sales agent with respect to these sales.

The requestor represented that, pursuant to a written agreement, the California corporation would pay the Sudanese corporation a percentage of the standard list price of all products sold through the Sudanese corporation. Payment would be made directly to the Sudanese corporation (not to any individual) in a financial institution in Khartoum, Sudan. The requestor also represented that it would give notice of the agency relationship, and make specific reference to the agency agreement, in any purchase agreement that would result in a commission for the Sudanese corporation. The requestor did not expect that any Sudanese government official would personally benefit from the proposed agency relationship.

DOJ Review Procedure Release 83-02

On July 26, 1983, the DOJ issued Review Procedure Release 83-02, relating to a proposed promotional tour. The requestor, a wholly-owned subsidiary of a publicly held American corporation, participated in a joint venture in a foreign country. This joint venture had a long-term contractual relationship with an entity owned and controlled by the foreign country. The joint venture had negotiated three phases of a four-phase contract with the foreign entity; the contracts totaled approximately \$7 million, with \$2.7 million going to the requestor. The price for the final phase had not been negotiated. It was anticipated, however, it would also be for several million dollars, of which the requestor would receive a substantial portion.

The general manager of the foreign entity had planned to travel to the United States on vacation with his wife. After the requestor learned that the manager planned to vacation in the United States, the requestor invited the manager and his wife to extend their vacation for 10 days in order to tour the American facilities of the requestor and its parent company. These facilities related to the performance of the joint venture's contracts with the foreign entity. In addition, the manager and his wife would be shown one or more projects not operated by the requestor in order to demonstrate facilities similar to those being constructed in the foreign country. Visits to these facilities would require minimal travel from the requestor's facilities. The purpose of these

visits was to familiarize the foreign entity's manager with the requestor's operations and capabilities.

In providing no-action comfort, the Release notes that the requestor would only pay reasonable and necessary actual expenses of the general manager and his wife incurred during the tour. These expenses, which would not exceed \$5,000, would include airfare from the city where the general manager and his wife planned to vacation (in the United States) to the three company sites (also within the United States) and return airfare to the vacation site. The requestor would also pay for lodging, meals, ground transportation and entertainment during the tour. The requestor proposed to pay all service providers directly, accurately record all expenses in its books and records, and reflect that the general manager and his wife were the persons for whom the expenses were incurred.

DOJ Review Procedure Release 83-03

In Review Procedure Release 83-03, also dated July 26, 1983, the DOJ responded to a joint request from the Department of Agriculture of the State of Missouri ("Missouri DOA") and CAPCO, Inc. ("CAPCO"), a Missouri corporation engaged in the management of properties by foreign investors. CAPCO proposed to pay, via a representative of Missouri DOA, the reasonable and necessary expenses of a Singapore government official in connection with a series of site inspections, demonstrations, and meetings in Missouri. The visit was intended to promote the sale of certain Missouri agricultural products and facilities.

CAPCO proposed to pay for airfare for one official, as well as travel, lodging, entertainment and meal expenses in Missouri. In addition, Missouri DOA represented that it might pay for certain additional as travel, lodging, entertainment and meal expenses. In the event that the Singapore official inadvertently paid these expenses himself, CAPCO and Missouri DOA intended to reimburse the official, provided an adequate receipt was furnished.

CAPCO represented that there was no agreement between the firm and the Government of Singapore to manage any of the Government's investments in the future. The Release noted, however, that individual owners and officers of CAPCO owned properties and firms that may enter into supply or service contracts or sales agreements with that government.

DOJ Review Procedure Release 84-01

On August 16, 1984, the DOJ issued Review Procedure Release 84-01 in response to a request from an American firm that wished to engage a foreign firm ("Marketing Representative") as its marketing representative in a foreign country. The engagement raised FCPA concerns because the Marketing Representative's principals were related to the head of state of the foreign country and one of the principals personally managed certain private business affairs for that head of state.

In selecting the Marketing Representative for the proposed engagement, the American firm listed several factors that may guide firms considering such relationships. These factors included (i) the number of years the Marketing Representative had been in operation; (ii) the

Marketing Representative's successful representation of several other large corporations; (iii) the qualifications of the Marketing Representative's principals; and (iv) the reputation of the Marketing Representative among businessmen and bankers in both the U.S. and abroad.

In light of the Marketing Representative's close connection with the foreign head of state, the Marketing Representative (via the requestor) made a number of representations. First, the Marketing Representative represented that it would not pay or agree to pay anything of value on behalf of the requestor to any public official in the foreign country for the purpose of influencing the official's act or to induce the official to use his or her influence to the Marketing Representative's benefit. If the Marketing Representative violated that pledge, the agreement would automatically terminate and the Marketing Representative would surrender all claims for sales. The agreement was also terminable by either party without cause upon thirty days notice and was governed by the law of the state in which the American firm had its principal place of business.

The Marketing Representative also represented that no owner, partner, officer, director, or employee was (or would become) an official of the foreign government during the term of the agreement.

Furthermore, the Marketing Representative agreed that it would assume all costs and expenses incurred in connection with its representation of the American firm, unless the American firm provided prior written approval. Such approval would include a detailed itemization of expenses claimed and a written authorization from the American firm. Prior written approval was also required before the Marketing Representative could assign any of its rights under the agreement to a third party or before it could obligate the American firm to third parties. All commissions were to be paid in U.S. dollars in the Marketing Representative's country of principal business.

Finally, the Marketing Representative agreed that it would disclose its identity and the amount of its commission to the U.S. Government, when required.

The DOJ indicated that based on the facts and circumstances as represented, it did not intend to take any enforcement action with respect to the proposed engagement of the Marketing Representative.

DOJ Review Procedure Release 84-02

The DOJ issued Review Procedure Release 84-02 on August 20, 1984. The Release discusses an American firm's proposed transfer of assets from one of the firm's foreign branch offices to a separate, foreign-owned company. The requestor, the American firm, then intended to invest in the foreign-owned company. FCPA concerns arose when an agent of the foreign company made a remark which indicated the agent's possible intent to make a "small gratuity" to low-level government employees to facilitate the foreign government approval needed for the transaction.

In deciding not to take enforcement action, the DOJ emphasized several factors:

- The employee of the foreign company represented that no payments were ever made to officials of the foreign government; the American firm confirmed this fact to the best of its knowledge. At the time the “gratuity” statement was made, the American firm discouraged any payments. Both parties subsequently represented that they would not violate the provisions of the FCPA.
- The American firm was to assume a minority interest in the foreign company after the transaction, with proportionate representation on the foreign company’s Board of Directors so long as it was a shareholder. Once it assumed that interest, the requestor represented that it would retain the rights to have the foreign company’s books and records audited by a major U.S. accounting firm to determine if violations of the FCPA had occurred.
- If the American firm were to learn that the foreign company violated (or intended to violate) the FCPA, it represented that it would notify DOJ and responsible foreign government authorities. Furthermore, the American firm represented that it would retain the right (but not the obligation) to end the relationship if FCPA violations were discovered.

DOJ Review Procedure Release 85-01

Opinion Release 85-01 was released on July 16, 1985. Atlantic Richfield Company (“ARCO”), doing business through a wholly-owned subsidiary, announced plans to build a chemical plant in France. ARCO intended to invite officials of French Government Ministries responsible for industrial finance and development programs and for the issuance of permits and licenses necessary for the project to Texas and Philadelphia to meet with ARCO management and to inspect a plant.

The French government was to designate the officials for the trip. ARCO obtained an opinion that the proposed conduct did not violate French law. Further, it represented that the travel would occur only during one week and ARCO would pay the necessary and reasonable expenses of the French delegation, which will include those for air travel, lodging and meals.

The DOJ indicated that based on the facts and circumstances as represented, it did not intend to take any enforcement action with respect to trip.

DOJ Review Procedure Release 85-02

Release 85-02 was a press release concerning the W.S. Kirkpatrick settlement, which related to allegations that the company made approximately \$1.7 million in improper payments through a Nigerian agent to obtain a \$10.8 million contract to provide medical equipment to the Nigerian government. W.S. Kirkpatrick pleaded guilty to a single count of bribery in violation of the FCPA violation and was fined \$75,000. Harry Carpenter, the Chairman of the Board and

CEO of W.S. Kirkpatrick, pleaded guilty to one count of FCPA bribery and was sentenced to three years probation, community service, and a fine of \$10,000.

DOJ Review Procedure Release 85-03

On January 20, 1987, the DOJ released Opinion Procedure Release 85-03. The requestor, an American company, had been attempting to resolve a claim against a foreign country and wished to enter into a settlement agreement. The requestor was unable, however, to identify the agencies or officials in the foreign country most responsible for and capable of settling the claim. The company wished to hire a former official of the foreign government as an agent to locate the correct agency. The requestor proposed paying the agent \$40 per hour, plus expenses, up to a limit of \$5,000.

The DOJ issued no action comfort in light of the representations that the proposed agent would enter into a written agreement specifying that the agent, among other things: (i) was not presently an official of the foreign country's government or an official of a political party or candidate for political office in the foreign country; (ii) understood and would abide by the FCPA; (iii) would not pass on his compensation to any official of the foreign government or government official; and (iv) would perform only those functions specifically authorized by the requestor.

The Release notes that action in the matter was taken in December 1985, although the Release was not published until January 1987.

DOJ Review Procedure Release 86-01

On July 18, 1986, the DOJ issued Opinion Procedure Release 86-01. The subject of the release was three United States corporations' intentions to employ members of the Parliaments of Great Britain and Malaysia to represent the firms in their business operations in the respective nations.

The first U.S. corporation wished to retain a British Member of Parliament, described as a backbencher, as a consultant at a rate of \$6,000 per month for six months. The Member occupied no other government position and did not have any authority with respect to the business of the U.S. corporation in Britain.

The second U.S. corporation wished to enter into a joint venture also with a British Member of Parliament who held no other position in the British Government. The joint venture was to purchase and operate airports in Great Britain. The Member would receive compensation in the range of \$40,000 to \$60,000 per year, and would be involved in the actual conduct of the joint venture's business operations.

The third U.S. corporation sought to retain a Member of the Malaysian Parliament as its representative in the purchase and sale of commodities in that nation. The MP occupied no position in the Malaysian government other than his seat in the Parliament, was to be paid \$4,000

per month for a period of one year and would receive 30% of the net profits generated by his representation, to the extent that amount exceeded his basic compensation.

All companies represented the compensation paid to the Members was reasonable and would be paid directly.

The Release noted that each Member of Parliament in the three requests occupied no special legislative position of influence other than that possessed by any single member in a large legislative body (Great Britain, over 600 members; Malaysia, over 350 members). Furthermore, each Member had entered into a written employment agreement in which he agreed to make full disclosure of his representation relationship with the U.S. corporation and agrees not to vote or conduct any other legislative activity for the benefit of the corporation. Each corporation and member also agreed that the Member would not use his position as a Member of Parliament to influence any decisions that would benefit the U.S. corporation.

Based on the facts and circumstances as represented, the DOJ issued no action comfort.

DOJ Review Procedure Release 87-01

On December 17, 1987 the DOJ issued Opinion Procedure Release 87-01, relating to a request from Lantana Boatyard, Inc. (“Lantana”), a company wishing to sell military patrol boats to an English corporation, Milverton Holdings, Ltd. (“Milverton”), owned by a Nigerian, Tayo Amusan. Milverton intended to resell the boats to the Nigerian government.

By the terms of the proposed transaction, Lantana was to be fully paid before any of the boats were delivered to Milverton, and Lantana would have no involvement in negotiations between Milverton and the Nigerian government except that Lantana was to send a representative to give a technical briefing to the Nigerian officials at Milverton’s expense.

Lantana represented that the contract between Lantana and Milverton would include provisions to the effect that neither Milverton nor any of its shareholders, directors, officers, employees or agents would perform any act in violation of the FCPA. Lantana also represented that it would obtain written certifications from each of its officers, directors and employees involved in the transaction, stating that he or she had no knowledge that Amusan, or any entity which he controls, has done or will do any act in violation of the FCPA. Lantana further represented that, if requested, it would disclose to any authorized official of the Nigerian government the price and term of the sales contract with Milverton.

Lantana also intended to pay a 10% commission to an international marketing organization that brought the opportunity to Lantana, which would be paid at the organization’s principal place of business. Lantana represented that the payment was consistent with normal business practices. Lantana further represented it would obtain written FCPA certifications from the marketing organization and the responsible officials.

The DOJ indicated that based on the facts and circumstances as represented, it did not intend to take any enforcement action with respect to proposed arrangements.

DOJ Review Procedure Release 88-01

On May 12, 1981 the DOJ issued Opinion Procedure Release 88-01 responding to a request from Mor-Flo Industries, Inc. and two of its subsidiaries (“Mor-Flo”), which intended to construct a facility for the production of gas and electric water heaters in Baja California, Mexico. As part of the project, Mor-Flo intended to participate in a Mexican Government program under which Mor-Flo would acquire certain deeply discounted debt instruments of the Government of Mexico or agencies thereof and exchange that debt paper with the Government of Mexico at a government-determined exchange rate. The funds received by Mor-Flo in exchange for the debt paper would then be restricted to expenditures in Mexico for plant and equipment.

Mor-Flo represented that it paid a fee to an agency of the Government of Mexico and that it would also be required to pay a fee to the financial institution serving as the Mexican Government’s financial agent in the United States. Those fees, approximately \$42,000 and \$320,000, respectively, were to be nonrefundable and paid without the assurance that Mor-Flo would be accepted into the program.

The DOJ issued no action comfort based on several representations from Mor-Flo. Mor-Flo represented that it would secure written confirmation from the financial institution that it was the duly authorized representative of the Government of Mexico and that none of the fees would be used in violation of the FCPA. Mor-Flo also represented that it would secure a written opinion of Mexican counsel that the payment of fees to the Government of Mexico and to its financial representative were not in violation of any Mexican law, rule or regulation.

DOJ Review Procedure Release 92-01

In February 1992, the DOJ issued Review Procedure Release 92-01 granting no action comfort in response to a request of Union Texas Pakistan, Inc (“UTP”). UTP wished to enter into a joint-venture agreement with the Ministry of Petroleum and Natural Resources of the Government of Pakistan under which it would provide training, travel and subsistence expenses to officials and employees of the Government of Pakistan.

According to UTP, under Pakistan law, the Government of Pakistan may require petroleum exploration and production companies to provide training to government personnel to assist them in performing their duties of supervising the Pakistan petroleum industry. The joint venture agreement proposed to UTP by the Ministry of Petroleum and Natural Resources contained a provision implementing this provision of law and obligating UTP to expend a minimum of \$200,000 per year for such training. UTP represented that the training would take place in Pakistan as well as at seminars, symposia and workshops in the United States and Europe. UTP proposed to pay the officials’ training expenses, including seminar fees, airfare, lodging, meals and ground transportation. UTP also agreed that, in the event it proposed to exceed \$250,000 in annual expenditures for training outside Pakistan, it would request further review by the DOJ.

DOJ Opinion Procedure Release 93-01

On April 20, 1993, the DOJ issued Opinion Procedure Release 93-01 at the request of a major commercial organization based in Texas. The requestor had entered into a joint venture partnership agreement to supply management services to a business venture owned and operated by a quasi-commercial entity owned and supervised by the government of a former Eastern Bloc country (the “Foreign Partner”).

The partnership was registered as a separate legal entity in the foreign state, and the companies proposed to select a board of directors, some representing the requestor and the others drawn from the Foreign Partner. The directors’ fees to the foreign directors would be approximately \$1,000 per month, which would approximate their regular income from the Foreign Partner.

The requestor represented that although the requestor or another entity owned by the requestor would pay the directors’ fees in the first instance, the fees ultimately would be reimbursed by the Foreign Partner either from its share of the profits or from its other funds. The requestor also represented that it would educate the foreign directors regarding the FCPA.

The DOJ indicated that based on the facts and circumstances as represented by the requestor, it did not intend to take any enforcement action with respect to directors’ fee payments described in the request.

DOJ Opinion Procedure Release 93-02

On May 11, 1993, the DOJ issued Opinion Release 93-02. The Release concerned an American company which sought to enter into a sales agreement with a foreign government-owned business that held an exclusive license to manufacture, sell, purchase, import, and export all defense equipment for that country’s armed forces. The law of that country required the military to deal only through the government-owned business.

The government-owned business acted as an agent for the foreign military. However, in order to do business with the military in that country, all foreign suppliers were required to enter into written agreements with the government-owned business, under which the supplier agreed to pay to the government-owned business a commission.

Nevertheless, the company represented that it would not enter into such an agreement, but rather would pay all commissions directly to the country’s treasury or, in the alternative, the commissions would be deducted and withheld by the government customer from the purchase price. Therefore, the company would make no payments to the government-owned business or to any foreign officials. Under these circumstances, the DOJ issued no action comfort.

DOJ Opinion Procedure Release 94-01

On May 13, 1994, the DOJ issued Opinion Procedure Release 94-01 in response to a request from an American company, its wholly-owned subsidiary and a foreign citizen. The

subsidiary manufactures clinical and hospital laboratory products. Its manufacturing operations are located on property acquired from a state-owned enterprise that, at the time of the request, was being transformed into a joint stock company.

The subsidiary desired to enter into a contract with the general director of the state-owned enterprise, a longtime resident of the area who possessed experience dealing with the local authorities and public utility service providers. The subsidiary intended to obtain direct electric power service for its plant by constructing a substation, which required the subsidiary to enter into a service agreement with the local power authority and obtain authorization from the authority to connect to its power grid. Also, in order to gain direct access to the substation, the subsidiary planned to perform minor road construction and install fences, which would require certain abutter consents and incidental governmental approvals.

The company wished to engage the individual to assist in obtaining the relevant permits and authorizations for these projects, which the company represented would be far more difficult to complete without his assistance. For the individual's consulting assistance, the subsidiary would pay him \$20,000 over twelve months.

Local counsel advised the company that, under the nation's law, the individual would not be regarded as either a government employee or a public official. Nevertheless, for the purposes of the Release, the DOJ considered him to be a "foreign official" under the FCPA.

The DOJ provided the requested no action comfort based on these circumstances and a series of representations by the foreign official.

- He would enter into the consulting agreement in his personal and private capacity and not as an officer, employee, or agent of the enterprise, or any other entity or individual. This included a representation that the consulting did not violate any rules of, or applicable to, the enterprise, and that his consultancy would not interfere with his duties as an officer and employee of the enterprise, and that he obtained approval from the enterprise.
- He would abstain from voting or taking any action in the event that any corporate actions or approvals of the state-owned enterprise were necessary for the subsidiary to seek or obtain consents, and instead he would refer all such matters to the governing body of the enterprise.
- He would not use his position as a director of the enterprise to influence any act or decision of the government on behalf of the subsidiary.
- No payments which he would receive under the consulting agreement would be used directly or indirectly to offer, pay, promise, give, or authorize payment of money or anything of value to any governmental or public official for the purpose of influencing any act or decision of such public official in his official capacity.

- The proposed relationship was lawful under the written laws and regulations of the nation, and all applicable reporting or disclosure laws would be satisfied.
- Payment would only be for consulting services and his compensation was not dependent on the success of the subsidiary in securing direct electric power service or the incidental access approvals. Also, he represented that he had no right to any future relationship with the subsidiary beyond that set forth in the consulting agreement.
- He would not appear on behalf of the subsidiary before any agency of the local government, and any communication to him concerning the approvals from representatives of any local governmental agency would be referred for response to the subsidiary.
- He would serve as an independent contractor for the subsidiary without authority to legally bind the subsidiary.
- If he violated these representations or breached the consulting agreement in any manner, the agreement would automatically be rendered void *ab initio* and he would surrender any claim for payment under the consulting agreement, even for services previously performed.

DOJ Opinion Procedure Release 95-01

On January 11, 1995, the DOJ issued Opinion Procedure Release 95-01 granting no action comfort in response to a request submitted by a U.S. energy company with prospective operations in a South Asian country. The requestor planned to acquire and operate a plant in a region of the foreign country that lacked modern medical facilities. A modern medical complex, with a budget in excess of one hundred million dollars, was then under construction and the requestor proposed donating \$10 million to the project for construction and equipment costs. The requestor represented that this donation would be made through a charitable organization incorporated in the U.S. and through a public limited liability corporation located in the South Asian country.

The requestor represented that prior to releasing any funds it would require all officers of the charitable organization and the foreign limited liability corporation to certify that none of the funds would be used in violation of the FCPA, and that none of the persons employed by either organization were affiliated with the foreign government. In addition, the requestor represented that it would require audited financial reports from the charitable organization, “accurately detailing the disposition of the donated funds.”

DOJ Opinion Procedure Release 95-02

On September 14, 1995, the DOJ issued Opinion Procedure Release 95-02 in response to a joint request from two companies (“Company A” and “Company B”). Company A had acquired offset obligations through contracts with the government of a foreign country. Offset

obligations were handled by an Offset office that is part of the foreign country's Ministry of Defense. Company B was owned by a U.S. citizen who established a program in the foreign country to generate offset credits for sale. In October 1993, Company B received an oral agreement from the Offset office's chairman that Company B would receive millions of dollars in offset credits in exchange for the establishment of a new company ("Newco") in that country. Company A then intended to purchase offset credits from Company B generated by the development of Newco.

A majority of the investors in Newco were to be foreign government officials. However, no official of the Ministry of Defense would be an investor, nor would the investors be in positions to grant or deny offset credits. Under the arrangement, Company B would receive offset credits from Newco by meeting certain program milestones. Company B represented that the milestones triggering the credits would not be tied to Newco's profitability and that Company B and the chairman of the Offset office would negotiate a written agreement stating that the offset credits will not be contingent upon the success of Newco.

Company A would not be an investor in Newco, but, under a management services agreement, Company A would provide a general manager and would subcontract out the remaining services necessary to operate Newco to a third company ("Company C"). Company B would provide financing to Newco for its operations. Company A would be paid a fee equal to a percentage of Newco's gross revenues and a percent of Newco's profits. Out of this fee, Company A would compensate Company C and Company B for their services and Company B's loan to Newco. None of the companies would have an equity interest in Newco.

Companies A and B certified to the DOJ that neither company had made or would make any improper payments in violation of the FCPA in connection with the organization or operation of the proposed Newco, nor any payments to government officials in connection with the proposed transactions. The companies further warranted that Company B had not paid and would not pay any funds from Company A for the sale of the offset credits to any investors in Newco or to any government officials.

The shareholders of Newco — some of whom were foreign government officials — also provided certifications to the DOJ. These certifications contained seven representations.

- The shareholders would not take any actions that would result in a violation of the FCPA by Company A and Company B; use payments received by Newco in a manner that would violate the FCPA; use Newco's funds or assets to take any action that would violate the FCPA; request that any of the parties to this opinion request or any local official perform any service or action that would violate the FCPA.
- The shareholders would be passive investors in Newco and would exercise no management control in Newco while holding a government office.
- The shareholders would recuse themselves from any government decision with respect to any matter affecting Newco or Company A; although a shareholder may hold a foreign

government position, his official duties do not include responsibility for deciding or overseeing the award of business by that government to the parties to this request, and he will not seek to influence other foreign government officials whose duties include such responsibilities.

- The shareholders would notify Company A of any third-party assignment of rights, and if such assignment would violate the FCPA, permit Company A to withdraw as a management contractor without penalty.
- The shareholders would not take any act to oppose Newco manager's power to ensure compliance by Newco with the FCPA.
- If the nature of political positions or responsibilities of any shareholder changed so that the representations in the preceding paragraphs would not be correct if applied to such new positions or responsibilities, he would promptly notify Company A in writing. If, after consultation by Companies A and B and Newco shareholders, any such concerns cannot be resolved to the satisfaction of the DOJ, then the parties would be entitled to withdraw from or terminate Newco.
- An opinion of local counsel would be obtained to the effect that Newco and its proposed activities, including those of the shareholders, are lawful under local laws; that Newco would not be established without such an opinion; and that the opinion, when obtained, would be given to the DOJ.

The shareholders also agreed to the following additional steps to address any potential FCPA-related concerns.

- Newco's Supervisory Board would meet periodically and report on its activities and compliance with the FCPA. The board would cause a record of the meeting to be prepared and distributed to the parties to the opinion request.
- The board would keep accurate expense, correspondence, and other records, including minutes of its meetings; the board will make financial records available to the auditors for Company A whenever requested.
- All payments by Newco to the shareholders in connection with Newco would be made solely by check or bank transfer, and no payments would be made in cash or bearer instruments. No payments in connection with Newco owed to a shareholder would be made to a third party.
- Any third parties retained by Newco to professional services would be retained only with the express written permission of Newco's general manager and would be required to sign an FCPA compliance representation as part of the consultancy or retainer agreement.

Based on these circumstances and representations, DOJ issue no action comfort.

DOJ Opinion Procedure Release 95-03

Also on September 14, 2005, the DOJ issued Opinion Procedure Release 95-03. The Release concerned an American company that wished to enter into a joint venture in a foreign country with an entity that was the family investment firm of a foreign official. The foreign official was a prominent businessperson in the country and held public and political offices. In addition, the foreign official was a relative of the leader of the foreign country.

The foreign official's responsibilities in the Joint Venture would include making contacts within the foreign country, developing new business, and providing investment advice and consulting services. The foreign official was to receive payments annually for services to the Joint Venture as well as a percentage of the profits received as a result of government projects awarded to the Joint Venture.

The foreign official and the official's relatives involved in the Joint Venture signed the FCPA Opinion Request and represented to the DOJ that they would comply with the FCPA as if they were subject to it. In addition, the American company and the foreign official and relatives made eight representations to the DOJ:

- Each of the Requestors was familiar with and in compliance with the FCPA and laws of the foreign country and each would remain in compliance for the duration of the Joint Venture.
- None of the payments received from the American company would be used for any purpose that would violate the FCPA or the laws of the foreign country; and no action would be taken in the interest of the Joint Venture that would violate the FCPA or the laws of the foreign country.
- The foreign official's government duties did not involve making decisions in connection with the government projects sought by the Joint Venture or involve appointing, promoting or compensating any other officials who were involved in deciding which companies would receive such projects.
- If the government official's office or responsibilities changed so that the official's representations in the request no longer applied, the official would notify the other requestors so that appropriate action could be taken.
- The foreign official would not initiate any meetings with government officials and any meeting between a government official and a member of the Joint Venture would be attended by at least two representatives of the Joint Venture.
- For each meeting between a government official and the foreign official on behalf of the Joint Venture, the foreign official would provide a letter to the Minister and the most senior civil servant of the relevant government department stating that the official was acting solely as a participant in the Joint Venture.

- No member of the Joint Venture would assign its rights under the Joint Venture to a third party without the approval of the other Joint Venture members.
- Special procedures would be in place with respect to the operation of the Joint Venture, including “the keeping of accurate expense, correspondence, and other records of the business of the Joint Venture” and special requirements that all payments by the Joint Venture would be by check or bank transfer and no payments would be made in cash. In addition, all payments owed to a Joint Venture member would be made directly to that member and all payments to foreign parties would be made in the foreign country.

Based on these representations, the DOJ issued no action comfort.

DOJ Opinion Procedure Release 96-01

On November 25, 1996, the DOJ issued Opinion Procedure Release 96-01 granting no action comfort in response to a request submitted by a nonprofit corporation established to protect a particular world region from the dangers posed by environmental accidents.⁵² The requestor proposed sponsoring a series of training courses in the U.S. and paying certain expenses for up to ten foreign government “representatives” to attend these courses. The requestor represented that it did not seek to obtain or retain business with the regional governments.

According to the Release, the requestor proposed paying – or arranging for a “leading non-governmental organization” to pay – for certain travel, lodging, and meal expenses for the government representatives. The expenses would include: (i) round-trip airfare to a U.S. city; (ii) transportation by van to and from the airport; (iii) hotel accommodations; and (iv) lunch. The requestor represented that all other expenses, “including meals other than lunch, taxis, phone calls, etc.,” would not be covered by the sponsorship. The estimated cost of this sponsorship was \$10,000 to \$15,000 per year.

The requestor represented that the sponsorship recipients would be in part by the foreign governments and in part by the nonprofit.⁵³ First, the requestor would invite nominations for sponsorship from particular foreign governments. Second, the requestor would select nominees based on the certain criteria, including: financial need; a demonstrated interest in enhancing government/industry coordination; the position of the nominee and the nominee’s ability to convey information to appropriate agencies within his or her government; and the completion of a particular survey.

52 The Release does not identify the nationality of the nonprofit or the basis of the nonprofit’s eligibility for the FCPA Opinion Release Procedure. It may have been that the requestor was a U.S. nonprofit corporation and thus a “domestic concern” for purposes of the FCPA and/or that the proposed training courses would be held within the U.S.

53 This stands in contrast to the “chosen at the foreign government’s sole discretion” processes of most other Opinion Procedure Releases where travel expenses are at issue.

DOJ Opinion Procedure Release 96-02

On November 25, 1996, the DOJ issued Opinion Procedure Release 96-02 in response to a request submitted by a U.S. company, a wholly-owned subsidiary of another U.S. company. The requestor was engaged in the manufacture and sale of equipment used in commercial and military aircraft. The requestor proposed modifying and renewing an existing marketing representative agreement (“Agreement”) with a state-owned enterprise of a foreign country (“Representative”).

The DOJ granted the requested no-action comfort based on various representations. According to the Release, the requestor represented that it had not conducted any business with the Representative pursuant to the existing agreement. The requestor further represented that, under the modified agreement, the Representative would: (i) serve as the requestor’s exclusive sales representative in the foreign country, (ii) identify ultimate purchasers, who would then receive parts and services directly from the requestor, and (iii) be compensated a commission based on a percentage of net sales. The requestor represented that the commission rate established by the Agreement was commensurate with rates paid by the requestor to other marketing representatives around the world. In addition, both parties represented that the Representative was not in a position to influence the procurement decisions of the requestor’s potential customers, because the Representative and the potential customers were under the control of separate regulatory entities of the foreign government.

The requestor represented that the Agreement would include a number of warranties by the Representative as well as certain terms and conditions related to the FCPA. First, all commission payments would be made to a designated bank account held in the name of the Representative. Second, the Representative would warrant that: (i) it was under different regulatory control than requestor’s potential customers; (ii) it had no governmental connection to any ultimate customer of requestor; (iii) it had been designated by its government as a “preferred representative” for foreign companies; (iv) it had the authority to act as a marketing representative for foreign companies; (v) it was not in the position to and would not improperly influence any sales transactions of the requestor. Third, the Representative would additionally warrant to its familiarity and compliance with local laws and with the “Code of Ethics and Standards of Conduct” of the requestor’s parent company, as well as its familiarity and compliance in all respects with the FCPA. Fourth, the requestor could terminate the Agreement at any time, and without prior notice, if the Representative failed to comply with any of its warranties.

In addition, requestor represented that the Agreement would include a certification by the Representative, to be filed with the DOJ, wherein the Representative would promise not to violate the FCPA and immediately to notify the requestor if future developments made its certifications inaccurate or incomplete.

DOJ Opinion Procedure Release 97-01

On February 27, 1997, the DOJ issued Opinion Procedure Release 97-01 in response to a request submitted by a U.S. company with a wholly-owned subsidiary that was submitting a bid to sell and service high-technology equipment to a foreign government-owned entity. In connection with the bid, the requestor entered into an agreement (the “Representative Agreement”) with a privately-held company (“Representative”) in that same foreign country. An unsubstantiated allegation of a past unlawful payment by Representative led requestor to seek DOJ guidance.

According to the Release, the requestor represented that the Representative was a privately-held company and that none of the owners, officers, or employees of the company was a government official. The requestor initially selected the Representative after interviewing several other prospective companies and determining that the Representative had the most experience and expertise with projects involving similar technology. The requestor also represented that the commission rate payable to the Representative was commensurate with the rates it paid for similar services in comparable sales. The requestor further obtained an opinion from local counsel in the foreign country that the Representative Agreement complied with local law.

The requestor represented that it had conducted a due diligence investigation of the Representative and that this investigation did not uncover improper conduct. However, subsequent to the requestor’s initial due diligence investigation, the requestor learned of an allegation that the Representative had been involved in an improper payment more than fifteen years ago. The requestor undertook a second due diligence investigation in response to this allegation, including hiring an international investigative firm, interviewing principals of the Representative, the Commercial Counselor at the U.S. Embassy in the foreign country, and other persons with extensive commercial and other experience in the country. The second investigation did not uncover evidence substantiating the allegation, but did reveal that a number of persons might have been motivated, for political reasons, to disparage the Representative or its associated person.

The Representative warranted to its familiarity and compliance with the FCPA and indicated that the Representative would execute a certificate, a copy of which would be filed with the DOJ, stating that: (i) it had not made any improper payments in violation of the FCPA; (ii) it would not make any such improper payments in connection with its agreement with requestor’s subsidiary; and (iii) it would notify requestor’s subsidiary immediately if subsequent developments caused any of its representations to no longer be accurate or complete.

The DOJ granted the requestor the no-action comfort sought, but advised the requestor to closely monitor the performance of the Representative “in light of the unsubstantiated allegations.”

DOJ Opinion Procedure Release 97-02

On November 5, 1997, the DOJ issued Opinion Procedure Release 97-02 in response to a request submitted by a U.S. utility company with operations in an Asian country. The requestor had commenced construction of a plant in a region with inadequate primary-level educational facilities. An elementary school construction project had been proposed and the requestor was considering donating \$100,000 directly to the government entity responsible for the project. This donation amount was less than the proposed budget of the project. The requestor represented that, prior to releasing any funds, it would require a written agreement from the government entity setting forth promises to fulfill a number of conditions, including that the funds be used solely to construct and supply the school.

Granting the requested no-action comfort, the DOJ noted that because the requestor's donation would be made directly to a government entity and not to any foreign official, the provisions of the FPCA did not appear to apply to the prospective transaction.

DOJ Opinion Procedure Release 98-01

On February 23, 1998, the DOJ issued Opinion Procedure Release 98-01 in response to a request submitted by a U.S.-based industrial and service company with operations in Nigeria. According to the Release, Nigerian authorities had held the requestor liable for environmental contamination at a site formerly leased by a subsidiary of the requestor, assessing a \$50,000 fine. To remove the contamination and resolve this liability, the requestor retained a Nigerian contractor that had been recommended by officials of the Nigerian Environmental Protection Agency.

According to the Release, when the requestor solicited a proposal for the project from the contractor, one of the contractor's representatives orally advised the requestor's representatives that (i) the \$50,000 fine would need to be paid through the contractor, and (ii) the contractor's fee would include \$30,000 in "community compensation and modalities for officials of the Nigerian FEPA and the Nigerian Ports Authority." "Reasonably" concluding that all or a portion of the "fine" and "modalities" would be paid to Nigerian government officials, the requestor sought DOJ guidance.

The DOJ informed the requestor that it would indeed take enforcement action if the requestor were to proceed with the requested payments. The DOJ, however, would "reconsider" its position if: (i) the requestor paid the fine directly to an official account of the appropriate government agency; (ii) the contractor were to reduce its fee by the amount included for "modalities"; and (iii) the requestor made arrangements to pay the contractor's fee to the Government of Nigeria, who would in turn pay the contractor provided that it was satisfied with the results of the clean-up.

DOJ Opinion Procedure Release 98-02

On August 5, 1998, the DOJ issued Opinion Procedure Release 98-02 granting no action comfort in response to a request submitted by a U.S. company with a wholly-owned subsidiary

operating in a foreign country. In connection with a bid by the subsidiary to sell a military training program to a government-owned entity, the requestor planned to establish a relationship with, and secure the services of, a privately held company in that same foreign country (“Representative”). The several agreements requestor intended to enter into with the Representative, as well as intended payments for past and future services, led the requestor to seek DOJ guidance.

According to the Release, the requestor had previously acquired an entity that had an International Representation Agreement with the Representative for certain marketing and consulting services. Subsequently, the requestor determined that the Agreement (for unspecified reasons) was invalid under local law, terminated the agreement, and offered the Representative a lump-sum payment for past services pursuant to a proposed Settlement Agreement. Still desiring to partner with Representative, requestor proposed two new agreements with Representative: an International Consultant Agreement and a Teaming Agreement. The requestor’s obligations under all three of these proposed agreements was conditioned on a favorable response from DOJ under the FCPA Opinion Procedure.

In relation to Settlement Agreement, the requestor represented that the amount to be paid to the Representative for past services had been reviewed – and determined “commercially reasonable under the circumstances” – by an independent accounting firm. In addition, the requestor represented that: (i) the Representative was familiar – and in full compliance – with relevant U.S. laws and regulations, including the FCPA; and (ii) Representative had not made any unlawful payments.

In relation to the International Consultant Agreement, requestor represented that it would pay the Representative a monthly retainer, with reimbursements for extraordinary expenses. In relation to the International Consultant Agreement and the Teaming Agreement, the requestor represented that: (i) the Representative was familiar with relevant U.S. laws and regulations, including the FCPA; (ii) the Representative warranted that no government official had an interest in Representative; and (iii) none of Representative’s officers, employees, principals or agents were also government officials.

In addition, the requestor represented that it had conducted a due diligence investigation of the Representative, including interviews with principals of the Representative and consultation with officials of the U.S. Embassy regarding the Representative and its principals, which revealed no improper conduct. The requestor also obtained an opinion from counsel in the foreign country, which stated that the Agreements complied with local law.

Finally, the Representative executed a certification (and agreed to the filing of a duplicate certification with the DOJ), which stated: (a) neither the owner, any director, officer, employee or agent of Representative was a government official; (b) no government official had any legal or beneficial interest in Representative, and no portion of the fees paid to Representative would be paid to any government official; and (c) the Representative would immediately advise the requestor if subsequent developments caused its certification to be incomplete.

DOJ Opinion Procedure Release 00-01

On March 29, 2000, the DOJ issued Opinion Procedure Release 00-01 in response to a request submitted by a U.S. law firm and a foreign partner of the firm (“Foreign Partner”). The Foreign Partner had recently been appointed to a high-ranking position in the government of a foreign country and had taken a leave of absence from the firm in order to accept the appointment. The requestor proposed making certain payments and providing certain benefits to the Foreign Partner while he served as a foreign public official: (i) continued access to the firm’s group rate for health, accidental, life and dependent insurance; (ii) a one-time payment of prospective “client credit” calculated to approximate the payments to which the Foreign Partner would otherwise be entitled as a partner for the following four years (discounted to present value); (iii) continued payments of interest on the Foreign Partner’s partnership contribution; and (iv) a guarantee of return to full partnership when the Foreign Partner left office.

According to the Release, the requestor represented that it had obtained a legal opinion of foreign counsel that stated the proposed payments would not violate local law. The requestor further represented that, at the time of the Request, it did not represent or advise the foreign government nor did it represent any client in a matter involving the foreign government. Acknowledging an inability to predict future business, however, and seeking to avoid the possibility that the benefits could be construed as intended to influence the Foreign Partner in the exercise of his official duties, the requestor filed a declaration in which it agreed to: (i) not represent any clients before the Foreign Partner’s ministry; (ii) maintain a list of all clients previously represented by the Foreign Partner or to which he would be entitled a client credit; and (iii) not represent or advise such clients in any matter involving doing business with or lobbying the foreign government. Finally, the requestor undertook to inform the Foreign Partner whenever he should recuse himself in a matter involving the requestor or a client.

The Foreign Partner also filed a declaration in which he agreed to recuse himself and to refrain from participating in any decisions by the foreign government related to: (i) the retention of the requestor to advise or represent the foreign government; (ii) any government business with any of the requestor’s current or former clients; (iii) any government business with any client Foreign Partner had previously represented or to which he would be entitled a client credit; and (iv) any matter in which the requestor or a client had lobbied the foreign government.

In granting no action comfort, the Release notes that, although foreign officials, such as Foreign Partner, are not ordinarily covered by the FCPA and cannot be the recipient of an Opinion Procedure Release, here the Foreign Partner was also a director of a U.S. law firm and therefore qualified as a “domestic concern.”

DOJ Opinion Procedure Release 01-01

On May 24, 2001, the DOJ issued Opinion Procedure Release 01-01 in response to a request submitted by a U.S. company, which planned to enter into a joint venture with a French company. Each company planned to own fifty-percent of the joint venture and share in the profits and losses of the venture equally. Both companies planned to contribute certain pre-

existing contracts and transactions to the joint venture, including contracts procured by the French company prior to January 1, 2000, the effective date of the French Law No. 2000-595 Against Corrupt Practices (“FLAC”). The requestor sought DOJ comfort regarding whether it could be held liable if it later became apparent that one or more of the contracts contributed by the French company had been obtained or maintained through bribery.

According to the Release, the requestor represented that it had taken a number of precautions to avoid violations of the FCPA. First, the French company had represented that none of the contracts it planned to contribute had been procured in violation of applicable anti-bribery or other laws. Second, the joint venture agreement permitted the requestor to terminate the joint venture if: (i) the French company was convicted of violating the FLAC; (ii) the French company entered into a settlement with an admission of liability under the FLAC; or (iii) the requestor learned of evidence that the French company violated anti-bribery laws and that violation, even without a conviction or settlement, had a “material adverse effect” upon the joint venture. Third, the French company terminated all agent agreements that were related to contracts the company planned to contribute and which were effective prior to January 1, 2000. All payment obligations to these agents had been liquidated by the French company such that neither the requestor nor the joint venture would make any payments in relation to such agreements. Fourth, although the French company would retain some payment obligations to agents whose agreements came into effect after January 1, 2000 for work done on contracts the company planned to contribute to the joint venture, none of these obligations would be contributed to or retained by the joint venture. Accordingly, neither the requestor nor the joint venture would make any payments in relation to such agreements. Fifth, the joint venture would enter into new agent agreements in accordance with a “rigorous compliance program designed to avoid corrupt business practices.”

The DOJ responded indicated that it had no intention to take any enforcement action “absent any knowing act in the future on the part of requestor in furtherance of a prior act of bribery (or the offer or promise to pay a bribe, or authorization thereof) on the part of, or on behalf, the French company concerning the contracts contributed by the French company.”

In addition, the DOJ subjected its opinion to “several important caveats.” First, the opinion relied on a particular interpretation of the French company’s representation that the contracts it planned to contribute had not been procured in violation of applicable anti-bribery and other laws. The DOJ interpreted the representation to mean that the contracts had been obtained “without violation of either French law *or* the anti-bribery laws of *all* of the jurisdictions of the various government officials with the ability to have influenced the decisions of their government to enter into the contracts” (emphasis added). If, however, the representation had been limited to violation of then-applicable French law, the DOJ warned the requestor that it could face liability under the FCPA “if it or the joint venture knowingly [took or takes] any act in furtherance of a payment to a foreign official with respect to previously existing contracts irrespective of whether the agreement to make such payments was lawful under French law when the contract was entered into.” Second, the DOJ expressed concern regarding, and specifically declined to endorse, the “materially adverse effect” standard for terminating the joint venture agreement. Believing the standard could be “unduly restrictive,” the DOJ warned that

the requestor could face liability if its inability to extricate itself from the joint venture resulted in the requestor taking acts in furtherance of original acts of bribery by the French company. Third, the DOJ indicated the opinion should not be deemed an endorsement of any specific aspect of the joint venture's compliance program's restrictions on the future hiring of agents. Fourth, the opinion did not speak to prospective conduct by the requestor following the commencement of the joint venture.

DOJ Opinion Procedure Release 01-02

On July 18, 2001, the DOJ issued Opinion Procedure Release 01-02 in response to a joint request, submitted on April 13, 2001, by a foreign diversified trading, manufacturing, contracting, service and investment organization and an American company (the "requestors"). The requestors indicated that they planned to form a Consortium (with the American company doing so through an offshore company in which it held a 50% beneficial interest) to bid on and engage in a business relationship with the foreign company's host government. The requestors sought the DOJ's guidance due to the fact that the chairman and shareholder of the foreign company acted as an advisor to of the country's senior government officials and also served as a senior public education official in the foreign country.

In providing no-action relief, the DOJ highlighted a number of representations made by the American company, the foreign company and the foreign company chairman that sought to allay concerns over the chairman potentially influencing government decisions that could affect the Consortium. Specifically, the requestors represented that the foreign company's chairman did not have oversight or influence over the prospective contract by virtue of his positions (as advisor or public education official), nor did his duties involve him acting in any official capacity concerning the award of the project. The requestors provided the DOJ with a legal opinion of local counsel indicating that the relevant tender had not been issued by ministries or agencies under the chairman's control, and that the Consortium's formation and planned activities did not violate the laws of the foreign country.

In addition, the requestors represented that the chairman would not initiate or attend any meetings with government officials on behalf of the Consortium, as doing so would violate the laws of the foreign country. The chairman would also recuse himself from any discussion, consideration, or decision regarding the project that might be construed as promoting the activities or business of the Consortium. The requestors further represented that all its bid submissions had and would disclose the chairman's relationship with the Consortium as well as his recusal from related matters.

Finally, the requestors represented that the Consortium agreement would require each member to agree not to violate the FCPA as well as explicitly acknowledge each member's understanding of the FCPA's applicability to the project bid. Any failure to comply with the provision would provide the non-breaching member a right to terminate the agreement.

DOJ Opinion Procedure Release 01-03

On December 11, 2001, the DOJ issued Opinion Procedure Release 01-03 granting no action comfort in response to a request submitted by a U.S. company with a wholly-owned subsidiary operating in a foreign country. requestor's subsidiary, with the help of a foreign dealer ("Foreign Dealer"), had submitted a bid to a foreign government for the sale of equipment. At the time of the bid's submission, the relationship between the requestor and the Foreign Dealer had been governed by an agreement ("Original Dealer Agreement").

Following the bid's submission, Foreign Dealer's president and principal owner made comments that one of the requestor's representatives understood as suggesting that payments had been, or would be, made to government officials to ensure acceptance of the bid. The Original Dealer Agreement subsequently expired, and the requestor sought to enter into a new agreement with the Foreign Dealer ("Proposed Dealer Agreement") should the bid be accepted.

According to the Release, the requestor made the following representations in regard to the comments made by the Foreign Dealer's owner. First, the requestor, through its counsel, had conducted an investigation and did not find any information substantiating the allegation. Second, the Foreign Dealer's owner represented to the requestor that no unlawful payments had been made or promised. The Foreign Dealer's owner made the same representation to the DOJ directly. Third, the requestor would timely notify the DOJ if it became aware of any information substantiating the allegations regarding unlawful payments.

The requestor also made the following representations in regard to the Proposed Dealer Agreement. First, the Foreign Dealer would certify that no unlawful payments were made or would be made to government officials. Second, the requestor would have the right to terminate the agreement if such payments are made. Third, the requestor would have the right to conduct an annual audit of the books and records of the Foreign Dealer and the requestor planned to fully exercise this right.

DOJ Opinion Procedure Release 03-01

On January 15, 2003, the DOJ issued Opinion Procedure Release 03-01 in response to a request submitted a U.S. issuer concerning its planned acquisition of a U.S. company ("Company A"), which had both U.S. and foreign subsidiaries. According to the Release, requestor's pre-acquisition due diligence revealed payments authorized or made by officers, including United States officers, of one of Company A's foreign subsidiaries to employees of foreign state-owned entities in order to obtain or retain business. The requestor notified Company A of its findings and both companies commenced parallel investigations of Company A's operations worldwide. The companies then disclosed the results of their investigations to the DOJ and the SEC. The requestor desired to proceed with the acquisition, but was "concerned that by acquiring Company A it is also acquiring potential criminal and civil liability under the FCPA for the past acts of Company A's employees."

According to the Release, Company A took certain remedial actions, with requestor's encouragement and approval, after discovering the unlawful payments, including (i) making

appropriate disclosures to the investing public; (ii) issuing instructions to each of its foreign subsidiaries to cease all payments to foreign officials; and (iii) suspending the most senior officers and employees implicated pending the conclusion of the investigation.

In addition, the requestor promised to take the following actions once the transaction closed. First, the requestor would continue to cooperate with the DOJ and SEC in their respective investigations of past payments and would similarly cooperate with foreign law enforcement authorities. Second, the requestor would ensure that any employees or officers of Company A that had made or authorized unlawful payments would be appropriately disciplined. Third, the requestor would disclose to the DOJ any additional pre-acquisition payments to foreign officials discovered following the acquisition. Fourth, the requestor would extend its existing anti-corruption compliance program to Company A, and modify its program, if necessary, to detect and deter violations of relevant anti-bribery laws. Fifth, the requestor would ensure that Company A implemented a system of internal controls as well as make and keep accurate books and records.

The DOJ granted the requestor no-action relief, but cautioned that the relief did not apply to the individuals involved in making or authorizing payments nor would it apply to any unlawful payments occurring after the acquisition.

DOJ Opinion Procedure Release 04-01

On January 6, 2004, the DOJ issued Opinion Procedure Release 04-01 in response to a request submitted by a U.S. law firm that proposed to sponsor a one-and-a-half day seminar in Beijing, China, along with a ministry of the People's Republic of China (the "Ministry"). The stated purpose of the seminar was to educate legal and human resources professionals of both countries about labor and employment laws in China and the U.S. and "to facilitate understanding, compliance, and development of the laws of both jurisdictions."

The requestor represented that it had no business before the foreign government entities that might send officials to the seminar, nor was it aware of any pending or anticipated business between clients (presumably of the requestor) who would be invited and government officials who would attend. The requestor further indicated that the Chinese Ministry, and not requestor, would select which officials attended the seminar.

The requestor proposed paying for the following costs of the seminar: conference rooms, interpreter services, translation and printing costs of seminar materials, receptions and meals during the seminar, transportation to the seminar for Chinese government officials who did not live in Beijing, and hotel accommodations for Chinese government officials. The requestor indicated that all payments would be made directly to the service providers and any reimbursed expenses would require a receipt. The requestor also represented that it would not advance funds, pay reimbursements in cash, or provide free gifts or "tokens" to the attendees. Additionally, the requestor would not compensate the Ministry or any other Chinese government official for their participation in the seminar. In support of its submission, the requestor obtained written assurance from a Deputy Director in the Ministry's Department of Legal Affairs (and

provided such assurance to the DOJ) that its proposed seminar and payments would not violate the laws of China.

The DOJ provided no-action relief to the requestor based on the facts and circumstances as described in the Release.

DOJ Opinion Procedure Release 04-02

On July 12, 2004, the DOJ issued Opinion Procedure Release 04-02, which provided no-action comfort (subject to certain caveats described below) in connection with the purchase by an investment group consisting of, “among others, JPMorgan Partners Global Fund, Candover 2001 Fund, 3i Investments plc, and investment vehicles [‘Newcos’]” (collectively, “requestors”) of certain companies and assets from ABB Ltd. (“ABB”) relating to ABB’s upstream oil, gas and petrochemical business (“OGP Upstream Business”).

On July 6, 2004, six days prior to the Opinion Procedure Release, the DOJ had announced guilty pleas for violations of the FCPA by two of the entities being acquired by the requestors, ABB Vetco Gray, Inc. and ABB Vetco Gray (UK) Ltd. On the same date, the SEC filed a settled enforcement against ABB, charging it with violating the anti-bribery, books and records, and internal controls provisions of the FCPA related to transactions involving business in several foreign countries, including Nigeria.

Previously, after executing a Preliminary Agreement on October 16, 2003, the requestors and ABB agreed to conduct an extensive FCPA compliance review – through separately engaged counsel and forensic auditors – of the acquired businesses for the prior five-year period. The Release details a voluminous review, involving more than 115 lawyers manually reviewing over 1,600 boxes of printed emails, CD-ROMS, and hard drives of electronic records (all amounting to more than 4 million pages) as well conducting over 165 interviews of current employees, former employees, and agents. In addition, the forensic auditors visited 21 countries and assigned more than 100 staff members to review thousands of transactions. The requestors’ counsel produced 22 analytical reports with supporting documents of the acquired businesses, which were provided to the DOJ and SEC along with witness memoranda as they were produced.

The requestors represented that they would undertake a number of precautions to avoid future knowing violations of the FCPA. First, requestors would continue to cooperate with the DOJ and SEC in their respective investigations of the past payments. Second, requestors would ensure that any employee or officer found to have made or authorized unlawful or questionable payments and still employed by Newco would be “appropriately disciplined.” Third, requestors would disclose to the DOJ any additional pre-acquisition unlawful payments that they discovered after the acquisition. Fourth, requestors would ensure that Newco adopted a proper system of internal accounting controls and a system designed to ensure that their books and records were accurate. Fifth, requestors would cause Newco to adopt a “rigorous” anti-corruption compliance code (“Compliance Code”) designed to detect and deter violations of the FCPA.

The Release details the various elements of Newco’s Compliance Code, which would include, among other things: (i) a clearly articulated corporate policy against violations of the

FCPA and foreign anti-bribery laws and the establishment of compliance standards and procedures aimed at reducing the likelihood of future offenses to be followed by all directors, officers, employees and “all business partners” (defined as including “agents, consultants, representatives, joint venture partners and teaming partners, involved in business transactions, representation, or business development or retention in a foreign jurisdiction”); (ii) the assignment of one or more independent senior corporate officials, who would report directly to the Compliance Committee of the Audit Committee of the Board, responsible for implementing and ongoing compliance with those policies, standards, and procedures; (iii) effective communication of the policies to all shareholders, employees, directors, officers, agents and business partners that included the requirement of regular training regarding the FCPA and other applicable anti-corruption laws and annual certifications by those parties certifying compliance therewith; (iv) a reporting system, including a “Helpline,” for all parties to report suspected violations of the Compliance Code; and (v) appropriate disciplinary procedures to address violations or suspected violations of the FCPA, foreign anti-corruption laws, or the Compliance Code; (vi) procedures designed to assure that Newco takes appropriate precautions to ensure its business partners are “reputable and qualified;” (vii) extensive pre-retention due diligence requirements and post-retention oversight of all agents and business partners; (viii) procedures designed to assure that substantial discretionary authority is not delegated to individuals that Newco knows, or should know through the exercise of due diligence, have a propensity to engage in improper activities; (ix) a committee to review and record actions related to the retention of agents and sub-agents, and contracts with or payments to such agents or sub-agents; (x) the inclusion of provisions in all agreements with agents and business partners (a) setting forth anti-corruption representations and undertakings, (b) relating to compliance with foreign anti-corruption laws, (c) allowing for independent audits of books and records to ensure compliance with such, (d) providing for the termination as a result of any corrupt activity; (xi) financial and accounting procedures designed to ensure that Newco maintains a system of internal accounting controls as well as accurate books and records; and (xii) independent audits by outside counsel and auditors at least every three years.

The DOJ provided no-action relief to requestors and their recently acquired businesses, for violations of the FCPA committed *prior* to their acquisition from ABB. The Release was subject to two caveats, however. First, although the DOJ viewed requestors’ compliance program as including “significant precautions,” it cautioned that the Release should not be deemed to endorse any specific aspect of requestors’ program. Second, the DOJ cautioned that the Release did not speak to any future conduct by requestors or its recently acquired businesses.

DOJ Opinion Procedure Release 04-03

On June 14, 2004, the DOJ issued Opinion Procedure Release 04-03 in response to a request by a U.S. law firm that proposed paying certain expenses for a visit to the three cities within the United States by twelve officials of a ministry of the People’s Republic of China (“Ministry”). The purpose for the ten day, three city visit was to provide the officials with opportunities to meet with U.S. public-sector officials and discuss various labor and employment laws, institutions, and resolution procedures in the United States. In connection with the

proposal, the requestor represented that it had secured commitments from various relevant federal and state agencies, courts and academic institutions to meet with the officials.

The DOJ issued no action comfort based on the requestor's representations that it had no business before the foreign government entities that would send officials on the visit and that the officials would be selected solely by the Ministry; it would host only officials working for the Ministry or related government agencies (and interpreters), and would not pay expenses for spouses, family or other guests of the officials; it would pay for the travel, lodging, meals and insurance for the twelve officials and one translator; all payments would be made directly to the providers and no funds would be paid directly to the Ministry or other government officials; apart from events directly connected to the meetings, requestor would not fund, organize, or host any entertainment or leisure activities, nor would requestor provide the officials with any stipend or spending money; and the requestor had obtained written assurance from a Deputy Director in the Ministry's Department of Legal Affairs that its proposed payments would not violate Chinese law.

DOJ Opinion Procedure Release 04-04

On September 3, 2004, the DOJ issued Opinion Procedure Release 04-04, which provided no-action relief to a U.S. company operating in the mutual insurance industry. The requestor proposed funding a "Study Tour" to the United States for five foreign officials who were members of a committee drafting a new law on mutual insurance for the foreign country to help the officials "develop a practical understanding of how mutual insurance companies are managed and regulated" and "to help the Committee further understand the differences (if any) in the organization, daily operation, capitalization, regulations, demutualization, and management of mutual insurance companies versus stock insurance companies (life and non-life)." The requestor indicated that the Tour would include visits to requestor's offices, as well as meetings with state insurance regulators, insurance groups, and other insurance companies.

According to the Release, the requestor represented that it did not have, nor did it intend to organize, a mutual insurance company in the foreign country. As such, the law to be drafted by the Committee would not apply to requestor regardless of its terms. In addition, the requestor represented that it did not write any insurance in the foreign country nor did it have any business there or with the foreign government except for certain reinsurance contracts purchased in the global market and a "Representative Office." However, the requestor acknowledged that it intended to apply for a non-life insurance license at some point and that, under current practice, an applicant for such a license needed to "demonstrate that it has been supportive of the country's socio-economic needs, proactive in the development of the insurance industry, and active in promoting foreign investment." According to the Release, the requestor's proposed Study Tour intended to help satisfy those criteria.

The requestor represented that the Study Tour would last for approximately 9 days and that the officials would be selected solely by the foreign government. The requestor proposed paying for the foreign officials' economy airfare, hotels, local transportation, a \$35/day *per diem*, and occasional additional meals and tourist activities. The requestor estimated the Tour would

cost approximately \$16,875. All payments would be made directly to the service providers and reimbursed expenses would require a receipt. Further, the requestor would not provide any gifts or tokens to the officials. Apart from these expenses, requestor would not compensate the foreign government or the officials for their participation in the visit.

DOJ Opinion Procedure Release 06-01

On October 16, 2006, the DOJ issued Opinion Procedure Release 06-01 in response to a request submitted by a Delaware corporation with headquarters in Switzerland. The requestor proposed contributing \$25,000 to either a regional Customs department or the Ministry of Finance (collectively, the “Counterparty”) of an African country as part of a pilot project to improve local enforcement relating to seizure of counterfeit products bearing the trademarks of requestor and its competitors. The requestor believed that such a program was necessary because of the African country’s reputation as a major point of transit for such counterfeit goods and because of the local customs officials’ compensation included a small percentage of any transit tax they collected, giving them a disincentive to conduct thorough inspections for counterfeit goods.

The requestor represented that in connection with its contribution, it would execute a formal memorandum of understanding with the Counterparty to (i) encourage the exchange of information relating to the trade of counterfeit products; (ii) establish procedures for the payment of awards to local Customs officials who detain, seize and destroy counterfeit products; (iii) establish eligibility criteria for the calculation and distribution of awards; and (iv) provide that the awards be given to those Customs officials directly by the Counterparty or given to local customs offices to distribute to award candidates.

The requestor further represented that it would establish “a number of procedural safeguards designed to assure that the funds made available by the [requestor’s] contribution were, in fact, going to provide incentives to local customs officials for the purposes intended.” The Release identified five such procedural safeguards. First, the requestor would make its payment via electronic transfer to an official government account and require written confirmation of the validity of the account. Second, requestor would be notified upon seizure of suspected counterfeit goods and would confirm the counterfeit-nature of those goods. In addition, payments to local Customs officials would not be distributed unless destruction of the goods had been confirmed. Third, the Counterparty would have sole control over, and full responsibility for, the appropriate distribution of funds. The requestor would, however, require written evidence that its entire contribution was distributed according to the award eligibility criteria and calculation method. Fourth, requestor would monitor the efficacy of the incentive program and conduct periodic reviews, including periodic reviews of seizure data. Fifth, requestor would require the Counterparty to retain records of the distribution and receipt of funds for five years and allow requestor to inspect those records upon request. In addition to the above, requestor would also ensure that the Ministry of Justice in the African country was aware of the pilot program and that all aspects of the program were consistent with local laws.

The requestor stated in its request that its pending business in the African country was relatively small and “entirely unrelated” to the request. The requestor also stated that its future business in the country was not dependent upon the existence of the program and that the program was not intended to influence any foreign official to obtain or retain business. Finally, requestor stated that it intended to fund the program on an as-needed basis (and encourage its competitors to do so as well), provided that the program proved successful.

The DOJ granted requestor no-action relief subject to two “important caveats.” First, as the language of the MOU and the proposed methodology for the selection of award recipients and distribution of funds was not provided to the DOJ, its opinion was not to be deemed an endorsement of either. The opinion was also not intended to opine on any possible expansion of the program within or outside the African country. Second, the Opinion did not apply to any payments by requestor for purposes other than those expressed in the request, nor did it apply to any individuals involved in authorizing or distributing the monetary awards.

DOJ Opinion Procedure Release 06-02

On December 31, 2006, the DOJ issued Opinion Procedure Release 06-02 in response to a request submitted by Company A, a wholly-owned subsidiary of a U.S. issuer, Company B. One of Company A’s foreign subsidiaries, known as Company C, sought to retain a law firm in the foreign country to assist it in obtaining required foreign exchange from an Agency of the country in which it operated. According to requestor (who had operational control over the prospective retention), although the Agency had promptly approved and processed Company C’s applications for foreign exchange in the past, in the months prior to its request, approval from the Agency had been slow, unpredictable, and sometimes unforthcoming.

Noting that its applications had recently been rejected for minor reasons, Company C proposed retaining the law firm to prepare and perfect its Agency applications and represent Company C during the review process to avoid or diminish pretextual delays and denials by the Agency. Company C proposed paying the firm a “substantial” flat fee for preliminary and preparatory work and an ongoing “substantial” rate, representing approximately 0.6% of the value of the foreign exchange requested each month, once the firm’s representation before the Agency began.

In granting no-action relief, the DOJ relied upon representations (described in more detail below), that include that: (i) no improper payment had been made or requested and the parties’ agreement did not contemplate such activity; (ii) the firm and its principle attorney had a reputation for honest dealing and Company C performed due diligence on the firm; (iii) the parties agreed to implement anti-corruption measures; and (iv) the fees, although high, appeared competitive and reasonable under the circumstances.

The Release details a number of due diligence steps that requestor undertook in determining whether or not to hire the proposed law firm. The requestor examined the source of the firm – noting that the firm’s principal attorney had been recommended on previous occasions to Company C by a firm with which it has a long standing relationship and a prominent criminal

attorney. In addition, Company C has retained the principal attorney for the firm on other occasions and has been impressed with the quality of his reputation. Finally, both the General Counsel of requestor and outside U.S. counsel interviewed the principal attorney and discussed, among other things, his understanding of the FCPA and ethical commitment to the engagement. Both found him to be professional and competent.

The proposed agreement between Company C and the law firm also contained several provisions aimed at minimizing the likelihood of an FCPA violation. The attorneys and third parties working on the matter were required to certify that they had not made and would not make improper payments and would comply with U.S. and other applicable law. In addition, employees of the firm and third parties working on the matter had to certify that they and their “parents, spouses, siblings and children” were not present or former government officials. The contract required that no payments be made that would violate the FCPA or other applicable law, and it required the law firm to know and understand Company B’s Government Relations policy. Further, the contract required weekly progress reports, including details on negotiations and a full account of payments, and allowed for Company C to audit the firm’s records in connection with this engagement.

The Release also notes that the requestor reviewed the proposed fees and determined that they were reasonable. Among other things, (i) the labor intensive nature of the work; (ii) the considerable time already devoted on the matter by the firm’s principal attorney; (iii) the existence of competing bids by other firms that were substantially higher than the proposed firm’s; and (iv) the customary nature of a flat fee (as opposed to hourly) within the foreign country, supported its conclusion as to the reasonableness of the fees.

Finally, the requestor made the following representations. First, that there had been no suggestion by anyone that improper payments were necessary to resolve the foreign exchange issue. Second, although the principal attorney for the firm was an advisor to the foreign country’s central bank, his position as such had no bearing on the Agency’s foreign exchange determinations. Third, the parties understood that the issue may not be resolved through hiring of the firm, and that a successful resolution might not be achieved.

In granting its no-action relief, the DOJ cautioned that the Release should not be understood as an endorsement of the adequacy of the requestor’s due diligence and anti-corruption measures “under facts and circumstances other than those described in the request.”

DOJ Opinion Procedure Release 07-01

On July 24, 2007, the DOJ issued Opinion Procedure Release 07-01 in response to a request submitted by a U.S. company that was classified as both an “issuer” and a “domestic concern” under the FCPA. The requestor proposed paying for certain expenses for a six-person delegation from an Asian government for an “educational and promotional tour” of one of requestor’s U.S. operations sites. The requestor’s stated purpose for the tour was to demonstrate its operations and business capabilities to the delegation in hopes of participating in future operations in the foreign country similar to those requestor conducted in the U.S.

The requestor represented that it did not conduct operations in the foreign country or with the foreign government at the time of the request. The delegation would consist of government officials working for “relevant foreign ministries” and one private government consultant. These delegates had been selected by the foreign government and not by requestor. In addition, to the requestor’s knowledge, the delegates had no direct authority over decisions relating to potential contracts or licenses necessary for operating in the foreign country.

The requestor represented that the delegation’s visit would last four days and be limited to a single operations site. It proposed paying for domestic economy class travel to the site as well as domestic lodging, local transport and meals for the delegates. (The foreign government would pay for the international travel.) All payments would be made directly to the service providers with no funds being paid directly to the foreign government or delegates. In addition, requestor would not provide the delegates with a stipend or spending money, nor would it pay the expenses for any spouses, family members, or other guests of the delegation. Further, any souvenirs provided would be branded with requestor’s name and/or logo and be of nominal value. Apart from meals and receptions connected to meetings, speakers, and events planned by requestor, it would not fund, organize or host any entertainment or leisure activities. Finally, requestor had obtained written assurance from legal counsel that its planned sponsorship of the delegation was not contrary to the law of the foreign country.

In providing no-action relief, the DOJ determined that the expenses were reasonable under the circumstances and were directly related to the promotion of requestor’s products or services, therefore falling within the “promotional expenses” affirmative defense under the FCPA.

DOJ Opinion Procedure Release 07-02

On September 11, 2007, the DOJ issued Opinion Procedure Release 07-02 in response to a request submitted by a U.S. insurance company, classified as a “domestic concern” under the FCPA. The requestor proposed paying for certain expenses for six junior to mid-level officials of a foreign government for an “educational program” at requestor’s U.S. headquarters to “familiarize the officials with the operation of a United States insurance company.” The requestor proposed that this program occur after the officials completed a six-week internship in the U.S. for foreign insurance regulators sponsored by the National Association for Insurance Commissioners (“NAIC”).

According to the Release, requestor represented that it had no “non-routine” business pending before the foreign government agency that employed the six officials. In addition, requestor’s routine business before the agency (which was apparently governed by administrative rules with identified standards) consisted of reporting operational statistics, reviewing the qualifications of additional agents, and onsite inspections of operations, all of which was “guided by administrative rules and identified standards.” The requestor’s only work with other foreign government entities consisted of collaboration on insurance-related research, studies, and training.

The requestor represented that the visit would last six days and that the officials would be selected solely by the foreign government, and further represented that it would not pay any expenses related to the six officials' travel to or from the United States, or their participation in the NAIC internship program. The requestor proposed paying only those costs and expenses deemed "necessary and reasonable" to educate the visiting officials about the operation of a U.S. company within this industry, including domestic economy class air travel, domestic lodging, local transport, meals and incidental expenses and a "modest four-hour city sightseeing tour." All payments would be made directly to the providers and reimbursed expenses would be limited to a modest daily amount and would require a receipt. The requestor would not pay any expenses for spouses or family members and any souvenirs would be branded with requestor's name and/or logo and be of nominal value. Additionally, requestor would not fund, organize, or host any entertainment or leisure activities, nor would requestor provide the officials with any stipend or spending money.

In providing no-action relief, the DOJ determined that the expenses were reasonable under the circumstances and were directly related to the promotion of requestor's products or services, therefore falling within the "promotional expenses" affirmative defense under the FCPA. In addition to its usual caveats about the Release applying only to the requestor and being based on the facts and circumstances as described, the DOJ also noted that it was not endorsing "the adequacy of the requestor's anti-corruption policies and procedures."

DOJ Opinion Procedure Release 07-03

On December 21, 2007, the DOJ issued Opinion Procedure Release 07-03 in response to a request submitted by a lawful permanent resident of the United States, classified as a "domestic concern" under the FCPA. The requestor was party to a legal dispute in an Asian country relating to the disposition of real and personal property in a deceased relative's estate. In connection with the dispute, requestor proposed making a payment of approximately \$9,000 to the clerk's office of the relevant family court to cover expenses related to the appointment of an estate administrator and other miscellaneous court costs. The requestor apparently did not make the payment out of concerns about its propriety under the FCPA, and withdrew her application for an estate administrator pending a favorable opinion from the DOJ.

According to the Release, nothing in requestor's communications with the foreign court indicated any improper motives on behalf of the judge or court with respect to the payment. In addition, the requestor represented that the payment would be made to the family court clerk's office and not to the individual judge presiding over the dispute. The requestor provided to the DOJ a written legal opinion from a lawyer who had law degrees in both the U.S. and the foreign country, which stated that the request was not contrary to, and in fact was explicitly lawful under the law of the foreign country. The requestor further represented that she would request an official receipt, an accounting of how the funds were spent, and a refund of any remaining amount of the payment not spent in the proceedings. The requestor's submission was accompanied by translated versions of the applicable foreign law and regulation relating to family court proceedings.

Although it is not readily apparent from the Release how the proposed payment would do so, the DOJ assumed that the payments could be reasonably understood to relate to requestor's efforts "in obtaining or retaining business for or with, or directing business to, any person" in order "to provide requestor with the guidance she seeks."

The DOJ identified two separate grounds on which to provide no-action relief to requestor. First, the requestor's payment would be made to a government entity (the family court clerk's office) and not to a foreign *official*. There was nothing in requestor's submission to suggest that the presiding judge or estate administrator (both of whom potentially could have been considered "officials" under the statute) would have personally benefited from the payment after it had been made to the court clerk's office. Second, consistent with one of the FCPA's affirmative defenses, requestor's payment appears to be "lawful under the written laws and regulations" of the foreign country, at least as represented by the experienced attorney retained by requestor in the Asian country.

DOJ Opinion Procedure Release 08-01

On January 15, 2008, the DOJ issued Opinion Procedure Release 08-01. At thirteen pages, it is the longest Release to date, and contains complex factual circumstances involving FCPA and local regulatory issues. The Release highlights the importance of adequate due diligence, transparency and the need to comply with local law when entering into foreign transactions.

Release 08-01 addresses the potential acquisition by the requestor's foreign subsidiary of a controlling interest in an entity responsible for managing certain public services for an unidentified foreign municipality.⁵⁴ At the time of the proposed transaction, the public utility (the "Investment Target") was majority-owned (56%) by a foreign governmental entity ("Foreign Government Owner") and minority-owned (44%) by a foreign private company ("Foreign Company 1"). The foreign private company was owned and controlled by a foreign individual ("Foreign Private Company Owner"), who had substantial business experience in the municipality and with the public services provided by the Investment Target.

Both the Foreign Government Owner and Foreign Company 1 appointed representatives to the Investment Target. Foreign Private Company Owner acted as the representative and general manager on behalf of Foreign Company 1 while another individual served as the representative and general manager on behalf of the Foreign Government Owner. Because of the Foreign Government Owner's majority stake, its representative was considered the legal representative and senior general manager for the Investment Target. Foreign Private Company Owner, by contrast, was not technically an employee of the Investment Target and received no compensation for serving as its general manager. The Release indicates that, nevertheless, the requestor considered the Foreign Private Company Owner a "foreign official" for purposes of the FCPA.

⁵⁴ The requestor is described as a Fortune 500 United States company with annual revenues of several billion dollars and operations in over 35 countries.

The Release indicates that sometime prior to November 2007, the Foreign Government owner and governmental entity responsible for managing state-owned entities determined that they would fully privatize the Investment Target. Around November 2007, the public bid process for the disposing of the Foreign Government Owner's 56% interest in the company was initiated.

The requestor represented that, previously in late 2005, the Foreign Private Company Owner, who was searching for a foreign investor with relevant experience, contacted the requestor. In June 2006, the parties developed a proposed scenario whereby the Foreign Private Company Owner would seek to acquire, through a second foreign entity ("Foreign Company 2"), 100% of the Investment Target through the government auction of the majority stake. The requestor's subsidiary would then purchase a controlling stake from Foreign Company 2 at a substantial premium over what the Foreign Private Company Owner paid for the Foreign Government Owner's stake. The Release does not clearly indicate whether there were any requirements regarding the privatization process — such as a citizenship requirement for purchasers — that would have prevented the requestor from acquiring the Foreign Government Owner's stake in the Investment Target directly.

In connection with the proposed transaction, the requestor performed due diligence to examine, among other things, potential FCPA risks. The requestor's due diligence included (i) a report by an investigative firm; (ii) screening the relevant individuals against the denied persons and terrorist watch lists; (iii) inquiries to U.S. Embassy officials; (iv) a forensic accounting review; (v) an initial due diligence report by outside counsel; and (vi) review of the due diligence report by a second law firm.

The requestor identified what it initially believed to be two FCPA-related risks that required resolution prior to consummating the transaction. First, the requestor believed that the Foreign Private Company Owner, by virtue of his position as manager of the majority government-owned Investment Target, was subject to certain foreign privatization regulations, which the requestor believed required disclosure of his ownership interests in Foreign Company 1 and Foreign Company 2 to the foreign government. Second, the requestor believed that the Foreign Private Company Owner was arguably prohibited from acting on a corporate opportunity relating to the Investment Target — such as realizing a purchase price premium for the Investment Target shares — unless disclosed to and approved by the Foreign Government Owner.

The requestor asked the Foreign Private Company Owner to make the necessary disclosures. Initially, the Foreign Private Company Owner refused, indicating that such disclosures were contrary to normal business practices in the foreign country and could result in competitive concerns, and the requestor abandoned the transaction. However, after approximately three weeks, the parties resumed discussions. Ultimately, through a series of discussions with relevant government officials and attorneys, the requestor learned that the foreign government took the position that the Foreign Private Company Owner was not subject to the foreign privatization regulations, as he was an unpaid, minority representative with the Investment Target. Further, the requestor informed these officials and attorneys of Foreign

Private Company Owner's roles in both Foreign Company 1 and Foreign Company 2 and the substantial premium he would receive upon completion of the transaction. These agencies and officials informed the requestor that they were aware of these issues and had taken them into consideration in approving Foreign Company 2's bid.

In describing its willingness to proceed with the transaction, the requestor cited seven factors: (i) the Foreign Private Company Owner was purchasing the Investment Target shares without financial assistance from the requestor (which apparently would have been inconsistent with the foreign privatization law); (ii) the premium to be paid by the requestor was justified based on legitimate business considerations, including the apparently very different valuation methodologies used in the United States and the foreign country; (iii) the requestor would make no extra or unjustified payments to Foreign Company 2 from which the Foreign Private Company Owner might make improper payments to a foreign official; (iv) the requestor would make no payments to any foreign official (other than the Foreign Private Company Owner); (v) Foreign Private Company Owner's status as a "foreign official," which resulted solely from the fact that the Investment Target was majority owned by the state, would soon cease; (vi) the Foreign Private Company Owner's purchase of the government stake was lawful under the foreign country's laws; and (vii) the Foreign Private Company Owner was not illegally or inappropriately pursuing a corporate opportunity belonging to the Investment Target by proceeding with the transaction.

In determining not to take an enforcement action based on the proposed transaction, the DOJ highlighted four factors:

- The requestor conducted "reasonable" due diligence of the Foreign Private Company Owner, focused on both FCPA risks and compliance with local laws and regulations. The DOJ also noted that the documentation of such diligence would be kept within the United States.
- The requestor required and obtained transparency relating to the significant premium that the Foreign Private Company Owner would realize from the sale of the formerly government-owned stake to the requestor.
- The requestor obtained from the Foreign Private Company Owner, representations and warranties regarding past and future compliance with the FCPA and other relevant anti-corruption laws.
- The requestor retained the contractual right to discontinue the business relationship in the event of a breach by the Foreign Private Company Owner, including violations of relevant anti-corruption laws.

DOJ Opinion Procedure Release 08-02

On June 13, 2008, the DOJ issued Opinion Release 08-02, which provided no-action comfort in connection with Halliburton's proposed purchase of the English oil-services company

Expro International Group PLC (“Expro”).⁵⁵ Expro, traded on the London Stock Exchange, provides well-flow management for the oil and gas industry. At the time of the Release, Halliburton was competing with a largely foreign investment group known as Umbrellastream to acquire Expro.

As described by Halliburton and assumed by the DOJ, U.K. legal restrictions governing the bidding process prevented Halliburton from performing complete due diligence into, among other things, Expro’s potential FCPA exposure prior to the acquisition. According to the Release, Halliburton had access to certain information provided by Expro, but its due diligence was limited to that information. Halliburton could have conditioned its bid on successful FCPA due diligence and pre-closing remediation. Umbrellastream’s bid, however, contained no such conditions, meaning a conditioned Halliburton bid could have been rejected solely on the basis of such additional contingencies.

As a consequence of its perceived inability to conduct exacting pre-acquisition due diligence, Halliburton proposed that it conduct detailed post-acquisition due diligence coupled with extensive self-reporting through a staged process. It should be recognized that while proposed by Halliburton as part of its opinion procedure release request, it would be usual under the circumstances for Halliburton to have made its proposal after discussions with the DOJ to ensure as best as possible that its suggested work plan would be acceptable.

First, immediately following closing, Halliburton was to meet with the DOJ to disclose any pre-closing information that suggested that any FCPA, corruption, or related internal controls or accounting issues existed at Expro. In this regard, it should be noted that Halliburton claimed that its pre-existing confidentiality agreement with the target prohibited it from disclosing the potentially troublesome conduct that it uncovered through its due diligence process. In a footnote, the DOJ accepts the representation that Halliburton had to enter into a confidentiality agreement and therefore not disclose the findings of its limited due diligence review, but cautions companies seeking guidance on entering into agreements that limit the amount of information the company can disclose to the DOJ.

Second, within ten business days of the closing, Halliburton was to present to the DOJ a comprehensive, risk-based FCPA and anti-corruption due diligence work plan organized into high risk, medium risk, and lowest risk elements. The work plan was to include each of the critical due diligence areas including: (i) use of agents and third parties; (ii) commercial dealings with state owned companies; (iii) joint venture, teaming and consortium arrangements; (iv) customs and immigration matters; (v) tax matters; and (vi) government licenses and permits. Such due diligence was to be conducted by external counsel and third party consultants with assistance from internal resources as appropriate. A status report was to be provided to the DOJ with respect to high-risk findings within 90 days, medium-risk findings within 120 days, and low-risk findings within 180 days. All due diligence was to be concluded within one year with periodic reports to the DOJ throughout the process.

⁵⁵ In a break from typical Opinion Release practice, Halliburton is identified by name. Requestors often remain anonymous. Expro and other involved parties were not identified by name but were identifiable through context and publicly available sources.

Third, agents and third parties with whom Halliburton was to have a continuing relationship were to sign new contracts with Halliburton incorporating FCPA and anti-corruption representations and warranties and providing for audit rights as soon as commercially reasonable. Agents and third parties with whom Halliburton determined not to have a continuing relationship were to be terminated as expeditiously as possible, particularly where FCPA or corruption-related problems were discovered.

Fourth, employees of the target company were to be made subject to Halliburton's Code of Business Conduct (including training related thereto) and those who were found to have acted in violation of the FCPA or anti-corruption prohibitions would be subject to personnel action, including termination.

In light of its proposed plan of post-acquisition due diligence, Halliburton posed three questions to the DOJ. First, whether the proposed acquisition itself would violate the FCPA. Second, whether through the proposed acquisition, Halliburton would "inherit" any FCPA liabilities of Expro based on pre-acquisition unlawful conduct. Third, whether Halliburton would be held criminally liable for any post-acquisition unlawful conduct by Expro prior to Halliburton's completion of its FCPA and anti-corruption due diligence, if such conduct were disclosed to the DOJ within 180 days of closing.

Based on Halliburton's proposed plan (and assuming full compliance with it), the DOJ concluded that it did not intend to take enforcement action against Halliburton. The DOJ specifically noted that this representation did not extend to the target company or its personnel.

With regard to Halliburton's first proposed question, the DOJ emphasized that because stock ownership of the target company was widely disbursed, it was not a case where the payment for the shares could be used in furtherance of earlier illegal acts of the target as distinguished from other situations previously identified by the DOJ. Previously, in Release 01-01, the DOJ noted the potential for inheriting liability by a non-U.S. joint venture partner for corrupt activities undertaken prior to that company's entry into the joint venture.⁵⁶ The U.S. requestor feared that, in entering into the joint venture, it might violate the FCPA should it later become apparent that one or more of the contracts contributed by the non-U.S. co-venturer was obtained or maintained through bribery. The DOJ provided no action comfort based on the requestor's representation that it was not aware of any contributed contracts that were tainted by bribes. The Release cautioned without elaboration, however, that the requestor might "face liability under the FCPA if it or the joint venture knowingly take any action in furtherance of a payment to a foreign official with respect to previously existing contracts."

Release 08-02 gives greater insight into what activities may or may not be deemed "in furtherance of" previous acts of bribery by an acquired company or joint venture partner. The

56 The Release explicitly identifies Release 01-01 as "precedent." Such a characterization is at odds with the DOJ's longstanding position (which is repeated in Release 08-02) that the Releases apply only to the specific requestor. The DOJ's invocation of the word precedent (even if not sufficient to be relied on in court proceedings or otherwise) is certainly a window into the mind of the DOJ as to the seriousness with which companies should view the guidance offered by the DOJ in its releases.

Release conditionally absolves Halliburton of successor liability under the reasoning that the funds contributed through the purchase would overwhelmingly go to widely-disbursed public shareholders, not Expro itself, and that there was no evidence that any Expro shareholders received their shares corruptly. Implicitly, the Release can be read to endorse the view that payments to shareholders who have received their shares corruptly would violate the FCPA.

The DOJ also determined that, in light of the restrictions placed on Halliburton in performing pre-acquisition due diligence, and the company's commitment to implement extensive post-acquisition due diligence, remedial and reporting measures, that it did not intend to take enforcement action with regard to any FCPA liabilities Halliburton could be argued to have inherited by Expro based on pre-acquisition unlawful conduct or for post-acquisition unlawful conduct by Expro prior to Halliburton's completion of its FCPA due diligence, if such conduct were disclosed to the DOJ within 180 days of closing.

Although the DOJ issued no-action relief, the Release is heavily qualified and contains significant expectations for Halliburton, were it to acquire Expro under the stated conditions. Above all else, the Release illustrates the critical need for due diligence. Although the circumstances made pre-acquisition due diligence impracticable due to the operation of non-U.S. law, the underlying message is that where such impediments do not exist, substantial and probing due diligence is expected. The DOJ also for the first time explicitly endorsed a program of post-acquisition due diligence, thereby bowing (albeit gently) to compelling commercial circumstances that would otherwise render a company subject to the FCPA uncompetitive. In doing so, the DOJ placed significant emphasis on conducting due diligence in all appropriate locations that includes (i) carefully calibrating risks (including the need for thorough examination of third party and governmental relationships); (ii) an exacting review of broad categories of documents (including e-mail and financial and accounting records); (iii) the need for witness interviews not only of the target personnel but others; and (iv) the retention of outside counsel and other professionals working with internal resources as appropriate. As to the latter point, it can be speculated that the use of internal resources will be deemed appropriate only where such resources are qualified and free of disabling conflicts.

The DOJ also placed considerable emphasis on the need for remediation, including the need (i) to terminate problematic relationships (including with employees and third parties); (ii) to enter into new contractual relationships with enhanced compliance protocol (including new contracts that contain audit rights) as "soon as commercially reasonable"; and (iii) to conduct effective compliance training.

Finally, the Release contains broad self-reporting obligations to the DOJ in all risk categories. The self-reporting aspects of the due diligence program can be seen (with the due diligence itself) as a critical basis upon which the DOJ provided its no-action relief. In addition, the DOJ was careful to extend the benefits of self-reporting to the target company in the context of any enforcement action the DOJ might pursue against the target and its personnel following such disclosures. This could raise important issues with respect to the attorney-client privilege and work product protections that must therefore be considered at the outset in connection with any company that might find it necessary or desirable to engage in similar self-reporting.

On June 23, 2008, ten days after the Release, Expro accepted Umbrellastream's bid, despite Halliburton's offer of a higher price per share. On June 26, 2008, the British High Court rejected an argument by two hedge funds that controlled 21 percent of Expro shares that the bidding should have been turned over to an auction. On July 2, 2008, Expro announced that the acquisition by Umbrellastream had been completed.

DOJ Opinion Procedure Release 08-03

On July 11, 2008, the DOJ issued Opinion Procedure Release 08-03 in response to a request submitted by TRACE International, Inc. ("TRACE"), a membership organization that specializes in anti-bribery initiatives around the world. TRACE, which is organized under the laws of the District of Columbia and therefore a "domestic concern" for the purpose of the FCPA, proposed paying for certain expenses for approximately twenty Chinese journalists in connection with an anti-corruption press conference to be held in Shanghai. The journalists were employed by Chinese media outlets, most of which are wholly-owned by the Chinese government, arguably making them "foreign officials" for purposes of the FCPA.

TRACE proposed paying slightly different travel expenses based on whether the journalist was based in Shanghai or traveling from outside of Shanghai. For those based within Shanghai, TRACE proposed providing them with a cash stipend of approximately \$28 U.S. dollars to cover lunch, transportation costs, and incidental expenses. For journalists traveling from outside of Shanghai, TRACE proposed providing them with a cash stipend of approximately \$62 U.S. dollars to cover lunch, local transportation costs, incidental expenses, and two additional meals. TRACE also planned on reimbursing the out-of-town journalists for economy-class travel expenses (by air, train, bus or taxi) upon the submission of a receipt, and pay for one night's lodging at a hotel at a rate not to exceed \$229 per journalist, which TRACE would pay directly to the hotel. With respect to the cash stipends, TRACE noted that they would be provided openly to each journalist upon signing in at the conference.

In providing no-action relief, the DOJ determined that the expenses were reasonable under the circumstances, as they directly related to the promotion of TRACE's products or services, and therefore fell within the "promotional expenses" affirmative defense under the FCPA. The DOJ noted, however, that despite the fact that such reimbursements may be commonplace, it placed no weight on that fact, which further confirms the view that commonality of a particular practice bears no weight on the appropriateness of that practice in the context of the FCPA.

DOJ Opinion Procedure Release 09-01

On August 3, 2009, the DOJ published Opinion Procedure Release 09-01. The Requestor, a "domestic concern" under the FCPA, is a manufacturer of medical devices that is attempting to enter into the market to sell its products to the government of a foreign country.

According to the Release, in or around March 2009, representatives of the Requestor visited the foreign country to meet with a senior official ("Official") of a government agency. The Official indicated that the government intended to provide a type of medical device to

patients in need by purchasing the medical devices and reselling them to patients at a subsidized lower price. The Official explained that the government would only endorse products for the program that it had technically evaluated and approved and advised the Requestor that its products would need to be evaluated.

The Requestor was asked to provide sample devices to government health centers for evaluation. The foreign government and the Requestor jointly determined that the optimal sample size for such a study was 100 units distributed among ten health centers as this number would ensure results free from anomalies that might result from a smaller sample size or sampling at a smaller number of centers. The Requestor indicated that it would also provide accessories and follow-on support for the medical devices free of charge. The approximate total value of the devices and related items and services is \$1.9 million.

According to the Release, the evaluation of the devices will be based on objective criteria that were provided to the DOJ, and the results of the evaluation will be collected by the Requestor's Country Manager, a physician, who will, along with two other medical experts, review the results and provide reports to a senior health official in the foreign country who will share his assessment with the Government Agency. The Government Agency will then evaluate the results and assessments to determine whether to endorse the device.

The foreign government has advised the Requestor that none of the companies' devices will be promoted by the foreign government above any of the other qualified devices in the program, and the Requestor indicated that it has no reason to believe that the Official who suggested providing the devices will personally benefit from the donations.

The DOJ provided no action comfort and noted that the proposed provision of medical devices and related items and services would "fall outside the scope of the FCPA" because the goods and services will be provided to the government health centers (selected by the Requestor), as opposed to individual government officials, and the ultimate end-users will be determined based on the following criteria and limitations:

- The 100 recipients will be selected from a list of candidates provided by the medical centers. The centers will be expected to nominate candidates that best meet certain objective criteria, which Requestor provided to the DOJ. All candidates will be required to present a certificate establishing their inability to pay.
- The 100 recipients will be selected from the list of candidates by a working group of health care professionals who are experienced in the use of this type of medical device. Requestor's Country Manager will participate in the working group, enabling the Requestor to ensure that the selection criteria are met. According to the Release, the Country Manager had previously received FCPA training.
- The names of the recipients will be published on the Government Agency's web site for two weeks following the selection.

- Close family members (defined as “immediate relatives, as well as nieces, nephews, cousins, aunts, and uncles”) of the Government Agency’s officers or employees, working group members, or employees of the participating health centers will be ineligible to be recipients under the program unless:
 - the relatives hold low-level positions and are not in positions to influence either the selection or testing process;
 - the relatives clearly meet the requisite economic criteria; and
 - the recipient is determined to be a more suitable candidate than candidates who were not selected based on technical criteria.
- The Country Manager will review the selection of any immediate family members of any other government officials to ensure that the criteria were properly applied and will report his determination to the Requestor’s legal counsel.

DOJ Opinion Procedure Release 10-01

On April 19, 2010, the DOJ issued Opinion Procedure Release 10-01. The Release arises out of an agreement between the U.S. Government and a Foreign Country Government, under which a U.S. Government Agency provides assistance to the Foreign Country. The Requestor, a U.S. company, entered into a contract with the U.S. Government Agency to design, develop, and build an unnamed facility for the Foreign Country. Under the agreement, the Requestor is also required to hire and compensate individuals in connection with the facility.

The Foreign Country notified the U.S. Government Agency that it had appointed an individual to be the Facility Director. The Foreign Country selected the candidate based on his or her qualifications, and the U.S. Government Agency subsequently directed the Requestor to hire the selected person as the Facility Director. The Requestor will pay the \$5,000 per month salary of the Facility Director, although indirectly through the in-country subsidiary of a subcontractor hired by the Requestor to handle personnel staffing issues. The Foreign Country is expected to assume the obligation to compensate the Facility Director after the initial one-year period of employment.

The Requestor approached the DOJ because the designated Facility Director is also a “Foreign Official” under the FCPA by virtue of his or her current position as a paid officer for an agency of the Foreign Country. As described in the release, the individual’s position as a Foreign Official does not relate to the facility, and the services that he or she will provide as Facility Director are separate and apart from those performed as a Foreign Official. Additionally, in his or her positions both as Facility Director and Foreign Official, the person will not perform any services on behalf of, or make any decisions affecting, the Requestor, including any procurement or contracting decisions, and the Requestor will not provide any direction to the individual with respect to his or her position as Facility Director. Accordingly, the Foreign Official designated to become the Facility Director will have no decision-making authority over matters affecting the Requestor.

In providing no-action relief, the DOJ highlighted several important facts relevant to its analysis of the request. The DOJ stressed that the Facility Director is being hired pursuant to a contractual agreement between a U.S. Government Agency and the Foreign Government, and that the Facility Director—although a Foreign Official under the FCPA—will not be in a position to influence any act or decision affecting the Requestor. The DOJ noted that pursuant to the agreement between the U.S. Government Agency and the Foreign Country, the Requestor is obligated and bound to hire as the Facility Director this specific person, whom the Requestor had no part in choosing, and who was chosen based on his or her personal qualifications for the job. Finally, the DOJ emphasized that the person’s new job as Facility Director is separate and apart from his or her existing job as a Foreign Official, and that both jobs are truly independent of the Requestor. The individual, in his or her capacities as both Foreign Official and Facility Director, will not take any directions from the Requestor, nor have any decision-making authority over matters affecting the Requestor, including procurement and contracting decisions.

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