FCPA/Anti-Bribery Spring Alert 2011

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INTRODUCTION

Enforcement of anti-corruption laws has never been as significant a priority for law enforcement as it is now. The U.S. Foreign Corrupt Practices Act ("FCPA") remains the most aggressively enforced international anti-bribery statute in the world, and U.S. authorities continue to expand their enforcement authority and seek ever-steeper penalties. Where once penalties in the hundreds of millions of dollars were unthinkable, they are now almost commonplace. So too individual prison sentences, once little more than a statutory possibility, are now a real and common threat. Yet there could be efforts to strengthen the law further, as the FCPA continues to receive criticism for its own perceived loopholes, including its increasingly unpopular (if perhaps illusory) exception for so-called facilitation payments.

But international companies can no longer simply focus on the American regulatory sphere. Other countries have joined the United States in a push for wider investigations and larger penalties. The landmark U.K. Bribery Act 2010, in particular, threatens to overtake the FCPA as the most aggressive and wide-ranging international anti-bribery statute. And other countries, such as Germany, are more willing than ever to investigate and prosecute corruption. As enforcement becomes more intense, both in the U.S. and abroad, the need for clear prospective guidance and defined prohibitions becomes ever more stark.

At the same time, there is an increasing sense that anti-corruption laws may be reaching a crossroads, as both the government and the private sector display an increased willingness to voice frustrations with the laws or go to trial and fight prosecution. In the United States, the U.S. Senate Judiciary Committee raised numerous questions regarding the FCPA's enforcement, and several recent prosecutions have been undercut as skeptical judges imposed far lighter sentences than the DOJ had hoped for or agreed to in plea deals. Abroad, countries such as the U.K. and Spain have passed anti-corruption laws that provide companies with some level of statutory defense if they have in place adequate compliance programs.

What then is the future of the FCPA? How do U.S. lawmakers and enforcement agencies respond to a law that is criticized both for its aggressiveness and its leniency? How do they reconcile the increasingly severe punishments handed down with the business community's ever-greater willingness to challenge the law's more extreme prosecutorial outcomes? Have FCPA prosecutions become so aggressive, and the punishments so draconian, that the statute is pressed to a breaking point?

Hughes Hubbard's FCPA/Anti-Bribery Spring Alert 2011 discusses these and other anti-bribery developments. This Alert is divided into two parts. Part I, the printed materials, begins with a summary and analysis of certain critical enforcement trends and lessons to be learned from settlements and other related developments. Following that summary and analysis are (i) a review of focus issues; (ii) a description of FCPA settlements and criminal matters from 2010 and early 2011 in reverse chronological order; and (iii) a discussion of selected recent FCPA and related developments. Part II, included (along with a copy of Part I) on CD, contains: (i) brief discussion of the statutory requirements of, and penalties under, the FCPA; (ii) a description of FCPA settlements and criminal matters from 2005 through 2009 in reverse chronological order;

(iii) a discussion of other FCPA and related developments; and (iv) 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

- *Requirement of Monitors or Consultants*: The imposition of compliance monitors as part of FCPA-related settlements continues to be common. Innospec's global settlement with U.S. and U.K. authorities included the appointment of the first-ever joint U.S.-U.K. compliance monitor—Kevin T. Abikoff, one of this Alert's authors and Chair of Hughes Hubbard's Anti-Corruption and Internal Investigations Practice Group. The landmark 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. In addition to the above, the SFO required the appointment of a monitor in the Mabey & Johnson case; and with the use of a French monitor in the Alcatel-Lucent and Technip settlements, this tool has become more common internationally. (*See, e.g.*, *Innospec*, *Siemens, Faro, AGA, Willbros Group, Delta & Pine, Baker Hughes, Vetco, Mabey & Johnson, Alcatel-Lucent*).

- *Vigorous Enforcement in the United States*: Despite the change in Administrations, and perhaps the expectations of some, FCPA enforcement has remained a high priority for the United States government under President Obama. 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. As Assistant Attorney General Lanny Breuer said at a November 2010 speech, "you are right to be more concerned … we are in a new era of FCPA enforcement; and we are here to stay." In the same speech, Breuer noted that, "in the past year, we've imposed the most criminal penalties in FCPA-related cases in any single 12-month period – ever. Well over $1 billion." All told, in the 2010 calendar year, U.S. authorities imposed approximately $1.7 billion in monetary penalties against corporations to resolve FCPA-related investigations.

- *Other Countries' Increased Enforcement of Their Own Anti-Corruption Laws*: Countries around the globe from Cambodia to the U.A.E. are actively evaluating and enhancing their anti-corruption efforts. Russia, Spain, and, perhaps most notably, 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 facing increasingly aggressive pressure to actively enforce their 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 BAES, 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 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, and the OECD's recently-released Phase 3 Report on the United States praised U.S. enforcement agencies for their frequent initiation of such international cooperation. (*See, e.g.*, *Alcatel-Lucent, Flowserve, AGCO, Innospec, Siemens, Akzo Nobel, BAES, 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, collectively by U.S. and German authorities, 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 now appear almost commonplace, with the BAES ($400 million to resolve an FCPA investigation through a false statement plea), Snamprogetti/ENI ($365 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. Greg Andres, Deputy Assistant Attorney General from the Department of Justice's Criminal Division recently told the Senate Judiciary Committee that "we are also vigorously pursuing individual defendants who

violate the FCPA [and] we do not hesitate to seek jail terms for these offenders when appropriate. The Department has made the prosecution of individuals part of its FCPA enforcement strategy." 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, and the U.K. Serious Fraud Office ("SFO") has indicated that, in appropriate circumstances, it will prosecute individuals without prosecuting the company itself. As in the *Fu*, *Martin*, *Philip*, *Srinivasan*, and *Wooh* cases, individual enforcement actions can follow or coincide with settlements with the company. By contrast, in such cases as *Sapsizian*, *Stanley*, 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. In April 2010, the DOJ 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. And as part of a plea agreement, Jeffrey Tesler recently agreed to forfeit almost $149 million. (*See, e.g.*, *Enrique & Angela Aguilar, Julian Messent, Control Components, Covino, Willbros Group, PCI, ITXC, Philip, Green, Srinivasan, Fu, Martin*, *Wooh*, *Alcatel-Lucent*, *Steph, Jumet & Warwick, Innospec, Tesler & Chodan*).

- *Willingness to Try Corruption Charges*: With the now completed trials of Frederic Bourke, Congressman William Jefferson, and Gerald and Patricia Green, and the pending trials of Lindsey Manufacturing, its executives, and John O'Shea, among others, 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. That the trials completed in 2010 led to convictions in whole or in part makes 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 recently obtained the extradition of Wojciech Chodan and Jeffrey Tesler, 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.*, *BAES, Siemens, Tesler and Chodan*).

- *Use of Related Statutes*: The BAES case demonstrates the continuing use by U.S. authorities and other regulators of complementary statutes (such as those governing export control or false statements) 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 BAES 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 BAES to the Department of Defense) to court, regulatory, or congressional testimony. Companies must be cognizant that they will potentially be held 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. These statutes can also apply—unlike the FCPA—to foreign officials for their conduct related to the corrupt payment. (*See, e.g.*, *Terra Telecommunications, Green, O'Shea, Terra Telecommunications, 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*).

- *Prosecution for Payments to Former Government Officials*: The DOJ prosecuted Alcatel-Lucent for, among a host of other conduct, an improper payment made by a subsidiary to a *former* Nigerian Ambassador to the United Nations for the purpose of arranging meetings with a government official. The DOJ did-not pursue an FCPA anti-bribery charge on the point, but the company was penalized for not accurately and fairly reporting the payment in its books and records. As with improper payments to private parties, the DOJ will look for ways to prosecute what they view as improper conduct even if it cannot prosecute FCPA anti-bribery charges. (*See, e.g.*, *Alcatel-Lucent*).

- *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 Dodd-Frank 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, Dodd-Frank 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 SHOT Show indictments demonstrate, however, 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 DOJ and SEC will prosecute or charge 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, and 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, Flowserve, 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. This interpretation was praised by the OECD in its Phase 3 Report on the U.S. (*See, e.g.*, *Helmerich & Payne, Nature's*

Sunshine, AGA Medical Corporation, Willbros Group, Bristow, Delta & Pine, Martin, Dow, Vetco, *Kay, Dimon, OECD Phase 3 Report*).

- *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. In the case of ABB, which reached an FCPA settlement in 2004 and subsequently disclosed and settled other violations, the DOJ sought, but did not obtain, recidivism points in the fine calculation, despite the fact that, although disclosed later, the underlying conduct had occurred *at the same time* as the previously disclosed violations. (*See, e.g.*, *Vetco*, *Baker Hughes*, *ABB*).

- *Lighter Sentences From Judges*: In a string of recent cases, Judges have diverted from DOJ requests and even from plea agreements and imposed significantly lighter sentences — both in length of prison terms for individuals and size of fines for companies — than were expected. These cases collectively may be taken to reflect unease from a segment of the judiciary towards certain aggressive prosecutions and perceived overreach by the DOJ. (*See, e.g., Bobby Elkin, ABB, James Giffen, Leo Winston Smith*).

- *Payments To Obtain Payment of Legitimate Debts May be Punished*: Among the misconduct charged by the SEC in the Pride settlement was a payment of $30,000 to a third party to bribe officials of a state-owned entity to pay receivables owed to Pride. Though the outstanding receivables were legitimately owed, the SEC took the view that the payment nevertheless ran afoul of the FCPA's books and records and internal controls provisions. Alcatel-Lucent was also charged with books and records violations related to payments made for the purposes of securing recovery of a debt owed by the government of Nigeria. (*See, e.g.*, *Pride, 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 has since 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.*, *ABB,*

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 55 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," and in Opinion Release 10-03 it explicitly uses past Opinion Releases as guidance. 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 Releases 08-02, 10-03*).

- Use of Constructive Knowledge Standard: Though the DOJ did not charge BAES with any violation of the FCPA, the case involves BAES's failure to maintain an effective anti-corruption compliance program. The Information repeatedly states that BAES 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.*, *BAES, Alcatel-Lucent, GlobalSantaFe*).

- Targeting Suspect Jurisdictions: The BAES Information provides a firm reminder that conducting business in or through suspect jurisdictions is itself a red flag. The DOJ took particular issue with BAES'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.*, *BAES, 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 Terra Telecommunications 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. And the DOJ's recently-launched Kleptocracy Asset Recovery Initiative directly targets corrupt foreign officials for forfeiture actions. (*See, e.g.*, *Gerald and Patricia Green, Terra Telecommunications, Chen Shui-bian*).

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 the 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 counsel 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, BAES*, *Technip*, *Snamprogetti, RAE*).

- *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." RAE was also criticized for implementing compliance procedures the DOJ characterized as "half measures." By contrast, the OECD's Phase 3 Report on the U.S. indicates that "effective application [of anti-bribery

controls] might result in a determination that a company did not possess the requisite criminal intent." (*See, e.g.*, *RAE*, *Siemens, Daimler, OECD Phase 3 Report*).

- *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 the procedures are not followed or are followed only to the extent to "paper the file." For example, the DOJ's resolution of its investigation into Alcatel-Lucent stressed that Alcatel managers, prior to the merger, regularly failed to notice or investigate so-called compliance "red flags." (*See, e.g.*, *Alcatel-Lucent*, *Maxwell, 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 that 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, BAES, AGCO, Alcatel-Lucent, Snamprogetti, HP*).

- *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*).

- *Ensure Compliance Down the Chain*: Because the FCPA prohibits actions "in furtherance of" improper payments, and because of the availability of aiding and abetting and conspiracy charges, companies may face liability if they are aware that money ultimately derived from them is being used to make improper payments by third parties engaged by subcontractors or agents. The Shell charging documents, for instance, allege that Shell subsidiaries knowingly reimbursed subcontractors for fees charged to the subcontractors by Panalpina, which had made improper payments to government officials on the subcontractors' behalf. (*See, e.g.*, *Shell*).

- *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, Pride*).

- *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 or operational areas (such as customs clearance and logistics) 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." Even officials at entities which are controlled by a government, but not majority-owned by that government have been interpreted as foreign officials. 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, Lindsey Manufacturing, Alcatel-Lucent, KBR/Halliburton, 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, flowers, wine, 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.*, *IBM, Veraz Networks*, *Avery Dennison*, *PCI, AB Volvo, Lucent, Philip, Ingersoll-Rand, York, Delta & Pine, Dow, Kozeny, UTStarcom, 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., Ball Corporation, 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. Also, Noble Corporation was punished for improperly recording various improper payments as facilitation payments. The SEC claimed that Noble personnel did not understand the concept of "facilitating payments" and that its internal controls were insufficient to prevent what the SEC considered bribes as being recorded as facilitating payments. 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, and the U.K. Bribery Act contains no facilitation payment exception. (*See, e.g.*, *Westinghouse, Noble*).

- *No De Minimus Exception*: There is no *de minimus* exception to the FCPA's prohibitions. The Panalpina settlement directly included bribes of "de minimus

amounts," as among those punished. Similarly, 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. Breakdowns in internal controls should be fully remedied, and companies which encounter anti-corruption issues in one circumstance should be careful not to repeat the mistakes that led to those issues. 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, RAE, Noble*).

- *Investigate Allegations Fully*: Enforcement agencies expect companies to fully investigate allegations or evidence of misconduct. RAE, for instance, was criticized for failing to perform an internal audit or other investigation into general allegations that bribery was continuing at a subsidiary despite the fact that the company had fully remediated the specific conduct that had been raised to it. (*See, e.g.*, *RAE*).

- *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. Moreover, once conducted, the results of a due diligence review, however unpleasant, should not be ignored. (*See, e.g.*, *Ball Corporation, RAE, 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, prosecutors are unlikely to excuse illegal conduct even in extreme circumstances, such as extortion by foreign officials. (*See, e.g.*, *Messent, Pride, DOJ Opinion Procedure Release 08-03, Faro, Willbros Group, Lucent, El Paso*, *Dow*, *Baker Hughes*, *Chiquita*, *Textron, Kay, Natco*, *Dimon*).

- *Prohibit Commercial Bribery As Well As Public Sector Bribery*: Many countries prohibit commercial bribery, regardless of whether a public official receives any benefit, and the

FCPA's anti-bribery and books and records provisions can be triggered by private sector commercial bribery. Further, in many circumstances, it can be difficult to discern who is or is not a government official. Therefore, anti-bribery policies and procedures should stress that bribery is improper regardless of the involvement of a government official. (*See, e.g.*, *Schnitzer Steel, ICC Guidelines*).

- *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, Global Witness 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 BAES as insufficiently qualified for the position. (*See, e.g.*, *Siemens, KBR/Halliburton*, *Ingersoll-Rand, Baker Hughes, BAES*).

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 key developments of particular note.

United Kingdom Anti-Bribery Developments

The passage of the Bribery Act 2010 ("Bribery Act" or "Act") by Parliament in April 2010 has been both hailed and decried for its potential to transform anti-bribery enforcement. Even before the Bribery Act's July 1, 2011 effective date, the U.K. Serious Fraud Office ("SFO") has become 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 under the Bribery Act. Before the Act passed Parliament, the SFO began "moving significant skills" to its anti-corruption resources, invested "heavily in training," and announced its intention to expand the staff focusing on anti-corruption to 100. The U.K. also announced plans to create a new Economic Crime Agency to centralize what some have referred to as a "piecemeal" approach to policing white collar crime.

Below are discussions of (i) the Bribery Act; (ii) final guidance issued by the Ministry of Justice on March 30, 2011, regarding the Bribery Act's new offense of the failure of a corporation to prevent bribery ("MOJ Guidance" or "Guidance"); and (iii) the proposal for a new Economic Crime Agency. Together, these actions represent a dramatic shift in anti-corruption enforcement by the United Kingdom and compel any company doing business in the U.K. to be carefully attentive to anti-corruption concerns and to 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 to non U.K. -based companies that "carry on business" in the U.K., regardless of whether the challenged conduct involved activities in the U.K.

<u>Bribery Act 2010</u>

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 was an antiquated mix of common law and statutes dating back to the 19th century, a legal framework that in 2009 then Justice Secretary Jack Straw conceded was "difficult to understand… and difficult to apply for prosecutors and the courts."

The Bribery Act creates four categories of offenses: (i) offenses of bribing another person; (ii) offenses related to being bribed; (iii) bribery of foreign public officials; and (iv) 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: (a) in order to induce a person to improperly perform a relevant function or duty; (b) to reward a person for such improper activity; or (c) 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 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 Bribery Act's Explanatory Notes, Parliament intended for the prohibitions on foreign bribery 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 when 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 business. In certain circumstances, offenses in this category overlap with offenses in the first category (which generally prohibits both foreign and domestic bribery). The MOJ Guidance, however, highlights that the offense of bribery of a foreign public official does not require proof that the bribe was related to the official's improper performance of a relevant function or duty. The overlap between the general bribery offenses and the offenses relating to bribery of foreign officials also allows prosecutors to be flexible, enabling them to bring general charges when a person's status as a foreign official is contested or to seek foreign official bribery charges when an official's duties are unclear.

Finally, and most significantly for large multinational corporations, 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, subsidiaries, and even subcontractors and suppliers to the extent they perform service on behalf of the organization. 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 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. As SFO Director Richard Alderman explained in a June 23, 2010 speech:

> "I shall have jurisdiction in respect of corruption committed by those corporates anywhere in the world even if the corruption is not taking place through the business presence of the corporate in this jurisdiction. What this means is this. Assume a foreign corporate with a number of outlets here. Assume that quite separately that foreign corporate is involved in corruption in a third country. We have jurisdiction over that corruption."

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.

Not surprisingly given its sweeping scope, the Bribery Act has received a fair bit of criticism from business circles, and the Ministry of Justice delayed its implementation until July 1, 2011, seven months later than initially promised, to give the business community time to adjust compliance policies to the MOJ Guidance..

The MOJ Guidance

On March 30, 2011, the MOJ Guidance, officially titled "Guidance About Procedures Which Relevant Commercial Organizations Can Put Into Place To Prevent Persons Associated With Them From Bribing (Section 9 of the Bribery Act 2010)," was released. Although the MOJ Guidance is "non-prescriptive" and does not change the legal standards contained within the Bribery Act, the Guidance focuses on a specific set of core principles to explain what the Ministry would consider to be "adequate procedures" sufficient to invoke the affirmative defense. Even though this Guidance is non-prescriptive, it is a useful showing of how the current MOJ interprets the language of the Act and what U.K. authorities and prosecutors will consider when assessing a company's internal policies and procedures. The true value of the MOJ Guidance will hinge on whether U.K. courts follow its interpretations of the Act.

The MOJ Guidance describes six principles it urges commercial organizations to consider when implementing procedures designed to prevent bribery. These principles—which are consistent with U.S. and international best practices—are not meant to propose any particular procedures but are instead to be "flexible and outcome focused, allowing for the huge variety of circumstances that commercial organizations find themselves in." This reflects the MOJ's stance that there is no "one-size-fits-all" solution to preventing bribery. The MOJ Guidance also

contains an Appendix A (which it specifically states is not part of the actual guidance) that illustrates how the principles may be applied to various hypothetical problem scenarios. Although these scenarios may not be part of the formal Guidance, they nonetheless provide a starting point for the dialogue or negotiations with U.K. prosecutors regarding whether a company's procedures are "adequate."

Organizations accused of violating the Bribery Act through associated persons bear the burden of proving the adequate procedures defense through a "balance of probabilities" test largely by demonstrating their commitment to the following six principles:

Principle 1 — Proportionate Procedures

Commercial organizations should have clear, practical, and accessible policies and procedures that are proportional both to the bribery risks they face and to the nature, scale, and complexity of their commercial activities. Organizations should tailor their policies and procedures—as well as the manner by which they implement and enforce those policies and procedures—to address the results of periodic and case-by-case risk assessments. Effective bribery prevention policies are those that both mitigate known risks and prevent deliberate, unethical conduct by associated persons.

Effective preventative policies and procedures are particularly important when dealing with third parties that negotiate with foreign public officials, which the MOJ flags as a category of "associated persons" that present a significant amount of risk. The Guidance recognizes the challenges of enforcing policies on third-parties, as well as retrospectively introducing new policies into existing business relationships, and encourages companies to approach these situations "with due allowance for what is practicable" based on their "level of control over existing arrangements."

Principle 2 — Top-Level Commitment

The MOJ Guidance makes clear that a key concern of U.K. authorities will be the tone of the culture fostered by an organization. Top level management — including the board of directors — must be committed to preventing bribery and establishing a culture within the company in which bribery is not condoned. In doing so, they should take an active role in communicating anti-bribery policies to all levels of management, employees, and relevant external actors. The manifestation of this commitment will vary based on the size and industry of the organization, but should communicate both internally and externally the management's zero-tolerance of bribery.

The Guidance further suggests that companies adopt a statement of commitment to counter bribery in all parts of the organization's operation that could be made public and communicated to business partners and third-parties. It also suggests personal involvement by top-level management in developing a code of conduct, overseeing the developments and implementation of an anti-bribery program, and conducting regular reviews of the effectiveness of those policies.

Principle 3 — Risk Assessment

Commercial organizations are expected to regularly and comprehensively assess the nature and extent of the bribery-related risks to which they are exposed. The MOJ Guidance acknowledges that what constitutes adequate risk procedures will vary from company to company and notes that companies should adopt risk assessment procedures that are proportionate to their size, their structure, and the nature, scale, and location of their activities. Effective risk assessment should include oversight by top level management, appropriate resourcing proportional to the scale of an organization's business and the need to identify all relevant risks, identify internal and external sources of information related to risk, contain appropriate due diligence inquiries, and ensure the accurate and appropriate documentation of both the risk assessment and its conclusions.

The Guidance also states that companies should, as part of their risk assessments, consider both internal and external bribery risks. Internally, the MOJ Guidance suggests evaluating such areas as the company's remuneration structure, training program, and anti-bribery policies. Externally, it identifies five categories of risk—country risk, sectoral risk, transaction risk, business opportunity risk, and partnership risk—that should be evaluated for each business venture. Above all, risk identification must be periodic, informed, and documented.

Principle 4 — Due Diligence

Companies are expected to have proportionate and risk-based due diligence procedures that cover *all parties to a business relationship*, including the organization's supply chain, agents and intermediaries, all forms of joint venture and similar relationships, and all markets in which the company does business.

The MOJ Guidance notes that due diligence is a "firmly established" element of corporate good governance that both assesses and mitigates risk. Due diligence is particularly important when committing to relationships with local entities and in mergers/acquisitions. The Guidance urges commercial organizations to expand their due diligence programs beyond initial screenings—which are expected for all associated persons, including employees—to include continued monitoring of all recruited or engaged associated persons. The Guidance also recommends that organizations take a risk-based approach to their immediate suppliers and ask that suppliers both agree to anti-corruption representations and agree to seek such representations from their own suppliers.

Principle 5 — Communication and Training

The MOJ Guidance indicates authorities will evaluate not only whether a company has adopted anti-bribery policies and procedures, but whether they have been implemented in such a fashion that they are "embedded and understood throughout the organization through internal and external communication, including training, that is proportionate to the risks [the company] faces." This involves more than just proper tone from top-level management; the Guidance notes that effective communication is a two-way channel and requires organizations to establish

secure and confidential means for internal and external parties to report potential bribery. Internal communications should focus on the implementation of compliance policies and emphasize the implication of those policies. External communication of bribery prevention policies, such as a code of conduct, can also reassure existing and prospective associated persons and deter those who intend to bribe on the company's behalf. Effective training is required for all employees and should be continuous as well as regularly monitored and evaluated.

Principle 6 — Monitoring and Review

Companies should institute continual monitoring and review mechanisms to ensure compliance, identify issues as they arise, and adjust policies and procedures as needed. The MOJ Guidance suggests that companies may want to go beyond regular monitoring and examine the processes that occur in response to specific incidents, such as governmental changes in countries where they operate, incidents of bribery, or negative press reports. The MOJ Guidance encourages companies to consider using both internal and external review mechanisms to conduct formal, periodic reviews and reports for top-level management. In addition, the Guidance notes that organizations "might wish to consider seeking some form of external verification or assurance of the effectiveness of anti-bribery procedures," but cautions that "certified compliance" within the industrial sector "may not necessarily mean that a commercial organization's bribery prevention procedures are 'adequate' for all purposes." Consequently, companies should institute continually monitoring and review mechanisms to ensure compliance, identify issues as they arise, and adjust policies and procedures as needed.

In addition to the Six Principles, the MOJ Guidance also discusses six specific issues pertaining to the failure to prevent bribery offense (and either predicate offense): (i) the impact of local law, (ii) hospitality and promotional expenditures; (iii) when a company is "doing business" in the U.K.; (iv) the definition of "associated persons" whose bribery corporations attempt to prevent through adequate procedures; (v) facilitation payments; and (vi) prosecutorial discretion.

- *Local Law*

U.K. prosecutors will be required to prove that, in cases of bribery of foreign public officials, the payment or advantage given to the official was neither permitted nor required by the written laws applicable to that official, including potentially the laws of the foreign country. The MOJ Guidance clarifies that "offset" arrangements, whereby additional investment is offered as part of a tender, will generally not violate the Bribery Act where the additional investment is subject to legislative or regulatory provisions. This would appear to cover what are often referred to as "social payments" and "local content" requirements where those payments are legitimate and made in compliance with written local law. Where local law is silent, however, authorities will have the discretion to prosecute such payments where it is in the public interest.

- *Hospitality and Promotional Expenditures*

The MOJ Guidance reassures companies that reasonable and proportionate hospitality or promotional expenses which seek to improve the company's image, better present products, or simply establish cordial relations are not prohibited by the Act, and such expenses will only trigger liability if they are made or intended to induce improper activity or influence an individual in their official role to secure business for the company. The inquiry as to whether an expenditure is a bribe will necessarily depend on the surrounding circumstances, and the greater and more lavish the expenditure, the greater the inference will be that it is intended to influence the official. The MOJ Guidance also indicates that, for a violation to occur, the hospitality or promotional expenditure must be one the official would not otherwise receive from his employer. A company, may, for example, pay travel expenses for a foreign official if the foreign government would otherwise have covered the same costs itself. The Guidance also suggests that entertainment expenses—even relatively lavish ones, such as tickets to Wimbledon, the Six Nations rugby tournament, or the Grand Prix—are permitted when linked to a legitimate promotional goal.

- *Doing Business in the U.K.*

One of the more controversial aspects of the Bribery Act is the application of the failure to prevent bribery offense to non-U.K. companies that "carry on a business, or any part of a business, in any part" of the U.K. The MOJ Guidance appears to narrow the scope of non-U.K. companies that would fall within the offense's reach by asserting that having a U.K. subsidiary is not, "in itself," sufficient to establish that the parent company is carrying on part of a business in the U.K., nor is raising capital on the London Stock Exchange, "in itself," sufficient to establish that a company is carrying on part of a business in the U.K.

Companies should be wary, however, of concluding that their U.K. subsidiary or U.K. stock listing will not require them to enact adequate procedures to prevent bribery. The Guidance asserts that the government will take a holistic, "common sense approach" to each case and warns that "the final arbiter, in any particular case, will be the courts . . . ." This latter caveat should be cold comfort to non-U.K. corporations, as a "wait-and-see" approach to compliance is never sensible when criminal convictions and penalties are at stake.

- *Associated Persons*

The MOJ Guidance expands upon the definition of "associated persons" contained within the Bribery Act. As discussed above, the Bribery Act uses a broad definition of associated persons that includes all employees, agents, subsidiaries, subcontractors, and even suppliers that "perform services" for or on behalf of a company. The Guidance, however, suggests that a factor in determining whether a corporation is liable for the acts of an associated person is the degree of control the corporation exercises over the associated person. This factor could significantly limit a parent corporation's liability in the U.K. for the actions of subcontractors and agents hired by foreign subsidiaries that operate with sufficient autonomy, particularly in the case of suppliers not directly dealing with the corporation and joint venture partners in the

context of a joint venture that exists as a separate entity from its members (unlike a contractual joint venture arrangement).

- *Facilitation Payments*

The Act contains no exemption for facilitation payments, and the MOJ Guidance cautions that such payments will trigger liability under the Act, as "exemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused." The MOJ Guidance specifically distinguishes the Act's treatment of facilitation payments from the U.S. FCPA, which provides an exception for facilitation payments. The Guidance recognizes that this zero-tolerance policy on facilitation payments will present challenges in many countries and industrial sectors, and notes that the "eradication of facilitation payments is recognized as a long term objective."[1] As noted below, this stance is consistent with recent guidance from the OECD that urged countries and companies to prohibit such payments due to their corrosive nature.

Richard Alderman, the Director of the SFO, stated the SFO's policy regarding facilitation payments in light of the MOJ Guidance. During a speech on April 7, 2011, Director Alderman stated,

> I do not expect facilitation payments to end the moment the Bribery Act comes into force. What I do expect though is for corporates who do not yet have a zero tolerance approach to these payments, to commit themselves to such an approach and to work on how to eliminate these payments over a period of time. I have also said that these corporates should come and talk to the SFO about these issues so that we can understand that their commitment is real. This also gives the corporate the opportunity to talk to us about the problems that they face in carrying on business in the areas in which they trade. It is important for us to know this in order to discuss with the corporate what is a sensible process.
>
> The type of case where we are likely to want to consider prosecution will be one where corporations have no intention of ceasing to use facilitation payments. Instead they want to continue. Indeed, they look at this as a way of obtaining an advantage over those corporations that have banned them.

This policy suggests a path forward for corporations operating in environments where the choice is between making facilitation payments and not doing business at all.

[1] Interestingly, the Ministry of Justice's "The Bribery Act 2010: Quick Start Guide," which it issued in conjunction with its official MOJ Guidance, notes that companies can continue to pay for legally required administrative fees or "fast-track services," as payments in these categories are not considered facilitation payments.

- *Prosecutorial Discretion*

The MOJ Guidance explicitly identifies hospitality, promotional expenses, and facilitation payments as areas where prosecutorial discretion provides a degree of flexibility. The Guidance outlines a two-stage test prosecutors must apply in determining whether to prosecute an offense under the Act: (i) whether there is sufficient evidence to provide a realistic prospect of a conviction; and (ii) if so, whether a prosecution is in the public interest. The more serious the offense, the more likely a prosecution will meet the second prong.

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. 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."

In January, it was reported that a consultation on the proposal would begin in the Spring of 2011. Despite delays in the Bribery Act's implementation, the new government's proposal to create a new enforcement agency arguably demonstrates its commitment to enforcing economic criminal laws.

Proposed SEC Whistleblower Rules

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), enacted July 21, 2010, established in Section 922 whistleblower rewards and protections for reporting to the SEC information relating to the violation of any U.S. securities law. Section 922's scope is substantially greater than the preexisting whistleblower program administered by the SEC, which previously only rewarded information related to insider trading; for example, the portions of the FCPA applicable to U.S. and foreign issuers are codified at Sections 13(b)(2) and 30A of the Exchange Act. Specifically, Section 922, codified as a new Section 21F of the

Exchange Act, mandates a reward of 10-30% of any money the government collects from an enforcement action based on "original" information received from the whistleblower or whistleblowers resulting in sanctions (including fines, disgorgement, and interest) against the company in excess of $1,000,000. Whistleblowers are 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.[2] 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.

Section 924 of the Dodd-Frank Act requires the SEC to adopt final implementing regulations within 270 calendar days of Dodd-Frank's enactment, although the SEC has pushed back the expected release of its final regulations to between May and July 2011. However, Section 924 permits whistleblowers to receive award for violations of the securities laws that occurred pre-enactment, and whistleblowers need not wait for the SEC to adopt final implementing rules before providing information that would entitle them to an award under Section 21F.

On November 3, 2010, the SEC took the first step towards adopting rules for the new whistleblower program by issuing proposed rules for the expanded whistleblower program. As required by the Dodd-Frank Act, the proposed rules require whistleblowers to satisfy four requirements in order to qualify for an award:

- First, whistleblowers must voluntarily provide the SEC with information. Information will not be considered voluntarily provided if the whistleblower previously received a request for information from the SEC, other authority, or a self-regulatory organization (such as a national securities exchange) about a matter to which the information is relevant, the whistleblower's employer received such a request (and provided the information), or a legal or contractual duty to report the information to such authorities existed.

- Second, the SEC will only award whistleblowers for providing "original information." Information is "original" if it (1) was not already known to the SEC from any other source (unless that source received the information from the whistleblower), (2) was derived from the whistleblower's independent knowledge or analysis, and (3) was not exclusively derived from judicial or government records or the news media

[2] The decision of the SEC can be appealed to the appropriate United States Court of Appeals.

- Third, the information provided must lead to successful enforcement by the SEC of a federal court or administrative action. Information "leads" to a successful enforcement action if the information "significantly contributed" to the success of an action started or reopened on the basis of the information, or if the information was "essential" to an ongoing action and would not otherwise have been obtained during that action. While whistleblowers may also receive awards for "related actions" enforced by the DOJ, certain other regulatory agencies, self-regulating organizations, or a state attorney general, successful enforcement by the SEC is a prerequisite for any award.

- Fourth, the SEC must obtain at least $1,000,000 in sanctions in the action. Monetary sanctions include civil and criminal fines, disgorgement, prejudgment interest, or any other monetary penalty imposed in an action by the SEC or a related action.

Awards for Whistleblowers

The Dodd-Frank Act granted the SEC discretion to determine whistleblowers' rewards, provided that the awards must be between 10% and 30% of the monetary sanctions. Whistleblowers who satisfy the four conditions described above could receive awards within these percentages of the total sanctions imposed in both SEC actions and those imposed in any successful related action brought by the DOJ, certain other regulatory agencies, a self-regulatory organization, or a state attorney general in a criminal case. The proposed rules would limit the aggregate award that multiple whistleblowers would receive to the same boundaries and the SEC would allocate the aggregate amount across several whistleblowers based on the same considerations used to determine the aggregate award.

Under the proposed rules, the SEC would consider the following in calculating whistleblower awards:

- The information's significance to the success of the enforcement action;

- The amount of assistance provided by the whistleblowers;

- The deterrent effect of making the award; and

- Whether the award will enhance the SEC's ability to enforce U.S. securities laws, protecting investors, and encourage the provision of high-quality information from future whistleblowers.

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 reach into the hundreds of millions, creating a similarly high incentive for potential whistleblowers.

<u>Protections Against Unintended Consequences</u>

When she announced the proposed rules, SEC Chairman Mary Shapiro noted, "With the potential for substantial awards comes the possibility for unintended consequences." The proposed whistleblower provisions could result in substantial awards if applied to FCPA enforcement, which could entice potential whistleblowers to bypass internal reporting mechanisms, abuse positions of power, violate duties of loyalty, or even intentionally expose a corporation to liability purely to later report the violation. Several elements of the proposed rules demonstrate an attempt to limit these unintended consequences.

- *Preserve the Effectiveness of Internal Compliance Programs*

Chairman Shapiro, in announcing the proposed rules, emphasized the importance of effective internal controls and compliance programs, and aspects of the proposed rules are intended to incentivize whistleblowers to work within their employers' compliance programs. First, the SEC will backdate whistleblower information, for the purposes of determining its originality, to the date that an employee reported the misconduct internally, and the rules grant whistleblowers a 90-day window after making an internal report of misconduct to report the same conduct to the SEC and still be eligible for an award. Second, although the proposed rules do not require the SEC to increase the award a whistleblower receives if the whistleblower first reports the information to internal compliance personnel, rather than bypassing a company's compliance program and running straight to the SEC, the SEC announced in a press release that the proposed rules "would permit" the SEC to do so.

The Dodd-Frank Act excludes law enforcement personnel, personnel working for agencies with oversight of the securities industry, and a person "who gains the information through the performance of an audit of financial statements required under the securities laws" from collecting whistleblower awards. The proposed rules would also prohibit awards for persons with pre-existing legal or contractual reporting obligations to the organization and who obtained the information through the performance of the obligations, unless the organization unreasonably, or in bad faith, fails to disclose the reported information to the SEC. The proposed rules expressly include under this regulatory carve-out auditors, attorneys, employees with "legal, compliance, audit, supervisory, or governance responsibilities," and anyone who received the disclosed information from such persons. The proposed rules would further deny awards to whistleblowers who obtained reported information while working for a foreign

government or foreign government regulatory authority or who were spouses, parents, children, siblings, or housemates of SEC employees.

- *Avoid Rewarding Culpable Employees*

The Dodd-Frank Act attempts to preclude culpable employees from receiving whistleblower awards by excluding from eligibility any person convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award. As noted, however, a whistleblower who was involved in an offense but avoids a criminal conviction related to the offense can still recover an award, even if they participated in the securities law violation.

The SEC's proposed rules attempt to mitigate this consequence by excluding any monetary sanctions that the whistleblower is ordered to pay "or that are ordered against any entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated" from both the $1 million threshold amount and the amount of recovery to be used in calculating the whistleblower's award. The proposed rules also expressly deny amnesty from SEC enforcement actions for whistleblowers, although they do provide that whistleblower's cooperation would be taken into account.

- *Promote Reliable Reporting*

Whistleblowers may not recover if they knowingly and willfully make any false, fictitious, or fraudulent statement or representation (including writings) to the SEC, the DOJ, or any other regulatory agency regarding the reported information.

Increased Whistleblower Protections

The incentives introduced by the proposed whistleblower rules are buttressed by new anti-retaliation protections established by the Dodd-Frank Act. Whistleblowers seeking damages for retaliation may not be forced to arbitrate their claims and now have the right to a jury trial, and the proposed whistleblower protection provisions increase the remedies an employee can receive for his or her employer's retaliation by providing for double back pay (with interest) in addition to reinstatement and reasonable attorneys' fees. Furthermore, confidentiality agreements between an employer and employee are now null and void with respect to securities violations, and Dodd-Frank doubles the statute of limitations period for bringing a retaliation claim from 90 days to 180 days. The proposed rules would enable whistleblowers to submit information anonymously through counsel.

Future Developments and Challenges

The proposed rules have generated substantial public comment by business associations, companies, interest groups, and individuals. Whistleblower advocates have argued that the

proposed rules are too restrictive. The business community has raised several concerns of its own, including:

- Whistleblowers should be required to report the information first to company compliance personnel;
- Whistleblowers should be given 180 days, rather than the proposed 90 days, to provide information to the SEC so that companies have additional time to investigate the allegations;
- Whistleblowers who participated in the improper conduct should be barred from any recovery, rather than simply having their awards reduced;
- Whistleblowers should be required to have complied with corporate policies in obtaining their information; and
- Employers should be able to take good-faith employment actions regarding whistleblowers

Even after final rules are adopted, the SEC's whistleblower rules may evolve in response to legal challenges. For example, persons denied whistleblower awards under the SEC's rules but who would have received an award under the Dodd-Frank Act could challenge the SEC's authority to deny them awards as being beyond the authority that Congress delegated to the SEC under the Dodd-Frank Act. The ever-increasing monetary penalties imposed in FCPA-related investigations will certainly create strong incentives for whistleblowers and their counsel to seek a recovery and contest any denial or reduction of an award. And regardless of their final form, the SEC's whistleblower rules will be yet another factor for companies to consider in designing or modifying compliance programs and in deciding how to respond to potential FCPA violations.

Lauren Stevens Indictment

On November 8, 2010, the DOJ indicted GlaxoSmithKline's ("GSK") former Vice President and Associate General Counsel, Lauren Stevens, for one count of obstructing justice, one count of falsifying/concealing documents, and four counts of issuing false statements during the course of a Food and Drug Administration ("FDA") investigation of GSK's marketing of an anti-depressant. The indictment does not suggest that Stevens participated in the marketing of the drug for unapproved, "off-label" uses. Instead, the charges are limited to her response to the FDA's inquiry. The alleged facts suggest Stevens personally led an internal investigation, conducted witness interviews, and prepared the response to the government inquiry, rather than retaining experienced outside counsel to do so. The government alleges that Stevens obtained, but concealed and failed to disclose, evidence of off-label marketing by GSK promoters. The government charges that her responses to the FDA's inquiries accordingly amounted to obstruction of the FDA's investigation, the falsification and concealment of documents, and material false statements to government agents based on her response to the FDA inquiry. If

convicted and sentenced to consecutive sentences, Stevens could face a statutory maximum of 60 years in prison.[3]

Although the alleged facts fall outside of the anti-bribery context (and, in fact, many of the facts involving Stevens' own internal investigation remain unknown), this prosecution's demonstration of the familiar, severe potential consequences of lying to the federal government reemphasizes important lessons about conducting internal investigations. First, internal investigations in response to government inquiries require a singular focus from the persons responsible for executing the investigation and preparing a response to the government. Second, such persons should have sufficient expertise to appreciate how government investigations proceed and what steps can be taken to ensure the credibility of an internal investigation. Third, internal investigations should be structured and staffed to protect the compliance function's independence from unwarranted business or operational pressures. Fourth, under some circumstances, professionals from outside the corporation can lend the investigation enhanced credibility and independence. Finally, good faith reliance on outside counsel's advice can negate accusations that in-house counsel had criminal intent to lie to investigators or obstruct an official investigation of the company.

- *Background*

In October 2002, the FDA requested that GSK produce all promotional material (including copies of all slides, videos, handouts, and other promotional materials presented or distributed) related to the anti-depressant Wellbutrin, as part of the FDA's investigation into whether GSK impermissibly marketed Wellbutrin for the off-label use of treating obesity. Stevens and GSK responded to this request by agreeing to conduct an internal investigation into GSK's marketing of Wellbutrin and agreeing to provide the FDA with any promotional materials GSK used to market Wellbutrin for the treatment of obesity.

The alleged facts strongly suggest that Stevens personally had the lead responsibility for GSK's internal investigation and response to the FDA's inquiry. The DOJ indictment suggests that, although Stevens had assistance from a team of lawyers and paralegals who gathered documents and information, Stevens herself personally handled numerous aspects of the GSK response to the FDA inquiry. Specifically, Stevens allegedly agreed to request marketing materials from all of the promoters of Wellbutrin but, after identifying 2,700 such promoters, only contacted 550 of them. After receiving only 40 responses from the 550 contacted promoters, Stevens personally sent written reprimands to 28 promoters after she determined that their materials promoted off-label uses for Wellbutrin and personally gathered information—in one instance including through an in-person meeting—on two doctors known to have promoted Wellbutrin for off-label uses at over 1,000 separate GSK-sponsored events. She also requested from other lawyers and reviewed a "pros and cons" analysis regarding whether to disclose to the FDA that off-label uses of Wellbutrin had been promoted, then determined not to produce any of the marketing presentations to the FDA while representing that GSK's marketing of Wellbutrin

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[3] As this Alert was going to press, Ms. Stevens was acquitted of all charges on a motion for judgment of acquittal following the close of the government's case.

had not promoted off-label uses. Finally, Stevens personally handled GSK's response to a whistleblower's leak of incriminating marketing materials to the FDA. In the response, she stated that the leaked information did "not present any new issues" and provided only the promotional materials from the promoters about whose activities Stevens knew the whistleblower had already told the FDA.

Assuming the allegations are true, the manner in which the internal investigation was handled allegedly allowed Stevens to place her company and herself at greater risk.

- *Dismissal of First Indictment and Re-Indictment*

Stevens raised a variety of legal and procedural challenges to the indictment and indicated that, among other things, she would seek to assert that she lacked the required mental state because she was acting on the advice of counsel. One of her pretrial motions sought disclosure of the prosecutors' statements to the grand jury, on suspicion that they failed to properly instruct the jury regarding the relevance of her acting on the advice of counsel and that they withheld exculpatory evidence.

On March 23, 2011, the court held that the prosecutors had indeed improperly instructed the jury regarding the advice of counsel defense and ordered the indictment dismissed without prejudice. The grand jury transcripts revealed that a grand juror had essentially asked whether advice of counsel was relevant to the charging decision, to which the prosecutors had responded that it was an affirmative defense that Stevens could raise only after she had been charged. The court held, to the contrary, that a defendant's good faith reliance on the advice of counsel is relevant to the initial determination of the defendant's mental state because such reliance negates the defendant's wrongful intent. The court explained that whether or not Stevens had acted in good faith on the advice of counsel was accordingly "highly relevant to the [grand jury's] decision to indict" and was not—as the government has advised the grand jury—an affirmative defense that Stevens could only raise after she had been charged.

The court held that dismissal of the indictment was required for this serious misstatement of applicable law; however, the court held that dismissal without prejudice—leaving the U.S. free to seek another indictment—was appropriate due to the absence of "willful prosecutorial misconduct." The United States promptly secured another grand jury's indictment of Stevens on the same charges on April 13, 2011. Stevens' trial began on April 26, 2011.

- *Lessons*

Under Department of Justice policies, "[w]here the facts and law allow, the Justice Department will pursue individuals responsible for illegal conduct just as vigorously as we pursue corporations." As just one example of this trend, the DOJ has charged over 50 individuals from 2009 to 2010 with crimes related to the Foreign Corrupt Practices Act ("FCPA"), more than six times the number of individuals it charged for such crimes from 2004 to 2005. As Assistant Attorney General Lanny Breuer recently pointed out, "individual wrongdoers must be prosecuted and sent to jail… [because the DOJ is] acutely aware that [they]

cannot allow companies to be seen as 'taking the fall' for executives who may have violated the law."

The Stevens case is yet another reminder that individual culpability does not stop at the underlying wrongful conduct. It can also attach to those individuals responsible for responding to a government inquiry who handle the response improperly. This creates significant risks for both companies and their in-house counsel if they fail to respond properly to government inquiries. Internal investigations can, however, be structured and staffed in such a way as to minimize the chance that those responsible for the internal investigation will become targets themselves.

First, internal investigations in response to government inquiries require a singular focus from the persons responsible for executing the investigation and preparing a response to the government. To protect both the investigators and the company, extreme care and attention must be paid to the receipt, organization, and maintenance of responsive information and to the content of any communications to the government. Internal investigators who wear several hats unrelated to the investigation are at greater risk of making, and potentially compounding, errors in judgment and in investigative practices.

Second, the persons responsible for an internal investigation should have sufficient expertise to appreciate how government investigations proceed and what steps can be taken to ensure the credibility of an internal investigation. Effective planning of an internal investigation requires an understanding of the government processes that likely led to the inquiry and the government's process for pursuing the inquiry and coming to a conclusion about whether wrongdoing occurred. Effective handling of a response to a government inquiry also requires an appreciation of how best to raise issues with government investigations, such as issues about the scope of the inquiry and of any production in response, and how best to ensure that the government investigators will be confident in the credibility of an investigation. Internal investigators without sufficient personal experience or recourse to professionals with such experience are at greater risk of failing to efficiently hand a government inquiry or satisfy the government that the company can be trusted to gather the facts on its own, without government recourse to more intrusive tactics, such as search warrants or interviews of personnel by federal agents.

Third, internal investigations should be structured and staffed to protect the compliance function's independence from unwarranted business or operational pressures. Such pressures may be countervailing to minimizing the risk of improperly responding to a government inquiry, and policies that establish internal investigators' reporting lines to appropriate compliance personnel will reduce the risk of improper pressures and increase the actual or perceived objectivity of the internal investigation. This is not to say that internal investigators should not understand how the affected business unit operates and be mindful of the disruption caused by any internal investigation; indeed, such understanding improves the efficiency of the investigation and increases the likelihood that employees will fully cooperate with the investigation.

Fourth, under some circumstances, professionals from outside the corporation can lend the investigation enhanced credibility and independence. Government authorities often regard the retention of outside professionals in evaluating the "authenticity" of corporate cooperation. Similarly, under November 2010 amendments to the U.S. Sentencing Guidelines, sentencing courts assessing whether a corporation is entitled to a mitigated fine because it has an effective compliance program may consider whether a corporate defendant engaged outside professional advisors to assess their compliance programs in response to detected criminal conduct.

Finally, outside counsel can provide an in-house counsel who has relied in good faith on outside counsel's advice with evidence negating any criminal intent, should the in-house counsel become a target or subject of an official investigation related to the internal investigation. The court's affirmation in the Stevens case that good-faith reliance on the advice of counsel is relevant to the grand jury's charging decision means that a well-documented showing of the grounds for the defense is critical to pre-indictment negotiations with prosecutors and, if successful, could spare in-house counsel the personal, professional, and financial expense of indictment. The defense is more likely to be effective when outside counsel is engaged early in an investigation, when outside counsel has a clear mandate and broad authority to take the lead role in the investigation, and when outside counsel's advice is thoroughly and formally documented. Although the timing and details of Stevens' retention of, and interactions with, her outside counsel are unclear, what is clear is that prosecutors did not believe that the advice of counsel defense (whenever they thought Stevens could raise it) was available to all aspects of Stevens' handling of the Wellbutrin investigation.

The Stevens prosecution—whatever the outcome—is a tragic development for those affected. With proper focus, expertise, and independence, internal investigators can reduce the risk that their handling of an internal investigation will land them in the same unfortunate circumstances.

Pharmaceutical and Medical Device Manufacturers Targeted

Pharmaceutical and medical device manufacturers have long been under the watchful eyes of government regulators and enforcement agencies, both in the United States and abroad. Such companies face stringent regulations and scrutiny regarding product safety, anti-kickback measures, marketing, advertising, and labeling. What many employees of these companies may not know, however, is that their routine business interactions with ordinary customers such as doctors and hospital administrators may constitute interactions with government officials, and therefore may trigger a web of complex anti-corruption laws. The prevalence of state-run health care systems around the world means that arrangements with doctors and hospitals that may be commonplace and legal in some parts of the world will be viewed by enforcement agencies as corrupt payments—or bribes—when the doctors or hospital administrators work for state institutions.

The U.S. government has made clear that the pharmaceutical and medical device industries are a focus for anti-corruption enforcement. In November 2009, Assistant Attorney General Lanny Breuer warned the attendees at an annual pharmaceutical conference of "one area

of criminal enforcement that will be a focus for the Criminal Division in the months and years ahead… [is] the application of the Foreign Corrupt Practices Act (or 'FCPA') to the pharmaceutical industry." Breuer promised an intense effort to root out foreign bribery in the industry and warned that this effort "will mean investigation and, if warranted, prosecution of corporations to be sure, but also investigation and prosecution of senior executives. Effective deterrence requires no less."

The government's efforts have already borne fruit in a dramatic way. Public disclosures and media reports have underscored the sincerity of the Assistant Attorney General's remarks and revealed the intensity of the DOJ's—and the SEC's—focus on the pharmaceutical and medical device industries. For example, this past summer saw the following noteworthy disclosures:

- May 19, 2010: the media reported that Pfizer and Johnson & Johnson were each close to resolving DOJ and SEC investigations into foreign sales practices, and Johnson & Johnson's SEC filings disclosed "issues potentially rising to the level of FCPA violations."

- July 19, 2010: media reports disclosed a DOJ FCPA investigation across three continents into six pharmaceutical companies, including AstraZeneca PLC, Baxter International Inc., Eli Lilly & Co., and Bristol-Myers Squibb Co.

- August 6, 2010: Merck & Co. disclosed its cooperation with a broad review by the DOJ and SEC of "pharmaceutical industry practices in foreign countries."

- August 9, 2010: SciClone Pharmaceuticals disclosed SEC and DOJ investigations into its interactions with government-owned entities in China and a general investigation of FCPA issues in the pharmaceuticals industry.

- August 12, 2010: the media reported that GlaxoSmithKline had received inquiries from the DOJ and SEC regarding possible violations of the FCPA.

Many of these companies have been under investigation for several years, and the consequences may be enormous, given that the DOJ and SEC have been obtaining corporate fines in the millions (and sometimes tens or hundreds of millions) of dollars. The consequences may be particularly severe for pharmaceutical and medical device companies that face the specter of exclusion from federal health care programs if convicted of program-related fraud. Finally, the DOJ has been increasingly seeking prison time for senior executives who bear legal responsibility for improper payments by their companies.

It should hardly come as a surprise that the government's focus on the pharmaceutical and medical device industries is resulting in enforcement actions across those industries. U.S. enforcement agencies previous focused investigations into particular industries or fields have produced some dramatic results. For example, the investigations into the oil and gas sector have resulted in enormous corporate fines, including those against Halliburton/KBR ($579 million),

Snamprogetti/ENI ($365 million), Technip ($338 million), Baker Hughes ($44 million), and Statoil ($21 million). Likewise, the long-running investigation into the U.N.'s Oil-for-Food Programme, first launched in 2002 and still ongoing, has resulted in recent settlements by GE ($23.4 million), Innospec ($40.2 million), AGCO ($20 million), and many others. And it appears this trend will continue; in January 2010, the SEC reportedly sent letters to a various banks requesting information about their business with sovereign wealth funds, potentially indicating a coming sweep of the financial services industry.

U.S. authorities' decision to place pharmaceutical companies squarely in the government's FCPA sights presents the industry with great challenges. In many ways, the anti-corruption pitfalls may be greater in the health care field than elsewhere because of the prevalence around the world of doctors and hospital administrators who happen to be employed by state institutions and therefore may constitute government officials for purposes of anti-corruption laws. Because doctors and hospital administrators in many countries may be considered government employees, some interactions with such customers may be considered corrupt even when similar interactions would be permissible in the highly regulated U.S. health care market. This especially presents risks for U.S. companies, which are increasingly reliant on foreign sales. But the pitfalls may be equally great for non-U.S. companies, whose executives often do not even realize that they may be subject to the broad jurisdictional reach of the U.S. Foreign Corrupt Practices Act.

FCPA SETTLEMENTS AND CRIMINAL MATTERS[4]

2011[5]

Ball Corporation

On March 24, 2011, the Ball Corporation ("Ball"), a publicly traded manufacturer of metal packaging for beverages, food, and household products based in Broomfield, Colorado, settled FCPA books and records and internal controls charges with the SEC. As part of the settlement, Ball agreed to pay a $300,000 civil penalty and consented to a cease-and-desist order, while neither admitting or denying the factual allegations.

The SEC charges stemmed from the actions of the company's Argentinean subsidiary, Formametal S.A. ("Formametal"), which Ball acquired in March 2006. The SEC alleged that, beginning in July 2006 and into October 2007, Formametal employees made at least ten illegal payments totaling approximately $106,749 to local Argentinean government officials. Payments were made with the authorization or acquiescence of Formametal's President and were in some instances arranged by the Vice President of Institutional Affairs (the "Vice President"), an Argentinean national who had previously been Formametal's President and owner.

Over $100,000 of the illegal payments were allegedly made to Argentinean customs officials, usually in hopes of circumventing local laws that prohibited the importation of used equipment and parts. These payments were improperly recorded as ordinary business expenses such as "fees for customs assistance," "customs advisory services," "verification charge," or "fees." One of these bribes was paid by the Vice President from his own funds, after which he was reimbursed in the form of a company car. Formametal initially booked the transfer as an interest expense, and later, after two Ball accountants learned in February 2007 it was reimbursement of a bribe, changed it to a miscellaneous expense. The SEC found that neither description was sufficient as the transfer was not accurately described as a reimbursement for an illegal payment. The SEC also alleged that in 2007 Formametal paid a bribe, authorized by its President, in hopes of obtaining an export duty waiver so as to avoid Argentina's high tariff on the export of domestic copper, generally 40% of the copper's value. The payment was funneled through Formametal's third party custom agent in five installments, although the company ultimately did not make any exports pursuant to the illegal payment. The payments were improperly recorded as "Advice fees for temporary merchandise exported."

The SEC found that Ball had "weak" internal controls, which made it difficult for the company to detect the subsidiary's repeated violations and allowed for the violations to continue

[4] 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.

[5] Cases and settlements have been organized by the date of the first significant charging or settlement announcement; recent events regarding longstanding cases may be included in the materials in Part II of this Alert.

into October 2007. Among the failings highlighted by the SEC was an insufficient response to an internal report produced by an analyst in Ball's general accounting group in June 2006—shortly after the subsidiary was acquired—identifying prior questionable payments, dishonest customs declarations, and document destruction. Although by the time of the report Ball had demoted Formametal's President and replaced the Chief Financial Officer, it did not, in the SEC's view, take further action sufficient to prevent future misconduct.

The SEC noted in the settlement order that it did not impose a higher civil penalty due to Ball's cooperation in the SEC investigation and related enforcement action. The DOJ reportedly closed its investigation without taking any enforcement action.

IBM

On March 18, 2011, International Business Machines Corporation ("IBM") agreed to settle FCPA books and records and internal controls charges with the SEC stemming from alleged improper cash payments and gifts, travel, and entertainment provided to government officials in South Korea and China. According to the SEC, IBM subsidiaries and an IBM joint venture provided South Korean government officials with approximately $207,000 in cash bribes, gifts, and payments of travel and entertainment expenses and engaged in a widespread practice of providing overseas trips, entertainment, and gifts to Chinese government officials. Without admitting or denying the SEC's allegations, IBM agreed to pay $8 million in disgorgement and prejudgment interest and a $2 million civil penalty. IBM also consented to the entry of a final judgment that permanently enjoins it from violating the books and records and internal control provisions of the FCPA.

- *South Korea*

According to the SEC, from 1998 to 2003, employees of an IBM-subsidiary IBM Korea, Inc. ("IBM Korea") and the IBM majority-owned joint venture LG-IBM PC Co., Ltd. ("LG-IBM") provided approximately $207,000 in cash bribes, gifts, travel, and entertainment to employees of South Korean government entities. Members of IBM Korea's management personally delivered IBM Korea company envelopes and shopping bags filled with cash to these officials in exchange for their assistance to designate IBM Korea as the preferred supplier of mainframe computers to the South Korean government, to secure contracts for IBM Korea business partners, and to ensure that the South Korean government would purchase IBM computers at higher-than-normal prices.

A manager at LG-IBM also directed an LG-IBM business partner to "express his gratitude"—in the form of a cash payment—to a South Korean official that facilitated the award of a contract to IBM despite performance problems identified in a benchmarking test of LG-IBM computers. The business partner was in turn "adequately compensated by generous installation fees" from IBM in exchange for acting as an intermediary. Employees of the government entity were also given free LG-IBM laptop computers to entice them to purchase IBM products.

Separately, an employee of LG-IBM made a cash payment of over $9,000 to a manager of a state-owned entity in order to secure a contract for personal computers. LG-IBM submitted a low bid to win the contract. After the contract was won, the employee and the manager went into the manager's office and replaced the tendered bid sheet with a new bid sheet showing a higher price that was closer to the state-owned entity's internal target price. After securing the contract, the LG-IBM employee directed an LG-IBM business partner to overbill LG-IBM for installation costs in order to conceal a cash payment to the agency manager.

Overbilled installation costs were also used on at least one other occasion to fund payments (in the form of cash and entertainment) to a South Korean government official in exchange for confidential information and to secure government contracts.

The complaint further alleged that LG-IBM paid the business partner for non-existent software services, funds from which the business partner then kicked back to an LG-IBM Direct Sales Manager who used the money to pay for gifts, entertainment (including entertainment provided by a "hostess in a drink shop"), and travel expenses for officials at South Korean government entities. The LG-IBM Direct Sales Manager also funded entertainment expenses by billing the South Korean government for laptop computers that it did not provide. Key decision makers were also given free computers and computer equipment to encourage them to purchase IBM products or assist LG-IBM in securing government contracts.

- *China*

The SEC also alleged that, from at least 2004 to 2009, more than 100 employees of the IBM (China) Investment Company Limited and IBM Global Services (China) Co., Ltd. (collectively "IBM China"), including "two key IBM China managers," created slush funds to finance travel expenses, cash payments, and gifts provided to officials of government-owned or controlled customers in China. IBM China provided improper travel and travel reimbursement in spite of an IBM policy requiring IBM China managers to approve all expenses and require customers (in this case, government officials) to personally fund any non-training related travel and side-trips. According to the SEC, IBM's internal controls failed to detect at least 114 instances where IBM China submitted false travel invoices, invoices for trips not connected to customer training, invoices for unapproved sightseeing for Chinese government employees, invoices for trips with little or no business content, and invoices for trips where per diem payments and gifts were provided to Chinese government officials. Employees at IBM China also funded unauthorized travel by designating travel agents as "authorized training providers," who then submitted fraudulent purchase requests for "training services" that could be billed to IBM China.

The DOJ has not released any comment on whether it intends to bring a parallel enforcement action.

Tyson Foods, Inc.

On February 10, 2011, Tyson Foods, Inc. ("Tyson") entered into a Deferred Prosecution Agreement ("DPA") with the DOJ and settled with the SEC for FCPA violations in connection with improper payments by Tyson's wholly-owned Mexican subsidiary, Tyson de Mexico ("TM"). Tyson is one of the world's largest processors of chicken and other food items. TM comprises approximately 1% of Tyson's total net sales.

According to the DPA's statement of facts, which Tyson stipulated was true and accurate, meat-processing facilities in Mexico must undergo an inspection program administered by the Mexican Department of Agriculture ("SAGARPA") called *Tipo Inspección Federal* ("TIF"), before the facilities may export products. As part of this certification process, on-site government veterinarians supervise the inspection program at the facility and ensure that all products are in conformity with Mexican health and safety laws. As described in the DOJ DPA, Mexican law has two categories of government TIF veterinarians: "approved" and "official." Mexican law permits "approved" veterinarians to charge the facility they supervise a fee for their services in addition to their government salary. However, once a veterinarian becomes "official," they receive all of their salary from the Mexican government and are not permitted to receive any payment from the facility.

The DPA indicates that from the time of Tyson's acquisition of TM in 1994 to May 2004, TM made $260,000 in improper payments to two TIF veterinarians, who for a majority of that time period were of "approved" status. These payments took the form of "salaries" to the veterinarians' wives, even though the wives did not perform any service for the company, and later through invoices submitted by one of the veterinarians. Between June 2003 and May 2004, the status of two TIF veterinarians was changed from "approved" to "official." Despite the change in status, TM continued to make payments to the veterinarians totaling at least $90,000 from fiscal year 2004 through 2006 to influence the veterinarians' decision making in the TIF process.

According to the DOJ, in June 2004, a TM plant manager discovered that the veterinarians' wives were on TM's payroll despite providing no services to the company and alerted a Tyson accountant of the situation. After a series of internal meetings between several Tyson and TM senior management officials in July 2004, it was agreed that the veterinarians' wives would no longer receive payments but several of the officials were tasked with exploring how to shift the payments directly to the veterinarians. On July 29, 2004, a senior executive at Tyson approved a plan to replace the payroll payments made to the veterinarians' wives with invoice payments made directly to the veterinarians. When an auditor at Tyson responsible for TM raised concerns in August 2004 about incomplete payroll accounting records from TM while noting "I am beginning to think they are being intentionally evasive," a Vice President in Tyson's Internal Audit department responded "Let's drop the payroll stuff for now." By the end of August 2004, TM began paying the veterinarians an equivalent amount as the wives' salaries through invoices submitted by one of the veterinarians.

In September 2005, a TM plant manager expressed discomfort with authorizing the invoice payments. In response, the general manager of TM emailed the plant manager that he had talked to a Tyson senior executive and "he agreed that we are OK to continue making these payments against invoices (not through payroll) until we are able to get TIF/SAGARPA to change." These payments were recorded as legitimate expenses in TM's book and records, and were consolidated with Tyson's reported financial results for fiscal years 2004, 2005 and 2006. During those years, Tyson recognized net profits of more than $880,000 from TM.

Tyson discovered these improper payments in November 2006 during an internal investigation and, in 2007, the company voluntarily disclosed the misconduct to the DOJ and the SEC. Pursuant to the DPA, Tyson agreed to self-report to the DOJ periodically, at no less than six-month intervals, regarding its remediation and implementation of compliance activities for the duration of the two year DPA.

In total, Tyson agreed to pay approximately $5.2 million, of which $4 million was a monetary penalty to the DOJ, which filed a two count criminal information including one charge for conspiracy to violate the books and records, internal controls and anti-bribery provisions of the FCPA and a second combined charge of violations of the anti-bribery and books and records provisions of the FCPA and aiding and abetting such violations. The monetary penalty was approximately 20% below the minimum amount suggested by the guidelines as described in the DPA. A significant factor behind this lower monetary penalty was that "the organization, prior to an imminent threat of disclosure or government investigation, within a reasonably prompt time after becoming aware of the offense, reported the offense, fully cooperated, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct."

The SEC had charged Tyson with violating the anti-bribery, books and records, and internal controls provisions of the FCPA. Without admitting or denying the SEC's allegations, Tyson consented to the entry of a final judgment ordering disgorgement plus pre-judgment interest of more than $1.2 million and permanently enjoining it from violating the anti-bribery, books and records, and internal controls provisions of the FCPA.

Maxwell Technologies

On January 31, 2011, Maxwell Technologies, Inc. ("Maxwell") entered into a DPA with the DOJ and settled with the SEC for FCPA-related violations stemming from improper payments to officials of various Chinese state-owned entities. Maxwell manufactures energy storage and power supply products in the U.S., Switzerland, and China, and is an issuer under the FCPA because its shares, listed on NASDAQ, are registered with the SEC. The SEC and DOJ had charged Maxwell with violations of the FCPA's anti-bribery and books and records provisions, while the SEC also alleged violations of the FCPA's internal controls provisions as well as Section 13(a) of the Exchange Act and Rules 13a-1, 13a-13, and 12b-20. Maxwell agreed to pay an $8 million criminal penalty to the DOJ and $6.35 million in disgorgement and prejudgment interest to the SEC to resolve U.S. authorities' investigations. According to the DPA, which has a term of three years and seven days, the criminal penalty was 25% below the bottom end of the range recommended by the U.S. Sentencing Guidelines due to, among other

things, Maxwell's voluntary disclosure, full cooperation with U.S. authorities' investigation, and agreement to cooperate with the government's ongoing investigation. In addition, Maxwell agreed to report to the DOJ, at no less than 12-month intervals for three years, on the remediation and implementation of its compliance program and internal controls.

The DPA states that from July 2002 through May 2009, Maxwell made approximately $2,789,131 in improper payments to Chinese foreign officials through Maxwell Technologies S.A. ("Maxwell S.A."), the company's wholly-owned Swiss subsidiary. Maxwell made these payments through a Chinese agent by, at the agent's instruction, over-invoicing state-owned customers and passing the surplus on to the agent, who then used the amount to bribe officials at the same state-owned customers. Maxwell admitted that members of its U.S. management "discovered, tacitly approved, concealed, and caused to be concealed" this bribery scheme in 2002. Its management discussed—over e-mail—that the scheme "would appear" to be "a kick-back, pay-off, bribe . . . given that we cannot obtain an invoice or other document that identifies what the payment is for." In response, one senior executive advised that the issue was well known and instructed the others, "No more e-mails please." After the 2002 discovery, annual payments to the Chinese agent increased from $165,000 to $1.1 million by 2008. Maxwell then improperly recorded such payments as sales commissions in its books and records.

According to the SEC's separate allegations, which Maxwell neither admitted nor denied in its settlement with the SEC, the bribery scheme again came to light during a 2008 internal review of Maxwell S.A.'s commission expenses after Maxwell's management team learned of the unusually high commissions paid to the Chinese agent. During the review, Maxwell's management team requested information about the high payments to the agent. In response, Maxwell's finance department obtained a signed certification from the agent stating that he was familiar with the FCPA and local laws on corruption. Satisfied with the declaration, Maxwell took no further action in 2008. In 2009, however, Maxwell S.A.'s sales director was notified by the Chinese agent—in person while on a business trip to China—that cash transfers listed on the agent's invoices to Maxwell as "extra amounts" were being transferred back to "customers" at state-owned entities. The agent subsequently told the company that a Senior Vice President, who was also General Manager of Maxwell S.A., "had known [of] and approved of the… arrangement…." Maxwell's CEO informed the audit committee and outside counsel of the agent's disclosures and, following the agent's statements concerning the Senior Vice President, Maxwell publicly disclosed the information to investors in its May 5, 2009 quarterly report for the period ended March 31, 2009. The Senior Vice President identified by the agent left the company in July 2009. According to the SEC, the improper payments generated approximately $15.4 million in revenue and profits of more than $5.6 million.

Maxwell provided relatively detailed disclosures in its March 31, 2010 10-Q quarterly report regarding the progress of its settlement talks with U.S. authorities and generated some media controversy as a result. Anticipating a monetary penalty in connection with a resolution of the DOJ and SEC investigations, Maxwell reported that the company recorded an accrual of $9.3 million in the fourth quarter of 2009 and explained that this amount:

> [W]as based on the Company's estimation of loss as required under GAAP and discussions with both government agencies. These discussions have resulted in an estimate of a potential settlement range of $9.3 million to $20.0 million. The top end of the range of $20.0 million represents the combined first offer of settlement put forth by the relevant governmental agencies.

On July 28, 2010, during the Q2 2010 earnings call, Maxwell's CFO informed investors that Maxwell had negotiated "an agreement in principle" to pay the SEC approximately $6.35 million over two installments. The CFO further disclosed that the DOJ had indicated that it would accept a penalty of $8 million to resolve the investigation, but that the company was still negotiating with DOJ and had offered $6.35 million. During the call, the CFO stated that because the settlement offers were ongoing there could be no assurance that the settlement with the SEC would be approved or that the company could settle with the DOJ for $6.35 million. Maxwell released a press release regarding this call on July 29, 2010. One day later, on July 30, 2010, Maxwell issued another press release with the statement as shown below:

> The Department of Justice has not indicated a specific settlement amount or other terms that would be acceptable to settle the ongoing investigation of alleged FCPA violations. As with all potential settlements with the DOJ, there are numerous other aspects of the settlement, in addition to the monetary penalties, that also need to be resolved.

Media reports speculated that the immediate clarification was the result of DOJ displeasure with the detailed public disclosure concerning the DOJ's negotiating position. However, although Maxwell did later increase its accrual to $8 million, the final penalty amount was no different than the DOJ's position that Maxwell disclosed during the June 28, 2010 earnings call.

2010

Alcatel-Lucent

Alcatel-Lucent S.A. is a French telecommunications company that provides products and services to voice, data, and video communication service providers. Alcatel-Lucent, and Alcatel S.A. before the November 30, 2006, merger that created Alcatel-Lucent (collectively, "Alcatel"), registered American Depositary Shares with the SEC that were traded on the New York Stock Exchange as American Depositary Receipts ("ADRs"). Accordingly, Alcatel was an issuer covered by the FCPA. An FCPA investigation into Alcatel S.A.'s merger partner, Lucent Technologies, Inc., was resolved in 2007 and is described later in this Alert.

On December 27, 2010, Alcatel-Lucent formally resolved investigations into FCPA violations in Costa Rica, Honduras, Malaysia, Taiwan, Kenya, Nigeria, Bangladesh, Ecuador, Nicaragua, Angola, Ivory Coast, Uganda, and Mali. This resolution had been previously disclosed on February 11, 2010, when Alcatel-Lucent stated that in December 2009 it reached agreements in principle with the SEC and DOJ to resolve their ongoing investigations. Alcatel-Lucent entered into a DPA with the DOJ and three Alcatel-Lucent subsidiaries—Alcatel-Lucent

France, S.A. (formerly Alcatel CIT, S.A.), Alcatel-Lucent Trade International A.G. (into which Alcatel Standard A.G. was merged in 2007), and Alcatel Centroamerica S.A. (formerly Alcatel de Costa Rica S.A.)—are expected to plead guilty to criminal informations charging them with a conspiracy to violate the FCPA's anti-bribery and accounting provisions. These three subsidiaries were persons other than issuers or domestic concerns who were subject to the FCPA for acts in the U.S. in furtherance of the FCPA violations.

Pursuant to its DPA, Alcatel-Lucent paid a monetary penalty of $92 million, agreed to retain an independent compliance monitor for three years, and agreed to enhance its compliance program. As is the case with Technip, Alcatel-Lucent's DPA states that the monitor is to be a "French national" and contains language designed to ensure that the monitorship is compliant with French law, including French data protection and labor laws, such as the French Blocking Statute. The DOJ stated that the monetary penalty was higher due to "limited and inadequate cooperation" by Alcatel S.A. "for a substantial period of time" until, after the 2006 merger with Lucent Technologies, Inc., Alcatel-Lucent "substantially improved its cooperation." The DOJ further stated that it gave Alcatel-Lucent credit for, "on its own initiative and at a substantial financial cost, making an unprecedented pledge to stop using third-party sales and marketing agents in conducting its worldwide business."

To resolve the SEC's investigation, Alcatel-Lucent, without admitting or denying the SEC's allegations, consented to an injunction against further FCPA violations, agreed to improve its compliance program, and paid $45,372,000 in disgorgement and prejudgment interest. The SEC alleged that corrupt payments made by Alcatel or its subsidiaries were either undocumented or recorded improperly as consulting fees and that "leaders of several Alcatel subsidiaries and geographical regions, including some who reported directly to Alcatel's executive committee, either knew or were severely reckless in not knowing about the misconduct."

The combined monetary penalties of more than $137 million is one of the largest-ever FCPA settlements. The DOJ also acknowledged the "significant contributions" to its investigation by numerous U.S., Costa Rican, and French authorities.

The following summary of the underlying facts is from Alcatel-Lucent's admissions in its DPA and from public information regarding U.S. or foreign enforcement investigations or actions.[6] Many of the admissions provide concrete examples of what facts and circumstance that, at least in the eyes of U.S. authorities, constitute "red flags" that require additional anti-corruption due diligence of potential business partners or establish a sufficient basis for FCPA liability due to an awareness of merely a high probability that payments to third parties will be passed on to foreign officials to assist in obtaining or retaining business.

6 The DPA and DOJ charging instruments cover a much broader set of conduct than is described in the SEC complaint, which limits itself to conduct in Costa Rica, Malaysia, Taiwan, and Honduras.

- *Business Practices and Internal Controls*

A significant portion of the facts admitted by Alcatel-Lucent concerned the failure of Alcatel's business practices and internal controls to detect and prevent corruption. The inadequate practices and controls singled out in Alcatel's DPA included:

  - Pursuing business through the use of third-party agents and consultants even though this was a business model "shown to be prone to corruption" because such third parties "were repeatedly used as conduits for bribe payments";

  - Allowing decentralized initial vetting of third parties by local employees "more interested in obtaining business than ensuring that business was won ethically and legally"; and

  - Allowing review of such initial vetting by the CEO at another subsidiary, Alcatel Standard (the "Alcatel Standard Executive"), who "performed no due diligence of substance and remained, at best, deliberately ignorant of the true purpose behind the retention and payment to many of the third-party consultants."

Specifically, the Alcatel Standard Executive's due diligence included "no effort, or virtually no effort, to verify" information gathered under Alcatel's approval procedures, beyond using Dun & Bradstreet reports to confirm the consultant's existence and physical address. Where the Dun & Bradstreet reports showed problems, inconsistencies, or red flags, "typically nothing was done."

Alcatel also admitted that "[o]ften senior executives… knew bribes were being paid, or were aware of the high probability that many of these third-party consultants were paying bribes, to foreign officials to obtain or retain business." As evidence of the executives' knowledge, Alcatel admitted that many consultants' contracts were not executed until after Alcatel had already obtained the customer's business, that consultants' commissions were excessive, that multiple consultant companies owned by the same person were sometimes hired for the purpose of obscuring excessive commission payments, and that lump sum payments that did not correspond to a contract were made to consultants. Alcatel, certain subsidiaries, and certain employees also knew, or purposefully ignored, that internal due diligence forms were not accurate, that many of the invoices submitted by third parties falsely claimed that legitimate work had been completed, and that payments were being passed to foreign officials.

- *Costa Rica*

Alcatel-Lucent admitted that corrupt payments to Costa Rican officials earned Alcatel CIT a profit of more than $23.6 million on more than $300 million in contracts.

Christian Sapsizian, a French citizen and Alcatel CIT's Director for Latin America, and Edgar Valverde Acosta, a Costa Rican citizen and president of Alcatel de Costa Rica ("ACR") negotiated consultancy agreements with two third-party consultants on behalf of Alcatel CIT for the purpose of making improper payments to Costa Rican officials to assist in obtaining business

in Costa Rica. Alcatel Standard (on behalf of Alcatel CIT) signed at least five consulting contracts with Servicios Notariales, which was headed by Valverde's brother-in-law, a fact Valverde omitted from the company profile he prepared. The contracts contained commissions as high as 9.75%, which was "a much higher commission rate" than Alcatel "normally awarded to a legitimate consultant," in exchange for "vaguely-described marketing and advisory services." Servicios Notariales created 11 false invoices between 2001 and 2003, totaling approximately $14.5 million. The other consultant, Intelmar, received at least four consulting agreements for "vaguely-described advisory services," under which Intelmar submitted inflated invoices for $3 million between 2001 and 2004. These payments were made through a bank in New York.

These payments and other moneys were corruptly given to foreign officials to secure three contracts for Alcatel CIT with Costa Rica's government-owned telecommunications company, the Instituto Costarricense de Electricidad ("ICE"). Sapsizian and Valverde obtained the first two contracts in 2001, together worth approximately $193.5 million, after promising an ICE official between 1.5% and 2.0% of the value of the second contract. The ICE official assisted with ensuring that the second contract would be based on a technology offered by Alcatel, rather than a technology offered by a competitor that Alcatel did not offer, and later agreed to share part of his payment with a senior Costa Rican official. In 2002, Alcatel secured the third contract, worth approximately $109.5 million, through payments to Costa Rican officials of $7 million passed through Servicios Notariales and $930,000 passed through Intelmar. Sapsizian and Valverde also enriched themselves through kickbacks of $300,000 and $4.7 million, respectively, from the payments made to Servicios Notariales.

Sapsizian, on behalf of Alcatel CIT, also rewarded ICE officials for selecting Alcatel for the third contract with $25,000 in travel, hotel, and other expenses incurred "during a primarily pleasure trip to Paris" in October 2003. Alcatel admitted that these reimbursements were not bona fide promotional expenses under the FCPA.

Alcatel's internal controls failed to detect or prevent these improper payments. The regional president supervising Sapsizian approved the payments to Servicios Notariales, despite telling Sapsizian "on several occasions" that the regional president "knew he was 'risking jail time' as a result of his approval of these payments," which the regional president "understood would, at least in part, ultimately wind up in the hands of public officials." The Alcatel Standard executive, mentioned above, also improved the retention and payment of these consultants "despite… obvious indications" that they were performing "little or no work yet receiving millions of dollars… reflecting a significant percentage of the payments in question." Neither Alcatel nor its subsidiaries "took sufficient steps" to ensure the consultants' compliance with the FCPA or "other relevant anti-corruption laws."

Sapsizian and Valverde were charged with criminal offenses relating to their conduct. On June 7, 2007, Sapsizian pleaded guilty to violating the FCPA's anti-bribery provisions and conspiring to do so. On September 30, 2008, he was sentenced to 30 months in prison, three years of supervised release, and ordered to forfeit $261,500 in criminal proceeds. Valverde was charged as Sapsizian's co-defendant, but remains a fugitive.

French and Costa Rican authorities are also investigating the above conduct. French authorities are investigating Alcatel CIT's use of consultants in Costa Rica. Costa Rican authorities and ICE instituted criminal, civil, and administrative proceedings relating to the improper payments. In January 2010, Alcatel-Lucent France, as the successor to Alcatel CIT, settled for $10 million civil charges brought by the Costa Rican Attorney General for the loss of prestige to the nation of Costa Rica (characterized as "social damage"). Criminal proceedings are ongoing against several Costa Rican individuals, Alcatel continues to face a variety of civil and administrative actions in Costa Rica, and in 2008 ICE's board terminated the operations and maintenance portion of the third contract described above.

- *Honduras*

Alcatel CIT, ACR, and Sapsizian also pursued business opportunities in Honduras with the assistance of Alcatel Mexico. Until late 2002, the state-owned telecommunications company Empresa Hondureña de Telecomunicaciones ("Hondutel") was responsible for evaluating and awarding telecommunications contracts on behalf of the Honduran government. The Comisión Nacional de Telecomunicaciones ("Conatel") was the Honduran government agency that oversaw Hondutel's activities and regulated the telecommunications industry in Honduras. From 2002 to 2003, Alcatel was awarded approximately $48 million of Honduran government contracts and was able to retain its business despite "significant performance problems." Alcatel earned profits of approximately $870,000 on these contracts.

To assist with its efforts to obtain or retain business in Honduras, Alcatel hired a local third-party consultant to provide vaguely-described services that included "maintaining liaisons with appropriate government officials." Alcatel admitted that Alcatel Standard knowingly failed to conduct appropriate due diligence on the consultant by failing to follow-up on "numerous, obvious red flags," including:

- The consultant had no experience in the telecommunications industry; instead, a company profile of the consultant, which was submitted as part of Alcatel's due diligence process and signed by the consultant and Alcatel's local area president, listed the consultant's main business as the distribution of "fine fragrances and cosmetics in the Honduran market," while the Dun & Bradstreet report on the consultant described him as a door-to-door cosmetics salesman;

- The consultant was selected by the brother of a senior Honduran government official. The official's brother regularly communicated with Alcatel using an e-mail address from a domain name associated with the senior official; and

- The senior official's brother once contacted the local area president in an attempt to collect commissions owed to the consultant, and the senior official personally followed-up on this request.

Alcatel also admitted that Alcatel CIT executives approved unspecified payments to the consultant while knowing that a significant portion of the payments would be passed on to the family of the senior Honduran official, with the high probability that some or all of the payments

would be passed on to the senior government official. In addition to these commissions, Alcatel reimbursed numerous "primarily pleasure" trips to Europe for an official who provided Alcatel with confidential information about competitors' bids for Hondutel contracts, a trip to Europe for another official and his spouse, an educational trip for that official's daughter, and a trip to Paris for a Hondutel in-house attorney who worked on one of the contracts awarded to Alcatel.

- *Malaysia*

The largest client of Alcatel Network Systems Malaysia Sdn. Bhd. ("Alcatel Malaysia"), a majority-owned Alcatel subsidiary, was Telekom Malaysia Bhd. Telekom Malaysia was the largest telecommunications company in Malaysia and was controlled by the Malaysian government, which held a 43% ownership interest. Celcom was the Telekom Malaysia subsidiary that handled mobile communications services. In connection with an $85 million contract tender, which Alcatel won, and other unspecified business opportunities, Alcatel Malaysia and Alcatel Standard knowingly circumvented Alcatel's internal controls and caused Alcatel's books and records to contain inaccurate and false information.

Efforts to circumvent Alcatel's internal controls took a variety of forms. From 2004 to 2006, Alcatel Malaysia's management approved 17 improper payments to Telekom Malaysia employees for nonpublic information about Celcom public tenders. Eight of the payments related to the public tender of the $85 million contract. Many of these payments were made against false invoices for "document fees," although one invoice was for the "purchase of tender documents." In 2005 and 2006, despite being aware of "significant risk" that two Malaysian consultants were merely conduits for passing improper payments on to Malaysian government officials, Alcatel Standard retained the consultants at $500,000 each to generate reports that were never prepared. One the consultants also worked for Alcatel Malaysia under a series of "gentlemen's agreements" before any formal contract was executed. Finally, Alcatel Malaysia's complete lack of policies and controls concerning gifts, travel, and entertainment for customers allowed Alcatel Malaysia to give unspecific "lavish gifts" to Telekom Malaysia officials.

- *Taiwan*

Taiwan's Ministry of Justice investigated an Alcatel-Lucent subsidiary, Alcatel-Lucent Deutschland A.G. (formerly known as Alcatel SEL, A.G.), and an Alcatel-Lucent joint venture (and Siemens A.G. distributor), Taiwan International Standard Electronics, Ltd. ("Taisel"), regarding allegations of bid-rigging and improper payments to officials surrounding the state-owned Taiwan Railway Administration's ("TRA") awarding of an axle-counter supply contract to Taisel in 2003. Following an internal investigation by Alcatel, it terminated Taisel's president and accepted the resignation of an Alcatel-Lucent Deutschland director of international sales. In criminal proceedings from 2005 through 2009, Taiwanese courts acquitted, and subsequently 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.

In resolving the U.S. authorities' investigations, Alcatel admitted that Alcatel Standard retained two consultants on behalf of Alcatel SEL to assist with the axle-counting, that these consultants claimed to have close relationships with Taiwanese legislators who were believed to have influence over the awarding of the axel-counter contract, that Alcatel paid these consultants more than $950,000 even though they had no telecommunications experience and provided no legitimate services, and that Alcatel used the consultants to make indirect, corrupt payments to Taiwanese legislators who could influence the award of the axel-counting contract.

As was the case with the consultants in Costa Rica and Honduras, Alcatel Standard retained these consultants without conducting adequate due diligence. Regarding one consultant, the Dun & Bradstreet report indicated that the contact information provided did not relate to the consultant, and a company profile (that was not signed by the required internal personnel until after-the-fact) indicated that the consultant had no relevant market experience or knowledge. Alcatel SEL wired a purported commission of more than $900,000 to this consultant after Alcatel had won the TRA contract, which the consultant than passed on to two legislators, one of whom had argued to TRA that Alcatel SEL met the technical requirements of the contract. The consultant also promised $180,000 in campaign contributions to one of the legislators and paid for travel and gifts to staff of the other legislator and a government minister, including a $3,000 set of crystal given to the minister's secretary.

A second Taiwanese consultant retained by Alcatel was the brother of a third legislator who had influence over TRA matters. At a meeting between an Alcatel SEL executive, the consultant, and the legislator, the legislator demanded a 2% success fee, paid through his brother, in exchange for the axle-counting contract. Alcatel SEL subsequently made payments to the brother through a bogus consulting contract for $383,895 between Taisel and the consultant, under which the consultant was never expected to provide any legitimate services to Taisel.

Ultimately, Alcatel SEL was awarded a $19.2 million axel-counting contract from TRA, on which Alcatel earned approximately $4.34 million in profits.

- <u>*Kenya*</u>

Alcatel's improper payments in Kenya concerned competition for an $87 million frame supply contract to a telecommunications joint venture. The joint venture was between an unnamed French "telecommunications and entertainment company" and a Kenyan company. Although the particular ownership structure of this joint venture is not disclosed, the joint venture had to have been at least 60%-owned by the Kenyan partner for the joint venture to have won the underlying telecommunications license. The frame supply contract included construction of a switching center, operations and maintenance center, and mobile network base stations. Alcatel CIT bid on the contract and was short-listed to make a final bid against one competitor.

Although bids were to be made formally to the joint venture, personnel from the French telecommunications and entertainment company handled the bidding process itself. The French

company informed Alcatel CIT that it would win the bid if an Alcatel entity paid $20 million to an intermediary. Alcatel agreed to this condition.

The improper payment was not made until after Alcatel was formally awarded the contract in February 2000. At the French company's direction, Alcatel hired the intermediary and rolled the intermediary's fees into the contract price. The French company was then able to restructure Alcatel's contract with the joint venture to increase the price to cover the intermediary's fees. The French company explained to Alcatel that the purpose of this arrangement was to pass money directly to its Kenyan joint venture partner. Alcatel Standard approved of this arrangement and was the entity that formally hired the intermediary. Alcatel reflected this arrangement on its books by increasing the price of its contract with the joint venture, which was not an accurate and fair reflection of the transaction. Alcatel also entered into a side agreement that had the effect of entitling it to reimbursement of its payments to the intermediary if Alcatel's contract with the joint venture were cancelled.

Alcatel admitted that, because Alcatel Standard knew that it would be difficult to justify a $20 million payment to one consultant, the payment was structured into several smaller transactions through three different banks to two different consulting companies, both of which were affiliated with the intermediary and one of which Alcatel Standard knew to be an offshore holding of the Kenyan joint venture partner. Payment to one of the companies was also made under a separate contract relating to a second telecommunications license. Although the intermediary provided monthly reports and economic intelligence on the telecommunications market in Africa, the intermediary failed to provide any information related to a second license or the Kenyan telecommunications market.

Ultimately, Alcatel admitted that there was "a high probability" that all or part of the payments to the intermediary would be ultimately passed on to Kenyan officials who had played a role in awarding the contract to the unnamed French company because of the following facts known to Alcatel: (i) the payments to the intermediary were "huge"; (ii) the intermediary performed "little legitimate work" in connection with the second license purportedly underlying one of the consulting contracts; and (iii) the intermediary's second company was an offshore holding of the Kenyan joint venture partner.

Alcatel has also disclosed that it understands that French authorities are "conducting an investigation to ascertain whether inappropriate payments were received by foreign public officials" in connection with payments by Alcatel CIT to a consultant "arising out of a supply contract between CIT and a privately-owned company in Kenya," which was the same supply contract that Alcatel had disclosed to the DOJ and SEC. Alcatel is cooperating with the French authorities and has submitted to them the findings of an internal investigation regarding those payments, which Alcatel had also submitted to the DOJ and SEC.

- *Nigeria*

Alcatel admitted that its books and records failed to fairly and accurately describe numerous payments by Alcatel subsidiaries to Nigerian officials for several purposes, including

to reduce tax or other liabilities, to obtain security services from Nigerian police, to recover a debt legally owed to Alcatel subsidiary ITT Nigeria of $36.5 million, and to benefit a political party official. Alcatel also failed to properly record a payment of $75,000 to a former Nigerian Ambassador to the United Nations to arrange meetings between Alcatel and a high-ranking Nigerian executive branch official.

Alcatel also paid more than €9.9 million to three consultants for the benefit of a senior executive at a private Nigerian telecommunications company. Some of the payments were made through a consultant known to have "significant connections" to a senior Nigerian government official, after which an affiliate of the Nigerian telecommunications company won the bid for a telecommunications license but then lost the license for failure to pay the required fee. The other payments were made through three different banks to consultants owned, at least partially, by a relative of the senior executive. Alcatel admitted that these payments were for the purpose of securing contracts between Alcatel subsidiaries and the private Nigerian telecommunications company and that this purpose was not reflected on Alcatel's books.

Following a voluntary disclosure to French and U.S. authorities, Alcatel disclosed that French authorities have "requested… further documents related to payments made by its subsidiaries to certain consultants in Nigeria" and that Alcatel responded to the request as part of its continued cooperation with French and U.S. authorities.

- *Bangladesh*

Alcatel admitted to paying a consultant $626,492 in commissions after Bangladesh's state-controlled telecommunications services provider abandoned a prior project being performed by a competitor for a project by Alcatel that was allegedly inferior on a cost/benefit basis. Alcatel paid the same consultant more than $2.5 million from 1997 to 2006 in connection with upgrades to an older telecommunications project. Alcatel admitted, without providing a detailed basis, that Alcatel Standard "was aware of a significant risk," at the time the payments were made, that the consultant "would pass all or part of these payments to foreign officials."

- *Ecuador & Nicaragua*

Alcatel paid a consultant, a wealthy local businessman with a "longstanding relationship" with the Alcatel Standard Executive who approved third-party consulting contracts, 10-14% commissions for assistance with obtaining or retaining business from three state-owned telecommunications companies in Ecuador. Because 10-14% was a "much higher" rate than Alcatel typically paid consultants, the Alcatel Standard Executive structured the commission payments to be paid through several different entities controlled by the consultant, each of which received a commission of between 3% and 5%.

From 1999 to 2004, Alcatel and its subsidiaries executed at least 58 separate consulting agreements with such entities and paid a total of more than $8.8 million in commissions. Although Alcatel's agreements with the consulting entities stated that the payments were for market evaluations, client and competition analysis, and assisting with contract negotiations,

Alcatel admitted that "it was anticipated" that the consultant would pass a portion of the payments on to officials at the state-owned telecommunications companies in order to secure business and improper benefits for Alcatel. Alcatel also paid for trips taken by telecommunications officials that were principally for leisure.

The Ecuadorian consultant also assisted Alcatel CIT, through Alcatel's Costa Rican subsidiary ACR, in obtaining business from the Nicaraguan state-owned telecommunications company Empresa Nicaraguense de Telecomunicaciones S.A. ("Enitel"). Although the Ecuadorian consultant appeared to provide no legitimate work in support of two contracts between Alcatel CIT and Enitel worth nearly $2 million, Alcatel CIT paid the consultant $229,382 while admitting that the consultant "likely used a portion of these payments to bribe certain key Enitel officials" whom the consultant later identified to Sapsizian as his "amigos." Alcatel CIT also paid for two Enitel officials to travel, largely for pleasure, to Madrid and Paris in late 2001.

- *Other Consultancy Agreements Not Subject to Proper Due Diligence*

Alcatel further admitted to failing to conduct adequate due diligence on, and to fairly and accurately record in its books, $3.5 million in payments to Angolan consultants, $3 million in payments under 65 contracts to an Ivory Coast consultant, $382,355 in payments to a Ugandan consultant, and less than $50,000 in payments to a Malian consultant. These payments were made, in most instances, despite the fact that Alcatel was aware, should have been aware, or was aware of a significant risk that such consultants would pass on all or part of these payments to foreign officials.

RAE Systems

On December 10, 2010, RAE Systems, Inc. ("RAE") settled FCPA charges with the DOJ and SEC relating to improper payments made by and on behalf of two Chinese joint ventures. Under its agreement with the SEC, RAE will pay $1,147,800 in disgorgement and $109,212 in pre-judgment interest to settle FCPA anti-bribery, books and records, and internal controls charges. Under a three-year Non-Prosecution Agreement ("NPA") with the DOJ, RAE will pay a $1.7 million penalty to settle FCPA books and records and internal controls charges. RAE, based in San Jose, California, develops and manufactures chemical and radiation detection monitors and networks. RAE's common stock is traded on the NYSE Alternext exchange.

According to the SEC and DOJ, between 2004 and 2008, RAE, through two Chinese joint ventures, paid approximately $400,000 to third party agents and government officials to influence foreign officials in order to obtain or retain business. RAE's problems began during its due diligence review of the Chinese company KLH, then owned by the Beijing Academy of Sciences. RAE's due diligence revealed various red flags, including that KLH's main clients were state-owned entities and government departments, KLH sales personnel financed their sales through cash advances and reimbursements, and KLH sales personnel used cash advances to bribe government officials. RAE also discovered that KLH's accounting and control mechanisms for the cash advances were flawed; specifically, sales personnel were submitting

unsupported and inaccurate tax receipts (known as "fapiao") to account for their use of the cash advances. The due diligence report, submitted to RAE's Board of Directors, detailed kickback mechanisms and concluded that "[t]o some extent, the financial statements have been distorted by these commissions." Separately, a RAE employee who had met with KLH personnel reported to high-ranking RAE executives that "KLH sales team is good at and used to selling cycle that is highly dependent on 'guanxi' – whatever it takes to spec and close deal… to kill the sales model that has worked for them all these years is to kill the JV deal value or hurt sales momentum."

Despite this information, RAE acquired a 64% stake in KLH (then renamed RAE-KLH) in 2004, and two years later raised their interest to approximately 96%. Upon acquiring its stake in the company, RAE orally communicated to RAE-KLH personnel that bribery practices must stop, however RAE did not impose sufficient internal controls or make changes to the cash advance practices. The DOJ described the efforts as "half-measures."

In 2005, RAE's Vice President and CFO visited RAE-KLH and observed that the company had approximately $500,000 in cash advances for which it had no fapiao. He then emailed RAE's U.S. headquarters that "[t]here is the possibility that cash may also be used for grease payments, to supplement sales employees' incomes and as bribes…" The company responded by implementing FCPA training and required its employees to sign anti-bribery certifications, but again, it made no changes to the problematic cash advance system. Consequently, sales personnel continued to use cash advances to bribe foreign officials. In 2006, RAE-KLH entered into a consultancy agreement with an agent, whom it paid approximately $86,195. The agent used the funds to bribe employees of state-owned enterprises to obtain business for RAE-KLH related to the Dagang Oil Field.

Later that year, RAE-KLH's recently-terminated General Manager emailed the company's U.S. headquarters alleging that RAE-KLH had entered into a $48,000 money laundering contract to mask kickbacks paid to clients. The company responded to the allegations, and the money paid by RAE-KLH under the contract was returned to it. The company did not, however, perform an internal audit or other investigation into the general allegation that bribery was continuing, nor did it impose any additional internal controls or make significant changes to the cash advance system. During 2007, RAE-KLH personnel continued to use cash advances to bribe government officials, including by purchasing a notebook computer for the Deputy Director of a state-owned chemical plant. RAE-KLH also entered into another contract with the same agent, who again used the funds to pay bribes to obtain two contracts.

In December 2006, RAE acquired a 70% interest in a separate Chinese company, Fushun Anyi, which then became RAE-Fushun. Despite the experience with KLH, RAE conducted no pre-acquisition due diligence and failed to implement an effective system of internal controls. In 2007, RAE-Fushun personnel engaged in bribery of government officials, including providing gifts such as fur coats, expensive liquor, and kitchen appliances.

In addition to the financial penalties, RAE also agreed to implement various enhanced compliance and reporting measures, cooperate with the government's investigation, and provide periodic reports to the DOJ and SEC over a three-year period.

Panalpina-Related Oil Services Industry Sweep

On November 4, 2010, the DOJ and SEC announced the resolution of seven FCPA investigations within the oil services industry. Touted as the first ever FCPA-related sweep of a particular industrial sector, these investigations centered around Panalpina World Transport (Holding), Ltd. ("PWT" or together with its subsidiaries "Panalpina") and FCPA violations related to its international freight forwarding and logistics services. The SEC and the DOJ conducted this industry-wide sweep as a proactive tactic to combat what they described as "widespread corruption in the oil services industry."

This investigation resulted in criminal and/or civil actions against GlobalSantaFe Corporation, Noble Corporation, PWT and its U.S.-based subsidiary Panalpina Inc., Pride International, Inc. and its wholly-owned subsidiary Pride Forasol S.A.S., Tidewater Inc. and its wholly-owned subsidiary Tidewater Marine International, Inc., Transocean Inc. (a subsidiary of Transocean Ltd.), and two Royal Dutch Shell plc. subsidiaries, Shell Nigeria Exploration and Production Company Ltd. and Shell International Exploration and Production. These actions originated in 2007, when three wholly-owned subsidiaries of Vetco International Ltd. pleaded guilty to criminal FCPA violations. A fourth Vetco affiliate, Aibel Group Ltd., entered into a DPA and agreed to cooperate with the DOJ by identifying, among other parties, the consultants, contractors, and subcontractors related to its subsidiaries' FCPA violations.

Collectively, these seven companies, their subsidiaries, and parent companies agreed to pay over $236 million to resolve U.S. authorities' investigations. In announcing the simultaneous dispositions on November 4, 2010, Chief of the SEC's recently-created FCPA Unit Cheryl J. Scarboro promised that the Unit will "continue to focus on industry-wide sweeps," and warned that "no industry is immune from investigation." By varying penalty reductions with regard to the companies' respective degrees of cooperation and self-disclosure, these agreements also represent a concerted effort by the DOJ to demonstrate its willingness to extend "meaningful credit" to business organizations that voluntarily disclose potential FCPA violations and cooperate with resultant FCPA investigations.

With the exception of Noble Corporation, each of the companies involved in the November 4, 2010, FCPA settlements employed the services of PWT and its subsidiaries (collectively "Panalpina"). In particular, the actions of Panalpina World Transport (Nigeria) Limited ("Panalpina Nigeria"), a former, majority-owned subsidiary and agent of PWT, was the common tie between the violations by Panalpina, Pride, Transocean, Tidewater, and Shell. Between 2002 and 2007, Panalpina Nigeria paid over $30 million in bribes to Nigerian officials, $19 million of which were made on behalf of Panalpina's U.S. customers and their foreign subsidiaries.

- *Panalpina World Transport (Holding), Ltd. and Subsidiaries*

On November 4, 2010, PWT and its wholly-owned, U.S.-based subsidiary, Panalpina, Inc. ("Panalpina U.S.") resolved DOJ and SEC FCPA investigations under which PWT and Panalpina U.S. agreed to pay $70.56 million in penalties to the DOJ, while Panalpina U.S.

agreed to disgorge $11.33 million in illicit profits to the SEC.[7] To resolve the DOJ charges, PWT and Panalpina U.S. stipulated to the DOJ's factual allegations. According to the DOJ, from approximately 2002 to 2007, Panalpina paid approximately $49 million in bribes to foreign officials through wholly-owned subsidiaries in Angola, Azerbaijan, Brazil, Kazakhstan, Nigeria, Russia, and Turkmenistan to help both itself and its U.S. and foreign customers obtain preferential customs, duties, and import treatment for international freight shipments. Some of these improper payments continued as late as 2009. Panalpina admitted to paying approximately $27 million of those bribes on behalf of customers who were U.S. issuers or domestic concerns.

In addition, Panalpina admitted to improperly recording and invoicing the bribes paid on behalf of clients to make them appear to be legitimate charges, in violation of the books and records provisions, by using approximately 160 different terms to falsely describe bribes and related payments on its invoices. Panalpina further admitted to authorizing bribes to secure foreign government contracts for itself.

PWT resolved the two criminal charges that the DOJ filed against it by entering into a three-year DPA. The DOJ charged PWT with conspiring to violate and violating the anti-bribery provisions of the FCPA. Panalpina U.S. agreed to plead guilty to a two-count criminal information alleging conspiracy to violate the FCPA's books and records provisions and aiding and abetting violations of the those same provisions by its issuer customers. Panalpina U.S. was specifically identified as the vehicle through which PWT engaged in bribery on behalf of its U.S. issuer customers. Panalpina U.S. simultaneously resolved SEC charges, without admitting or denying the SEC's allegations, by consenting to being permanently enjoined from violating or aiding and abetting violations of the FCPA and agreeing to disgorge $11.33 million in illicit profits. Panalpina U.S. is not itself an issuer, but was subject to DOJ jurisdiction as a domestic concern. The SEC claimed jurisdiction to bring its complaint against Panalpina U.S. because the SEC considered Panalpina U.S. to be an agent of customers who were U.S. issuers and also because Panalpina U.S. allegedly aided and abetted its issuer clients' FCPA violations.

The DOJ considered multiple factors when agreeing to enter into a DPA with PWT, including PWT's comprehensive compliance investigations and reviews, prompt and voluntary reports of its findings from these investigations, efforts to require and encourage employee cooperation with government investigations, PWT's (eventual) cooperation with DOJ and SEC investigations, and PWT's "substantial remedial measures." These remedial efforts included the creation of a compliance department with direct reporting to the Board of Directors, implementation of a compliance program and related policies, conducting systematic risk assessment in high-risk countries, developing internal review mechanisms, retaining/promoting/firing employees and management based on their individual commitments to compliance, implementation of internal compliance and audit functions, voluntarily and independently hiring outside compliance counsel, and PWT's decision to independently and at substantial cost close down operations in Nigeria to avoid future potential improper conduct.

[7] Both PWT and Panalpina U.S. agreed to separate, corresponding $70.56 million penalties. However, as part of the agreement, the Panalpina U.S. fine is deducted from the PWT fine.

- *Panalpina Conduct in Nigeria*

According to charging documents, Panalpina Nigeria expedited customer shipments by bribing officials in the Nigerian Customs Service ("NCS"), the government office responsible for assessing and collection duties and tariffs on goods imported into Nigeria. Panalpina used the term "special" on invoices to describe cash payments made to expedite customs paperwork. Payments made to NCS officials in order to resolve customs problems or to avoid Nigerian regulations were invoiced to customers as "intervention" or "evacuation" payments. Many of the improper payments were made as part of Panalpina's express courier service, Pancourier.

In addition, Panalpina Nigeria also bribed NCS officials to help its customers secure new Temporary Import Permits ("TIPs") and extensions to existing TIPs. Under Nigerian law, a TIP allows a foreign company to temporarily import expensive equipment or vessels into Nigerian waters without paying the standard import tax, which is typically at least 10% of an imported item's total value. Any equipment or vessels not removed before a TIP's expiration, however, are subject to a fine of up to six times that equipment or vessel's value. Panalpina Nigeria's corrupt payments to NCS officials enabled its customers to effectively receive permanent TIPs, thereby avoiding both the costly import tax and the harsh post-expiration penalties.

As well as providing such transaction-specific payments to NCS officials, Panalpina Nigeria provided hundreds of officials in the Nigerian Port Authority, Maritime Authority, police, Department of Petroleum, Immigration Authority, and the National Authority for Food and Drug Control with weekly or monthly payments to obtain preferential treatment for itself and its customers.

Panalpina also admitted to paying foreign government officials to secure contracts for itself. In 2005, Panalpina directed $50,000 to a National Petroleum Investment Management Services ("NAPIMS") official to gain preferential treatment and secure a logistics contract on an oil project jointly operated by the Nigerian National Petroleum Corporation and a major oil company.

- *Panalpina Conduct Outside Nigeria*

PWT also operated subsidiaries in Angola, Azerbaijan, Brazil, Kazakhstan, Russia, and Turkmenistan that provided similar freight forwarding services by bribing customs, tax, and health and safety officials to secure preferential treatment for PWT and its clients.

From approximately 2002 to 2008, Panalpina Transportes Mundiais, Navegação e Transitos, S.A.R.L. ("Panalpina Angola") paid approximately $4.5 million in bribes to Angolan government officials. Panalpina Angola made hundreds of "special intervention" or "SPIN" payments, which ranged from *de minimus* values to amounts of up to $25,000 per transaction, to get officials to overlook incomplete documentation, to help customers avoid paying customs duties, and to avoid fines and legal problems when Panalpina Angola or its customers failed to comply with Angolan legal requirements. Additionally, from 2006 to 2008, Panalpina Angola paid over $300,000 to two Angolan officials to secure two separate Angolan oil and gas logistics contracts. In one case, the money for the payments came from profits made on the contract,

while in the other case Panalpina invoiced the government-controlled entity for salary payments to a non-existent "ghost employee" and used the funds to make cash payments to an Angolan official.

Schemes in other countries followed similar patterns. Panalpina Azerbaijan LLC ("Panalpina Azerbaijan") paid approximately $900,000 in bribes to Azeri government officials to overlook incomplete or inaccurate documentation, receive reduced customs duties, and avoid fines levied against both Panalpina Azerbaijan and its customers. Panalpina Azerbaijan also made payments to Azeri tax officials in order to secure preferential tax treatment. Panalpina Limitada ("Panalpina Brazil") paid over $1 million in bribes to Brazilian officials in order to expedite customs clearance and resolve customs and import-related issues on behalf of its customers. Panalpina Kazakhstan LLP ("Panalpina Kazakhstan") made over $4 million in what it described internally as "sunshine" or "black cash" payments to Kazakh government officials to cause the officials to overlook incomplete or inaccurate customs documentation, avoid levying proper customs duties, and to discourage them from fining Panalpina or its customers for failing to comply with legal requirements. Panalpina Kazakhstan also made payments to Kazakh tax officials responsible for conducting annual tax audits in order to both expedite the audits and avoid or reduce any resultant tax-related fines. Panalpina World Transport Limited (Russia) ("Panalpina Russia") paid over $7 million in bribes to Russian officials to expedite customs delays, avoid administrative fines, resolve problems with temporary import permits, and to occasionally bypass the customs process in total. Finally, Panalpina World Transport Limited (Turkmenistan) ("Panalpina Turkmenistan") paid over $500,000 to Turkmen government officials responsible for enforcing Turkmenistan's customs, immigration, tax, and health and safety laws.

- *GlobalSantaFe Corporation*

The SEC filed a complaint against GlobalSantaFe Corporation ("GSF") alleging violations of the anti-bribery, books and records, and internal controls provisions of the FCPA. GSF is now known as Transocean Worldwide, Inc., and is a subsidiary of the Swiss-based Transocean Ltd. According the SEC's complaint, GSF paid a customs broker $87,000 to obtain two TIP extensions for the oil rig Adriatic VIII after its initial TIP expired in 2003, including false documentation showing the Adriatic VIII had left Nigerian waters. While these "paper moves" allowed the Adriatic VIII to remain in Nigerian waters, $3,500 of the payment was invoiced as "additional charges for export." GSF management in Nigeria knew the Adriatic VIII had not left Nigerian waters and knew or was aware of the high probability that the "additional charges for export" on the invoice was an attempt to disguise a bribe. GSF used its customs broker to carry out several other paper moves for the oil rigs Adriatic I and Baltic I. The SEC alleged that these payments helped GSF avoid $1.5 million in costs by not moving their oil rigs out of Nigerian waters and enabled GSF to gain an additional $619,000 in revenue by avoiding related work interruptions. The SEC also identified $82,000 in additional "intervention" and "retaining" payments related to expired or expiring oil rig TIPs that allowed GSF to earn an additional $268,000 in avoided costs and gained revenues. The SEC further alleged that, through customs brokers, GSF made approximately $300,000 of similarly-improper payments to government officials in Angola, Gabon, and Equatorial Guinea, and that none of the payments in

Angola, Gabon, Equatorial Guinea, or Nigeria were properly recorded in GSF's books and records.

Without admitting or denying the SEC's allegations, GSF agreed to the entry of a court order enjoining it from violating the FCPA, to disgorge approximately $2.7 million of ill-gotten gains and pay prejudgment interest of approximately $1 million, and pay a civil penalty of $2.1 million.

- *Pride International, Inc.*

The DOJ and the SEC also settled investigations of Pride International, Inc. ("Pride") relating to corrupt payments to foreign officials in eight different countries. According to the SEC, from 2001 to 2006, Pride, often through its subsidiaries, allegedly paid or authorized payments of approximately $2 million to foreign officials in India, Kazakhstan, Libya, Mexico, Nigeria, the Republic of the Congo, Saudi Arabia, and Venezuela. Of these payments, the DOJ brought enforcement actions against Pride and its subsidiary Pride Forasol S.A.S. ("Pride Forasol") for $804,000 in payments made to foreign officials in Venezuela, India, and Mexico to extend drilling contracts, influence customs officials, gain favorable customs duties and tax assessments, extend the temporary importation status of drilling rigs, and influence court rulings.

The DOJ charged Pride with violating and conspiring to violate the anti-bribery and books and records provisions of the FCPA. Pride resolved these charges by entering into a three-year DPA with the DOJ, while Pride Forasol pleaded guilty to charges of conspiring to violate the anti-bribery and books and records provisions of the FCPA, violating the anti-bribery provisions of the FCPA, and aiding and abetting Pride's books and records violations. Together the companies will pay approximately $32.6 million in monetary penalties, a total fine roughly 55% below the minimum recommended fine suggested by the United States Sentencing Guidelines. This reduced penalty reflects, in part, the assistance that Pride provided in regards to the DOJ and SEC investigation into Panalpina and its subsidiaries. Pride voluntarily disclosed the results of an internal investigation into misconduct occurring in Venezuela, India, and Mexico to the DOJ, as well as the fact that Panalpina subsidiaries in Kazakhstan, Nigeria, and Saudi Arabia acted as intermediaries in making payments to Kazakh tax officials, NCS officials, and Saudi customs officials, respectively. The DOJ viewed this disclosure as one that "substantially assisted" its Panalpina-related investigations because "the extent of Panalpina's conduct was unknown by the Department at the time of the Companies' disclosure." Without admitting or denying the SEC's allegations, Pride agreed to a permanent injunction against future violations of the FCPA, to disgorge over $19.3 million in ill-gotten gains, and to pay prejudgment interest of roughly $4.2 million.

In August 2010, two former Pride International, Inc. employees, Joe Summers and Bobby Benton, entered settlements with the SEC for their involvement in the alleged misconduct, both directly as the employees of an issuer and indirectly as aiders and abettors of Pride's violations, by agreeing to injunctions and paying civil penalties. On August 5, 2010, Joe Summers, Pride's former Venezuela country manager, consented to the entry of a permanent injunction prohibiting future FCPA violations and agreed to pay a $25,000 civil penalty. On August 9, 2010, Benton,

Pride's former Vice President of Western Hemisphere Operations, consented to a settlement of FCPA charges that included a permanent injunction from future FCPA violations and the payment of a $40,000 civil penalty.

- *Venezuela*

Summers authorized payments totaling approximately $384,000 to third parties believing that all or portions would be passed on as bribes to an official of Petroleos de Venezuela S.A. ("PDVSA"), Venezuela's state-owned oil company, to extend three drilling contracts between 2003 and 2005. The PDVSA official had requested and been paid $60,000 for each month of additional drilling he was able to secure. In another instance, Summers authorized payments of $12,000 per rig per month for extended drilling rights. Finally, when the company faced a large backlog of outstanding accounts receivable from PDVSA, Summers authorized the payment of a $30,000 to a third party to be used as a bribe to another PDVSA employee to secure the payment of the receivables.

On February 12, 2005, Benton, received a draft report from Summers' replacement that included details of the improper payments described above, which had been discovered during an audit of Pride's vendors in Venezuela. Benton deleted from the report all references to the improper payments. Four days later, on February 16, 2005, Benton e-mailed the new Venezuela country 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.

- *Mexico*

In 2004, in Mexico, a customs official inspected port facilities leased to various local Pride subsidiaries and identified various customs violations related to the importation status of equipment on a supply boat. Benton allegedly authorized a $10,000 bribe solicited by the customs official in order to garner more favorable treatment regarding these customs violations. 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. 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 fictitious "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 in Pride Mexico's books as payments for customs agency services. Benton did not inform Pride's management, legal department, or internal auditors of the matter and allowed false records to remain on Pride's books and records.

Despite his knowledge and authorization of bribe payments, Benton falsely signed certifications in connection with Pride's 2004 and 2005 annual reports in March 2005 and May

2006, respectively, stating that he had no knowledge of FCPA violations. Benton executed the March 2005 certification less than three weeks after he redacted all references to bribery from the internal audit action plan. "But for Benton's false statements," the SEC concluded, "Pride's management and internal and external auditors would have discovered the bribery schemes and the corresponding false books and records."

- *India*

In 2001, India's Commissioner of Customs initiated an administrative action against the Indian branch of a Pride subsidiary, Pride Foramer India, claiming that the entity had intentionally understated the value of a rig it had imported in 1999. After an unfavorable ruling, Pride Foramer India appealed to an administrative tribunal. A France-based in-house lawyer at Pride Forasol S.A.S. was advised by a customs consultant that a payment to one of the administrative judges could secure a favorable result. In 2003, the lawyer authorized three payments totaling $500,000 to Dubai bank accounts of third party companies for the benefit of the administrative judge. Later that year, Pride received a favorable ruling overturning the Customs Commissioner's determination. A U.S.-based finance manager of Pride, believing that all or a portion of the payments would be given to a foreign official, authorized recording the payments under a newly-created accounting code for "miscellaneous expenses."

- *Kazakhstan*

The SEC alleged that in 2004 Pride Forasol made three payments totaling $160,000 to Panalpina's Kazakh affiliate "while knowing facts that suggested a high probability" that all or a portion of the money would be used as bribes to Kazakh officials in relation to various customs issues. Also in 2004, in connection with a tax audit, Kazakh officials indicated to Pride Forasol Kazakhstan that it could lower its substantial tax liabilities by making a payment to the tax officials. The tax officials instructed the company to retain a particular tax consultant, whom the company ultimately paid $204,000 while knowing that all or a portion of the funds would be passed on to the tax officials.

- *Nigeria*

The SEC alleged that, from 2001 to 2006, Panalpina, acting on behalf of Pride Forasol Nigeria ("Pride Nigeria"), paid NCS officials a series of bribes ranging from $15,000 to $93,000 to extend oil rig TIPS in Nigeria and, in 2002 paid a NCS official a $35,000 lump-sum fee to bypass future customs inspections of imported consumable goods. The payment was invoiced and recorded as "handling of consumables." The SEC also alleged that Pride Nigeria paid at least $172,000 to tax officials or, later, a Nigerian tax agent who passed on a portion of the money to tax officials to avoid or reduce outstanding expatriate income taxes. Pride recorded the payments as "expatriate taxes," "settlement of expatriate taxes," or "Vat Audit Report Settlement."

- *Saudi Arabia, Libya, and The Congo*

The SEC further alleged a series of illicit payments in 2005, including a $10,000 payment from a petty cash fund to secure a Saudi customs official's help in expediting customs clearance for an oil rig and a $8,000 payment to the Congo Merchant Marine to avoid an official penalty for improper oil rig certification. Lastly, the SEC accused Pride Forasol Libya of paying a Libyan Tax Agent $116,00 to resolve unpaid social security taxes, $84,000 of which Pride surrendered "without adequate assurances that the Libyan Tax Agent would not pass some or all of these fees to [Libyan social security agency] officials."

- *Tidewater Inc.*

Caymans Island corporation Tidewater Inc. ("Tidewater") and its wholly-owned subsidiary Tidewater Marine International, Inc. ("TMII") settled charges with both the SEC and the DOJ related to alleged bribery of foreign government officials in Azerbaijan and Nigeria. The DOJ charged TMII with conspiring to violate both the anti-bribery and books and records provisions of the FCPA. Additionally, the DOJ charged TMII with aiding and abetting a violation of the books and records provisions of the FCPA. The SEC separately alleged that Tidewater violated the anti-bribery, books and records, and internal controls provisions of the FCPA.

In 2001, 2003, and 2005, the Azeri Tax Authority initiated tax audits of TMII's business operations in Azerbaijan. According to both the DOJ and the SEC, TMII paid roughly $160,000 to a Dubai entity while knowing that some or all of the money would be paid as bribes to Azeri officials to resolve the tax audits in TMII's favor. TMII received roughly $820,000 in benefits from these bribes, which it improperly recorded as "payment of taxes," "tax and legal consultancy," or agent expenses in a "Crew Travel" account. With the exception of the 2003 "consultancy" fees (which were recorded by a TMII joint venture and were not rolled-up into Tidewater's financial statements), Tidewater incorporated these records into statements it filed with the SEC.

Additionally, the SEC and the DOJ alleged that, from 2002 to 2007, Tidex Nigeria Limited, a Nigerian company 60% owned by a Tidewater subsidiary, authorized payments totaling $1.6 million to Panalpina as reimbursements for bribes (described as "intervention" or "recycling" payments) to NCS employees in exchange for their help in unlawfully extending TIPs and expediting customs clearance for Tidewater vessels. By August 2004, TMII managers and employees were aware of and condoned the payments. The total benefit in avoided costs, duties, and penalties received by TMII in exchange for these payments was approximately $5.8 million. These payments were improperly recorded as legitimate business expenses by Tidex, whose books and records were consolidated into Tidewater's SEC filings.

Tidewater and TMII resolved the DOJ's allegations by entering into a DPA requiring, among other things, that TMII pay a $7.35 million criminal penalty. Tidewater also resolved the SEC's allegations by agreeing to a court order enjoining it from violating any provision of the FCPA, disgorging roughly $7.2 million in profits, paying $881,146 in prejudgment interest, and

paying a $217,000 civil penalty. On March 3, 2011, Tidewater settled related bribery charges brought by the Nigerian Economic and Financial Crimes Commission by agreeing to pay a $6.3 million monetary penalty.

- *Transocean, Inc.*

The DOJ charged Transocean Inc., a Caymans Island subsidiary of Switzerland's Transocean Ltd. (collectively "Transocean"), with both conspiring to violate and violating the anti-bribery and books and records provisions of the FCPA. The SEC similarly alleged violations of anti-bribery, books and records, and internal controls provisions of the FCPA. According to the DOJ, from 2002 to 2007, Transocean conspired to make and made corrupt payments to NCS officials through Panalpina's courier service to resolve and avoid violations stemming from its oil rigs' expired TIPs. These bribes, which Transocean improperly recorded as "clearance" expenses, allowed Transocean to gain approximately $2.13 million in profits during the extended TIP periods. The SEC also claimed that Transocean paid $207,170 in "intervention" charges to operate its oil rigs without proper paperwork.

Additionally, the DOJ claimed that Transocean used Panalpina's Pancourier service, which paid "local processing charges" to NCS officials to help Transocean bypass the normal customs clearance process in order to avoid paying official taxes and duties. According to the SEC, Transocean used Pancourier to bypass the normal customs process 404 times and avoid $1.48 million in customs duties. The SEC also alleged that Transocean used Panalpina to pay $32,741 to NCS officials in order to expedite the delivery of medicines and other goods.

Transocean, Inc., Transocean Ltd., and the DOJ entered into a three-year DPA that requires, among other things, that Transocean, Inc. pay a $13.44 million penalty. This penalty is 20% below the minimum penalty suggested by the United States Sentencing Guidelines in recognition of Transocean's prompt and thorough internal investigation, establishing a team of experienced auditors to oversee FCPA compliance, cooperation with the DOJ and SEC, agreeing to self-monitor and report to the DOJ, and implementation of a revised FCPA compliance policy. Transocean also received credit because a subsidiary of Transocean Ltd., Transocean Offshore Deepwater Drilling Inc., hired a new chief compliance officer with substantial experience in corporate ethics and anti-corruption compliance policies. Transocean similarly resolved the SEC's charges, without admitting or denying the allegations, by consenting to a permanent injunction against violating the FCPA and agreeing to pay nearly $7.3 million in disgorgement and prejudgment interest.

- *Royal Dutch Shell plc*

Royal Dutch Shell plc ("Shell") and its wholly-owned subsidiary, the Shell Nigeria Exploration and Production Company ("SNEPCO") entered into a three-year DPA with the DOJ, while Shell and another wholly-owned subsidiary, Shell International Exploration and Production ("SIEP") agreed to an SEC administrative order. According to the DOJ, SNEPCO and SIEP paid approximately $2 million to subcontractors (who in turn, hired Panalpina) knowing that some or all of that money would be used by Panalpina to bribe NCS officials.

These payments resulted in roughly $7 million worth of savings from avoided taxes, duties, and penalties. SNEPCO improperly recorded these payments as "local processing fees" and "administrative/transport charges." The SEC estimated that these fees and savings were actually higher, and claimed that SIEP authorized the payment of approximately $3.5 million to NCS officials to obtain preferential customs treatment that resulted in roughly $14 million in additional profits, neither of which were accurately reflected in Shell's books and records.

The DOJ claimed that "red-flags" existed for SNEPCO employees regarding Panalpina's Pancourier service because it rarely, if ever, provided official documentation of duties or taxes being paid. Additionally, the DOJ alleged that SNEPCO employees developed actual knowledge that Panalpina was paying money to NCS officials because, in 2003 and 2004, a subsea engineering, procurement, installation and commissioning ("EPIC") contractor explained to SNEPCO employees that Pancourier operated outside the "normal customs clearing process," reduced customs fees by 85-90% by replacing them with "local process fees," and made it impossible to obtain official receipts to provide evidence of paying customs duties or taxes. In 2004, a Houston-based subsea contract engineer sought advice from two of SNEPCO's Nigeria-based lawyers on the legality of the Pancourier freight-forwarding service. SNEPCO's Nigerian lawyers concluded that the "local process fees" were being made in lieu of official customs duties and that "[o]rdinarily, this sort of concession granted by SNEPCO could be extra contractual and illegal." Numerous other internal communications similarly indicated that SNEPCO and SIEP employees had knowledge that the Pancourier service involved paying bribes to NCS officials.

Despite internal concerns regarding the legality of Panalpina's freight forwarding services, SNEPCO and SIEP employees continued to authorize the use of the Pancourier service. Additionally, the SNEPCO Bonga Logistics Coordinator informed the Subsea Epic Contractor and Panalpina employees in Nigeria that SNEPCO would reimburse Pancourier invoices containing improper payments to NCS officials if the term "local processing fee" were replaced with the term "administrative/transport charge." SNEPCO continued to reimburse invoices that used the term "administrative/transport charge" to describe improper payments to NCS officials until around February 2005, at which point Panalpina changed its invoices to simple, non-descriptive flat fees in an effort to better conceal the payments it made on SNEPCO's behalf. The DOJ did note that certain SNEPCO employees refused to pay some fees absent official documentation, but that these efforts were the exception rather than the rule.

Although SNEPCO was the nominal defendant in the DOJ proceeding, both Shell and SNEPCO jointly entered into the DPA with the DOJ and agreed to share responsibility for the corresponding $30 million monetary penalty. The SEC alleged a similar agent relationship between SIEP and Shell to hold Shell accountable for actions taken by Panalpina. Shell and SIEP resolved the related administrative action brought by the SEC by agreeing to cease and desist from further FCPA violations and pay approximately $18.1 million in disgorgement and prejudgment interest.

- *Noble Corporation*

Unlike several of the companies discussed above, Switzerland-based Noble Corporation ("Noble"), an issuer whose stock trades on the New York Stock Exchange, was able to secure an NPA, rather than a DPA, from the DOJ relating to corrupt payments to NCS officials. Noble entered into a three-year NPA with the DOJ on behalf of the Cayman-based Noble Corporation, which became a wholly-owned subsidiary of Noble through a 2009 stock transaction. Prior to the stock transaction, the Cayman corporation was also an issuer within the meaning of the FCPA. This enforcement actions stem primarily from the actions of a group of Nigeria-based, wholly-owned subsidiaries of the Cayman corporation (collectively "Noble Nigeria") that became wholly-owned subsidiaries of Noble during the 2009 stock transaction.

As part of the NPA, Noble admitted that, from 2003 to 2007, it utilized a Nigerian customs agent to submit false paperwork on Noble Nigeria's behalf to extend expired TIPs and conduct paper moves of oil rigs located in Nigerian waters. In 2004, as part of its compliance program, Noble initiated an audit of its West Africa Division, which included the operations of Noble Nigeria. This audit uncovered Noble Nigeria's paper move process, and in July 2004, the Audit Committee was advised the paper process would be discontinued. Despite this, by February 2005, Noble personnel determined that alternatives to the paper process were too expensive and time-consuming and chose to resume the paper process. Five subsequent paper moves occurred between roughly May 2005 to March 2006. During those paper moves, certain Noble and Noble Nigeria managers authorized Noble Nigeria to funnel roughly $74,000 in "special handling charges" through a Nigerian customs agent to NCS officials to avoid complications and costs associated with expired TIPs. By extending its TIPs through paper moves, Noble avoided $2.97 million in costs, duties, and penalties. Noble improperly recorded these "special handling charges" as "facilitation payments" in its books and records.

Noble's Audit Committee was not notified of the resumption of the paper process, and Noble's Head of Internal Audit repeatedly excluded information regarding the process from reports and presentations to the Audit Committee and affirmatively misled the Audit Committee regarding the company's FCPA compliance. In 2007, the Audit Committee became aware that a competitor had initiated an internal investigation of its import process in Nigeria, and Noble responded by engaging outside counsel to conduct a review of its own conduct. Noble subsequently voluntarily disclosed its conduct to the DOJ and the SEC. Under the NPA, Noble agreed to a $2.59 million monetary penalty. The DOJ expressly recognized Noble's voluntarily, timely, and complete disclosure of the misconduct, the quality of its remedial measures, and its full cooperation with the DOJ's investigation.

In its parallel enforcement action, the SEC alleged that the FCPA policy Noble had in place during the period of alleged misconduct lacked sufficient procedures, training, and internal controls to prevent payments made to NCS officials to obtain TIPs and TIP extensions. To support this conclusion, the SEC cited Noble's 2004 internal audit, which both uncovered the use of payments to obtain TIPs and TIP extensions and concluded that Noble Nigeria personnel did not understand the relevant provisions of the FCPA. In particular, the SEC claimed that Noble's personnel did not understand the concept of "facilitating payments" and that its internal controls

were insufficient to prevent what the SEC considered bribes as being recorded as facilitating payments. Noble settled FCPA anti-bribery, books and records, and internal controls charges with the SEC, without admitting or denying the SEC's allegations, by consenting to a court order enjoining it from violating the FCPA, disgorging roughly $4.3 million, and paying roughly $1.3 million in prejudgment interest.

ABB Ltd., Fernando Basurto & John O'Shea

On September 29, 2010, ABB Ltd. ("ABB") resolved U.S. authorities' investigation into FCPA violations related to the company's activities in Mexico and the United Nations' Oil-for-Food Programme. According to U.S. authorities, ABB and its subsidiaries made at least $2.7 million in improper payments in exchange for business that generated more than $100 million in revenues. ABB is a Swiss engineering company that is an issuer under the FCPA because its American Depositary Receipts are publicly traded on the New York Stock Exchange. Previously, in July 2004, ABB and two subsidiaries had resolved unrelated 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 pay more than $30 million in combined criminal fines.)

ABB's U.S. subsidiary, ABB Inc.—a domestic concern under the FCPA—pleaded guilty to violating, and conspiring to violate, the FCPA's anti-bribery provisions. ABB Inc. received a criminal fine of $17.1 million. ABB itself entered into a three-year DPA with the DOJ, paid a monetary penalty of $1.9 million, and consented to the filing of a criminal information against its Jordanian subsidiary, ABB Ltd. – Jordan, for conspiring with an unnamed employee and unknown others to violate the FCPA's books and records provision by failing to accurately record kickbacks relating to the Oil-for-Food Programme. In the DPA, ABB also agreed to "enhanced" compliance obligations, including: (i) the use of chief, regional, and country compliance officers; (ii) the retention of legal counsel for compliance; (iii) the ongoing performance of "risk-based, targeted, in-depth anti-bribery audits of business units" according to an agreed-upon work plan; (iv) the use of "full and thorough" pre-acquisition anti-corruption due diligence; (v) changes to its business model to eliminate the use of agents wherever possible; (vi) thorough anti-corruption due diligence of all third party representatives; (vi) country-specific approval processes for gifts, travel, and entertainment; and (viii) biannual reporting to the DOJ, SEC, and U.S. Probation Office.

Under the DPA, the parties had agreed to steeper fines; however, at sentencing, Judge Lynn Hughes of the United States District Court for the Southern District of Texas, noting that "the guidelines are just guidelines," reduced the culpability score by two points, leading to a reduction in ABB Inc.'s fine from the $28.5 million contemplated in ABB's DPA and ABB Inc.'s plea agreement to $17.1 million. Judge Hughes appeared to take issue with the DOJ's contention that ABB should be punished more harshly as a recidivist because different individuals were involved in the charged misconduct than were involved in the misconduct leading to ABB's 2004 guilty plea. The DOJ's contention that this was irrelevant given that

ABB's compliance procedures had failed (or simply did not exist) in both instances fell on deaf ears; "[The DOJ is] arguing that somehow ABB is more culpable and it should be punished more severely because it didn't have procedures," Judge Hughes stated at the hearing. "My point is procedures don't work."

Without admitting or denying the SEC's allegations, ABB agreed to disgorge $22,804,262 in ill-gotten gains and pre-judgment interest to the SEC, pay a $16,510,000 civil penalty, and report periodically to the SEC on the status of its remediation and compliance efforts. The combined monetary penalties against ABB Ltd. and its subsidiaries exceeded $58 million.

As is common in negotiated FCPA dispositions, the parent company—here ABB—was able to avoid a criminal conviction through the DPA and pleas by its subsidiaries. ABB Inc., although a wholly-owned subsidiary of ABB Ltd., was treated as a stand-alone domestic concern under the anti-bribery provisions, and ABB Ltd. – Jordan (through its own subsidiary ABB Near East Trading Ltd.) was guilty of an FCPA books and records conspiracy because its books were rolled into ABB Ltd.'s books at the end of the fiscal year. In support of its agreement to the DPA with ABB, the DOJ stated that it considered, among other things, the fact that ABB Ltd.'s "cooperation during this investigation has been extraordinary," ABB Ltd. "conducted and continues to conduct" an "extensive, global review of its operations and has reported on areas of concern to the Fraud Section [of the DOJ] and the SEC," and "following the discovery of the bribery, ABB Ltd. and ABB Inc. voluntarily and timely disclosed to the Fraud Section and the [SEC] the misconduct."

ABB had announced that it voluntarily disclosed to the DOJ and SEC suspected FCPA violations involving employees of ABB subsidiaries in Asia, South America, and Europe in 2007. 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.

- *Mexican Bribery Scheme*

ABB Network Management ("ABB NN"), a Texas-based business unit of ABB, Inc., allegedly bribed officials of two electric utilities owned by the government of Mexico, Comisión Federal de Electricidad ("CFE") and Luz y Fuerza del Centro ("LyFZ"), between 1997 and 2004. ABB NN, through an agent, Grupo Internacional de Asesores S.A. ("Grupo") and two other Mexican companies serving as intermediaries, allegedly provided checks, wire transfers, cash, and a Mediterranean cruise vacation to officials and their spouses. ABB failed to conduct due diligence on the transactions, which were improperly recorded on ABB's books as commissions and payments for services in Mexico. As part of its guilty plea, ABB, Inc., admitted that ABB NN paid approximately $1.9 million in bribes to CFE officials alone between 1997 and 2004. Such improper payments resulted in contracts from CFE and LyFZ that generated $13 million in profits on $90 million in revenues for ABB.

ABB NN's primary business involved providing electrical products and services to electrical utilities around the world, many of which are described as state-owned. ABB NN worked with Grupo on a commission basis to obtain contracts from Mexican governmental utilities, including CFE. John Joseph O'Shea, the General Manager of ABB NN, and Fernando Maya Basurto, a principal of Grupo, allegedly conspired with a number of individuals and intermediary companies to make illegal payments to various officials at CFE. In return, ABB NN 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, ABB NN 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 ABB NN. 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 ABB NN 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 Grupo, 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 ABB NN received the Evergreen Contract, an extension of the earlier SITRACEN Contract, and that the contract contained certain terms that were favorable to ABB NN. 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 ABB NN.

Over the course of the Evergreen Contract, ABB NN allegedly utilized Basurto and Grupo 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 ABB NN, 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 charging documents further allege that $29,500 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 ABB NN 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 an unnamed Co-Conspirator X received approximately 9% of the value of the SITRACEN and Evergreen Contracts for all of the services that they performed for ABB NN, 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 ABB NN, ABB Ltd. conducted an internal investigation and voluntarily disclosed the potential violations to the DOJ, SEC, and Mexican authorities. In August 2004, ABB Ltd. 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 ABB NN 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 e-mail apparently sent by O'Shea that instructs Basurto to "never deliver or e-mail 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.

- *Oil-for-Food Kickbacks*

From 2000 to 2004, ABB also participated in the U.N.'s Oil-for-Food Programme for Iraq ("OFFP"). Six ABB subsidiaries participated in the program and allegedly paid more than $300,000 in kickbacks to the Iraqi government in exchange for at least 11 purchase orders from entities connected to the Iraqi Electrical Commission under the OFFP. The kickbacks were allegedly paid through ABB's subsidiary in Jordan, ABB Near East Trading Ltd. ABB improperly recorded the kickbacks, some of which were in cash, on its books as legal payments for after-sales services, consulting, and commissions. According to the SEC, ABB secured Oil-for-Food contracts that generated $3.8 million in profits on $13.5 million in revenues.

- *Prosecutions of Individuals*

The DOJ has charged several individuals in connection with the Mexican bribery scheme described above. On November 18, 2009, U.S. authorities arrested O'Shea, charging him with criminal conspiracy, twelve counts of violating the FCPA's anti-bribery provisions, four counts of money laundering, and falsification of records in a federal investigation. The DOJ is also seeking the forfeiture of more than $2.9 million in criminal proceeds from the offenses and any money or property illegally laundered.

On September 30, 2010, Judge Hughes ordered the government to proceed to trial on the FCPA charges alone, after which the court would schedule a trial on the remaining charges if necessary; in so ordering, the court considered the non-FCPA charges to be "derivative" of the "substantive" FCPA counts and expressed concern that a trial on all of the charges might result in the defendant being "pilloried by other stuff that's not part of the substantive counts." On March 7, 2011, O'Shea filed a motion to dismiss challenging the DOJ's assertion that CFE employees are "foreign officials" under the FCPA. On March 28, 2011, the DOJ filed an opposition to the motion to dismiss, arguing that O'Shea's challenge is premised on a question of fact and is, therefore, premature to address pre-trial and that the plain language of the FCPA, the legislative history of the FCPA, and the relevant case law all support the DOJ's assertion that officers of CFE are foreign officials under the FCPA. O'Shea's trial on the FCPA charges is currently scheduled for May 2011.

Basurto, a Mexican citizen, 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 pleaded guilty to one count of conspiring with O'Shea and others to violate the FCPA's anti-bribery provisions, launder money, and obstruct justice. Basurto's sentencing has been continued until 30 days after the conclusion of O'Shea's trial.

The directors of Grupo, Enrique and Angela Aguilar, were separately indicted for their role in another alleged FCPA offense involving Grupo on September 15, 2010. Enrique Aguilar was charged with anti-bribery violations, conspiracy to violate the FCPA, money laundering, and conspiracy to commit money laundering. Angela Aguilar was charged only with the money laundering-related offenses. Their cases are discussed separately below in connection with the Lindsey Manufacturing disposition.

Lindsey Manufacturing, Enrique & Angela Aguilar

On September 15, 2010, husband and wife, Enrique Faustino Aguilar Noriega, 56, and Angela Maria Gomez Aguilar, 55, of Cuernavaca, Mexico, were indicted by a federal grand jury in Los Angeles. Both had been named in criminal complaints filed under seal on December 29, 2009, and August 9, 2010, respectively, and on September 15, 2010, a grand jury returned an indictment against them. The indictment charged Mr. Aguilar with committing, and conspiring to commit, money laundering and FCPA anti-bribery violations. Although the criminal

complaint initially filed against Mrs. Aguilar alleged violations of the FCPA's anti-bribery provisions, the grand jury only indicted her for the money laundering-related offenses.

Mr. and Mrs. Aguilar were both directors of Grupo Internacional de Asesores S.A. ("Grupo"), a Panamanian company with the business purpose of serving as a commercial agent for transactions with Comisión Federal de Electricidad ("CFE") - a government owned Mexican electrical utility. Grupo was headquartered in Mexico and operated through a Houston brokerage account, which Mrs. Aguilar had sole signatory power over, and through which she managed Grupo's finances.

On October 21, 2010, the grand jury returned a superseding indictment. The grand jury added additional FCPA counts to the offenses charged against Mr. Aguilar, otherwise retained the earlier charges against the Aguilars, and named a California company and two executives as new defendants. These new defendants were Lindsey Manufacturing Company ("Lindsey Manufacturing"), Dr. Keith E. Lindsey, the President and majority owner of Lindsey Manufacturing and whom the government alleged to have "ultimate authority" over all of Lindsey Manufacturing's operations, and Steve K. Lee, the Vice-President of Lindsey Manufacturing who controls the company's finances and shares signatory authority with Lindsey over the company's bank accounts.

The indictment alleged that the Aguilars laundered money from Lindsey Manufacturing, a privately held company that manufactures emergency restoration systems and other equipment supporting the electrical utility industry, to pay bribes to the head of the Mexican state-owned electric utility company CFE. CFE supplies electricity to the entire country, except for Mexico City, and frequently partners with Mexican and foreign companies to supply electricity services. The indictment alleged that Lindsey Manufacturing, Lindsey, Lee, and Mr. Aguilar knew that about the improper transfers, gifts, and payments to government officials.

The FCPA conspiracy allegedly began in or around February 2002 and continued until March 2009. Beginning in 2002, Lindsey Manufacturing hired Grupo as its sales representative in Mexico. Mr. and Mrs. Aguilar, as directors of Grupo, were to assist the company in obtaining business from CFE and served as the intermediaries for payments between Lindsey Manufacturing and CFE. The indictment alleges that Grupo was hired because of Mr. Aguilar's close personal relationship with certain government officials, in particular the Sub-Director of Operations and Director of Operations, and others, at CFE during the period in question.

Lindsey Manufacturing agreed to pay Grupo a 30% commission on all contracts obtained from CFE, a significantly higher rate than the company had paid to its previous representatives. The government alleges that for each CFE contract Lindsey Manufacturing won, Lindsey Manufacturing then inflated its invoices to CFE by thirty percent so that CFE bore the full cost of the "commissions" paid to the Aguilars, which the government contends the co-conspirators knew would be passed on, in whole or in part, as bribes to CFE officials. As a result, CFE ultimately would pay the costs of the bribes paid to its own officials. Further, to hide the unusually large percentage of the Grupo's commission, the Aguilars allegedly created false invoices to Lindsey Manufacturing purporting to show that only 15% of the contract price was

paid to Grupo as a true commission on the CFE contracts and the other 15% was paid to Grupo for additional services, which the government contends were fictitious.

Specifically, the government identified 29 separate wire transfers from Lindsey to Grupo that included more than $5.9 million in improper payments for CFE officials. The government further alleged several improper payments beyond these wire transfers. An executive at CFE, referred to as Official 1, was the Sub-Director of Generation for CFE from 2002 until 2007, when he became Director of Operations. In July 2006, Mr. Aguilar began using funds from Grupo's Houston brokerage account to pay Official 1's monthly American Express credit card bill. When instructing the Houston brokerage firm to make these regular payments, Mr. Aguilar justified the payments from Grupo's accounts by falsely explaining that the head of CFE was the brother-in-law of Grupo's owner.

In August 2006, Mr. Aguilar purchased an 82-foot, $1.8 million yacht, *Dream Seeker*, which he then gave to Official 1. To complete this purchase, Mr. Aguilar used funds from Grupo as well as funds from the Swiss bank account of another company, Sorvill International S.A. ("Sorvill"), that was also controlled by the Aguilars. Like Grupo, Sorvill was incorporated in Panama, headquartered in Mexico, and its officially stated business was the provision of sales representation services for companies doing business with the Mexican utility company CFE. Unlike Grupo, Sorvill maintained bank accounts in Germany and Switzerland.

In early 2007, the Aguilars purchased a 2005 Ferrari Spider for $297,500 from Ferrari of Beverly Hills, using funds from Grupo's Houston account and from Sorvill's Swiss account. According to an affidavit filed with the court, Angela Aguilar authorized Official 1 to take possession of the new Ferrari. Mr. Aguilar also purchased a car insurance policy for the Ferrari in his name, but that listed CFE Official 1 as the Ferrari's driver. And in March 2007, Mr. Aguilar wired $45,000 from Sorvill's Swiss bank account to an escrow account at Banner Bank on behalf of the Official 1's half brother.

According to the Associated Press, Official 1, also referred to in some documents as "N.M.," is likely Nestor Moreno, who resigned from CFE in late 2010. According to the Associated Press, Mexico's federal attorney general's office has opened an investigation against Mr. Moreno and has confiscated the *Dream Seeker*.

The Aguilars also funneled cash to a second CFE executive, referenced in the indictment as Official 2. Official 2 is described in the superseding indictment as the CFE Director of Operations until 2007, when Official 1 took that job. In November 2006, Mr. Aguilar transferred $500,000 from Grupo's Houston brokerage account into accounts at Banco Popular controlled by Official 2. False documentation purported to show that the first $250,000 was for a female relative of Official 2, while the second $250,000 was for a male relative of Official 2. Mr. Aguilar supplied documentation falsely indicating that CFE Official 2's relatives were Grupo employees being paid for "professional services advice." Additionally, in March 2007, Mr. Aguilar caused $100,000 in "consulting fees" to be transferred to bank accounts benefiting Official 2, although the fees were ostensibly earned by, and paid to, the official's mother and brother.

Mr. Aguilar remains a fugitive, believed to be in Mexico. Mrs. Aguilar was arrested on August 27, 2010, in Houston and remains in custody. Lindsey and Lee were both arrested and released on bond pending trial, which is scheduled for March 29, 2011. On February 28, 2011, however, Lindsey Manufacturing, Lindsey, and Lee filed a motion to dismiss arguing that the officers of CFE are not foreign officials under the FCPA. The motion is substantially similar to that filed by John O'Shea discussed above and in the *Control Components* case discussed below. On March 10, 2011, the DOJ filed an opposition to the motion to dismiss, arguing that the defendants' challenge is premised on a question of fact and is, therefore, premature to address pre-trial and that both the plain language of the FCPA and the legislative history of the FCPA support the DOJ's assertion that officers of CFE are foreign officials under the FCPA. The defendants' motion was denied on April 1, 2011, with the court holding from the bench that CFE is a government instrumentality and its officers are therefore foreign officials for the purposes of the FCPA.

This prosecution is a direct outgrowth of cooperation the DOJ received in another FCPA investigation. In an August 9, 2010, affidavit in support of the criminal complaint against Angela Aguilar, an FBI agent averred that the investigation into the Aguilar's was a direct result of disclosures by ABB Ltd. relating to the FCPA investigation ultimately resolved by ABB in September 2010, discussed above. In October 2010, the court ordered federal prosecutors to disclose to defense counsel "materials obtained from [the government's] investigation into ABB Ltd. in the interests of justice and to allow the defendants to adequately prepare for trial."

James H. Giffen and Mercator Corporation

On August 6, 2010, The Mercator Corporation ("Mercator"), a merchant bank with offices in New York, pleaded guilty in federal court to one count of making an unlawful payment to a senior government official of the Republic of Kazakhstan in violation of the FCPA. Mercator was sentenced to a $32,000 fine and a $400 assessment and agreed to withdraw and relinquish any and all right, title, or interest in a series of Swiss bank accounts, including $84 million frozen by the Swiss government and subject to a civil forfeiture action.

More than seven years earlier, Mercator's CEO and principal shareholder, now 69-year-old James H. Giffen, had been indicted on 62 counts linked to activities in Kazakhstan. The indictment charged Giffen with a criminal conspiracy to violate the FCPA's anti-bribery provisions and to commit mail and wire fraud, violations of the FCPA's anti-bribery provisions, mail and wire fraud, money laundering, conspiracy to commit money laundering, and filing false personal income tax returns. In announcing the April 2003 indictment, the DOJ alleged that Giffen had made "more than $78 million in unlawful payments to two senior officials of the Republic of Kazakhstan in connection with six separate oil transactions, in which the American oil companies Mobil Oil, Amoco, Texaco and Phillips Petroleum acquired valuable oil and gas rights in Kazakhstan."

However, by 2010, those multiple serious charges had been reduced to one relatively minor charge, willful failure to supply information regarding foreign bank accounts in violation of 26 U.S.C. § 7203, to which Giffen pled guilty in a Manhattan federal district court.

Specifically, Giffen admitted that he had failed to disclose his control of an $84 million Swiss bank account on his March 1997 income tax return.

For his guilty plea on the one remaining charge, Giffen still faced a statutory maximum imprisonment of up to a $25,000 fine, up to one year in federal prison, or both. However, on November 2010, the sentencing judge essentially repudiated the government's charges by sentencing Giffen—who had been released on a personal recognizance bond after his 2003 arrest—to "time served" and to pay a total lump-sum assessment of only $25. How a high-profile bribery indictment involving tens of millions of dollars ended with a fine less than most parking tickets is a story with as many twists as the spy novels to which it has been compared.

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 of Kazakhstan, and he and Mercator provided Kazakh officials with advice on strategic planning, investment priorities, and attracting foreign investment to the Kazakh government. Between 1995 and 2000, Mercator was awarded $69 million in success fees for helping to broker large oil and gas right deals between U.S. oil companies and the Kazakh government.

The DOJ alleged that, between 1995 and 2000, Giffen caused at least four U.S. oil companies—Mobil Oil, Texaco, Amoco, and Phillips Petroleum—to make payments totaling approximately $70 million into escrow accounts in connection with some of Kazakhstan's most lucrative oil and gas projects, in particular, the Tengiz field, one of the world's largest oil fields, and the Karachaganak field, one of the world's largest gas condensate fields. 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 Kazak 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.

According to the criminal information filed and to which Mercator pleaded guilty in 2010, Giffen used parts of the $67 million in success fees and the $70 million diverted to the Swiss bank to make unlawful payments to three senior, unnamed Kazakh government officials (KO-1, KO-2, and KO-3). The funds were also used to purchase luxury goods—notably two snowmobiles—for KO-1, KO-2, and KO-3. In 2004, prosecutors identified one of the recipients of Giffen's bribes as Kazakh President Nursultan Nazarbayev, the oligarchic ruler of that country since its independence in 1991.

Few predicted that Giffen would emerge from this case after seven years with a guilty plea merely to a relatively-paltry tax-related misdemeanor, a charge that one commentator described as "a face-saver for the government."[8] But Giffen's defense strategy was both bold

[8] Glovin, David. "Oil Consultant Giffen to Plead Guilty to Misdemeanor After Bribery Charges," Bloomberg, August 6, 2010.

and novel: Giffen sought discovery in support of a possible public authority defense, claiming that the U.S. government had effectively authorized his conduct through its secret intelligence agencies.

The discovery requests, sustained over government objection, triggered the Classified Information Procedures Act ("CIPA")[9] procedures that govern the handling of classified information in federal trials. As a result, there followed a complicated series 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 defense.[10] As the Second Circuit recognized, "regulating Giffen's access to classified information has presented the district court with a significant challenge."[11]

During Giffen's November 19, 2010 sentencing, media reports indicate that U.S. District Judge William Pauley took the dramatic and unusual step of praising Giffen from the bench for approximately 20 minutes, describing Giffen as a patriot and voluntary instrument of U.S. foreign policy during and after the Cold War. The judge admonished the government for prosecuting a case for seven years that, the judge said, should never have been brought, and he commended "the prosecutors for having the courage to take another look at this case." The judge further reportedly noted that since his initial arrest, Giffen's fortune had shrunk, not only from the $10 million bail he had posted until prosecutors dropped the serious charges in 2010, but also from enormous legal bills that forced him to cut staff from his company, Mercator, even while the Government of Kazakhstan continued to consult with him. Expressing deep sympathy with Giffen's long and expensive legal battle at the twilight of his career, the judge asked rhetorically, "In the end, at the age of 69, how does Mr. Giffen reclaim his good name and reputation?" The judge then reportedly stated, "This court begins that process by acknowledging his service."

According to the judge, with access "to the highest levels of the Soviet Union," Giffen acted as "a conduit for secret communications to the Soviet Union and its leadership during the Cold War" and, later, as a "trusted adviser to Kazakhstan's president," all while advancing American "strategic interests." The judge continued, "These [Kazakh] relationships, built up over a lifetime, were lost the day of his arrest." In these and other comments, the Judge showed that he had been thoroughly persuaded by Giffen's defense and by the many still-classified U.S. diplomatic and intelligence documents reviewed by the Judge alone, although the Judge did not divulge any specifics learned from those documents.

Giffen's alleged activities are also at the core of the civil litigation filed by businessman Jack Grynberg against BP, Statoil, British Gas, and others discussed *infra*. Grynberg alleges in

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[9] 18 U.S.C. App. § 3.

[10] *See United States v. Giffen*, 473 F.3d 30 (2d Cir. 2006) (dismissing appeal for lack of jurisdiction).

[11] *Id.* at 41 n.11. *See also* Morvillo, Robert G. & Robert J. Anello, "'Graymail' or the Right Defense?" N.Y.L.J., April 4, 2006 ("When a defendant seeks to use classified information to rebut the government's charges . . . the task is not a simple one. The defendant is required to jump through a multitude of procedural hoops to access the desired information.").

his civil suit that BP, Statoil and the other defendants paid approximately $12 million in bribes to Kazakh officials through Giffen.

Giffen's $84 million Swiss bank account had also been the focus of a 2007 civil forfeiture action brought in U.S. District Court of Manhattan. The account was in the name of Condor Capital Management, a corporation controlled by Giffen and incorporated in the British Virgin Islands. The $84 million was allegedly related to unlawful payments to senior Kazakh officials involved in oil and gas transactions arranged by Mercator Corporation in Kazakhstan. However, the forfeiture action failed because a special 2007 agreement among the governments of the United States, Switzerland, and Kazakhstan specifically designated the funds to be used by a Kazakh NGO benefiting underprivileged Kazakh children.

General Electric

On July 27, 2010, General Electric Company ("GE"), agreed to settle FCPA books and records and internal controls charges with the SEC for its involvement in a $3.6 million kickback scheme as part of the now infamous Iraqi Oil-for-Food Programme. GE agreed to pay $23.4 million in fines, disgorgement and interest to settle the charges against it as well as two wholly-owned subsidiaries for which GE had assumed liability through acquisition—Ionics, Inc. and Amersham plc ("Amersham"). In addition, GE, Ionics, Inc. (now GE Ionics, Inc.) and Amersham (now GE Healthcare Ltd.) consented to the entry of a court order enjoining them from future violations of the FCPA books and records and internal control provisions.

The allegations in the SEC's complaint involve separate schemes by two subsidiaries of GE (Marquette-Hellige and OEC-Medical Systems (Europa) AG ("OEC Medical")) and two subsidiaries of companies that would later be acquired by GE (Ionics, Inc. and Amersham).

According to the complaint, Marquette-Hellige and OEC-Medical made approximately $2.04 million in kickbacks through a third-party agent to the Iraqi government under the Oil-for-Food Programme. Marquette-Hellige allegedly agreed to pay illegal in-kind kickbacks valued at approximately $1.45 million in the form of computer equipment, medical supplies, and services on three contracts that generated profits of approximately $8.8 million. OEC-Medical, using the same agent, made similar in-kind kickback payments worth approximately $870,000 to secure a bid on a contract that generated a profit of $2.1 million. Similar to other OFFP schemes, OEC-Medical and the third-party agent created fictitious services in the contract in order to justify increased commissions for the agent to conceal the illegal payment from U.N. inspectors.

Separately,Norway-based company Nycomed Imaging AS, a subsidiary of Amersham, made approximately $750,000 in improper payments on nine contracts between 2000 and 2002 which earned the company approximately $5 million in profits. The contracts were negotiated by a Jordanian agent and authorized directly by Nycomed's salesman in Cyprus, who increased the agent's commission to 27.5% to cover the kickbacks. When a U.N. official inquired about the basis of the 27.5% commission, a Nycomed manager sent a letter to the U.N. falsely describing work the agent had performed to justify the commission.

In addition, Italian company Ionics Italba, a subsidiary of Ionics, Inc., earned $2.3 million in profits through illegal kickbacks of nearly $800,000 on five separate contracts to sell water treatment equipment to the Iraqi Oil Ministry. Side letters documenting the kickbacks for four of the contracts were concealed from U.N. inspectors.

GE acquired Amersham in 2004 and Ionics, Inc. in 2005 and assumed liability for the conduct of each entity and its subsidiaries. According to a statement from Cheryl Scarboro, Chief of the SEC's FCPA Enforcement Unit, "GE failed to maintain adequate internal controls to detect and prevent these illicit payments by its two subsidiaries (Marquette-Hellige and OEC Medical) to win Oil-for-Food contracts, and it failed to properly record the true nature of the payments in its accounting records. Furthermore, corporate acquisitions do not provide GE immunity from FCPA enforcement of the other two subsidiaries involved."

Technip and Snamprogetti

On July 7, 2010 and June 28, 2010, respectively, Snamprogetti Netherland B.V. ("Snamprogetti"), a Dutch subsidiary of the Italian oil and gas company ENI S.p.A. ("ENI") and Technip S.A. ("Technip"), a French-based construction, engineering and oilfield services company, 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 ("DPAs") with the two companies and charged 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 DPA 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 in greater detail in Part II in connection with the KBR/Halliburton case.

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 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.

Dimon, Inc. and Universal Corporation

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. ("Alliance One"), for violating the FCPA's anti-bribery provisions and aiding and abetting violations of the internal controls and books and records provisions. From 1996 to 2004, the time of the alleged conduct, Dimon was a U.S. issuer. Alliance One is a U.S. issuer that was formed in May 2005 by the merger of Dimon and Standard Commercial Corporation. The SEC and DOJ enforcement actions stemmed from payments allegedly made to foreign officials at a Kyrgyzstan regulatory entity established to regulate the sale and export of Kyrgyz tobacco, and at the state owned Thailand Tobacco Monopoly ("TTM").

Without admitting or denying the SEC's allegations, Bobby J. Elkin, Jr. (a former country manager for Kyrgyzstan), Baxter J. Myers (a former regional financial director), Thomas G. Reynolds (a former international controller), and Tommy L. Williams (a former senior vice president for sales) consented to the entry of final judgments permanently enjoining each of them from further such violations. Myers and Reynolds also each agreed to pay a $40,000 civil penalty.

On August 3, 2010, Elkin pleaded guilty to a criminal conspiracy to violate the FCPA and was sentenced on October 21, 2010, to three years' probation and a $5,000 fine. Although the government had requested that Elkin receive 38 months' imprisonment, the sentencing court imposed only probation. The court determined probation was appropriate because Elkin had substantially assisted the U.S. government in its investigation, that Elkin had faced a choice of

either making the corrupt payments or losing his job, and likened Elkin's payments to the CIA's payments to the Afghan government, which the judge noted were not violations of federal law but were relevant to "the morality of the situation."

In August 2010, U.S. authorities also announced the resolution of several related investigations. On August 6, 2010, the DOJ and the SEC settled FCPA complaints against both Alliance One and Universal Corporation, Inc. ("Universal Corporation"), another large tobacco company which issued securities in the U.S. Collectively, the monetary penalties imposed on Alliance One and Universal Corporation in these April and August 2010 dispositions exceeded $28.5 million.

As part of the DOJ's Non-Prosecution Agreement ("NPA") with Alliance One, it and two subsidiaries pleaded guilty to criminal conspiracies to violate, and substantive violations of, the FCPA's anti-bribery and accounting provisions. Collectively, the Alliance One subsidiaries paid a criminal fine of $9.45 million and the parent company agreed to cooperate with the DOJ's investigation and retain an independent compliance monitor for a minimum of three years. This independent monitor would oversee Alliance One's implementation of an anti-bribery and anti-corruption compliance program while periodically reporting to the DOJ. To settle the related SEC investigation, Alliance One also agreed to disgorge $10 million in ill-gotten gains.

Universal Corporation, one of Alliance One's competitors, similarly pleaded guilty to conspiring to violate the FCPA and to violating the anti-bribery provisions relating to the corrupt payments to officials at TTM as part of its NPA with the DOJ. Universal Corporation simultaneously settled FCPA anti-bribery, books and records and internal controls charges with the SEC, which in addition to the improper payments in Thailand, had alleged FCPA violations relating to Universal's conduct in Mozambique and Malawi.[12] Universal Corporation agreed to disgorge more than $4.5 million in ill-gotten gains with the SEC settlement and its Brazilian subsidiary, Universal Leaf Tabacos Ltda. ("Universal Brazil"), agreed to pay a $4.4 million criminal fine in connection with the DOJ NPA. Like Alliance One, Universal Corporation also agreed to cooperate with the DOJ investigation and retain an independent compliance monitor for a minimum of three years.

The following factual summary is based on the stipulations in the criminal investigations resolved in August 2010 against the former Alliance One employees and the corporate defendants, except where otherwise noted.

- <u>*Kyrgyzstan*</u>

From 1996 through 2004, Dimon's wholly-owned Kyrgyz subsidiary, Dimon International Kyrgyzstan, Inc. ("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., a wholly-

[12] The DOJ's charges were limited to Universal's conduct in Thailand.

owned subsidiary of DIK, that included a five cent per kilogram charge for "financial assistance." Elkin allegedly paid this charge by delivering bags of U.S. currency to a high-ranking Tamekisi official upon request. These cash payments had no legitimate business purpose and a total of approximately $2.6 million was paid to this Kyrgyz official under the arrangement. Elkin also paid approximately $260,000 in bribes to the Akims for allowing DIK to purchase tobacco from the regions under their control.

Additionally, Kyrgyz tax officials repeatedly conducted extortive tax audits of DIK but, according to U.S. authorities, the extortive nature of these audits did not excuse the resulting corrupt payments. On one occasion, according to the SEC's complaints, the tax officials determined that DIK failed to submit two reports, imposed a fine of approximately $171,741, 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. In total, DIK made payments of approximately $82,850 to the Kyrgyz tax authorities from 1996 through 2004.

Elkin made the payments to Kyrgyz officials through a bank account, held in his name, known as the "Special Account." 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 control issues relating to cash, and that corruption in Kyrgyzstan exposed Dimon to financial risk.

- *Thailand*

From 2000 to 2003, Dimon colluded with Standard Commercial and another competitor to pay bribes of more than $1.2 million to government officials of TTM while realizing approximately $7 million in profits. The bribes were part of the parties' contracts with TTM that included "special expenses" or "special commissions" calculated on a per-kilogram basis. As part of this scheme, Dimon paid nearly $700,000 in bribes to TTM officials and secured more than $9.85 million in contracts from TTM. In addition to the payments, Dimon arranged for trips by the TTM officials to Brazil on the pretext of looking at tobacco blends and samples, which included unrelated activities such as piranha fishing, trekking in the Amazon jungle, and trips to Argentina, Milan, and Rome. The kickbacks were paid through Dimon's local agent and recorded as sale commissions to the agent. The payments were authorized by Dimon personnel, including a senior vice president of sales who allegedly knew that the payments were going to TTM officials. This Dimon senior vice president instructed one such payment to be transmitted as eight smaller payments to several different bank accounts over several days and in an e-mail discussion with an unidentified employee about the "special commission," he stated "[i]t would be better if I did not have to answer too many questions" in the U.S. According to the SEC's

complaint, 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.

Similar to Dimon, Universal Corporation made "special expenses" payments on a per kilogram basis to the TTM between 2000 to 2003. In this time period, its Brazilian subsidiary, Universal Brazil, paid $697,800 in "special expenses." In return, Universal Brazil realized net profits of approximately $2.3 million from its sales to TTM. The bribes took the form of direct payments by Universal Brazil employees to bank accounts in Hong Kong provided by the local agent. Universal also partially paid for of a "purported inspection" trip to Malawi in 2000 by TTM officials, including a portion of the airfare, more than $3,000 in "pocket money" to certain officials, and more than $135,000 in "special expenses" to a TTM agent. In addition to the kickbacks, the SEC complaint also alleges that Universal Brazil colluded with two unidentified competitors to apportion tobacco sales to TTM and coordinate sales prices. In the DOJ Plea Agreement, it was noted that Universal Corporation maintained insufficient oversight or review over its subsidiaries' financial records, including that Universal Corporation never audited their records between 2000 to 2004.

- *Malawi and Mozambique*

According to the SEC complaint, between October 2002 and November 2003, a Universal subsidiary, Universal Leaf Africa (Pty) Ltd. ("Universal Leaf Africa"), made payments totaling $850,000 to two high-ranking Malawian officials and a Malawian political opposition leader. The SEC alleged that such payments were routed through Universal's Belgian subsidiary, and were improperly recorded as service fees, commissions, expenses related to local law purchasing requirements, and donations to the government. According to the SEC, Universal had no effective internal controls in place to ensure that these payments were proper.

Regarding Mozambique, the SEC alleged that between 2004 and 2007 Universal Leaf Africa made payments of more than $165,000 through Universal subsidiaries in Belgium and Africa to five Mozambican officials and their family members. These Mozambique payments were alleged to have been made at the direction, or with the authorization, of the Universal Leaf Africa's regional director. The bribes took the form of cash payments, debt forgiveness, and gifts, including supplies for a bathroom renovation and personal travel on a company jet. These bribes were meant to assist Universal Corporation secure a land concession that gave its subsidiary the exclusive right to purchase tobacco from regional growers, avoid export taxes, and procure beneficial legislation.

The SEC alleged that Universal failed to have and maintain adequate internal controls to ensure that such payments were not made in order to obtain or retain business. Specifically, that Universal did not require supporting documentation for the payments, which were improperly recorded as, among other things, commissions, consulting fees, and travel advances.

Daimler

On April 1, 2010, Daimler AG ("Daimler"), a German automotive company and foreign issuer traded on the New York Stock Exchange, paid $185 million dollars to resolve 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.

According to media reports, on November 12, 2010, the Investigative Committee of the Prosecutor General's Office of the Russian Federation announced that it had initiated criminal proceedings against Daimler. Reportedly, the Committee specifically announced, "Due to results of a preliminary audit . . . a criminal case has been initiated . . . into fraud committed through deception and breach of confidence in concluding contracts for the delivery of Mercedes-Benz automobiles to state bodies." Russia's President, Dmitry Medvedev, and Russia's Interior Minister, Rashid Nurgaliev, are reported to have ordered the investigation after Daimler admitted the above conduct to resolve U.S. authorities' investigation.

- *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 €112 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 €550,000 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 €95 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.

Terra Telecommunications (Haiti Teleco)

Since May 2009, numerous indictments, arraignments, and guilty pleas have come down relating to a scheme by the U.S. telecommunication company Terra Telecommunications Corp. ("Terra") 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 Terra, individuals associated with 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 wherein executives at Terra, a Nevada corporation based in Miami, Florida, made 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, the two officials granted Terra 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.

The prosecution of Antoine and Duperval is believed to be the first time foreign officials have been charged in connection with an FCPA matter. Because they could not be charged with violations of the FCPA insofar as the statute criminalizes the provision but not the receipt of bribes, Antoine and Duperval 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, ordered to pay $1,852,209 in restitution, and required to forfeit $1,580,771. Duperval was arraigned on March 22, 2010 and pleaded not guilty.

Also on December 4, 2009, the DOJ indicted Joel Esquenazi and Carlos Rodriguez, the president and vice-president, respectively, of Terra, for their alleged involvement in the scheme. According to the indictment, Esquenazi and Rodriguez paid more than $800,000 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 Esquenazi and Rodriguez pleaded not guilty in January 2010. Esquenazi went a step further on November 10, 2010, by filing an amended motion to dismiss the indictment on the grounds that the DOJ's interpretation of the term "foreign official" in the FCPA was unsustainable. He argued that employees (including executives) of state-owned or state-controlled commercial entities did not fall within the definition of "foreign official" because that definition only applied to "officials performing a public function." In a nod to then-current political dialogue in the U.S., Esquenazi argued:

> Mere control or partial control or ownership (or partial ownership) of an entity by a foreign government no more makes that entity's employees "foreign officials" than control of General Motors by the U.S. Department of Treasury makes all GM employees U.S. officials.

In the alternative, Esquenazi argued that the court should dismiss the indictment because the FCPA's definition of "foreign official" was unconstitutionally vague.[13]

In its response, filed on November 17, 2010, the DOJ declined to defend its interpretation although it asserted that, if the court required, "the government [was] more than willing to elaborate on how the FCPA's plain text, its current interpretation by courts, its legislative

[13] A decidedly similar motion had previously been filed by Nam Nguyen as part of the Nexus Technologies case discussed in Part II, however that motion had been denied as moot based on a superceding indictment.

history, and U.S. treaty obligations… confirm that the definition of 'foreign official' includes officials of state-owned and state-controlled companies." Instead, the DOJ argued that Esquenazi's motion was a premature request for a ruling on the sufficiency of the evidence. Two days later, the Court agreed with the DOJ and issued a fairly perfunctory decision in its favor. Both Esquenazi and Rodriguez still await trial.

On April 27, 2009, the former controller of Terra, Antonio Perez, pleaded guilty to conspiracy to violate the FCPA and money laundering laws. On January 21, 2011, Perez was sentenced to two years in prison followed by two years of supervised release. He was also ordered to pay a $100 fine and to forfeit $36,375.

The DOJ also indicted several individuals who served as intermediaries for the corrupt payments. On May 15, 2009, Juan Diaz pleaded guilty 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 Terra 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. On July 30, 2010, Diaz was sentenced to four years and nine months in prison and three years of supervised release. He was also ordered to pay $73,824 in restitution and to forfeit $1,028,851.

In addition, on February 19, 2010, 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. Fourcand was sentenced to six months in prison for his involvement in the scheme.

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 Terra to J.D. Locator. This individual, Marguerite Grandison, was the Telecom Consulting's president as well as the Duperval's sister. 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 2011.

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 tetra ethyl 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. The SEC filed a settled enforcement action on August 5, 2010 against Naaman and Innospec's former Business Director, David Turner, a U.K. citizen, for their involvement in the scheme. Turner agreed to disgorge $40,000, while Naaman will disgorge $810,076 plus prejudgment interest of $67,030 and pay a

civil penalty of $438,038. Without admitting or denying the SEC's allegations, Turner and Naaman also consented to the entry of final judgments permanently enjoining them from violating Exchange Act Sections 30A and 13(b)(5) and Rule 13b2-1 thereunder, and from aiding and abetting Innospec's violations of Exchange Act Sections 30A, 13(b)(2)(A), and 13(b)(2)(B), and as to Turner, from violating Rule 13b2-2.

Paul W. Jennings, Innospec's former CFO and CEO, also settled with the SEC on January 24, 2011. The SEC alleged Jennings was aware of and/or approved numerous improper payment schemes used by the company. The SEC also alleged Jennings signed false annual certifications that were provided to auditors from 2004 to 2009 stating that he complied with Innospec's Code of Ethics (which incorporated the FCPA) and that he was unaware of violations of the Code of Ethics by anyone else. Jennings also allegedly signed false annual and quarterly Sarbanes-Oxley certifications and false management certifications to auditors regarding the company's books and records and internal controls. Without admitting or denying the SEC's allegations, Jennings consented to the entry of a final judgment permanently enjoining him from violating Sections 30A and 13(b)(5) of the Securities Exchange Act of 1934 and Rules 13a-14, 13b2-1 and 13b2-2 thereunder, and from aiding and abetting Innospec's violations of Exchange Act Sections 30A, 13(b)(2)(A) and13(b)(2)(B). Jennings agreed to disgorge $116,092 plus $12,945 in prejudgment interest and to pay a civil penalty of $100,000.

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's 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. In March 2010, the house arrest was lifted, although Balladares must still report to the Special Prosecutor for Organized Crime twice each month.

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.

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. 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 BAES's worldwide activities, to be split between a criminal fine in the U.K. and a charitable donation to benefit the people of Tanzania, whose officials had received payments from BAES. As part of its settlement with BAES, discussed below in connection with the Tanzanian conduct, the SFO agreed not to pursue further action against BAES for prior conduct, with few exceptions. The dropped investigations included the SFO's investigation and prosecution of Count Alfons Mensdorff-Pouilly from Austria, a BAES agent who had been charged with conspiracy to corrupt in connect with BAES sales to European countries.

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, the SFO 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 were 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 had investigated $12.4 million in payments that BAES made to a purported Tanzanian marketing agent in connection with BAES's sale of a £28 million air traffic control radar system to Tanzania.

According to court documents, a local businessman, Shailesh Vithlani, had been recruited and retained by a Siemens entity (later acquired by BAES) as a marketing advisor to assist in negotiations. Vithlani had entered into a contract with a subsidiary of the Siemens entity, however, shortly before the radar contract was signed, two new adviser agreements with Vithlani were concluded. One agreement was made between Red Diamond Trading Company ("Red Diamond"), a British Virgin Islands entity created by BAES for the purposes of the transaction to ensure confidentiality, and a Vithlani-controlled Panama-incorporated company, Envers Trading Corporation. The fee for Vithlani's services under this contract was to be not more than 30.025% of the radar contract price. The other arrangement was for services direct to BAES by another Vithlani-controlled business, Merlin International, registered in the B.V.I. The fee under this agreement was 1% of the radar contract value. Between January 2000 and December 2005 around $12.4 million was paid to Vithlani's companies by BAES or Red Diamond.

BAES and the SFO entered a settlement agreement, under which BAES admitted to failing to keep accurate accounting records regarding the payments to the Tanzanian marketing agent "sufficient to show and explain the transactions of the company," in violation of Section 221 of the U.K.'s Companies Act of 1985. BAES also admitted that there "was a high probability that part of the $12.4m would be used in the negotiation process to favour BAE," and agreed to make a payment of up to £30 million, less any fines imposed by the court, to the Tanzanian government without admitting any liability to the Tanzanian government. Media reported that, at a December 20, 2010, plea hearing, the SFO also stressed that BAES had "gone to very considerable lengths to ensure that the conduct giving rise to the offence is never again repeated" and had "instituted appropriate standards of compliance."

In exchange, the SFO agreed to a series of express declinations of further actions against BAES that went beyond the conduct BAES had disclosed to the SFO. The SFO agreed to "terminate all its investigations into the BAE Systems Group," that—with the exception of conduct related to the Czech Republic or Hungary—"there shall be no further investigation or prosecutions of any member of the BAE Systems Group for any conduct preceding 5 February 2010," that there would be no civil proceedings "against any member of the BAE Systems Group" relating to matters the SFO investigated, and that "[n]o member of the BAE Systems

Group shall be named as, or alleged to be, an unindicted co-conspirator or in any other capacity in any prosecution the SFO may bring against any other party."

At the plea hearing, Justice David Michael Bean of the Crown Court at Southwark challenged the propriety of the plea agreement. Justice Bean harshly criticized the plea agreement's failure to include a corruption-related offense, stating, according to media reports, that the "obvious inference" from the accounting plea was that part of the secret payment was, in fact, a bribe to a Tanzanian official to win the contract. "I do not read that the money paid was just payments reflecting the fact Mr. Vithlani was a busy man. I read that part of the 12.4m was used to make corrupt payments. Is that what it means?" inquired Justice Bean. Media reports stated that Mr. Justice Bean further criticized BAES for taking a "hear no evil, speak no evil" posture by arranging the payment so that it would not know how much was paid to foreign officials. Justice Bean continued the hearing over to December 21 because he would not approve the settlement until he knew the intended use of the $12.4 paid to the marketing agent. In subsequent formal remarks, Justice Bean further commented that he was "surprised to find a prosecutor granting a blanket indemnity for all offences committed in the past, whether disclosed or otherwise."

On December 21, however, Justice Bean approved the settlement despite his misgivings. Although noting that U.K. law did not require him to accept the purported basis of the plea—which included suggestions by the SFO, seriously doubted by Justice Bean, that the payments to the agent were for his lobbying efforts and that "public relations and marketing services" would have been an appropriate description for the payments under Section 221—Justice Bean concluded that he had no power to modify the settlement agreement or sentence BAES for an offense to which it did not admit. Justice Bean also considered the fact that BAES had already paid U.S. authorities $400 million for unrelated conduct and observed that the settlement agreement's offset of any criminal fines against the £30 million payment to Tanzania placed "moral pressure on the Court to keep the fine to a minimum so that the reparation is kept at a maximum." Accordingly, Justice Bean sentenced BAES to a fine of £500,000 and a payment of £225,000 towards the SFO's costs.

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 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. On April 28, 2010, 21 of the defendants entered pleas of not guilty. The final defendant, Daniel Alvirez, pleaded guilty to two counts of conspiracy to violate the FCPA on March 1, 2011. Jonathan Spiller, one of the 21 who initially pled not guilty, pleaded guilty to a single count of conspiracy to violate the FCPA on March 29, 2011.

- *Richard Bistrong*

"Individual 1" is reported to be Richard T. Bistrong, a former executive of Armor Holdings, a U.S. issuer acquired by BAES in 2007. One of the SHOT show defendants who entered into a plea agreement 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 to 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 September 16, 2010, Bistrong pleaded guilty to the criminal conspiracy charge pursuant to a plea agreement with the United States in which Bistrong admitted to the facts as described in the Statement of the Offense. As part of his February 2009 plea agreement, filed in open court for the first time on September 16, 2010, he agreed to cooperate fully with the government concerning his own conduct and "any wrongful conduct involving others," and such cooperation included "working in an undercover role to record meetings and telephone calls." Bistrong's sentencing hearing has not been scheduled and is unlikely to occur until after the SHOT Show defendants' cases have been resolved.

- *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. 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." Subsequently, Chemring entered into a new agreement to acquire Allied's two principle operating units for $59.6 million, and Allied announced on September 1, 2010, that this sale had been completed. The sale left Allied with no significant operating assets,

and on October 1, 2010, Allied announced that its stockholders had approved the dissolution of the company once the company has resolved "the matters relating to the DOJ subpoena." Allied announced that it does not expect to be able to resolve these matters before August 31, 2011.

- *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 Amaro Goncalves, 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. Smith & Wesson has since disclosed two shareholder derivative actions brought against the company stemming from the potential FCPA violations.

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.

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. 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 or competitors; (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 Programme ("OFFP"). Many of the companies discussed in connection with the OFFP settlements (or one of their affiliates) are 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]hough the government changes, the nation remains, with rights and obligations unimpaired."[14] 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 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

[14] 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).

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.[15] 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 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. On April 30, 2010, the Republic of Iraq filed both an opposition to the defendants' motion to dismiss and a motion to compel defendant BNP Paribas to arbitrate banking-related claims. Although the court denied the Republic of Iraq's motion to compel arbitration on March 3, 2011, it has yet to rule on the defendants' motion to dismiss.

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 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; 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

15 *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).

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, which the court granted.

El Instituto Costarricense de Electricidad ("ICE"), the state-owned telecommunications and electricity provider of Costa Rica, filed a complaint against Alcatel-Lucent S.A. ("Alcatel") in Florida state circuit court in Miami on May 7, 2010. Earlier in the year, Alcatel had settled with the DOJ and the SEC, admitting to certain FCPA violations. The ICE suit, in turn, sought damages for Alcatel's bribery of ICE personnel and other government officials under Florida's racketeering statutes, which allow for treble damages. On January 19, 2011, the court issued an order dismissing the complaint on grounds of forum *non conveniens*, which ICE has appealed. As a part of its motion, Alcatel has stipulated to the jurisdiction of Costa Rican courts and waiver of the statute of limitations.

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 BAES 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. 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 BAES by the city of 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 in Part II, 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.

A derivative action was filed against the officers and directors of Parker Drilling Company in Harris County District Court, Texas on June 3, 2010. The company had initially disclosed in May 2008 that it was under investigation by the DOJ and the SEC for its use of "customs and freight forwarding agents" in Kazakhstan and Nigeria. Plaintiffs alleged that shareholders were not sufficiently informed of any further details of the scope or impact of the investigation until March 2010, when the directors disclosed that the company had made "potentially illegal payments" to a Kazakhstan government official, and that the costs of the investigation to date exceeded $20 million. The complaint alleges counts of breach of fiduciary duty, abuse of control, gross mismanagement, and waste of corporate assets against Parker Drilling's directors and officers. Two additional complaints were consolidated with the original complaint on October 22, 2010.

Two derivative suits against Smith & Wesson Holding Corporation ("Smith & Wesson") were filed in Clark County Court in Nevada in September 2010. Both complaints alleged one count of breach of fiduciary duty. The allegations stem from the December 2009 indictment of Smith & Wesson Vice President Amaro Goncalves for FCPA violations, discussed above, and Smith & Wesson's subsequent disclosure in July 2010 that it is currently under investigation by the DOJ and SEC. The allegations at this point are limited to assertions that the officers and directors failed to prevent the alleged FCPA violations through implementation of anti-corruption practices and procedures. These actions were consolidated and removed to the District Court for the District of Nevada in November; a consolidated amended complaint has not yet been filed.

A shareholder of Avon Products, Inc. ("Avon") filed a derivative action on July 21, 2010, in the Southern District of New York. The complaint alleged counts of breach of fiduciary duty, abuse of control, waste of corporate assets, and unjust enrichment. After the court questioned the existence of diversity jurisdiction, an amended complaint was filed adding an allegation of a violation of Section 14(a) of the Exchange Act. The complaint alleges that the defendants breached their fiduciary duty by failing to implement appropriate anti-corruption policies. On November 15, 2010, plaintiff entered into a stipulation with two other plaintiffs to consolidate and serve as lead plaintiffs.

Shareholders brought suit against Hewlett Packard Company ("HP") on October 19, 2010 in the Northern District of California, alleging enrichment and breach of fiduciary duty "for causing the company to engage in unlawful conduct and/or consciously disregarding widespread violations of law." The complaint alleges that the officers and directors "knowingly allowed and rewarded" violations of the FCPA, the Anti-Kickback Act of 1986, the False Claims Act, and the Truth In Negotiations Act. Effective February 3, 2011, the parties voluntarily stayed this action for 45 days in reaction to HP's announcement that its board would be expanded, that defendant directors would not stand for re-election, and that a special committee of independent directors would be convened to investigate the wrongdoing alleged.

Securities Suits

Several companies face securities suits, either as standalone actions or as companions to derivative suits. An Exchange Act class action claim was filed against SciClone Pharmaceuticals, Inc. ("SciClone"), on August 13, 2010 in the Northern District of California. The complaint alleged that SciClone's stock dropped 40% the day it was announced that the SEC and the DOJ were investigating possible FCPA violations related to the company's business in China. Plaintiffs contended that SciClone's sales figures were materially misleading because they were "propped up" by FCPA violations. The complaint's allegations with respect for scienter were thin, consisting of vague allegations of knowledge and motive, which could prove to be the most difficult hurdle plaintiffs face. On December 1, 2010, the court approved a voluntary dismissal without prejudice of plaintiffs' claims.

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 in Part II). 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. On July 23, 2010, Siemens filed a motion to dismiss arguing failure to plead scienter on all claims, and that those claims which are not entitled to safe-harbor protection are barred by the statute of limitations. Oral argument was heard on Siemens' motion to dismiss on November 19, 2010, and, as of the date of this publication, the court has not yet rendered its decision.

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 *supra*. 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. 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. Panalpina is headquartered in Switzerland and is traded on the Swiss Exchange; 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. For this reason, plaintiffs' action was hindered by the Supreme Court's June 24, 2010 ruling in *Morrison v. National Australia Bank* that securities fraud actions could not be brought by shareholders who purchased on foreign exchanges. Panalpina and plaintiffs settled in August 2010.

UTStarcom, Inc. ("UTStarcom") also settled a securities fraud litigation which included FCPA allegations, reaching an agreement approved by the Northern District of California in August 2010. The $30 million settlement related back to a complaint originally filed in November 2004. As filed, the complaint alleged fraudulent reporting of misleading sales results, failure to disclose known product defects, and sham transactions designed to affect marginal internal revenues, among a broad range of other allegations. Subsequently, after UTStarcom disclosed that it was being investigated by the DOJ and the SEC for possible FCPA violations involving the company's activities in China, India, and Mongolia, plaintiffs tacked on FCPA allegations to the third amended consolidated complaint, filed in May 2007. As described in Part II, UTStarcom settled criminal and civil FCPA charges with the DOJ and the SEC in 2009.

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 in Part II. 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 or Competitors

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'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. The parties entered a Notice of Settlement in October 2010.

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 in Part II, 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.

Companies accused of bribery also have faced lawsuits from the competition allegedly edged out. On July 23, 2010, NewMarket Corporation ("NewMarket") filed suit in the Eastern District of Virginia against Innospec, Inc. ("Innospec"). Filed in response to Innospec's guilty plea to FCPA violations in Iraq and Indonesia, the complaint as amended alleges violations of the Sherman Act, the Robinson-Patman Act, the Virginia Antitrust Act, and the Virginia Business Conspiracy Act. Specifically, NewMarket alleges that Innospec's bribes were intended to prevent its customers from purchasing fuel additives from NewMarket. Innospec has moved to dismiss four of the counts for lack of subject matter jurisdiction and failure to state a claim; specifically, that because at the time of the conduct, it was an English-headquartered company doing business in Iraq and Indonesia, the statutes do not apply to entirely extraterritorial conduct.

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 original complaint was dismissed without prejudice on March 31, 2010, for failure to state a claim under the Antiterrorism Act. Specifically, the court held that plaintiffs failed to "allege, at a minimum, that each defendant knew that the oil it was buying through the OFP was tied to a kickback to Hussein and that Hussein was using OFP kickback money to fund terrorism that targeted American nationals." 704 F. Supp. 2d 623, 665 (S.D. Texas 2010). All other claims

were dismissed with prejudice. The Antiterrorism Act allows claims only by United States nationals only; those plaintiffs meeting that requirement filed an amended complaint on April 23, 2010.

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.

Steven Jacobs, former President of the Macau Operations of Las Vegas Sands Corporation ("Sands"), filed a complaint on October 20, 2010 in the Clark County Court in Nevada alleging counts of breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious discharge. Jacobs alleges that his termination was directly related, among other things, to his repeated refusal to withhold business from Chinese banks that refused to exercise influence with government officials on behalf of Sands, to investigate senior government officials in order to blackmail them, and to continue to retain a Macau attorney despite concerns that he "posed serious risks under the criminal provisions" of the FCPA.

Stephen Lowe, a former employee of Indianapolis-based supplier of automatic transmissions for commercial vehicles Allison Transmission, Inc., filed a complaint dated November 15, 2010, in Marion County Superior Court, Indiana, alleging retaliatory discharge, breach of contract, breach of implied covenant of good faith and fair dealing, and promissory estoppel. The complaint alleges that Lowe, while working in Shanghai, became aware of a scheme in which a coworker bribed Beijing city bus officials in order to secure contracts. Specifically, Lowe claims he witnessed envelopes of cash being transferred to officials over dinner meetings, and was asked to attend high-stakes card games in which money was deliberately lost to bus officials. A coworker allegedly informed Lowe that he routinely provided officials with gifts, money, and prostitutes. Lowe alleged that he reported these actions to superiors, and was fired three months later because he "lacked leadership potential." The action was settled in January 2011 for undisclosed terms.

Sempra Global is facing a retaliatory dismissal complaint filed November 4, 2010, in state court in San Diego County, California. Rodolfo Michelon served for five years as Director and Controller, Mexico, before his termination. His complaint alleges that he repeatedly questioned and protested against "miscellaneous frauds and bribes," including in one case bribing Mexican police to evict a private landowner. Michelon alleged his protests were met with "open hostility and threats of termination." The complaint alleges counts of fraud, wrongful discharge, and preemptive retaliatory termination.

On August 27, 2010, Peter Barker-Homek, former CEO of TAQA New World, Inc. ("TAQA"), the state-owned oil company of Abu Dhabi, filed a complaint against his former employer in the Eastern District of Michigan. Barker-Homek alleges that TAQA forced him to resign because he refused to engage in bribery of government officials. Specifically, he alleges a scheme by other TAQA executives to smear and dismiss him after his refusal to bribe officials in Morocco in order to be permitted to build there, and his refusal to employ an Indian computer company that would give kickbacks to TAQA executives (who are state employees). The complaint alleged counts of breach of contract, retaliatory discharge, assault, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligent supervision. TAQA moved to dismiss for lack of personal jurisdiction, forum non conveniens, and failure to state a claim. The parties are currently engaged in jurisdictional discovery.

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 in Part II. 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 in Part II, is currently a fugitive. Because of these obstacles to continuing discovery, the case was abated by Judge Kenneth Hoyt on August 31, 2010.

International Guidance and Developments

WikiLeaks Corruption Revelations

In November 2010, the non-profit organization WikiLeaks began releasing the contents of diplomatic cables from 274 U.S. embassies, consulates, and diplomatic missions around the world. As of February 4, 2011, WikiLeaks released 3,436 of a claimed 251,287 cables covering the period from December 28, 1966 to February 28, 2010. Of those cables, 133,887 are unclassified, 101,748 are classified Confidential, and 15,652 are classified Secret under the U.S. government classification system. The cables cover a wide range of foreign policy issues. Several of the cables released by WikiLeaks relate to potential corruption of foreign government by various corporations. Two of the most prominent sets of cables relate to potential corruption issues in Nigeria and are discussed below.

- *Royal Dutch Shell*

In October 2009, Ann Pickard, Executive Vice President of the oil company Royal Dutch Shell PLC ("Shell"), mentioned Shell's infiltration of the Nigerian government in a discussion with the American Ambassador to Nigeria related to China's reported interest in Nigeria's oil blocks. Pickard said that Shell received a copy of a letter sent by the Special Advisor to the Nigerian President on Petroleum Matters to the Chinese stating that the Chinese offer for oil exploration blocks was not sufficient. Although the Nigerian Minister of State for Petroleum Resources initially denied that the letter had been sent, Pickard said Shell had "good sources" indicating that the letter was sent to both China and Russia. She claimed that "Shell had seconded people to all the relevant ministries and that Shell consequently had access to everything that was being done in those ministries." She also stated that the Government of Nigeria had "forgotten" Shell's level of access to those ministries.

An NNPC spokesman stated that "Shell does not control the government of Nigeria and has never controlled the government of Nigeria." Shell refused to comment on the content of the cables but stated that the "assertion that Shell has somehow infiltrated the Government of Nigeria is absolutely untrue, false and misleading."

- *Pfizer*

An April 2009 cable from the U.S. Embassy in Nigeria revealed that Pfizer Inc. told an Embassy official that it hired investigators to uncover information linking the then-current Nigerian Attorney General Michael Aondoakaa to corruption in order to pressure Aondoakaa into dropping two federal lawsuits against Pfizer. Pfizer was sued by the Nigerian federal and state authorities over a 1996 drug trial involving children living in Kano, Nigeria, during an unprecedented meningitis epidemic. On April 2, 2009, Pfizer lawyers and Pfizer Country Manager Enrico Liggeri informed the Ambassador and an Embassy economics official that it had reached a preliminary agreement to settle the two cases brought by the Kano state authorities for $75 million. The lawyers also stated that the former Nigerian Head of State Yakuba Gowon mediated between Pfizer and the Nigerian federal and state governments. The lawyers said

Gowon convinced the federal government to drop its lawsuits and convinced the state government to lower its settlement demand from $150 million to $75 million. Nigerian representatives had wanted the payment made in lump sum checks, while Pfizer, worried about transparency issues, had pushed for a trust fund to administer portions of the settlement and specific earmarks to aid the health care system in Kano.

On April 9, 2009, Liggeri met with the same Embassy economics official, without the Pfizer lawyers present, and advised the official that Pfizer was “not happy” settling the state cases but concluded the settlement was reasonable considering the length of the litigation, which cost Pfizer $15 million per year in legal and investigative expenses. He said that Pfizer believed the lawsuits were “wholly political” because Nigeria took no action against Doctors Without Borders, who administered the same drug to other Nigerian children during the epidemic. Doctors Without Borders has denied administering the drug at issue during the meningitis outbreak. Liggeri also stated that Pfizer hired investigators to expose Aondoakaa’s ties to corruption to coerce him into dropping the remaining federal cases. Liggeri said that the investigators passed the information to the local media, which ran a series of damaging articles describing Aondoakaa’s alleged links to corruption in February and March. He also said that Pfizer had “much more damaging information” on the Attorney General and that the Attorney General’s “cronies” were pressuring him to drop the cases for fear of further media scrutiny.

In October 2009, the Nigerian federal government dropped its lawsuits against Pfizer under a confidential agreement negotiated between Pfizer and attorneys for the Nigerian government. The settlement amount has not been disclosed. In a statement, Pfizer said that, under the settlement, it paid the legal fees and expenses incurred by the Nigerian federal government’s counsel of record for the case and did not make any payments to the government itself. Pfizer claimed that it negotiated the settlement agreement in good faith and denied conducting an investigation of the Attorney General. Pfizer has also maintained that the drug trial was conducted legally and ethically. Aondoakaa stated that he was not aware that Pfizer had him investigated. In February 2010, Acting Nigerian President Goodluck Jonathan removed Aondoakaa, who was involved in numerous alleged scandals, from his position. Since his removal from office, he has been banned from holding public office by a Nigerian Federal High Court, barred from entering the U.S. due to his history of corruption, and suspended as a Senior Advocate of Nigeria for two years by the Legal Practitioners Privileges Committee.

European Court of Justice - In-House Counsel Legal Privilege

In a landmark ruling issued September 14, 2010 in *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission*, the European Court of Justice (“ECJ”) rejected calls to broaden the scope of the attorney-client privilege in European Union (“EU”) competition law investigations carried out by the European Commission (“EC”). In such investigations, the attorney-client privilege is subject to two cumulative conditions, as originally established in a 1982 ECJ ruling in *AM & S Europe v. Commission*: (i) the exchange with the lawyer must be connected to “the client’s rights of defense” and (ii) the exchange must emanate from “independent lawyers,” i.e., “lawyers who are not bound to the client by a relationship of employment.” The ECJ confirmed that the attorney-client privilege in EU competition law

matters extends only to communications between the client and an external lawyer admitted to the Bar of a Member State of the European Economic Area ("EEA"). Crucially, the attorney-client privilege *does not* protect from discovery and disclosure in an EU competition law case internal communications between company management and an in-house lawyer, even if that lawyer is admitted to and a member of the Bar, nor does it protect communications between the company and external lawyers who are not admitted to the Bar of an EEA Member State.

- *Case Background*

On February 12 and 13, 2003, EC officials, assisted by representatives of the U.K. Office of Fair Trading ("OFT"), carried out a surprise investigation on the premises of Akcros Chemicals Ltd. ("Akcros") in Manchester, England, and seized copies of a number of documents. Akcros representatives informed the EC officials that certain seized documents were covered by the attorney-client privilege. The EC officials and Akcros representatives disagreed on the applicability of the attorney-client privilege to several documents, in particular two emails between the managing director of Akcros and the in-house coordinator for competition law at Ackros' then-parent, Akzo Nobel ("Akzo"). The in-house lawyer, who was also an Advocaat of the Netherlands Bar, had signed an agreement with Akcros that specifically acknowledged his independence and professional obligations to the Netherlands Bar, which would have permitted the company to assert privilege under Dutch law. The EC rejected the claim of privilege in a 2003 decision. Akzo and Akcros challenged the EC's decision before the Court of First Instance (now the General Court), which dismissed the challenge in 2007. Akzo and Akcros appealed that dismissal to the ECJ. The U.K., the Netherlands, Ireland, and a number of professional associations intervened in support of extending the attorney-client privilege to in-house counsel.

- *The ECJ's Decision*

Akzo, Akcros, and a number of the interveners argued that the criterion that the lawyer must be "independent" should not be interpreted to exclude in-house lawyers. They argued that in-house lawyers enrolled in a bar or law society are as independent as external lawyers due to their obligations of professional conduct and discipline. The ECJ reiterated that the requirement that the lawyer be independent was based on "a conception of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs." The ECJ held that "the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that attorney-client privilege does not cover exchanges within a company or group with in-house lawyers." It stated that, due to their economic dependence and close ties with their employers, in-house lawyers do not have the same degree of independence from their employers as lawyers working in external law firms with respect to their clients, despite their professional ethical obligations and any membership in a bar or law society. In-house lawyers may also be required to carry out tasks that have an effect on the commercial policy of the company. The ECJ held that an in-house lawyer cannot be treated in the same manner as an external lawyer because he is an employee, "which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence."

The ECJ further held that, although recognition of the attorney-client privilege for communications with in-house lawyers has become more common at the national level than at the time of the original *AM & S Europe* case, it was not possible to identify tendencies in the national laws of EU Member States that were uniform or had clear majority support. Many Member States do not extend the attorney-client privilege to communications with in-house lawyers and a number of Member States do not allow in-house lawyers to be admitted to a Bar or Law Society. The ECJ held that the legal situation of EU Member States and EU law had not evolved to such an extent as to justify recognition of attorney-client privilege for in-house lawyers.

Akzo and Akcros similarly argued that attorney-client privilege should be extended to in-house lawyers in the interest of legal certainty. They argued that, because EU competition law is often applied in parallel with corresponding national laws and many EU Member States recognize attorney-client privilege for in-house lawyers, the application of attorney-client privilege should not depend on which authority carries out the investigation. The ECJ, however, determined that limiting the scope of attorney-client privilege in EU competition law investigations carried out by the EC did not create any legal uncertainty as companies can determine their rights, obligations, and position based on which authority conducts the investigation.

The ECJ rejected the argument that the need for confidential in-house legal advice to prevent infringements of competition law had increased due to the modernization of procedural rules and the desirability of the establishment of compliance programs. It also rejected the argument that the principle of national procedural autonomy, which allows EU Member States to designate procedural rules for their domestic legal systems governing actions based on rights derived from EU law, meant that Member States could define the limits of attorney-client privilege. The ECJ held that the principle of national procedural autonomy did not affect the scope of the attorney-client privilege in EC investigations under EU law. Rather, the ECJ held that the interpretation and application of EU law cannot depend on the national law relevant to the inspected company.

- *Impact*

In *Akzo*, the ECJ reaffirmed that the attorney-client privilege in EU competition law investigations before the EC does not apply to in-house attorneys. Companies with operations in the EU therefore must be cautious with respect to communications containing legal advice from in-house counsel. This rule extends only to EU competition law investigations before the EC; national law covering privilege will govern in other situations, likely covering most investigations. However, materials produced in EU/EC investigations may become accessible to plaintiffs or regulators in other countries, including non-EU countries, even if those materials would have been privileged originally in those countries. Similarly, as occurred in *Akzo*, the EC may ask officials of a national competition authority to assist in an investigation, and in such a situation, the *Akzo* rule would apply and privilege would not be available for communications with in-house attorneys. Companies should be aware of the different privilege rules potentially applicable to them depending on jurisdiction and select appropriate counsel accordingly

International Chamber of Commerce Guidelines

On November 19, 2010, the Anti-Corruption Commission of the International Chamber of Commerce ("ICC") released guidelines on the vetting of agents, intermediaries and other third parties (the "ICC Guidelines"). The ICC, founded in 1909, today has hundreds of thousands of member enterprises in over 120 countries. The ICC Guidelines, intended for voluntary self-application, describe the use of third parties as "the weak link in the chain" of an entity's anti-corruption practices. The ICC recommends that due diligence be applied to third parties acting on behalf of principles in both the private and public sectors.

Under Article 2 of the ICC Rules, member enterprises must implement an anti-corruption policy that ensures that (i) payment amounts to third parties are appropriate and for legitimate services, (ii) no payments are inappropriately passed on by third parties as bribes, (iii) agents explicitly agree not to pay bribes and can have their contracts terminated if they do so, and (iv) the enterprise maintains appropriate records pertaining to all third parties engaged for transactions with state, private, or public bodies. Importantly, the ICC Guidelines note that corruption risks are not limited to third parties who deal with the public sector, as a growing list of countries criminalize commercial bribery. The ICC Guidelines therefore suggest conducting appropriate due diligence on intermediaries operating in both the private and public sector. The ICC Guidelines are notable for the level of detail they provide on the potential content of an FCPA due diligence process, and are worthy of review by any company seeking to create or update its due diligence procedures.

The ICC makes clear that the objective of the due diligence process should be to confirm that the proposed transaction with the third party is legal under applicable law and to "provide a reasonable record supporting the presumption that the third party will not use its influence with the government, public entities or the private sector in order to corruptly obtain or retain business, other authorizations or permits or other improper advantage in the conduct of business." Consistent with other due diligence guidance, the ICC recommends that a business should select a due diligence process "that is appropriate to its unique circumstances, including its size, resources, and risk profile." The ICC Guidelines suggest that companies may find tiered due diligence procedures—where certain categories of intermediaries undergo more significant review—a more efficient and effective use of resources.

The ICC Guidance stresses the importance of a "collaborative" due diligence process involving various parts of the organization. The ICC contemplates the use of outside due diligence service providers, however it cautions that "the final decision to retain or not the candidate [t]hird party should be taken by the enterprise and not outsourced."

The ICC Guidance contemplates four main sources of information as part of such a process: (i) the sponsoring department of the enterprise; (ii) the third party candidate; (iii) non-sponsoring departments or business units; and (iv) outside sources.

- *Sponsoring Department*

The ICC Guidance proposes requiring the Sponsoring Department to complete an application form. Because the employee proposing the engagement may have an interest in the hiring of the candidate or the success of the deal, that employee alone should not be allowed to make the final decision on the engagement of the candidate third party. The entity can independently assess the candidate by requiring a form that sets forth such information as the business need for employing a third party, the business justification for the proposed compensation, an evaluation of the commercial and technical competence of the candidate, specific information regarding the candidate's reputation for integrity, details on how the candidate was identified, whether any other third parties were considered, and why the candidate was proposed.

- *The Candidate*

The ICC recommends that an entity may also obtain information from the candidate directly by requiring the candidate to complete a questionnaire and provide supporting documentation. The topics covered by such questionnaires could include the candidate's basic information and qualifications; ownership and other business interest; status as a public official (including whether any of the candidate's owners, directors or employees are or previously were public officials, or have any relationship with public officials); financial data; information about current and previous litigation; information about current and previous criminal investigations, sanctions, debarment and convictions; and references. The ICC points out that, in doing so, an entity must be aware of possible legal restrictions on the process such as data privacy protections for the candidate's employees.

The ICC also suggests interviewing the candidate in person if feasible. "Although not practical for all retentions, interviews conducted in person are generally more effective in assessing the responses to these inquiries, and provide a better setting to ask the often delicate questions necessary." The ICC also notes that interviews can also be used to train the candidate regarding enterprise policies and procedures, and to communicate a commitment to complying with applicable anti-bribery laws and policies. The ICC suggests memorializing the interview in a memorandum to be kept with the due diligence file.

- *Non-Sponsoring Departments or Business Units*

As a third source of information, the ICC suggests gathering information regarding the candidate from internal sources *other* than the person who has proposed to engage the candidate. Internal sources can provide information on the candidate's past dealings with the enterprise, including the candidate's background and reputation. The ICC also suggests comparing the proposed compensation to internally prepared compensation guidelines and external benchmarks.

- *Outside Sources*

Finally, the ICC guidelines suggest numerous outside sources that can be used to obtain information regarding the candidate, including (i) commercial and bank references; (ii) news sources; (iii) reports from independent enterprises that compile financial and other information about commercial entities; (iv) government databases of parties subject to sanctions; (v) embassy staff or other government sources; and (vi) due diligence service providers. The ICC also recommends seeking a local law opinion where there is an issue of whether the arrangement is permissible under local law.

Once a candidate has been approved, the ICC recommends that detailed contractual clauses describe the third party's compliance with anti-corruption policies. After the initial approval, the guidelines suggest ongoing monitoring of transactions with the third party, along with periodic auditing and reevaluation of the party's risk. Businesses should consider requiring employees of the third party to undergo anti-corruption training. Each payment to the third party should be independently reviewed and checked for red flags. The ICC recommends extra attention be given to third parties whose compensation is linked to their success. When such compensation is determined to be appropriate, "careful documentation of the legitimate business case for the engagement" is a recommended practice.

Transparency International Progress Report 2010

On July 28, 2010, Transparency International ("TI") released its 2010 Progress Report (the "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 ("OECD Convention"). The Progress 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. Among the positive developments of the past year, the Progress Report identified the OECD Council's extensive new recommendations for further combating bribery and the launch of Phase 3 monitoring reviews, the new U.K. Bribery Bill, legal reforms in countries such as Spain, Chile and Turkey, and large settlements struck by prosecutors in the U.S., U.K. and Germany in which defendants agreed to pay fines amounting to many hundreds of millions of dollars. In addition, the Report noted that the number of countries that are classified as "active enforcers" increased from four to seven over the past year.

TI classifies seven countries—Denmark, Germany, Italy, Norway, Switzerland, United Kingdom, 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. These seven active enforcers represent countries that account for about 30% of the world's exports. The Progress Report classifies another nine countries as "moderate" enforcers, meaning that they

have at least one major case, as well as other active investigations. These are: Argentina, Belgium, Finland, France, Japan, South Korea, the Netherlands, Spain, and Sweden. The Progress Report criticized 20 other countries for having little or no enforcement. Included in this group is one G8 member, Canada.

According to the Progress 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 Progress 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 Working Group to close potential loopholes in the Convention and in national implementing legislation such as payments to political parties and private-to-private corruption;

- Recommends that the new OECD initiative to increase public awareness of the criminality of foreign bribery focus on countries outside of the OECD where foreign bribery is prevalent;

- Calls upon the Working Group to undertake a study into the use of negotiated settlements to ensure that procedures are adopted that make settlement terms public and subject to approval by courts; and

- Encourages China, India and Russia to sign the Convention so that all major exporters play by the same rules.

The Progress Report identifies two broad categories of inadequacies it identifies: inadequacies in legal framework and inadequacies in enforcement system. TI identified twenty-nine countries with legal inadequacies, including insufficient definition of foreign bribery (nine countries), jurisdictional limitations (13 countries), lack of corporate criminal liability (12 countries), inadequate sanctions (15 countries), inadequate provisions for holding parent companies liable for acts of subsidiaries (12 countries), and inadequate statutes of limitations (nine countries). TI identified 32 countries as having inadequate enforcement systems, including insufficiently ensured prosecutorial independence (seven countries), decentralized or uncoordinated enforcement (eight countries), inadequate resources or training (21 countries), inadequate whistleblower and complaint systems (24 countries), inadequate accounting and auditing standards (seven countries), and lack of awareness raising (13 countries).

Despite the positive developments, that the fact that only 7 of the 38 parties to the OECD Convention are active enforcers creates an unstable situation, particularly considering that the OECD Convention is based on a *collective* commitment of all members to fight corruption. The Progress Report concludes that unless lagging countries increase enforcement, the efforts of active members may wane.

Foreign Investigations of Note

Julian Messent

On October 22, 2010, Julian Messent pleaded guilty in Crown Court in London to making or authorizing corrupt payments of almost $2 million to officials of the Costa Rican state insurance company, Instituto Nacional de Seguros ("INS"), and the national electricity and telecommunications provider, Instituto Costarricense de Electricidad ("ICE"). Four days later, Messent was sentenced to 21 months in prison, ordered to pay £100,000 compensation to the Republic of Costa Rica, and barred from acting as a company director for five years by Judge Geoffrey Rivlin QC of the Southwark Crown Court.

At the time the payments were made, Messent was head of the Property (Americas) Division at PWS International Ltd ("PWS"), a London-based insurance company. In that capacity, he was responsible for securing and maintaining contracts for reinsurance in the Central and South America regions. One of those contracts was to act as the broker of a lucrative reinsurance policy for INS, which in turn served as the insurer for ICE. This policy was known as the "U-500" contract. According to the UK's Serious Fraud Office ("SFO"), between 1999 and 2002, Messent authorized 41 corrupt payments totaling nearly $2 million to at least three Costa Rican officials, their wives, and associated companies as inducements or rewards for assisting in the retention of PWS as the broker of that policy. The covert payments were routed through bank accounts in the names of the wives of two of the Costa Rican officials and through accounts in Panama and the U.S., and a travel agency in Florida.

The corrupt payments were first discovered by Costa Rican authorities. The 2002 elections resulted in the replacement of a number of officials at INS and ICE. Though it is not clear whether the recipients of the PWS payments were among those officials ousted, it is clear that shortly after this turnover, the authorities began making inquiries into the contract with PWS and payments made in connection with it. According to news reports, Costa Rican authorities attempted to contact the company about the payments in September 2005, and when PWS failed to respond, Costa Rica complained to the British embassy and hired U.K. counsel to threaten PWS with a lawsuit. The British embassy quickly referred the case to the SFO.

In August 2006, the SFO initiated an investigation (conducted jointly with the City of London Police) in response to Costa Rica's allegations. Messent, who had been promoted to the chief executive post at PWS in 2003, resigned shortly thereafter. PWS was placed in administration by early 2008 and a substantial portion of its assets sold to another UK insurer,

the THB group. An attorney for the SFO told Judge Rivlin that the exposure of the illicit payments was "one of the factors" in PWS going into administration.

Under an agreement with the SFO, Messent pled guilty to two counts of making corrupt payments contrary to §1(1) of the Prevention of Corruption Act 1906. Specifically, Messent admitted to paying $25,832 to the wife of Alvaro Acuna, an agent of INS, in February 1999 and $250,000 to a company associated with Cristobal Zawadski, another agent of INS, in June 2002.

Judge Rivlin sentenced Messent to 21 months incarceration for each count, with the terms to be served concurrently. Rivlin reportedly reduced Messent's sentence from what would have otherwise been four-to-five years on account of his cooperation with the SFO's investigation and the plea agreement.

At sentencing, Messent's attorney emphasized that his client had not acted alone in making the corrupt payments. He claimed that Messent had "inherited" the arrangements when he became head of the firm's Latin America department in 1996, that he had not concealed the payments from other employees, and that the details were known to the heads of the finance department and the compliance unit. According to observers, Judge Rivlin said he "accepted" that Messent did not act alone in making the payments, and "did not attempt to hide or disguise these payments" within the company or in accounting records. Yet Judge Rivlin thought it plain—and sufficient—that Messent had been "deeply involved in the decision making" and "authorized" the corrupt payments, which "represent[ed] a loss to the Republic of Costa Rica."

The SFO apparently chose to forgo pursuing prosecutions of any other individuals or PWS in connection with the illicit payments. According to the SFO, it declined to prosecute the company because any fine levied against it would likely have been enforced against its pension funds, which already faced a "substantial deficit, " and so the punishment would have been disproportionately felt by the company's employees.

Costa Rican authorities, however, are in the process of pressing charges against ten people for accepting bribes in the case. Trial is reportedly scheduled to take place sometime this year. According to the SFO, it has been assisting those prosecutors there, including providing detailed banking documentation. The SFO reports that it has also been contacted by authorities in Panama and the U.S.

Messent's case is notable to observers of the U.K. justice system for several reasons. First, it makes clear that even where circumstances are present that justify not prosecuting an organization, the SFO will hold individuals accountable for corrupt activity. In this case, because PWS was in administration, and any fines levied would have been paid out by the company's employee pension funds, the U.K. authorities decided not to pursue a case against the entity. This practice may be especially relevant in prosecutions under the new Bribery Act, presuming that it goes into effect, as an organization might avail itself of the defense of "adequate procedures" as currently written in that legislation, while an individual could not.

Second, it affirms the unremarkable proposition that the fact that bribery is a standard industry practice constitutes neither a defense nor a mitigating factor in UK courts. Here the

former-CEO and chairman of PWS, Lord Malcolm Person, was quoted in *The Guardian* as stating, “It is very regrettable that something like this should happen. But in 1997 when this started, it was regarded as perfectly normal. Under that regime, all the other insurance brokers were doing exactly the same thing.” Judge Rivlin directly rejected this line of argument at sentencing.

Third, it clarifies the status of plea agreements entered into with the SFO. The viability of plea agreements had been thrown into some doubt in early 2010 when two U.K. judges expressed concern that the SFO had exceeded its authority by agreeing to sentences with defendants in overseas corruption cases and warned the SFO against plea deals that purported to bind the courts in sentencing decisions. Some commentators questioned whether those warnings threatened the SFO’s whistleblower program and its partnership with the U.S. Justice Department in resolving international bribery cases. Here, however, Messent entered into a plea agreement with the SFO that appears to have been largely respected. According to observers of the sentencing, Judge Rivlin made clear that he was applying a substantial reduction to the sentence he otherwise would have handed down precisely because of the plea agreement reached between Messent and the SFO, which reflected Messent’s cooperation with the SFO’s investigation. And SFO director Richard Alderman was quoted as saying, “This case is also a good example of how an early plea agreement can bring a swift resolution.”

Securency

On October 6, 2010, Australian, British, and Spanish authorities executed search warrants at 16 different residential and commercial locations linked to Securency International Pty Ltd. (“Securency”) as part of an investigation into whether Securency paid millions in bribes to foreign officials to secure international contracts to print polymer banknotes. The investigation, being conducted jointly by the U.K.’s SFO and the Australian Federal Police (“AFP”), began in May 2009 following reports that, over the previous decade, millions in Australian dollars had been exchanged in commissions to offshore bank accounts owned by Securency agents or middlemen to bribe foreign officials.

The polymer substrate made by Securency is used to make plastic banknotes in circulation in approximately 30 countries. Securency is believed to have bribed politicians and other officials in Indonesia, Nigeria, Vietnam, and Malaysia to secure banknote printing contracts in those countries. At the time of the alleged conduct, Securency was jointly owned by Reserve Bank of Australia (“RBA”) and the British firm Innovia Films. RBA appointed the chairman and half of Securency’s board and oversaw its operations. A limited audit commissioned by the RBA and released in March 2010 found that Securency paid almost $50 million to overseas agents from 2003 to 2009. Despite publication of the bribery allegations and the initiation of an AFP investigation in May 2009, the RBA reportedly did not stop Securency from continuing to transfer millions of dollars to overseas middlemen for an additional six months.

During the initial searches on October 6, 2010, two individuals linked to Securency were arrested in the United Kingdom in connection with the investigation. The following week,

British authorities arrested and questioned three additional individuals regarding alleged bribery of high-ranking Nigerian officials on behalf of Securency. Two of those three individuals were alleged to have made transfers of millions of dollars to offshore accounts in 2006 to win contracts to print polymer banknotes for Nigeria. In September 2010, Malaysia's Anti-Corruption Commission ("MACC") arrested three individuals for questioning related to the bribery scheme.

Documents obtained by the Australian newspaper *The Age* also reportedly revealed that the Australian government's trade agency Austrade helped select some of the middlemen used in the alleged bribery scheme and helped court some of the foreign officials suspected of receiving bribes. The Australian Senate's foreign affairs, defense, and trade committee requested that Austrade provide it with Securency-related documents, but Austrade has refused that request due to an AFP warning that the release of the documents could harm the investigation. The Australian Parliament thus far has rejected calls for a parliamentary inquiry into the RBA's oversight of Securency, despite claims that the RBA ignored warnings that Securency was engaged in bribery and instead endorsed the scheme. The AFP itself does not have the authority to investigate the government entities that either assisted Securency or endorsed its practices, including the RBA-appointed members of Securency's board.

No criminal charges have been filed in the investigation. By the end of November 2010, both Innovia Films and the RBA had announced plans to sell their stakes in Securency.

Deutsche Telekom

In late August 2010, German prosecutors raided the offices of German telecommunications giant Deutsche Telekom AG ("Deutsche Telekom"), as well as the homes of several employees, as part of an investigation into the activities of Deutsche Telekom subsidiaries in Hungary and Macedonia. According to news reports, the raids were part of an investigation that was sparked by a request for assistance from the United States Securities Exchange Commission ("SEC"), which is conducting an ongoing investigation into Deutsche Telekom's Macedonian and Hungarian affiliates. However, German prosecutors have insisted that the raids were not requested by the SEC and were ordered after the German investigation raised suspicions that a violation of German anti-corruption law may have occurred.

Deutsche Telekom announced on September 15, 2010 that its CEO, Renee Obermann, was a suspect in the German probe and that his home was one of the residences searched as part of the raids. According to news reports, prosecutors were investigating whether Obermann told Makedonski Telekom, Deutsche Telekom's Macedonian subsidiary, that he would only approve dividend payments if the Macedonian government kept the telecommunication market closed to competition. The government of Macedonia is a large shareholder of Makedonski Telekom and, according to some news reports, prosecutors were pursuing this evidence on the theory that the dividend levels may have affected government decisions. However, other reports indicate that prosecutors were trying to link Obermann's statements regarding dividend payments to alleged improper payments made by third parties. Deutsche Telekom strongly denied that Obermann

was involved in any wrongdoing. In January 2011, citing lack of evidence, German prosecutors dropped all charges against Obermann.

In February 2006, Deutsche Telekom's Hungarian subsidiary, Magyar Telekom, initiated an internal investigation after its auditors identified two suspicious contracts during an audit of the company's financial statements. The company hired outside counsel to assist in the investigation and informed the Department of Justice ("DOJ") and SEC as well as the Hungarian Financial Supervisory Authority of the findings of its auditors. The SEC subsequently initiated its investigation and sought the assistance of German authorities.

In a December 3, 2009 Form 6-K, Magyar Telekom announced the findings of the internal investigation, which revealed misconduct arising from various contracts related to Montenegro and Macedonia. According to the 6-K, the investigation revealed "affirmative evidence" that approximately €7 million in expenditures made under four Montenegrin consultancy contracts "served improper purposes." The investigation also revealed that, between 2000 and 2006, a group of former senior executives caused approximately €24 million to be paid out based on over twenty suspect consultancy, lobbying, and other agreements in order to obtain regulatory or other benefits that could only be obtained from the government of Macedonia. While the investigation failed to find evidence to establish that the contracts had a legitimate purpose, it likewise could not determine definitively that the funds were paid to government officials. However, the investigation noted a correlation between the company obtaining specific regulatory benefits from the government and making payments under the contracts. In addition, the investigation determined that "former senior executives knowingly caused, structured, or approved transactions" that, among other things, intentionally circumvented internal controls, lacked appropriate due diligence, and included false and misleading documents and records. Further , certain of the transactions included expenditures that were not for the purposes stated in the contracts, but were instead intended to obtain benefits that could only be conferred by government action. In addition, the investigation revealed that certain former employees destroyed documents related to Magyar Telekom's activity in Macedonia.

The company explained in its 6-K that it had already taken some remedial measures in response to the findings of the internal investigation, including personnel actions and internal controls improvements, and that it was assessing what other measures may be necessary.

As discussed in detail in Part II, in 2008 U.S. and German authorities successfully cooperated in parallel investigations into German company Siemens Aktiengesellschaft which resulted in the largest corruption related fine to date.

Vietz GmbH

On August 19, 2010, German police raided the Hanover head office of Vietz GmbH, a supplier to the oil and gas pipeline industry, and the company's plants in Leipzig and Essen on suspicion that the company paid bribes to secure foreign contracts. During the raid, the police removed computers and paper files. The raid was triggered by admissions made by the company's owner and managing director, Eginhard Vietz, in an August 10th interview with the

German newspaper *Handelsblatt* that the company and its competitors pay bribes in Africa, the Middle East, and Asia as a standard business practice. He said his company regularly paid bribes "because there are certain countries where there is no other way to do it." Vietz claimed that no one was disadvantaged by his payment of bribes to the foreign officials. He said that most of the people that decide who wins state contracts are poorly paid and easily bribed, and that he had lost contracts because competitors offered larger bribes.

Vietz offered a detailed description of the methods used to bribe foreign officials. He said that the payments were usually funded by inflating commissions to sales agents, with the money then transferred to accounts in Switzerland and passed on as bribes. The amounts were generally between 5% and 10% of the total contract value and were added to the prices charged to customers, so the company's margins were not reduced. He said he carefully structured the bribes to comply with German tax laws. The Hanover prosecutor, Manfred Knothe, said that the police had no choice but to investigate Vietz for bribery because his description of the scheme was so detailed.

Cryptometrics

On May 27, 2010, the Royal Canadian Mounted Police ("RCMP") arrested former Cryptometrics Canada Inc. ("Cryptometrics") employee Nazir Karigar on allegations that he bribed Indian government officials. Karigar was charged under Canada's Corruption of Foreign Public Officials Act ("CFPOA"). Cryptometrics has not been charged with a crime.

Cryptometrics develops facial recognition software for airports and governments around the world. Karigar represented the company in India. The alleged bribery involved payments to an Indian government official in order to facilitate the execution of a multimillion-dollar contract to supply an airport security system to India. The RCMP's A Division began investigating after it became aware of the bribery scheme in June 2007. The RCMP has questioned other Cryptometrics employees in the continuing investigation, but neither Cryptometrics nor any other employee has been charged in the case. Cryptometrics' U.S. parent company filed for Chapter 11 bankruptcy protection on September 17, 2010.

Although the CFPOA was passed in 1999, it has only been used in one prior case, in which a Canadian company and the US official it bribed were charged. Canada has been criticized by the Organization for Economic Cooperation and Development and others for failing to adequately investigate foreign bribery by Canadian companies and citizens. In 2008, international pressure led the RCMP to devote two units to international anti-corruption enforcement.

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 €35 million contract for delivery and installation of an IP network for the Chief Public Prosecutor's Office 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. On December 15, 2010, in its Form 10-K, HP acknowledged that in addition to the matter being investigated by Russian and German authorities, U.S. authorities have requested information related to certain other transactions, including transactions in Russia, Serbia and in the Commonwealth of Independent States ("CIS") dating back to 2000, as well as information related to two former HP executives seconded to Russia and to whether HP personnel in Russia, Germany, Austria, Serbia, the Netherlands or the CIS were involved in kickbacks or other improper payments.

German prosecutors indicated the investigation began in 2007 after a tax auditor discovered that €22 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.

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.

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.

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 February 10, 2011, David Mabey, the Sales Director of Mabey & Johnson, and Charles Forsyth, the Managing Director of Mabey & Johnson, were found guilty of making illegal payments in violation of United Nations sanctions by a jury in Southwark Crown court. A third defendant, Richard Gledhill, Mabey & Johnson's Sales Manager for Iraq, had pleaded guilty to sanctions offenses at an earlier hearing and gave evidence for the prosecution. On February 23, 2011, Judge Geoffrey Rivlin of the Southwark Crown Court sentenced Forsyth to 21 months' imprisonment, ordered him to pay prosecution costs of £75,000, and disqualified Forsyth from acting as a company director for five years. Judge Rivlin also sentenced Mabey to eight-months' imprisonment, ordered him to pay prosecution costs of £125,000, and disqualified Mabey from acting as a company director for two years. In issuing the sentences, Judge Rivlin noted that Forsyth's sentence reflected that he "bears the most culpability" and that, in regards to Mabey, "[w]hen a director of a major company plays even a small part, he can expect to receive a custodial sentence." Gledhill, on the other hand, received a suspended sentence of eight months in recognition of his cooperation with prosecutors.

The Prosecution Opening Note in the Mabey & Johnson proceeding 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 noted 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 for the supply of bridges valued in excess of €4.2 million as part of the United Nations Oil-Food-Food Programme discussed in Part II. 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. The three individual defendants noted above participated in the Iraq scheme.

- *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 commissions 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.

United States Regulatory Guidance and Developments

FCPA Senate Judiciary Committee Hearings

On November 30, 2010, the Senate Judiciary Committee - Subcommittee on Crime and Drugs, held a hearing titled, "Examining Enforcement of the Foreign Corrupt Practices Act." Senator Arlen Specter (D-Penn) chaired the hearing. Senators Leahy (D-VT), Klobuchar (D-MN) and Coons (D-DE) also attended the hearing and contributed questions.

Much of the hearing focused on the perceived failure of the DOJ to seek jail sentences for individual wrongdoers. Sen. Specter emphatically stated that the only effective way to increase deterrence is to impose jail sentences, "I am convinced that the only impact on matters of this sort is a jail sentence - fines are added to the cost of doing business [and] end up being paid by the shareholders - criminal conduct is individual." Sen. Specter highlighted a list of prosecutions where high fines were levied yet there had been no individual prosecutions, including Siemens, BAES, and Daimler. Although the Senators agreed that fines were necessary, they expressed concern that fines alone punish innocent shareholders without deterring the individual bad-actors that commit and/or tolerate business practices that violate the FCPA.

The hearing's first panelist, Greg Andres, Deputy Assistant Attorney General from the Department of Justice's Criminal Division, addressed these concerns by stating that "we are also vigorously pursuing individual defendants who violate the FCPA [and] we do not hesitate to seek jail terms for these offenders when appropriate. The Department has made the prosecution of individuals part of its FCPA enforcement strategy." Mr. Andres cited the fact the DOJ has prosecuted fifty individuals since January 2009 with thirty-five defendants awaiting trial on FCPA related matters. He contrasted these statistics with the fact that, in 2004 DOJ charged only two individuals. These statistics were undercut somewhat by panelist Assistant Professor Michael Koehler from Butler University College of Business, who asserted that twenty-two individuals were part of one case—the SHOT Show case, discussed above—and that twenty-four of the individuals came from cases where the recipient of the alleged payments was not a "bona fide foreign government official," but was an employee or official of a state-owned enterprise. Koehler was critical of the DOJ's longstanding position that employees of state-owned enterprises were government officials for purposes of the FCPA, an interpretation he found inconsistent with Congressional intent.

Senators and panelists seized on some of the most popular proposals relating to FCPA reform and briefly discussed several proposals that have recently been suggested by the business community or lawmakers, including: an amendment limiting successor criminal liability for prior acts of an acquired company; potential institution of a corporate self-compliance, limited amnesty program modeled on the DOJ Antitrust Division's Corporate Leniency Program for corporations; and prosecuting the bribe takers or solicitors in addition to providers. When Sen.

Coons suggested mandatory debarment penalties and exclusions from government contracting for FCPA offenders, Mr. Andres rejected the proposal because the "remedy would likely be outweighed by the accompanying decrease in incentives for companies to make voluntary disclosures, remediate problems, and improve their compliance systems."

Senators and panelists also questioned the whether a statutory clarification of the term "foreign official" might help clarify the business community's understanding of and compliance with the FCPA. Mr. Andres rejected the suggestion that statutory clarification was necessary, arguing that case law supports the DOJ's interpretation of the term "foreign official," which is sufficiently defined in DOJ Opinion Procedure Releases. Mr. Andres also argued that DOJ Opinion Procedure Releases provide businesses "clear guidance" on actions that potentially exposure them to civil and criminal penalties.

One area that Mr. Andres and the Senators did agree on was the need for uniform global anti-corruption enforcement. Sens. Klobuchar and Coons independently expressed concerns that U.S. anti-corruption enforcement disadvantaged U.S. companies in the global marketplace, particularly when other countries (specifically China) either fail to implement or refuse to enforce anti-corruption legislation. Mr. Andres noted that the United States government and the DOJ needed to continue to engage foreign governments and multi-national organizations to ensure that they adopt and fully enforce anti-bribery laws. To this end, Mr. Andres identified the OECD Anti-Bribery Convention as an area of growing success in global anti-corruption enforcement.

Sens. Klobuchar and Coons have since indicated they are working towards introducing proposed amendments to the FCPA, but details of the potential amendments have not been released. Sen. Specter was defeated in the Democratic primary in May 2010.

Chamber of Commerce Recommendations

In October 2010, the U.S. Chamber Institute for Legal Reform (the "Chamber," an advocacy arm of the U.S. Chamber of Commerce) released "Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act." In it, the Chamber proposes five major amendments to the FCPA, which the Chamber argues would provide greater certainty to the business community in attempting to comply with the FCPA. The Chamber argues that the current FCPA, at least as interpreted by enforcement agencies, is often unclear as to what is and is not a violation and fails to take into account the realities of companies doing business in countries with endemic corruption or in which many companies are state-owned. Many of these criticisms will find support in the business community.

First, the Chamber argues that the FCPA should include a defense for companies that have in place anti-bribery compliance measures, similar to the compliance defenses currently available under the laws of the U.K. and Italy. The Chamber argues that such an amendment would bring the FCPA in line with commonly-recognized limitations on *respondeat superior*, and protect companies acting in good faith from incurring liability for misconduct committed by rogue employees.

Second, the Chamber argues for an amendment limiting successor criminal liability for prior acts of an acquired company. Focusing on DOJ Opinion Procedure Release 08-02 (discussed in detail in Part II), which delineated the kind of post-acquisition due diligence the DOJ expected where pre-acquisition due diligence could not be undertaken, the Chamber argues that the DOJ "has thus leveraged the threat of successor liability into a means to achieve expansive internal controls," and that Release 08-02 "is a harbinger of the increased threat posed by the FCPA to businesses contemplating mergers and acquisitions with companies that have foreign subsidiaries or offices." The Chamber argues for the abolition of criminal successor liability regardless of whether or not the company conducts due diligence. Further, the Chamber argues that specific guidance should be promulgated regarding the type of due diligence that should be exercised by companies, similar to the internal controls guidance contained in the U.S. Sentencing Guidelines.

Third, the Chamber suggest adding a willfulness requirement for corporate criminal liability, such that prosecutors would have to show the company knew the charged conduct was unlawful.[16] The Chamber argues that such a requirement would protect companies from liability for unlawful conduct by subsidiaries of which the parent was unaware. Similarly, the Chamber argues that a willfulness requirement would eliminate the perceived jurisdictional unfairness of the FCPA, whereby prosecutors can charge companies for activities taken abroad by foreign actors who may be entirely unaware that their conduct implicates, let alone violates, U.S. law.

Fourth, the Chamber recommends limiting a parent company's civil liability for acts of a subsidiary. The Chamber notes that the SEC "routinely charges parent companies with civil violations of the anti-bribery provisions based on actions taken by foreign subsidiaries of which the parent is entirely ignorant." While the specific charges brought in any action are both highly fact-dependant and potentially the matter of some negotiation, the fear of such actions is certainly real in the business community, and the Chamber argues that the FCPA should be amended to further clarify that a parent should not be exposed to liability under the anti-bribery provisions for the actions of a subsidiary where the parent did not direct, authorize, or know of the improper payments.

Finally, the Chamber asks for clarification as to the definition of "foreign official." The Chamber takes particular issue with the statute's failure to define what is and is not an "instrumentality" of a foreign government. Given the prevalence of state-owned enterprises, as well as state investment, with or without control, in private enterprises, particularly in countries such as China, specific guidance as to issues such as what levels of ownership or control will qualify as an instrumentality would be roundly welcomed.

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[16] The Chamber bases this argument in part on the premise that the FCPA limits an individual's liability (as opposed to a corporation's) for violations of the anti-bribery provisions to situations in which the individual has violated the act *willfully*. In fact, individuals may be liable for violations the FCPA's anti-bribery provisions without acting willfully; however, without willfulness, only civil penalties are available. 15 U.S.C. § 78dd-2(g)(2); 15 U.S.C. § 78dd-3(e)(2); 15 U.S.C. § 78ff(c)(2).

Extractive Industry Reporting Rules

Section 1504 of the Dodd Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") institutes a new disclosure requirement for issuers engaged in "resource extraction." Under Dodd-Frank, issuers who are required to file annual reports with the SEC and who are engaged in commercial development of oil, natural gas, or minerals will be required to produce an annual report of information relating to any payment to a foreign government or the federal government for the purposes of such commercial development. The requirement applies to payments made by the issuer, a subsidiary of the issuer, or any entity under the control of the issuer. As such, this measure reportedly covers 90% of the world's largest international oil and gas companies and eight of the world's top ten mining companies.

The information must be submitted in an interactive data format and must include: (i) the total amounts of the payments, by category; (ii) the currency used to make the payments; (iii) the financial period in which the payments were made; (iv) the business segment of the issuer that made the payments; (v) the government that received the payments, and the country in which the government is located; (vi) the project of the issuer to which the payments relate; and (vii) any other information that the SEC considers necessary or appropriate in the public interest or for the protection of investors. This information will be publicly available on the SEC's website.

Dodd-Frank requires the SEC to adopt rules regarding the requirement, and, on December 23, 2010, the SEC issued its Proposed Rules. The Proposed Rules, however, often fail to give meaningful insight on certain key issues. For instance, the term "foreign government" is defined as "a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government, as determined by the Commission." This definition raises many of the same questions as to what is or is not a government entity as the FCPA, including the definition of "instrumentality," and what level of ownership or control by a foreign government in a company would qualify a company as government-owned, none of which are addressed by the Proposed Rules. The Proposed Rules also decline to define such key items as the statutory exception for "*de minimis*" payments or what "other material benefits" should be classified as payments that must be recorded. At least until Final Rules are issued, the exact contours of the requirement remain somewhat opaque. Nevertheless, this is a significant new requirement, and disclosures under it will undoubtedly catch the eye of anti-bribery enforcement agencies.

Sentencing Guidelines Update

On November 1, 2010, the United States Sentencing Commission issued a revised version of the United States Sentencing Guidelines ("U.S.S.G." or "Guidelines"). The Guidelines contain detailed instructions and rubrics for U.S. courts to consider when sentencing both individual and organizational defendants. The 2010 amendments contain several important modifications in regards to the sentencing of business organizations.

One of the rubrics within the Guidelines calculates an offender's "culpability score." This score acts as a multiplier for a base criminal fine; low culpability scores can reduce a

criminal fine by up to 95%, while a high culpability score can double an offender's monetary exposure. A business organization may receive a reduction in its culpability score if it is determined to have in place an effective compliance and ethics program. The Guidelines consider an effective compliance and ethics program to include:

- Standards and procedures to prevent and detect criminal conduct;
- Corporate leadership that is knowledgeable about the compliance and ethics program and that exercises reasonable oversight with regard to its implementation;
- Reasonable efforts to ensure that individuals who engage in illegal activities are not within the substantial authority personnel of the organization;
- Effective training programs and dissemination of information regarding the compliance program;
- Reasonable steps to ensure that the compliance program is followed, including monitoring and auditing, evaluation of the effectiveness of the program, and a mechanism for anonymous questions and complaints;
- Promotion and enforcement of the compliance and ethics program, including appropriate incentives and disciplinary measures; and
- Reasonable steps to respond appropriately to criminal conduct once it is discovered and to make any necessary modifications to the program.

The 2010 Guidelines leave these factors intact, but make certain adjustments to their application.

- *Use of Outside Compliance Advisors as Remedial Measures*

U.S.S.G. section 8B2.1(b)(7) states that "after criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program." The 2010 Guidelines clarify this element; the "appropriate response" for a business organization that discovers criminal conduct involves:

- Remedying the harm caused (restitution to identifiable victims and other remediation);
- Self-reporting and cooperating with authorities;
- Acting appropriately to prevent further similar criminal conduct, including assessing the compliance and ethics program and making modifications as necessary to ensure the program is effective. The steps taken…may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications.

This suggests that corporations can receive remediation credit for hiring outside professional advisors to improve their compliance programs. For example, the Panalpina DPA, entered into immediately after the 2010 Guidelines came into force (discussed at length, in Part I), specifically rewarded the company for voluntarily employing outside compliance counsel. The Guidelines stop short, however, of endorsing an independent monitor, as had been previously proposed.

- *Culpability Score Reductions*

Prior to the 2010 amendments, a business organization could not receive a culpability score reduction for its compliance and ethics program if any high-level personnel participated in, condoned, or was willfully ignorant of the offense. The 2010 Guidelines contain a limited exception to this rule when:

- Individuals with operational responsibility for an organization's compliance or ethics program have a "direct" reporting obligation to the organization's governing authority (or appropriate subgroup thereof);
- The compliance program itself detected the offense;
- The organization promptly self-reported the offense to the appropriate government authorities; and
- No individual with operational responsibility for the compliance program participated in, condoned, or was willfully ignorant of the offense.

The "direct reporting" obligation discussed in regards to culpability score reductions is a new concept in the 2010 Guidelines. Commentary in the Guidelines specifies that a "direct" reporting obligation exists when an individual has express authority to communicate personally to the governing authority (or appropriate subgroup thereof) "promptly on any matter involving criminal conduct" and "no less than annually on the implementation and effectiveness of the compliance and ethics program." To satisfy this requirement, companies may be advised to structure their compliance program so that the chief compliance officer (or similar position) reports directly to the Board of Directors or its equivalent.

OECD Phase 3 Report on the United States

On October 15, 2010, the OECD Working Group on Bribery in International Business Transactions ("Working Group") issued a report (the "Report") regarding its Phase 3 on-site visit to the United States, the purpose of which was to help the OECD assess the United States' implementation of the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"). The on-site visit involved three days of meetings with representatives from the U.S. government, the business community, legal community and civil society.

Overall, the Report, which constitutes the final phase of a peer review process established in the OECD Convention, commended the U.S. for its commitment to the fight against corruption, particularly its substantial enforcement of the FCPA and the involvement and support of high-level government officials in the fight against corruption. The Report noted that since Phase 2 (which was conducted in October 2002) the U.S. has increased enforcement of its laws steadily and increased penalties for violations both in terms of fines and prison terms. In addition, the Report commended the U.S. for strengthening auditing and accounting standards through the Sarbanes-Oxley Act and whistleblower protections under the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The Report applauded the broad interpretation of many of the aspects of the FCPA by U.S. authorities. In particular, the Report noted favorably positive legal developments concerning the broad interpretation given to the term foreign official – specifically its application to members of the judiciary and employees of state-owned or controlled companies. In addition, the Report approved of the opinion of the Fifth Circuit in *United States v. Kay*, which broadly read the FCPA's business nexus test to include payments that would assist in maintaining business operations (such as payments to evade taxes), even if those payments did not themselves lead to discrete business contracts being awarded or maintained. The Report took the view that the court's opinion was consistent with Article 1 of the OECD Convention, where the corresponding formulation is, "in order to obtain or retain business *or other improper advantage* in the conduct of international business."

Among the other U.S. efforts applauded by the Report was the use of industry wide sweeps to investigate and prosecute FCPA violations and, specifically, the use of "sweep letters" by the DOJ and SEC. These sweep letters, which request co-operation from industry members on a voluntary basis, are part of an innovative and effective set of tools employed by U.S. regulators that has led to the "high level of FCPA enforcement" according to the Report. At times, the Report noted, this level of enforcement was not reciprocated; U.S. representatives told the OECD that while the U.S. has often initiated co-operation with foreign authorities, it is rare for other countries to initiate co-operation with the U.S.

The Report also identified "common themes" of frustration from the U.S. private sector, including frustration at losing contracts to competitors from major emerging economies where bribery of foreign officials is not criminalized, losing contracts to competitors from countries where existing anti-bribery laws are not enforced, and "endemic" demands for payments including the solicitation of facilitation payments.

- *<u>Implementation and Further Recommendations</u>*

The Report noted that, of the 14 recommendations made by the Working Group in Phase 2, the United States satisfactorily implemented seven of them and partially implemented two others. Among the recommendations that the U.S. had not yet implemented, three were modified by the Working Group during Phase 3. For instance, the Report concluded in Phase 3 that the U.S. is satisfactorily able to deter violations among non-issuers through the anti-bribery provisions as well as laws governing bank fraud, tax fraud, and wire and mail fraud, and thus

modified its Phase 2 recommendation that the U.S. make the books and records provisions applicable to certain non-issuers based on the amount of foreign business they conduct. Two Phase 2 recommendations remain entirely unimplemented by the U.S.: (i) the U.S. should make a clear public statement which identifies the criteria used by the DOJ and SEC in prosecuting FCPA cases; and (ii) the U.S. should set up a mechanism for the periodic review and evaluation of the U.S.'s FCPA enforcement efforts, including a compilation and analysis of relevant statistics.

While generally commending the U.S.'s efforts, the Report made several recommendations for the U.S. to improve its compliance with the OECD Convention. These recommendations were split into two groups: (1) "Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery" and (2) "Recommendations for ensuring effective prevention and detection of foreign bribery."

As mentioned above, following previous phases in the peer review process, the U.S. has implemented most of the recommendations of the Working Group – even if only partially. Therefore, the Phase 3 recommendations provide a glimpse into possible future changes to the FCPA and/or its enforcement.

The Report included six recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery. First, the Report expressed concern that some FCPA criminal charges had to be dropped because of the statute of limitations bar and noted that a five-year statute of limitations may not be long enough given the growing complexity and sophistication involved in paying and concealing bribes. Therefore, the Report recommended that the U.S. evaluate whether the five-year limitations period is still sufficient to allow for proper investigation and prosecution. Second, the Report urged the U.S. to evaluate its approach to facilitation payments and, in the process, consider the views of the private sector and civil society regarding ways to clarify the facilitation payment exemption. Third, the Report recommended that the U.S. consolidate and summarize available information on the FCPA's application to improve clarity for the business community. The Report specifically pointed to the application of the affirmative defense for reasonable and *bona fide* expenditures as an area where such an exercise would be useful. Fourth, as discussed, the Report commended the decision in *U.S. v. Kay* that the business nexus test is broadly construed. The Report recommended that the U.S. clarify the DOJ's official policy on this subject by revising the Criminal Resource Manual to reflect the Fifth Circuit's decision. Fifth, though the Report applauded the use of Non-Prosecution Agreements and Deferred Prosecution Agreements, it urged the U.S. to make information regarding their use and impact in deterring foreign bribery publicly available. Sixth, the Report recommended that the U.S. verify that debarment and arms export license denials are applied equally in cases of domestic bribery and foreign bribery.

Additionally, the Report made three recommendations for ensuring effective prevention and detection of foreign bribery. First, the Report noted the lack of feedback from small to medium sized companies and recommended that the U.S. take steps to increase awareness of the FCPA among this group. Second, the Report recommended the U.S. raise awareness of its dogged pursuit of books and records violations, particularly for misreported facilitation

payments. Third, the Report recommended that the U.S. clarify its policy on dealing with claims for tax deductions for facilitation payments and provide guidance to auditors to aid in identifying payments disguised as facilitation payments that actually violate the FCPA.

Kleptocracy Asset Recovery Initiative & Chen Shui-bian

On July 25, 2010 at the African Union Summit in Uganda, Attorney General Eric Holder announced a new Kleptocracy Asset Recovery Initiative, which aims to combat large-scale foreign official corruption and recover public funds. According to Assistant Attorney General Lanny Breuer, the Kleptocracy Asset Recovery Initiative will involve three sections in the DOJ's Criminal Division: (i) the Asset Forfeiture and Money Laundering Section, which will lead the initiative; (ii) the Office of International Affairs; and (iii) the Fraud Section. "We are going to bring cases against the assets of those around the world who have stolen from their citizenry and have taken money that obviously belongs to their country," said Assistant Attorney General Breuer, "Those people are the embodiment, in some ways, of what's wrong in these countries."

Consistent with the announcement, less than two weeks earlier, on July 14, 2010, the DOJ had filed forfeiture claims in New York and Virginia federal courts against properties purchased by a holding company beneficially owned by Huang Jui-Ching, the daughter-in-law of the former President of Taiwan, Chen Shui-bian.

In September 2009, both Chen and his wife, Wu Sue-Jen, were convicted by a Taiwanese court of embezzling state funds, taking bribes, money laundering and forgery. While this conviction is on appeal, Chen is currently serving a 20 year sentence and Wu has not yet begun her prison sentence. In addition, the couple were fined NT$170 million ($5.29 million) and NT$200 million ($6.23 million) respectively.

The DOJ's actions, however, are connected to separate allegations of fraud, which were awaiting trial in Taipei at the time of the forfeiture complaints' filings. The complaints allege that between 2005 and 2006, Wu received a bribe of approximately NT$200 million ($6.23 million) delivered in cash-filled fruit boxes from Yuanta Securities Co. LLC ("Yuanta"), which at the time was trying to increase its shareholdings in Fuhwa Financial Holding Company Ltd. ("Fuhwa"). The bribe money was allegedly to ensure that then-President Chen's administration did not interfere with Yuanta's acquisition of Fuhwa shares. This and other bribe money was then laundered with Yuanta's help through a series of shell companies and Swiss bank accounts controlled by the couple's son, Chen Chih-Chung, and his wife, Huang Jui-Ching. A portion of the money was transferred to the U.S. and used to purchase a condominium in Manhattan, New York and a house in Keswick, Virginia. The DOJ brought six counts of violating U.S. money laundering laws, which prohibit the purchase of property with proceeds of unlawful activity, and conspiracy to violate the money laundering statute. The statute, codified at 18 USC §§1956-1957, defines "unlawful activity" to include an offense against a foreign nation involving the bribery of a public official.

It is unclear if the DOJ will succeed with these specific forfeiture claims. In November 2010, a Taipei court acquitted Chen and Wu of the charges that they accepted bribes from

Yuanta. This ruling is currently on appeal and the family's U.S. lawyers have filed motions to dismiss the forfeiture claims. Among its various opposition arguments, the DOJ maintains that even if the acquittal is upheld, it has no bearing on the U.S. proceedings because acquittals of criminal charges do not dispose of civil forfeitures based on the alleged criminal conduct.

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FCPA/Anti-Bribery
Spring Alert 2011
Part II

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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: (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 "conscious disregard," "willful blindness" or "deliberate ignorance"—should be

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).

> 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 Alleged Anti-Bribery Violations

Under the FCPA, facilitating payments "to expedite or to secure the performance of a routine governmental action" are excepted 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] Also, its practical effect is limited because many other jurisdictions and international conventions do not permit facilitation payments.

There are 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 narrow in practice

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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).

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 violations.[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

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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 MATTERS[31]

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 ("NPA") with the DOJ and agreed to pay a monetary penalty of $1.5 million. The DOJ stated that it agreed to a NPA 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 NPA. 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 NPA'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,

[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. Cases and settlements have been organized by the date of the first significant charging or settlement; recent events regarding longstanding cases may be included in the materials in Part II of this Alert.

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 NPA'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 spent nearly $7 million on approximately 225 such trips. Specifically regarding ten such initial contracts, UTStarcom 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.

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 Programme ("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 congressmen 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 11 counts, including 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. Jefferson was acquitted on three counts of honest services wire fraud, one count of obstruction of justice, and the lone count of violating the FCPA. Jefferson has appealed his conviction.

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 ("NPA") 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 his consulting agreement expired in mid-2001. 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 trade on the New York Stock Exchange, entered into a Deferred Prosecution Agreement ("DPA") 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 Programme ("OFFP"). As part of the three-year DPA, 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 three years. According to a spokesman, the fine will be paid by Latin Node's parent company, eLandia International Inc. ("eLandia"). Almost two years later, on December 14, 2010, Latin Node's founder and former CEO and Chairman of the Board, Jorge Granados, and former Vice President of Business Development, Manual Caceres were indicted by a federal grand jury in Miami. Shortly after, on December 17, 2010, the DOJ charged Manuel Salvoch, Latin Node's former CFO, in a sealed criminal information. Granados and Caceres were arrested on December 20, 2010, and their 19 count indictment was unsealed. Granados and Caceres were charged with one count of conspiracy to violate the FCPA, twelve counts of violating the FCPA's anti-bribery provisions, one count of money laundering conspiracy, and five counts of money laundering. Granados and Caceres each potentially face up to a five year sentence in connection to the conspiracy and FCPA violations, and up to 20 years on the money laundering counts. Salvoch was arrested on January 11, 2011 and pleaded guilty to conspiracy to violate the FCPA on January 12, 2011. Salvoch faces up to five years in prison, three years of supervised release, and a criminal fine of $250,000 or more. Granados and Caceres are scheduled for trial in September 2011.

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 Latin Node 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, Empresa Hondureña de Telecomunicaciones ("Hondutel"). The charging documents alleged that, as early as November 2003, Latin Node began seeking the assistance of a Hondutel official (identified as "Official A" in the Statement of

Offense against Latin Node) who "headed the evaluation committee responsible for awarding interconnection agreements with private telecommunications companies…." Latin Node subsequently was awarded an interconnection agreement with Hondutel in December 2005 despite what it knew to be "financial weaknesses" in its proposal. Shortly thereafter, Latin Node's wholly-owned subsidiary, LN Comunicaciones, entered into a sham "consulting" agreement with a company called Servicios IP, S.A. ("Servicios") 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 Official A'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 Official A. In June 2007, Latin Node hired Official A and made her responsible for business development in Latin America and the Caribbean.

Additionally, as elaborated on in the separate indictment filed against Caceres and Granados, Latin Node, at the direction of Granados and Caceres, agreed to pay kickbacks to three Hondutel officials to reduce rates Latin Node was to pay on calls terminating in Honduras. Granados and Caceres allegedly orchestrated the payments with the Hondutel officials and certain unnamed co-conspirators , and caused the illicit payments to be made by a series of checks and wire transfers chiefly from a Latin Node account at Citibank in Miami.

Granados and Caceres allegedly instructed Latin Node employees to submit fraudulent billing statements to Hondutel to help disguise the discrepancy between Hondutel's normal rates and those paid by Latin Node, which had been identified by the Hondutel Collections Department. Granados also allegedly directed a Latin Node employee to delete emails relating to Hondutel from Latin Node's computer servers.

In total, according to the DOJ, approximately $1,099,899 in improper payments were made. Of this amount, $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 Communications, knowing that some or all of the funds would be passed on to government officials.

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. In March 2004, 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 that he claimed to have 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. Granados and Caceres were implicated in the Yemeni scheme in the Latin Node charging documents, however their indictment relates only to the Hondutel scheme.

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.

From 2003 to 2007, 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 2012 and each face a maximum of five 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. On March 3, 2011, the DOJ, without explanation, dismissed the related obstruction charge against Carson "in the interests of justice."

- 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 was 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.

On February 21, 2011, the four defendants filed a motion to dismiss arguing that the FCPA did not apply to their conduct, as employees of state-owned entities should not be considered to be "foreign officials." Their motion, reminiscent of previous unsuccessful motions filed in the *Nguyen* and *Esquenzi* cases, argues that the plain wording of the statute and the legislative history suggest that the term "instrumentality" of a foreign government—routinely interpreted by the DOJ and SEC to include state-owned entities—should be read to include only entities that are "innately governmental," such as government boards, bureaus, or commissions. It further argues that, particularly given the DOJ's continued refusal to provide specific guidance

on the definition of "instrumentality," the term is unconstitutionally vague. The DOJ has not yet filed its response.

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

Jeffrey Tesler & Wojciech Chodan

On December 6, 2010, Wojciech Chodan pleaded guilty to one count of conspiracy to violate the FCPA, and on March 11, 2011, Jeffrey Tesler pleaded guilty to conspiring to violate and violating the FCPAs. Tesler and Chodan's legal troubles stem from their central involvement in the Bonny Island, Nigeria bribery scheme described below.

In their original indictment in a Houston court on February 19, 2009, the DOJ charged one count of conspiracy to violate the FCPA and ten counts of violating the FCPA, and sought forfeiture of over $132 million. The London Metropolitan Police arrested Tesler, a lawyer and 50-year London resident, 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 to bank accounts in Switzerland and Monaco controlled by Tesler.

With respect to Chodan, the indictment alleged that he was a former employee and consultant of KBR's U.K. subsidiary and 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 was also a board member of one of the JV entities that entered into consulting agreements with Tesler and Consulting Company B. The indictment identifies several communications among Chodan, Tesler and others about the bribery scheme's details, including payment structures and recipients.

After indictment, the DOJ pursued Tesler and Chodan's extraditions from the U.K. to face charges in the United States. Because both men are foreign citizens, and because neither were in the U.S. at any relevant time, the case raises interesting jurisdictional questions. The indictment asserts jurisdiction by classifying the men as "agents" of a "domestic concern" (KBR) and alleging that certain actions 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 U.S. and Tesler and Chodan. In one, the government alleges a KBR salesperson

emailed 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 a London court, Tesler's attorney argued that extradition would be unfair as he also faces prosecution in the U.K. by the SFO and that the charged offense was against Nigeria rather than the U.S. Chodan's attorney made a similar argument on his behalf at Chodan's extradition hearing on February 22, 2010. On March 25, 2010, 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. On April 20, 2010, Judge Tubbs similarly ordered extradition for Chodan.

Both Tesler and Chodan appealed to the High Court in London to block their respective extradition orders. On Appeal, Chodan's attorney argued that it would be "unjust and oppressive" to "haul" then-72-year-old Chodan "out of his domestic bliss" with his wife and extradite him to the United States where he could die in prison. Without explanation, Chodan withdrew his High Court challenge on November 8, 2010, and was extradited to the United States. Chodan appeared in a United States District Court in Houston, Texas, and on December 6, 2010, pled guilty to conspiring to violate the FCPA and agreed to forfeit $726,885. At his sentencing hearing, currently scheduled for late April 2011, Chodan will face up to 5 years in prison for the conspiracy charge.

At Tesler's January 2011 hearing at the High Court in London, two Lord Justices ruled that Tesler's extradition to the United States could also go forward. As quoted by the BBC, the Lord Justices stated that as a conspirator, Tesler could not escape liability for his corrupt activities by remaining physically outside the U.S. when "as a result of [his conduct] very substantial sums of money were planned to be made in the United States…. The effects of his actions were to be felt in the United States and were intended to be felt there. A United States entity [KBR] was intended to be one of the beneficiaries of his corrupt conduct." Tesler subsequently withdrew all appeals in the U.K. and was extradited to the U.S. On March 11, 2011, Tesler pleaded guilty to conspiring to violate and violating the FCPA. As part of his plea agreement, Tesler agreed to forfeit approximately $149 million. Tesler is scheduled for sentencing on June 22, 2011.

The Tesler and Chodan cases exemplify increasing cross-border cooperation in anti-corruption investigations and prosecutions. In its press releases related to Tesler and Chodan, the DOJ acknowledges assistance from the DOJ Criminal Division's Office of International Affairs, the SFO's Anti-Corruption Unit and the police forces of the City of London, as well as authorities in France, Italy, and Switzerland.

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 agreed to 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.

KBR's U.K. subsidiary, M.W. Kellogg Limited ("MWKL") reached a civil settlement with the U.K. Serious Fraud Office ("SFO") on February 15, 2011 based on the same underlying facts. The SFO recognized that MWKL took no part in criminal activity, but it benefitted from the proceeds of the conduct in violation of the Proceeds of Crime Act 2002. MWKL agreed to pay £7,000,028 (approximately $11.2 million), an amount equal to the share of dividends payable from profits generated by the Bonny Island project, and to overhaul its internal audit and internal controls functions. 55 percent of the total settlement costs will be reimbursed by Halliburton under the companies' indemnity agreement.

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 ("DPA"), 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, from 2000 to 2001, 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 €31.9 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]

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

[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.

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.

Several other countries have also investigated Siemens for bribery. Most notably, in January 2011, the Greek government indicated it will seek damages from Siemens following an 11-month parliamentary investigation into allegations Siemens paid bribes to secure various government contracts from the late 1990s up to 2009, including related to the 2004 Athens Olympics. Greece estimates the bribery cost Greek taxpayers €2 billion. A spokesman for Siemens AG stated the company "has done everything humanly possible to shed light on the past dealings and has always fully cooperated with the authorities." Nigeria's Economic and Financial Crimes Commission also reached a settlement with Siemens and a Siemens subsidiary in November 2010, which is discussed *infra*.

- *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 Programme.

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's 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)

[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.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01018.htm (last visited May 12, 2011) (emphasis in original).

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.

- *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 fund" 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.

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 ("DPA") 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 DPA. The new owners were required by the DOJ to ensure the company's compliance with the terms of the DPA 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.

On September 15, 2010, the court sentenced Nexus and the individual defendants. Nexus was fined $11,200.00 and, as a condition of its plea agreement, Nexus ceased all operations permanently and surrendered all of its net assets to the court. Lukas was sentenced to two years' probation, community service, and a fine of $1,000.00 in light of the substantial assistance he provided the government after his indictment. Kim, who also provided substantial assistance to the government, was sentenced to two years' probation, community service, and a fine of $20,000.

The other two defendants, who had not provided substantial assistance to the United States following their indictment, were incarcerated. An, who was on probation for an unrelated offense and who tested positive for cocaine at the time of his arrest, was sentenced to nine months' imprisonment and three years' supervised release. Nam, the president and founder of Nexus, was sentenced to sixteen months' imprisonment and two years' supervised release.

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. Stanley's sentencing has been delayed several times, and it is widely believed that he will not be sentenced until he has finished cooperating with the DOJ's prosecution of other individuals and companies involved in the scheme. Thus far, testimony from Stanley has helped the DOJ settle charges with, among others, Technip and Snamprogetti (discussed in Part I).

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 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 at 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 ("DPA") 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.

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

On May 8, 2008, Martin Self, a partial owner and former president of Pacific Consolidated Industries LP ("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. On December 6, 2010, Smith was sentenced to six months imprisonment followed by six months of home confinement and three years supervised release. H was also ordered to pay $7,700 in fines and special assessments. The DOJ had sought a significantly harsher prison sentence of 37 months, however Smith argued that his age and ill health –along with his lengthy pretrial supervision justified a lighter sentence.

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 ("DPA") 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, Jordon. 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 the 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 September 11, 2009, a jury convicted Gerald and Patricia Green, co-owners of Film Festival Management, Inc. ("FFM"), of conspiracy, violating the FCPA and money laundering for masterminding a sophisticated bribery scheme that led the couple to obtain several Thai government contracts, including contracts for Thailand's annual film festival. The jury also found Patricia Green guilty of falsely subscribing U.S. income tax returns in connection with this scheme. The DOJ sought sentences of more than 30 years' imprisonment for Gerald Green and between 19 ½ and 24 years for Patricia Green.

On August 12, 2010, the Greens were both sentenced to only six months in prison and three years of supervised release (six months of which must be served in a home detention program). Although the court did not impose criminal fines because it determined that the Greens did not have the ability to pay, the Greens were ordered to pay restitution, jointly and severally, in the amount of $250,000. On August 13, 2010, the court further ordered the forfeiture of the Greens' property derived from their criminal conduct, or substitute property if such derived property cannot be found or is comingled with other property, up to $1,049,456

plus each defendant's share in their company's benefit plan. In October 2010, the DOJ appealed the sentences imposed, which were far lower than the sentences the DOJ sought, and the Greens have cross-appealed their underlying convictions.

The original January 16, 2008, indictment alleged that, from 2002 to 2007, Mr. and Mrs. Green conspired to, and ultimately did, bribe a senior 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"). Initially identified simply as the "Governor," the Thai official was later revealed to have been Juthamas Siriwan, 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 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 twice superseded the original indictment to bring additional charges against the Greens. 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 in a second superseding indictment. The government dismissed a substantive money laundering count prior to the case going to the jury. The jury found the Greens guilty of the charged conduct, except that it was unable to reach a verdict on the obstruction of justice count against Gerald Green.

Although the FCPA itself does not apply to the foreign officials who receive bribes, in January 2010, a federal court granted the DOJ's request to unseal January 2009 indictments of Siriwan and her daughter for money laundering and conspiracy to commit money laundering relating to the Greens' conduct. Siriwan's daughter, Jittisopa "Jib" Siriwan, was allegedly actively involved in the bribery scheme by traveling to Singapore, the U.K., 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. The money laundering offenses carry statutory maximum terms of imprisonment of 20 years, but both mother and daughter remain fugitives. The DOJ is also seeking forfeiture from of more than $1.7 million from four existing bank accounts, plus all commissions, fees, proceeds, and a sum of money equal to the total amount of criminally-derived proceeds.

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 to 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 ("NPA") 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 NPA, 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 Oil-for-Food Programme. 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 ("DPA") 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 DPA, 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."

- <u>*OFFP Payments*</u>

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.

Syncor International Corp & Monty Fu

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. On January 31, 2011, the DOJ advised the Bristow group that it had closed its inquiry into the suspected misconduct.

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 ("NPA") 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 NPA.

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 NPA) 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 ("NPA") 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 NPA 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 NPA, 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 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

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

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 in Part I.

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 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

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

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 NPA 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 DPA.

<u>**2006**</u>

Schnitzer Steel Industries

On October 16, 2006, the SEC settled charges with Schnitzer Steel Industries Inc., ("SSI"), an Oregon-based steel company that sells scrap metal. The SEC charged SSI with approximately $1.8 million in corrupt payments in violation of the anti-bribery provisions of the FCPA. According to the charges, from 1999 to 2004 SSI paid cash kickbacks or made gifts to managers of government-controlled steel mills in China to induce the purchase of scrap metal from SSI. During the same period, SSI also paid bribes to managers of private steel mills in China and South Korea, and improperly concealed these illicit payments in its books and records.

SSI buys and resells metal, including selling scrap metal to steel mills in Asia. In 1995, SSI began using two recently acquired subsidiaries, SSI International Far East Ltd. ("SSI Korea") and SSI International, Inc. ("SSI International"), to facilitate its Asian scrap metal sales.

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

From 1999-2004, SSI Korea and SSI International employees made improper cash payments to managers of scrap metal customers owned, in whole or in part, by the Chinese government to induce the purchase of scrap metal from SSI. Specifically, SSI paid over $205,000 in improper payments to managers of government-owned customers in China in connection with 30 sales transactions. According to SEC settlement documents, SSI's gross revenue for these transactions totaled approximately $96 million, and SSI earned $6.2 million in net profits on these sales.

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. Brown was not ordered 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 DPA 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 DPA, 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 and Novak were specifically charged with criminal conspiracy, two FCPA anti-bribery violations, and a money-laundering conspiracy.

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 EGGS projects in Nigeria. His sentencing has been continued on multiple occasions, most recently until April 2011. Tillery remains at large. Media reports suggested that he had been deported on August 15, 2010, from Nigeria to the U.S., but subsequent reports indicated that a Nigerian court delayed his extradition and that he has become a Nigerian citizen.

ITXC

On September 6, 2006, Yaw Osei Amoako, the former regional manager of ITXC Corporation, an internet telephone provider, 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 ("DPA") 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 DPA, 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 two-year NPA with the DOJ for violating the FCPA's books and records provision in connection with the same conduct. In the NPA, 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 China, the 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 ("NPA") 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 NPA 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-subsidiary 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.[37]

[37] 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 pointed 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

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

"highlight the important principle that disclosures regarding material contractual terms such as representations may be actionable by the Commission."

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 Tainjin'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.[38] 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. On February 3, 2011, the U.S. government informed the court in a related case that the Government of the Bahamas had appealed the case to the Judicial Committee of the Privy Council in London, the court of last resort for Bahamian law, and on December 17, 2010, the Privy Council granted discretionary review of the issue of extradition. The Czech Republic is also apparently seeking the extradition of Kozeny.

[38] 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.

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 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, and the U.S. Court of Appeals for the Second Circuit heard oral argument regarding his appeal on February 10, 2011.

In a related matter, 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 on February 10, 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. Lewis's sentencing, currently scheduled for August 4, 2011, has been repeatedly postponed during the government's pursuit of Kozeny's extradition. By delaying Lewis's sentencing, the government is able to continue to hold Lewis to his agreement to cooperate against Kozeny and Lewis's sentence will account for such cooperation.

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

International Guidance and Developments

Global Witness Report - British Banks and Nigerian Corruption

On October 11, 2010, the prominent U.K. NGO Global Witness released a report titled "International Thief - How British Banks Are Complicit In Nigerian Corruption," identifying four British banks (Barclays, HSBC, RBS, NatWest) and the U.K. branch of a fifth (UBS) that held accounts for two Nigerian state governors accused of funneling corruptly-acquired money through the banks to sustain their luxurious lifestyles. The report was based on documents related to civil asset recovery cases brought by the Nigerian government at the High Court in London against the governors to recover the illicit assets. It focuses on the histories of two Nigerian Governors, Diepreye Alamieyeseigha and Joshua Dariye.

By British law, banks are required to carry out due diligence on their customers, which consists of two stages. First, the banks must know the identity of their customer and assess the money laundering risk posed by the customer. Senior foreign politicians, known as "politically exposed persons," are deemed to be higher risk because their control over state revenues and contracts gives them greater opportunity for corruption. Current regulations require banks to be aware when their customers become politically exposed persons and carry out enhanced due diligence on such customers. Although no regulation requires banks to know whether a foreign country bans its senior politicians from holding international accounts, industry guidance published by the UK Joint Money Laundering Steering Group required banks to know which countries were placed on the Non-Cooperative Countries and Territories ("NCCT") list by the Financial Action Task Force, an inter-governmental group that sets global anti-money laundering standards, and to carry out extra due diligence on transactions from those countries. Nigeria was on the NCCT list from 2001 to 2006. This industry guidance has quasi-legal status in the UK.

Second, banks must monitor their customers' accounts for suspicious activity. If the bank suspects a customer is engaged in money laundering, it must file a "suspicious activity report" ("SAR") with the Serious Organised Crime Agency and wait a set period for consent to proceed with the transaction. SARs are confidential, so it is usually not possible to confirm whether one has been filed. The Steering Group's guidance suggested that banks take "reasonable measures to establish the source of wealth (including the economic activity that created the wealth) as well as the source of funds to be used in the relationship." Since 2007, the regulations have required banks to "take adequate measures to establish the source of wealth and source of funds" of politically exposed persons. The guidance suggested that "ongoing scrutiny should be applied to any unexplained sources of wealth, e.g. value of property owned by the client that does not match the income or initial wealth profile." It also states that "a suspicious transaction will often be one that is inconsistent with a customer's known, legitimate activities." The guidance recommends that banks ask the following questions: (i) is the size of the transaction consistent with the normal activities of the customer; and (ii) is the transaction rational in the context of the customer's business or personal activities?

The guidance also recommends that banks develop benchmarks of normal activity for different types of customers. It warned banks that large volumes of cash deposits, especially from non-UK customers, posed a high risk of money laundering. At the time of the activities discussed in the Global Witness report, the guidance suggested that banks also subject close associates of politically exposed persons to additional scrutiny. This additional scrutiny is now required by regulation in the U.K. As part of their ongoing monitoring of their customers, banks must check for patterns that indicate a customer is an associate of a politically exposed person or is receiving significant and unusual payments from a politically exposed person.

- *Alamieyeseigha*

According to Global Witness, Diepreye Alamieyeseigha, governor of Bayelsa State in Nigeria's oil-rich Delta region, was arrested in September 2005 in London on money laundering charges following investigations by the Nigerian Economic and Financial Crimes Commission ("EFCC") and the UK Metropolitan Police's Proceeds of Corruption Unit. In December 2005, he was impeached by the Bayelsa State Assembly and stripped of immunity from prosecution. In July 2007, he was convicted by a Nigerian Court of thirty-three counts of money laundering, corruption, and false declaration of assets. Alamieyeseigha amassed a personal fortune by soliciting bribes and receiving payments from government contractors. He controlled accounts with RBS, HSBC, Barclays and NatWest, despite statements in asset disclosures to the Nigerian government that he held no foreign bank accounts. Both the receipt of payments from contractors and the maintenance of foreign bank accounts by a public official violated the Nigerian Constitution.

RBS, HSBC, and UBS allowed him to receive payments and property from contractors working for Bayelsa State. The High Court ruled that a number of the RBS and HSBC transactions were bribes and ordered that all of Alamieyeseigha's assets at the banks be returned to Nigeria. His UBS assets were returned to Nigeria following an out-of-court settlement between Nigeria and UBS. In 2003, the Nigerian Independent Corrupt Practices and Other Related Offences Commission began investigating Alamieyeseigha for corruption, which was prominently reported and easily could have been discovered by a bank conducting due diligence. At least one of the banks, UBS, was aware of the allegations in 2003 and continued to do business with Alamieyeseigha. Additionally, the amount of money moving through his accounts with the banks significantly exceeded the assets and income claimed on the disclosures he filed with the Nigerian government.

Despite the constitutional prohibition on foreign bank accounts, Alamieyeseigha had opened an account with UBS in England just three months after taking office as Governor in 1999. Shortly after opening the account, he told UBS staff that he anticipated a sharp increase in deposits from $35,000 to $1.5 million. UBS filled out an "Approval Form" for "Public Functionaries" in late 1999 indicating that the bank knew Alamieyeseigha was an elected official and stating that his wealth was unrelated to his political activities. Although it carried out at least a cursory investigation into Alamieyeseigha's source of wealth, Global Witness concluded that UBS never saw any of his asset declarations to the Nigerian government or knew that he was required to submit such declarations. A thorough investigation of the financial requirements for

a Nigerian governor likely would have revealed both the requirement to submit asset declarations and the ban on accounts outside of Nigeria. A review of his asset declarations would have revealed a discrepancy between his reported income and assets and the $1.5 million planned for deposit into the UBS account.

In late April 2001, a Bayelsa state contractor deposited $1 million into the UBS account and, a week later, made an additional $500,000 deposit to the same account. By this time, UBS was a signatory to the Wolfsberg Principles, which state that banks should accept only clients whose wealth could reasonably be established as legitimate and would subject politicians and other individuals with positions of public trust to heightened scrutiny. A UBS employee "politely" inquired as to the source of these funds and was told by Alamieyeseigha that the money came from the sale of a palace to the contractor. No such property or other properties of such value were listed on his asset declarations. The UBS employee apparently accepted Alamieyeseigha's statements and, rather than investigate further, convinced Alamieyeseigha to invest the money in a trust account with UBS.

As noted above, UBS was aware of the 2003 corruption investigation of Alamieyeseigha by May of that year. That same month, Alamieyeseigha attempted to use the trust account to buy a luxury apartment in London. This time, UBS categorically insisted on specific documentation regarding the source of the funds in the account. Alamieyeseigha never provided an explanation but found a different way to buy the apartment. Despite his failure to respond to inquiries regarding the funds in the account, UBS kept the trust account open. By December 2005, Alamieyeseigha's personal account with UBS contained over $500,000 and the trust account contained $1.8 million, considerably above his declared assets.

Around the same time the UBS account was opened in 2001, the same contractor who opened that account paid £1.4 million through HSBC for a London residence on behalf of Alamieyeseigha with the assistance of an HSBC banker. Documents indicate that the HSBC banker was aware that the contractor planned to purchase the house for Alamieyeseigha through a British Virgin Islands shell company. It is unclear whether the HSBC banker knew the shell company was wholly owned by Alamieyeseigha. The contractor also referred to Alamieyeseigha as "Chief" in communications with the banker, which likely should have prompted HSBC to investigate whether Alamieyeseigha was a public official. While it is unclear whether HSBC raised any concerns about this transaction or conducted any due diligence, the High Court later described it as a bribe.[39]

Later in 2001, the same contractor opened an account at HSBC for Alamieyeseigha with a £420,000 deposit. Both the contractor and the contractor's lawyer already banked at HSBC and served as Alamieyeseigha's "referees" for the bank. Alamieyeseigha and the contractor later

[39] The same contractor purchased a second London residence for Alamieyeseigha in 2002 for £1.4 million, although it is unclear which bank processed the payments. A different contractor purchased a London residence for £241,000 in December 1999 on Alamieyeseigha's behalf, only eight months after his election. Both purchases were made through the same British Virgin Islands shell company and both were determined to be bribes by the High Court. Alamieyeseigha purchased a fourth London residence through the shell company in 2003 for £1.75 million, although the source of the funds for this purchase is unclear.

gave conflicting accounts as to whether the money in this account was related to the contractor's business with Bayelsa State. HSBC informed Global Witness that it was aware that the Nigerian Constitution prohibited governors from holding bank accounts outside of Nigeria and from receiving gifts from government contractors, but did not confirm whether it was aware of these prohibitions at the time of these transactions. HSBC refused to comment on the case in particular, but stated that it had policies relating to anti-money laundering controls since 1994 and specific policies related to "politically exposed persons" since 2000.

In 2004, Alamieyeseigha opened an account at RBS using a second offshore shell company based in the Seychelles. Although he claimed that he expected the annual turnover for the account to be £250,000, approximately £2.7 million was deposited in 26 separate deposits in the fourteen months after he opened the account. Of those deposits, about £1.6 million came through a Nigeria-based bank from a company that contracted with Bayelsa state. Although Alamieyeseigha claimed the deposits were unspent campaign funds, the High Court stated that the evidence showed that the deposits were bribes. It is unclear whether RBS identified Alamieyeseigha as a senior foreign official with a higher risk of money laundering activities and whether RBS investigated the source of his funds. Even if RBS did not know Alamieyeseigha's status as a governor (easily obtainable from an internet search) or that the funds came from a contractor in the state he governed, the transaction should have undergone heightened scrutiny because the funds came through a bank based in Nigeria, which was on the NCCT list at the time. Additionally, RBS should have scrutinized this shell company account because, other than one property purchase, money was only deposited into the account and never withdrawn, which a judge later observed was not characteristic of a functioning business. RBS cooperated with authorities investigating Alamieyeseigha, but declined to answer specific questions from Global Witness.

- *Dariye*

Joshua Dariye, governor of Plateau State from 1999 to 2007, was arrested in London in September 2004 on money laundering and corruption charges but subsequently fled to Nigeria. The UK Metropolitan Police began their investigation of Dariye in July 2003. According to documents obtained by Global Witness, Dariye transferred approximately £2.85 million into the UK through multiple accounts with Barclays and NatWest. Following successful civil asset recovery proceedings by Nigeria, the assets in these banks were returned to Nigeria. Although he was immune from prosecution in Nigeria during his governorship, at the time of the report Dariye was awaiting trial on fourteen money laundering and corruption charges.

Between July 2003 and March 2004, about £1.17 million of the funds was routed through the NatWest account of a Dariye associate. That associate, a housing tenancy manager in a London suburb, was later jailed for three years for money laundering in connection with those deposits. The associate, who was made the guardian of Dariye's children, claimed the money was used to pay the costs of educating the children at a private school in England. It is unknown whether NatWest knew of the association with Dariye or conducted due diligence on these transfers. However, such large deposits were likely inconsistent with the normal banking

activity and salary of a housing tenancy manager, which under the Steering Group guidance should have led to additional scrutiny of the transactions.

Between September 1999 and January 2004, £1.69 million was transferred through Barclays and NatWest accounts held by either Dariye or his wife. A large portion of these transfers were deposits of tens of thousands of pounds of cash. Under the Steering Group's guidance, such large cash transfers should have triggered additional scrutiny. Like Alamieyeseigha, Dariye claimed to have no accounts outside Nigeria on his asset declarations to the Nigerian government.

- *Responses*

Four of the five banks (Barclays, HSBC, NatWest, and UBS) also reportedly took money from former Nigerian dictator Sani Abacha during the 1990s. As a result of the revelation of this activity in 2001, the banks purportedly tightened their internal procedures to prevent corruption. Although some of the banks replied to inquiries by Global Witness with general statements about their approaches to fighting financial crimes, none of the banks answered specific questions about their role in Alamieyeseigha's or Dariye's activities.

As of the date of the Global Witness report, the UK regulator, the Financial Services Authority ("FSA"), had never publicly fined or named any British bank for handling corrupt funds, either willingly or negligently, although it claims to have demanded changes to the banks' procedures following the Abacha allegations. In the past two years, the FSA has imposed fines on banks on several occasions for inadequate anti-money-laundering procedures, unrelated to corruption. In addition, the FSA fined RBS £5.6 million in 2010 for failing to properly implement UK financial sanctions. The FSA refused to confirm or deny that enforcement action was taken against the banks discussed in the Global Witness report and has made no public statement on whether it investigated the allegations concerning Alamieyeseigha, Dariye, and the five banks. The British coalition government promised to break up the FSA, moving its functions to the Bank of England and two new entities, a Consumer Protection and Markets Authority and an Economic Crime Agency. The entity to be tasked with responsibility for enforcing anti-money laundering laws has not been identified.

- *Recommendations*

The Global Witness report makes a number of recommendations stemming from the above-described cases, certain of which may be more likely to be implemented than others:

  - Banks should keep lists of countries that ban specific politically exposed persons from holding accounts abroad and should not accept such persons as customers. Regulators should ensure that this happens and provide information on which countries impose such bans.

  - Regulations should require that banks only accept funds from politically exposed persons, or their family members and associates, if the bank has strong evidence that the source of funds is not corrupt.

- To address the lack of transparency regarding shell companies, every country should publish an open list of the beneficial owner/controller of all companies and trusts, and subject institutions that register them to due diligence requirements.

- The international community and national regulators must provide more information to banks on corruption-related money laundering to educate their staff on identifying potentially corrupt funds.

- Using proactive techniques, regulators should ensure that banks carry out meaningful customer due diligence, especially for politically exposed persons. Regulators should identify banks that fail to implement their own policies and name and shame banks that take corrupt funds or have inadequate systems in place.

- Countries should deny visas to foreign officials where there is credible evidence they are involved in corruption.

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."[40] 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 states[41] 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

[40] 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.

[41] The ten Nigerian states analyzed were Abia, Anambra, Bauchi, Cross River, Enugu, Kaduna, Kano, Lagos, Ogun and Sokoto.

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 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." While INT follows the same anti-corruption strategies promoted by the World Bank, it also adopted an independent, three-pillar strategy in 2009 that focuses on: (i) detection; (ii) investigation and sanction; and (iii) prevention. An Independent Advisory Board ("IAB") exists to provide recommendations and to assist INT in achieving these goals.

The INT is responsible for: (i) investigation of allegations of fraud by both third parties ("external") and World Bank employees ("internal"); (ii) preparation of Notices of Sanctions Proceedings and criminal referrals to member countries; (iii) case intake and assessment, data mining, and proactive risk analysis; (iv) preventative engagement, training, and advisory roles within World Bank's six regions; and (v) providing forensic accounting support to investigative and preventative efforts. Sanctionable offenses for external parties include kickbacks, bribes, accounting fraud and overcharging, misuse of project assets, and mis-representation 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.

To this end, in 2010, INT launched a pro-active communication strategy designed to encourage partnerships between World Bank investigative units and other "[c]redible investigating and prosecuting bodies." Through this strategy, INT hopes to "develop[] a broad range of partnerships with agencies and entities at the global, regional and national level" to promote early interaction, resource sharing, and enhanced anti-corruption cooperation. For two days in December 2010, INT hosted over 200 anti-corruption officials from more than 134 countries (known as the "International Corruption Hunters Alliance") at the World Bank's Washington D.C. headquarters with the goal of enabling officials from developing countries "to interact with counterparts from OECD countries, share information, and work toward a global enforcement regime." In February 2011, INT implemented "The Disclosure of Information Policy of the Integrity Vice Presidency" to promote global transparency and accountability. This policy attempts to maximizing public access to information by establishing clear procedures for requesting access to INT documents that still safeguards the deliberative process, the integrity of INT investigations, and the confidentiality of INT sources.

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 pubic 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 continues 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.

New Spanish Penal Code

On December 23, 2010, by virtue of Organic Law 5/2010, amending Organic Law 10/1995, Spain's new penal code took effect. Most notable among its modifications to the previous penal code is the introduction of criminal liability for companies, which had not previously existed under Spanish law.

Previously, companies had only been subject to fines when held jointly and severally liable for actions of their employees. Under the new penal code, however, companies can be criminally liable for crimes committed on their behalf or for their benefit where the company has not exercised due control over persons acting on the company's behalf. Where a company, prior to the misconduct, has in place adequate internal controls to prevent crimes, this may be considered as a mitigating factor. Only certain delineated crimes are applicable to companies, including bribery, money-laundering, and fraud. The new penal code also expands the prohibitions on commercial bribery, concealment, and money-laundering among other corruption-related offenses.

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.

On February 16, 2011, Russian President Dmitry Medvedev proposed to amend Russia's anti-corruption laws to increase penalties for accepting and offering bribes. According to President Medvedev, "countering corruption remains one of the key tasks for the Interior Ministry, Prosecutor General's Office, Investigative Committee, and Federal Security Service." Under the proposed legislation, parties giving and officials caught accepting commercial bribes would face monetary penalties 100-times the size of the bribe. Penalties for noncommercial corruption are slightly lower, but still start at a minimum of 25-times the amount offered or paid. Medvedev noted that stiff financial penalties—which can go as high as 500 million rubles (approximately $17 million) under the proposed legislation—are necessary to produce reform because "experience shows that even the threat of 12 years in prison doesn't stop some bribe takers." Although both the Russian Government and Supreme Court gave the proposed legislation a "positive assessment," the law still has to be passed within the Duma. Even if passed, international anti-corruption groups have expressed concerns that the harsh penalties will fail to deter commercial bribery; Transparency International's Russia office, for example, predicted that people involved in large-scale bribery would "continue to escape responsibility at

the investigation stage" while those bribing doctors, police officers, and teachers for what many view as necessary services would "get the maximum" sentence. Nevertheless, Assistant Attorney General Lanny A. Breuer encouraged Russia to enact the measure as a significant step towards "reversing a trend that has placed Russia against the growing tide of anti-corruption efforts in other parts of the world."

Developments in China

Companies operating in China face heightened anti-bribery risks, not least of all because of the predominance of state-owned entities. Over the last several years, Chinese authorities have paid increasingly close attention to corruption issues from both legislative and enforcement perspectives.

- Legislative

On February 25, 2011, the National People's Congress of China approved a series of amendments to PRC Criminal Law. Among these amendments (which include provisions addressing everything from food safety guidance to pet ownership regulation) is a provision that dramatically expands China's existing anti-corruption legislation. Beginning on May 1, 2011, China will join the growing list of governments with legislation designed to hold individuals and business organizations accountable for bribing foreign officials.

PRC Criminal Law contains numerous articles that prohibit and propose to punish offering, giving, soliciting, and accepting bribes. Chapter VIII of the PRC Criminal Law, which specifically addresses embezzlement and bribery, focuses primarily on bribery of and acceptance of bribes by public servants of the PRC. Persons who offer or give anything of value to public servants to obtain "unjust benefit" can face up to three years of criminal detention. Public servants who solicit or accept bribes will have illegally-gained property confiscated and face penalties that vary based on the monetary value of the bribe, which range from simple administrative sanctions (when the bribery is relatively minor and involves an amount of not more than 5,000 yuan) to life imprisonment or death (in the event of serious violations involving sums of greater than 100,000 yuan).

Chapter III, which deals with economic crimes, criminalizes offering, giving, soliciting, and accepting bribes within the business community. A person that takes advantage of his or her position to illegally seek or accept property from another in exchange for a business advantage or who accepts any rebate or commission for personal gain can have the illegally-acquired property confiscated and can face imprisonment in excess of five years. Individuals and business organizations that offer or provide bribes to obtain "illegal gains" face fines as well as up to ten years imprisonment. Under existing PRC Criminal Law, directors are held personally responsible for actions committed by their business organization and can face individual penalties independent of any fine imposed on the organization itself. Chapter III also penalizes individuals responsible for state-owned companies, enterprises, or institutions who practice favoritism in awarding contracts or work to friends and relatives.

The February amendments, which are scheduled to come into effect on May 1, 2011, will criminalize giving property (which can be interpreted as "anything of value") to both domestic *and* foreign officials—including officials of international public organizations—for the purpose of gaining in improper business advantage. In addition to addressing bribery that occurs outside of China, the amendments also expand the jurisdictional reach of the PRC Criminal Law. The amended PRC Criminal Law will give Chinese prosecutors increased authority to pursue criminal charges against Chinese citizens (whether located and acting abroad or within China), foreign citizens located within China, both domestic and wholly foreign-owned companies organized under PRC law, joint enterprises with companies organized under PRC law, and China-based representative offices of foreign companies.

China previously passed a 52-point ethics code in February 2010. 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.

- *Enforcement*

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."

The Information Office of the State Counsel of China published a white paper on China's anti-corruption efforts in December 2010 titled "China's Efforts to Combat Corruption and Build a Clean Government (the "White Paper"). The White Paper contains eight elaborately-titled sections, each describing a separate facet of the country's fight against corruption, such as "Unswervingly Pushing Forward the Undertaking of Combating Corruption and Building a Clean Government," which provides a history of Chinese anti-corruption efforts since the founding of the PRC in 1949. While the White Paper makes clear that "corruption persists, some cases even involving huge sums of money," the White Paper is not shy to trumpet China's anti-corruption successes; the White Paper cites a study showing that from 2003 to 2010, Chinese citizens' rate of satisfaction with "the work of combating corruption and building a clean government" rose steadily from 51.9% to 70.6%. Among other notable claims, the White Paper states that from 2003 to 2009, more than 240,000 embezzlement, bribery, dereliction of duty, and infringement of rights cases were filed by Chinese authorities, and, in 2009 alone, 3,194 people were punished criminally for offering bribes. From 2005, when China launched a special campaign against bribery, to 2009, over 69,200 cases of commercial bribery were "investigated and dealt with."

Aside from the enforcement statistics, the White Paper is notable for the lengthy attention it gives to what it terms, "Education in Clean Government and Construction of Culture of Integrity." Aside from focusing solely on anti-corruption enforcement, the White Paper suggests an approach to anti-corruption prevention that includes programs to "promote the culture of integrity" at all levels of society. The White Paper also emphasizes China's international cooperation, including that China has signed 106 judicial assistance treaties with 68 countries and regions, concluded bilateral extradition agreements with 35 countries, and established the China-U.S. Joint Liaison Group on Law Enforcement Cooperation.

Nigeria Anti-Corruption Enforcement

On November 22, 2010, Siemens AG and Siemens Nigeria Limited settled criminal bribery and money laundering charges with the Nigerian government. To settle the charges, which involved payments of approximately $17.5 million in bribes, Siemens agreed to pay a fine of 7 billion Nigerian Naira (about $46.5 million USD) to the Nigerian government and agreed to maintain "good conduct" in the future. Siemens' fine represents roughly three times the amount of bribes allegedly paid.

In the wake of Siemens' $1.6 billion anti-corruption settlements with the U.S. and German authorities in 2007, the Nigerian government began its own investigation into Siemens' corrupt activities involving Nigeria. In October 2010, the Nigerian Economic and Financial Crimes Commission ("EFCC") charged Siemens AG, Siemens Nigeria Ltd., and several individuals in a 35-count indictment relating to bribery and money laundering activities between 2001-2006. The indictment charged, for example, that Siemens provided bribes in the form of

airfare and tickets to the 2006 FIFA World Cup in Germany to senior executives at the Federal Ministry of Power and Steel and the Power Holding Company of Nigeria. The EFCC also alleged that Siemens paid all expenses for medical trips to Germany for senior officials at the Federal Ministry of Communications and Nigeria Telecommunications Ltd. Separate but related money laundering charges allege that Siemens, along with three expatriates and another company, "collaborat[ed] in disguising the movement" of approximately $98,000.

Under the settlement, the EFCC agreed to drop the charges against Siemens (but 18 counts remain pending against the individual defendants). When announcing the settlement, Attorney General and Minister of Justice Mohammed Adoke stated that the EFCC considered Siemens' "sober expression of regret and solemn undertakings, agreement to pay a penal fine of N7 billion, representing three times the amount of bribes given by the company and undertaking to put in place a monitoring committee, comprising of two nominees of the Federal Government." While acknowledging "the yearnings of some Nigerians for jail sentences to be imposed" on culpable individuals, the Nigerian Attorney General stated that the "heavy fine" will have a deterrent effect and "go a long way in financing infrastructural delivery" in Nigeria.

The charges against Siemens are illustrative a more general push by Nigerian officials to charge both domestic and foreign individuals and companies for corruption in Nigeria. As discussed above, on March 3, 2011, Tidewater settled bribery charges brought by the EFCC by agreeing to pay a $6.3 million monetary penalty. Also, notably, on October 13, 2010, prosecutors in Nigeria charged Adeyanju Bodunde, former President Olusegun Obasanjo's senior aide, with six counts of money laundering for allegedly receiving close to $5 million in bribes related to the Bonny Island scandal (discussed elsewhere in this Alert). In addition, in December 2010, Nigerian prosecutors filed charges against former U.S. Vice President Dick Cheney—and announced that they may even seek an Interpol warrant for Cheney's arrest—for conspiracy to bribe Nigerian officials in connection with the Bonny Island scandal while serving as CEO of Halliburton. However, just days after Vice President Cheney was formally charged, Nigeria announced that it had dropped the charges after Halliburton agreed to pay $35 million in an out-of-court settlement. Shortly thereafter, Snamprogetti Netherlands BV agreed to pay $32.5 million in a related settlement.

Alstom

In March 2010, U.K. authorities conducted a search of the U.K. offices of French industrial giant Alstom. 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 based on information provided by the Swiss government. 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.

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 had previously been 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 providing 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."

U.S. Regulatory Guidance and Developments

Overseas Contractor Reform Act

The U.S. House of Representatives passed the "Overseas Contractor Reform Act" on September 15, 2010. The Act, introduced by Representative Peter Welch (D-VT) purported to exclude parties found to be in violation of the FCPA from receiving government contracts or grants. The Act contained several large loopholes, however. First, the prohibition can be waived by the head of a federal agency. Second, the prohibition only applies to parties "found to be in violation of the FCPA" after a "final judgment." Final judgment is defined as the period when "all appeals of the judgment have been finally determined, or all time for filing such appeals has

expired." Because most FCPA cases are resolved with Non-Prosecution or Deferred Prosecution Agreements, the debarment penalty would likely not attach to these enforcement actions, as there has been neither a finding of a violation, nor a final judgment. Further, the Act applied only to parties found to be in violation of the anti-bribery provisions of the FCPA, not the books and records and internal controls provisions. As many FCPA settlements (Daimler, Siemens, and BAES to name a few) are structured so as not to charge anti-bribery violations, even where such violations could be established, the Act would fail to reach a further swath of FCPA enforcement actions. The Act never made its way to the Senate, however, and it is unknown if it will be reintroduced in the current Congress.

BP House Resolution

On July 30, 2010, Representative Daniel Maffei (D-NY) sponsored and Former Representative Christopher Lee (R-NY) and Representative Michael McMahon (D-NY) co-sponsored House Resolution 1597 to encourage the United Kingdom to investigate BP p.l.c. ("BP") for potential corrupt practices related to the release of Libyan Abdel Baset al-Megrahi, who was convicted of masterminding the 1988 bombing of Pan Am Flight 103, which killed 270 people. In 2009, al-Megrahi was released from prison to seek treatment for his terminal prostate cancer.

The resolution refers to BP's July 15, 2010 statement that a delayed prisoner-transfer between Britain and Libya ''could have a negative impact'' on BP's oil negotiations. The resolution alleges that "BP inappropriately attempted to affect the Scottish Government's decision and possibly even the doctor's diagnosis."

Previously, on July 19, 2010, just days before the resolution was submitted, Senator Charles Schumer (D-NY) wrote a letter to the DOJ, asking for an investigation into potential FCPA violations stemming from the incident. Sen. Schumer wrote, "BP has admitted that it lobbied United Kingdom government officials to wrap up a proposed prisoner transfer agreement (PTA) with the Libyan government amid concerns that a delay in reaching this agreement would harm a deal BP had signed with Libya's National Oil Company to explore for oil and gas in the Gulf of Sidra and in parts of Libya's western desert—an agreement which BP estimated could lead to eventual earnings of up to $20 billion." As Sen. Schumer described, "If BP, or its officials, promised the Libyan Government that it would secure al-Megrahi's release from detention in exchange for oil exploration rights—or even that it would provide lobbying services for such a release on the Libyan Government's behalf— BP may have been unlawfully authorizing performance of valuable services to the Libyan Government in exchange for profitable oil exploration rights in express violation of the FCPA. Similarly, if BP promised anything of value to United Kingdom government officials to secure al-Megrahi's release, this would also violate the FCPA."

It has been noted that the Senator's call for an investigation by the DOJ on such grounds may be construed on a false premise. In order to trigger the anti-bribery provisions of the FCPA, something of value must be offered or transferred to a foreign official; the FCPA is not triggered where something of value is given to foreign government itself. H. Res. 1597 by contrast, is

directed to the British government, and calls more vaguely for an investigation into 'foreign corrupt practices' by BP.

H. Res. 1597, as a House Resolution merely expresses the sense of the House and does not carry the force of law, and thus the purpose of the bill was to make a political statement and a call to action. Furthermore, Rep. Maffei, the primary sponsor of the resolution, was then a member of the House Judiciary Committee, which has the jurisdiction to investigate corporations for violations under the FCPA. However, BP has not been investigated by the Committee for corruption in relation to this matter. Ultimately, H. Res. 1597 was simply referred to the House Committee on Foreign Affairs and never acted upon. At the conclusion of the 111th Congress, Reps. Maffei and McMahon were both defeated for reelection. Rep. Lee resigned in February 2011 following an unrelated scandal.

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 Report[42] 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

42 "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.

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.

- *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.

- <u>*Nigeria*</u>

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. Jamie 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 Director of Enforcement, Robert Khuzami, announced that the agency would increase its enforcement efforts under the FCPA and would 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 current Enforcement Manual, released on February 8, 2011, 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 current 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.

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.[43] 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.

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[43] 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, Chapters 8 and 15 (Law Journal-Seminars Press, first published July 2007 and updated semi-annually since).

- *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 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."[44]

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.

[44] 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.

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 February 8, 2011 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."

- *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.

U.S. Investigations, Disclosures, and Prosecutions of Note

Schlumberger

Schlumberger Limited, the world's largest oil and gas services company and an issuer of securities listed on the NYSE, is reportedly being investigated by the DOJ for possible FCPA violations in Yemen relating to a total of $1.38 million paid to a local consulting firm, Zonic Invest Ltd. ("Zonic"), which was managed by the nephew of the President of Yemen. In a series of articles in October and November 2010, *The Wall Street Journal* reported the existence of the investigation based on its interviews of several "people familiar with the matter" and a review of internal Schlumberger documents—including e-mails—made available to it. The following summary is based on publicly-reported information.

Although the payments to Zonic took place beginning in 2003, Schlumberger's compliance department only became aware of the relevant issues in 2008. The company's subsequent internal investigation determined that corporate anti-corruption policies had not been violated. It is not clear whether the Yemeni Zonic investigation is related to the DOJ's ongoing investigation of Schlumberger in connection with Panalpina's freight-forwarding and customs clearance activities, which Schlumberger previously disclosed to investors in its October 2007 quarterly filing and regarding which Schlumberger stated that it was "cooperating with the DOJ and is conducting its own investigation with respect to these [Panalpina] services."

In 2002 or earlier, Schlumberger began looking for ways to team with the Government of Yemen to create a Data Bank Development Project of seismic information about oil exploration in Yemen. In 2002, before entering into any joint effort with Schlumberger, the Yemeni Petroleum Exploration and Production Authority ("PEPA") pushed the company to hire Zonic as

a local agent in Yemen. Zonic's general director was Tawfik Saleh Abdullah Saleh, a nephew of Yemeni President Ali Abdullah Saleh.

After Schlumberger agreed to hire Zonic and pay it a $500,000 signing bonus, the Data Bank Development Project went forward. Zonic then pushed for additional and unusual contracting arrangements, and Zonic asked to be paid 20% of Schlumberger's profit on the project. Schlumberger initially refused these requests, but after Schlumberger's Yemen country manager "suggested that those amounts be compensated through services" Schlumberger determined that Zonic could help with human resources, furniture, and computer hardware and networking services.

As of 2003, Schlumberger had still not signed a contract with Zonic. Despite not signing any contract, Schlumberger paid the $500,000 "signing" bonus to Zonic in late 2003. By May 2004, as Schlumberger continued to resist signing a formal contract with Zonic, Schlumberger's Yemen country manager received threatening telephone calls. Finally, Schlumberger signed the contract with Zonic, and the telephone harassment of the country manager ceased.

The 2008 Schlumberger internal investigation revealed that Zonic did provide some real goods and services, such as lobbying, administrative support, building security, and computer hardware. In regard to computer hardware, it appears that Zonic billed Schlumberger more than $200,000 for particular computer hardware, even though Schlumberger itself was a leading global provider of that specific hardware. Other contractual services, including the provision of computer software, were reportedly never provided at all.

While the relationship between Schlumberger and Zonic appears to have been tense from the beginning, it deteriorated further around 2006 in an ongoing dispute over certain invoices. Zonic continued to request money, but Schlumberger ultimately discontinued payments, essentially ending the relationship. Zonic's Abdullah Saleh then sued Schlumberger for breach of contract in a Yemeni court; the progress of this suit in Yemen is unknown.

In an interview with *The Wall Street Journal*, Abdullah Saleh claimed that no threats were ever made against Schlumberger personnel. He reportedly said, "Schlumberger came to us for help. They had been trying for so many years to get the [Data Bank Development Project] contract. If it wasn't for Zonic, there would have been no data bank project."

While pursuing the data bank project and working with Zonic, Schlumberger also reportedly entered into contracts to rent vehicles for use in Yemen, sometimes from government officials employed by the powerful PEPA. From 2005-2007, for example, Schlumberger rented three cars for a total of $6,000 per month, when the market rate would have been approximately $950 per vehicle, less than half the amount charged to Schlumberger. These three vehicles were rented from a PEPA Committee Member who, by virtue of his position, would have had signatory power over contracts awarded to oil and gas services companies such as Schlumberger. Schlumberger also reportedly rented three Toyota Land Cruisers rented from 2004-2008 for $2700 per month per vehicle, an $1100 monthly premium above market rates per vehicle, from PEPA General Manager of Materials Abdul Hameed Al-Miswari, the man responsible for

approving importation of equipment into Yemen. When Schlumberger managers learned that the Land Cruiser rental contract involved a PEPA official as the counter-party, they cancelled the contract. In apparent retribution, Al-Miswari personally intervened to stop two subsequent Schlumberger imports into Yemen.

Finally, *The Wall Street Journal* reported that, since 2003, Schlumberger had been using a customs broker called Dhakwan Petroleum and Mineral Services Co. Ltd ("Dhakwan"). Schlumberger managers cancelled the contract when they discovered that Dhakwan is led by a close friend and ally of the Yemeni President. Schlumberger imports quickly stalled. Schlumberger attempted to hire a new customs company, only to discover that the new company was itself using Dhakwan. Schlumberger concluded that it had no choice but to use Dhakwan, whose website currently lists Schlumberger as a customer.

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 Columbia ("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.

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 ("DPA") 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 and DOJ are 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 DOJ subsequently joined the SEC's requests for information. 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 DPAs 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 that were also under investigation by the German prosecutor in Munich; however that investigation has since been resolved.

- *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. John & Johnson also is under investigation by the DOJ and SEC related to its participation in the Oil-for-Food Programme.

  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. 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.

- *Wright Medical Group*: In its June 10, 2008 Form 8-K, Wright Medical Group, Inc. ("Wright Medical") 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 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, Congress directed the Attorney General to adopt a revised review procures to address some of the perceived drawbacks to the Review Procedure process. The DOJ finally adopted revised procedures, known as the Opinion Procedures, in 1992.

Under the DOJ's advisory opinion procedures, issuers subject to the FCPA 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 advisory opinions 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.

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. He 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.[45] 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.[46] 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.

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[45] 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.

[46] 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 a government entity and not to any foreign official, the provisions of the FCPA 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.[47] 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.

[47] 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")).[48] 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.

[48] 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.[49] 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

[49] 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.

DOJ Opinion Procedure Release 10-02

On July 16, 2010, the DOJ issued Opinion Procedure Release 10-02 in response to a request by a U.S.-based nonprofit microfinance institution ("MFI") that provides loans and basic financial services to low-income entrepreneurs around the world who may otherwise lack access to loans or financial services. The Requestor intended to convert all of its local operations to commercial entities licensed as financial institutions. One of these operations was a wholly owned subsidiary in a country in Eurasia (the "Eurasian Subsidiary") that wished to transform itself from a limited liability company regulated by an agency of the Eurasian country (the "Regulating Agency") into an entity that would permit it to apply for regulation by the Central Bank of the Eurasian country, with the ultimate goal of acquiring a license as a bank.

The Regulating Agency expressed concern that allowing the MFI to transition from "humanitarian" status to commercial status could result in grant funds and their proceeds either being withdrawn from the country or being used to benefit private investors. The Regulating Agency pressured the Eurasian Subsidiary to take steps to "localize" its grant capital to ensure that it remained in the Eurasian country. Specifically, the Regulating Agency insisted that the Eurasian Subsidiary make a grant to a local MFI in an amount equal to approximately 33 percent of the Eurasian Subsidiary's original grant capital and provided a list of local MFIs from which to choose.

The Requestor believed that compelled grants to an institution on a designated short list could raise red flags under the FCPA. The Eurasian Subsidiary undertook a three-stage due diligence process to vet the potential grant recipients and select the proposed grantee. First, it conducted an initial screening of six potential grant recipients by obtaining publicly available information and information from third-party sources. Based on this review, it ruled out three of the six MFI candidates as unqualified. Second, the Eurasian Subsidiary undertook due diligence on the remaining three potential grant recipients to learn about each organization's ownership, management structure and operations. This review involved requesting and reviewing key operating and assessment documents for each organization, as well as conducting interviews with representatives of each MFI. The Eurasian Subsidiary eliminated one organization for

conflict of interest concerns, and another after the discovery of a previously undisclosed ownership change in the entity. Third, the Eurasian Subsidiary undertook targeted due diligence on the remaining potential grant recipient, the Local MFI. This diligence was designed to identify any ties to specific government officials, determine whether the organization had faced any criminal prosecutions or investigations, and assess the organization's reputation for integrity.

The third round of due diligence revealed that one of the board members of both the Local MFI and the Local MFI's Parent Organization was a sitting government official in the Eurasian country and that other board members are former government officials. The DOJ noted, however, that the sitting government official serves in a capacity that is completely unrelated to the microfinancing industry, and, under the law of the Eurasian country, sitting government officials may not be compensated for this type of board service. Further, the Local MFI confirmed that neither its own board members nor the board members of the Local MFI's Parent Organization receive compensation for their board service.

The Requestor indicated that the Proposed Grant would be governed by a written grant agreement with the recipient and be subject to numerous controls. First, the Eurasian Subsidiary would pay the grant funds in eight quarterly installments, in order to allow interim monitoring and to assist the Local MFI in effectively managing the inflow of capital. Each successive installment would be retained by the Eurasian Subsidiary until the satisfactory completion of a quarterly monitoring review and/or semi-annual audit. Second, each quarter, the Local MFI's use of grant funds would be reviewed by an independent monitor. In addition, every six months, the Local MFI's use of the donated funds would be audited by an accounting firm selected by the Eurasian Subsidiary. The monitoring and audits would continue for three years beyond the disbursement of the final installment of loan capital. Third, a portion of the grant funds would be dedicated to capacity-building to help the Local MFI develop the organizational infrastructure needed to make effective use of the new loan capital. Fourth, as discussed, the grant agreement would expressly prohibit the Local MFI from transferring any of the grant funds to the Local MFI's Parent Organization or otherwise using the grant funds to compensate board members of either the Local MFI or the Local MFI's Parent Organization.

Finally, the grant agreement would include a series of anti-bribery compliance provisions, including provisions: (i) prohibiting the Local MFI from paying bribes or giving anything else of value to benefit government officials personally; (ii) requiring the Local MFI to keep and maintain accurate financial records and to provide the Eurasian Subsidiary's representatives access to its books; (iii) requiring the Local MFI to adopt a written anti-corruption compliance policy; (iv) requiring the Local MFI to certify its compliance with these obligations upon request by the Eurasian Subsidiary; (v) prohibiting the Local MFI from undergoing a change in ownership or control, upon penalty of forfeiting the grant; and (vi) permitting the Eurasian Subsidiary to terminate the agreement and recall the grant funds if it obtains evidence that reasonably suggests a breach of the compliance provisions.

The DOJ provided no action comfort and stated that, based on the due diligence performed and the controls in place, "it appears unlikely that the payment will result in the corrupt giving of something of value to [government] officials." The Release further states that,

"the Requestor has done appropriate due diligence and … the controls that it plans to institute are sufficient to prevent FCPA violations."

The Release is notable in that it expressly relies on three previous Releases (95-01, 97-02, and 06-01) dealing with charitable grants and bases its approval of the Requestor's due diligence in part on its completion of the due diligence steps outlined in those prior Releases. In doing so, the Release further clarifies what due diligence the DOJ expects in such situations, including: (i) FCPA certifications by the recipient; (ii) due diligence to confirm recipients' officers are not affiliated with the foreign government; (iii) the provision of audited financial statements; (iv) a written agreement with the recipient restricting the use of funds; (v) steps to ensure the funds are transferred to a valid bank account; (vi) confirmation that contemplated activities had taken place before funds were disbursed; and (vii) ongoing monitoring of the program.

The Release is also notable because it expressly states that the Eurasian Subsidiary's Proposed Grant to the Local MFI "is for the purpose of obtaining or retaining business (nonprofit business, to be followed by for-profit business) in the Eurasian country; that is, the Proposed Grant would be made as a condition precedent to obtaining a license to operate as a financial institution." This suggests the DOJ may, in appropriate circumstances, view payments made by non-profit organizations engaged in charitable or humanitarian work as payments to "obtain or retain business" under the FCPA.

DOJ Opinion Procedure Release 10-03

On September 1, 2010, the DOJ released Review Procedure Release 10-03 in response to a request from a limited partnership established under U.S. law and headquartered in the United States (the "Requestor"). The Requestor planned to engage a consultant and its sole owner (collectively, the "Consultant") to assist with the Requestor's attempt to obtain business from a foreign government. The consultant was a U.S. partnership and its owner was a U.S. citizen.

The Requestor developed natural resource infrastructure and sought to enter into discussions with the foreign government about a particularly novel initiative. It felt that it required the assistance of an agent in order to break through a market dominated by established companies and gain the necessary audience with the foreign government.

The complicating factor was the Consultant's past and present representation of that same foreign government and a number of its ministries in unrelated matters. The Consultant held contracts to represent the foreign government and act on its behalf, including performing marketing on behalf of the Ministry of Finance and lobbying efforts in the United States. It was a registered agent of the foreign government pursuant to the Foreign Agents Registration Act, 22 U.S.C. § 611, *et seq*., and it had previously represented ministries of the foreign government that would play a role in discussions of the Requestor's initiative.

The Requestor represented that the Consultant had taken steps to wall off employees who would work on the contemplated representation from those working on the various representations of the foreign government or its ministries, and that the Consultant would

provide, at the Requestor's insistence, full disclosure of the representation to the relevant parties. The Requestor had also confirmed the legality of the Consultant representing both it and the foreign government under local law and had secured from the Consultant contractual obligations to limit further representation of the foreign government for the duration of the consultancy.

At issue was whether the Consultant would be considered a "foreign official" for the purposes of the FCPA. The DOJ indicated that the answer depended on the circumstances of the engagement. The DOJ emphasized that the FCPA defines the term "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, *or any person acting in an official capacity for or on behalf of any such government* or department, agency, or instrumentality, or for or on behalf of any such public international organization." 15 U.S.C. § 78dd-2(h)(2)(A) (emphasis supplied by DOJ). Thus, where the Consultant had acted or would act *on behalf of* the foreign government (in its capacity as an agent of that government), the Consultant likely would be deemed a "foreign official" for the purposes of the FCPA. However, where the Consultant was not acting *on behalf of* the foreign government, it likely would not fall within that definition.

In this particular case, the DOJ indicated that the steps taken by the Requestor were sufficient to ensure that the Consultant would not be acting on behalf of the foreign government for the purposes of the consultancy and therefore it would not be deemed a "foreign official" in that context. As a result, the DOJ would not take enforcement action based solely on payments to the Consultant. The DOJ cautioned the Requestor, however, that while the Consultant would not be deemed a "foreign official" for FCPA purposes under the circumstances described, the proposed relationship increased the risk of potential FCPA violations, and the Review Procedure Release did not foreclose the DOJ from taking enforcement action should an FCPA violation occur during the consultancy.

Release 10-03 is particular noteworthy for several reasons. First, it reemphasized that the definition of "foreign official" under the FCPA is independent of—and almost always broader than—the definitions of similar terms in the local laws of foreign countries. In the present case, it did not matter that the Requestor had represented that as a matter of local law, the Consultant's owner and its employees were not employees or otherwise officials of the foreign government. As the DOJ pointed out, the FCPA's definition of "foreign official" is broader than persons formally designated by the foreign government as employees or officials and might have captured the Consultant in different circumstances.

Second, it makes clear that the definition of "foreign official" is, at times, conduct-specific. The DOJ indicated that when an individual is deemed to be a "foreign official" by virtue of acting on behalf of a foreign government, that classification attaches only in certain circumstances, *i.e.* when that individual is actually acting in that capacity and not necessarily when he is acting in other capacities.

Third, it is an example of the DOJ extending an analytical framework that it previously applied to one category of cases to another category of cases and underscores the influential—if not precedential—value of previous guidance to future circumstances. The DOJ cited, and

appeared to draw support for its determination in this case from, a number of previous releases wherein the DOJ stated its lack of enforcement intent relating to various proposals to hire *employees and officials* of foreign governments. In those cases, the DOJ stated that it looked to determine whether there was any indicia of corrupt intent, whether the arrangement was transparent to the foreign government and the general public, whether the arrangement was in conformity with local law, and whether there were safeguards to prevent the foreign official from improperly using his or her position to steer business to or otherwise assist the company, for example through a policy of recusal. That analytical framework is the same or similar to the one applied in the present release, even though here the DOJ was addressing a slightly different category, *i.e.* individuals who in certain circumstances might be deemed a "foreign official" because they were acting *on behalf of* a foreign government in those circumstances.

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