FCPA/Anti-Bribery Alert
Summer 2012

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INTRODUCTION

For the last several years we have reported on the developing trend of enhanced anti-corruption enforcement and the concomitant dedication of resources by prosecutors, regulators and other interested parties around the world. Not only have we witnessed a continued commitment toward enhanced anti-corruption activities, but it would appear prudent at this point to conclude that we have passed the tipping point: anti-corruption norms are no longer a trend whose ebbs and flows are properly followed, but are better considered fixtures in the firmament of good corporate governance.

Accordingly, we continue to see regulatory and prosecutorial authorities seeking and obtaining financial penalties amounting to tens of millions of dollars and jail sentences for individuals. While the United States Department of Justice has had several setbacks in its prosecution efforts in the past year, we see no evidence that the DOJ will diminish its efforts or that it has been dealt systemic blows. Rather, the setbacks are best considered as individual bumps in the road for a very determined government agency that continues to dedicate considerable resources and effort to enforcing anti-corruption norms.

We have seen not only the emergence of regulatory and prosecutorial efforts outside the United States, including in Nigeria and other jurisdictions whose enforcement efforts were thought to be lagging, but also the World Bank and other international financial institutions pushing forward individually and collectively (*e.g.*, through cross-debarment) a sophisticated regulatory agenda that increasingly bears hallmarks of a quasi-governmental agency, including published decisions of the World Bank's Sanctions Board.

Enforcement efforts are not limited to companies that have failed to adopt appropriate policies and procedures or have a rogue employee. Rather, we have seen regulatory attention dedicated to companies who had publicly (or privately to regulatory authorities) indicated that they had adopted an effective compliance program only to be found to have either a mere paper program or one that was begun and abandoned. Such instances have been and will be dealt with harshly by authorities who rely on companies to develop and maintain programs, particularly in instances where they have provided assurances in this regard or where regulatory authorities have reduced penalties in reliance on the adoption of an enhanced compliance program.

Finally, there is the persistent question of whether anti-corruption laws, most prominently the United States Foreign Corrupt Practices Act, will be watered down. Despite the various criticisms of the FCPA, recent instances where companies have appeared to make determined efforts to ignore the FCPA's prohibitions or attempt to conduct white wash style investigations potentially as cover for illicit conduct (or at least to save costs if nothing more nefarious), would seem to provide more than enough fodder to assure that no governmental support will likely accrue to efforts to weaken the FCPA or its sister laws and regulations outside the United States.

Hughes Hubbard's FCPA/Anti-Bribery Alert Summer 2012 discusses these and other anti-bribery developments. This Alert is divided into two parts. Part I begins with a summary and analysis of certain critical enforcement trends and lessons to be learned from recent 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 2011 and 2012 in reverse chronological order; and (iii) a discussion of selected recent FCPA and related developments. Part II contains: (i) a brief discussion of the statutory requirements of, and penalties under, the FCPA; (ii) a description of FCPA settlements and criminal matters from 2005 through 2010 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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PART I

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: 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 U.K. Serious Fraud Office ("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. Indeed, even the World Bank has been utilizing its own form of monitor in connection with entering into negotiated resolution agreements including in the recent case involving Alstom. However, use of monitors is not a universal feature of settlements; the recent Johnson & Johnson settlement instead imposed a requirement of six corporate compliance reviews to be undertaken by the company and provided to the DOJ. Similarly, the Marubeni and JGC settlements instead required retention of a "Compliance Consultant," whose facially more limited reports would be provided to the Board of Directors rather than to the DOJ, as is standard under a monitorship. (*See, e.g.*, *Innospec*, *Siemens, Faro, AGA, Willbros Group, Delta & Pine, Baker Hughes, Vetco, Mabey & Johnson, Alcatel-Lucent, Johnson & Johnson, JGC, Marubeni*).

- *Vigorous Enforcement in the United States*: 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 to 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. Penalties imposed in 2011 did not match those heights, but remained significant, with high water marks for the year including JGC settling for $218.8 million and Magyar Telekom and Deutsche Telekom settling for $95 million.

- *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 such as Germany, France, Australia, Norway and Switzerland (to name a few) are facing increasingly aggressive pressure to actively enforce their anti-corruption laws. Non-OECD nations such as China and Nigeria (albeit on a more selective basis), have also aggressively investigated and prosecuted corruption offenses, including with respect to foreign nationals.

- *Cooperation Between International 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 Aon, Siemens, Flowserve, and Akzo Nobel matters. Indeed, in 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. U.K. authorities took a similar approach in the Johnson & Johnson case, limiting their prosecution to account for double-jeopardy concerns based on the U.S. enforcement action. 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 2010 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, Aon, Johnson & Johnson*).

- *Increased Anti-Corruption Enforcement by and Cooperation Among Multinational Development Banks:* Increasingly, multinational development banks' anti-corruption standards and enforcement activity are important considerations for companies providing goods or services that are, or potentially will be, financed through international development funding. The World Bank Group has been a leader in this regard, having debarred more than 530 entities and individuals since 1999. In 2006, the World Bank and several other international financial institutions agreed on the harmonization of anti-corruption standards, common investigative practices, and information sharing, and in 2010 several of these institutions agreed to impose cross-debarment for any debarment imposed for a period of more than one year. This cross-debarment agreement greatly amplifies the impact of debarment by any one of the participating institutions on an entities ability to compete for international development contracts.

- *Large Corporate Penalties*: Corporate penalties In the tens and hundreds of millions of dollars have, over the last several years, become commonplace. 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. The BAES ($400 million to resolve an FCPA investigation through a false statement plea), Snamprogetti/ENI ($365 million), JGC ($218 million), Daimler ($185 million), and Alcatel-Lucent ($137 million) settlements are among others to break nine figures.

- *Prosecutions of Individuals*: The SEC and DOJ remain willing to pursue charges against individuals when the facts warrant such action. 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 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.

    - *Prosecution of Individuals Rather Than 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 Garth Peterson, Gerald and Patricia Green, Mario Covino, Richard Morlok, and the former officers of Pacific Consolidated Industries among others. These individuals may not even be United States citizens, though they work for United States companies or in United States offices. The Control Components prosecutions included indictments of foreign citizens acting abroad as agents of a domestic concern. The SEC remains similarly willing to charge rogue individuals. As stated in the SEC's press release regarding Peterson, "[t]his case illustrates the SEC's commitment to holding individuals accountable for FCPA violations, particularly employees who intentionally circumvent their company's internal controls."

  - *Severe Prison Sentences*: In October 2011 and May 2012, the DOJ obtained its most severe sentences for individuals' FCPA violation to date, the 15-year prison term handed to Joel Esquenazi, nine year prison term handed to Jean Rene Duperval, and seven year prison term handed to Carlos Rodriguez as part of the Terra Telecommunications/Haiti Teleco action. These follow several years of increasingly harsh sentences for individual offenders and serve as perhaps the starkest reminder to employees and directors of the FCPA's true teeth. They also contrast with the perhaps short-lived trend of judges diverting from DOJ requests to impose more lenient sentences, such as the Bobby Elkin, Leo Winston Smith, and James Giffen cases. (*See, e.g.*, *Terra Telecommunications, Garth Peterson, 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, Lindsey Manufacturing and its executives, and John O'Shea, among others, it is 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. Prosecutors have not encountered universal success in such trials, but there remains no reason to believe that the DOJ will shy away from trials as a matter of policy or practice.

- *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*).

- *Emphasis on Systemic Controls*: Enforcement agencies have placed additional emphasis on the ability of companies to generate reports analyzing and compiling company-wide data on key anti-bribery issues such as travel and exceptions, and appear to reward companies that can effectively analyze and present otherwise voluminous data as part of their cooperation, such as in the recent Bizjet settlement. Companies considering or undertaking systems modifications should consider implementing such tools on the front end. (*See, e.g., Bizjet*).

- *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 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 Industry Sweeps*: The SEC and DOJ have continued to use industry-wide sweeps in conducting their investigations, including the oil-services industry, pharmaceutical industry, and most recently, film industry. Given the successful prosecutions that have come from these sweeps, further sweeps should be expected. (*See, e.g., Hollywood Sweep, Panalpina-Related Oil-Services Sweep, Biomet, Smith & Nephew, Johnson & Johnson*).

- *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 the companies 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.

- o *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. Antitrust laws may also be used by prosecutors or in civil actions where the improper conduct negatively affects competition, such as by bid-rigging. (*See, e.g.*, *Terra Telecommunications, Green, O'Shea, Terra Telecommunications, Innospec, Military and Law Enforcement Products Sting, Bridgestone*).

- *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. Numerous pharmaceutical industry related proceedings similarly involved payments to persons employed by both public and private hospitals, while 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, Johnson & Johnson, Biomet, Smith & Nephew*).

- *Prosecution for Payments to Former Government Officials*: The DOJ prosecuted Alcatel-Lucent for, among other things, 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 it views 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. The SFO has also instituted a whistleblower service. (*See, e.g.*, *Siemens, Dodd-Frank Act, SFO Whistleblower Service*).

- *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 demonstrated, despite the defendants' eventual acquittal, the DOJ is increasingly using the assistance of the FBI and traditional law enforcement techniques to find and investigate violations of the FCPA. For example, *The New York Times* reported that law enforcement officials had indicated that as many as six other undercover operations are currently under way. 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*: In recent years, there has been a noticeable increase in the number 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 extended quickly to newly acquired subsidiaries. The SFO has taken a similar line in moving against Mabey Engineering (Holdings) Ltd. under the Proceeds of Crime Act for actions of its subsidiary Mabey & Johnson. (*See, e.g.*, *Fiat*, *Faro, Willbros Group, AB Volvo, Flowserve, Westinghouse, Akzo Nobel, Ingersoll-Rand, York, Bristow*, *Paradigm, Textron, Delta & Pine, Dow, Deutsche Telekom, Diageo, Mabey & Johnson*).

- *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 individuals such as Noble CEO Mark Jackson and Nature's Sunshine Products, Inc. executives Douglas Faggioli and Craig D. Huff 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. 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 Jackson, 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.*, *Noble, 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, obtain favorable treatment in pending court cases, schedule inspections, obtain product delivery certificates, alter engineering design specifications in favor of a particular bidder, to obtain preferential customs treatment, avoid or expedite necessary inspections, alter the language in an administrative decree, obtain governmental reports and certifications necessary to market a product, reduce taxes, or receive favorable referrals and reports to customers. 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, Rockwell, Watts Water*).

- *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*).

- *Payments To Recover 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 their 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 standards to evaluate cooperation by companies and individuals, including the use of DOJ-like Deferred Prosecution Agreements (first used in the Tenaris settlement) with the attendant requirements of full cooperation, waiver of statute of limitations, and enhanced compliance measures. (*See, e.g.*, *BizJet, Smith & Nephew, Bridgestone, Rockwell, Tenaris, ABB, Innospec*, *Siemens, Faro, AGA, Westinghouse, Bristow*, *Paradigm, Textron, Dow, Baker Hughes*).

- *Declination Forecast*: It is not unreasonable to assume that, where companies have compliance programs in place and can demonstrate that they have conducted credible, good-faith internal reviews which uncover misconduct by low-level employees, enforcement agencies will increasingly prove willing to decline enforcement activity. We may also expect future guidance from these agencies as to when the conditions might support such determinations, in similar fashion to the landmark "Seabord Report" of 2001. (*See, e.g.*, *Garth Peterson*).

- *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 the DOJ's prosecutorial guidelines prohibit the practice of seeking attorney-client waivers as an element of cooperation, this has little impact on the DOJ's ability to require that companies continue to provide it with significant factual information in order to be given credit for cooperation. (*See, e.g.*, *Martin*, *Wooh*, *Vetco*, *El Paso*, *Textron, Kozeny, Johnson & Johnson*).

- *Opinion Releases as Guidance*: The DOJ has, to date, issued 56 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. The recent Second Circuit decision upholding Frederic Bourke Jr.'s conviction on a constructive knowledge standard further strengthens this position. (*See, e.g.*, *BAES, Alcatel-Lucent, GlobalSantaFe, Bourke*).

- *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. The Second Circuit's Bourke decision directly stated that Bourke's knowledge that corruption was pervasive in Azerbaijan contributed to his constructive knowledge of improper payments. (*See, e.g.*, *BAES, Bourke, 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. Other jurisdictions such as China have also targeted officials. (*See, e.g.*, *Gerald and Patricia Green, Terra Telecommunications, Kleptocracy Asset Recovery Initiative*).

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, Magyar Telekom*).

- *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 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." (*See, e.g.*, *Johnson & Johnson, KBR*).

- *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. Recent enforcement actions against Diageo and Smith & Nephew demonstrate once again that distributors can pose many of the same risks as traditionally associated with sales agents. (*See, e.g.*, *Siemens, AB Volvo, Chevron, Paradigm, Baker Hughes*, *Ott and Young, Diageo, Smith & Nephew, Johnson & Johnson*).

- *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, Johnson & Johnson*).

- *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, Aon*).

- *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; Johnson & Johnson*).

- *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.*, *Watts Water, 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 that 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, Comverse, Johnson & Johnson, Smith & Nephew, Biomet*).

- *"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. Travel expenditures for government officials and customers, even when linked to legitimate business and promotional activities, remain a frequent source of charged impropriety. Benefits to relatives of the foreign official may also run afoul of the law. 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, Diageo, Rockwell, Aon, Biomet, Johnson & Johnson*).

- *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, Tenaris, 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, Tenaris*).

- *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. Ongoing litigation by the individual Noble defendants on this point made add further clarity to this interpretation. The U.S. government's 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 Minimis Exception*: There is no *de minimis* exception to the FCPA's prohibitions. The Panalpina settlement directly included bribes of "de minimis 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, the Avery Dennison settlement similarly involved $100 payments, and the Diageo settlement involved numerous $100-$300 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 that encounter anti-corruption issues in one circumstance should be careful not to repeat the mistakes that led to those issues. Identification of red flags or suspicious conduct by internal or external auditors have also been used by enforcement agencies as evidence of companies' knowledge of and failure to stop improper practices. 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.*, *Walmart, Armor, Johnson & Johnson Smith & Nephew, 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. Johnson & Johnson was similarly criticized for the failure of its internal audit team to properly respond to anonymous reports of improper payments in Greece. (*See, e.g.*, *Walmart, Armor, Smith & Nephew, Johnson & Johnson, RAE, Wal-Mart, Johnson & Johnson, Walmart*).

- 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 and where evidence of misconduct in a region or industry is shown should be used to inform controls regarding future business. (*See, e.g.*, *Diageo, Biomet, Ball Corporation, RAE, eLandia, PCI, Baker Hughes, Vetco, Basurto, DOJ Opinion Procedure Release 08-02*, *DOJ Opinion Procedure Release 08-01, Smith & Nephew*).

- 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, Johnson & Johnson*).

- 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, Comverse*).

- *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, Aon*).

- *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. The World Bank, in its first published decisions, also emphasized that only internal investigations conducted by experienced, independent counsel will enable a respondent company to mitigate the penalty to be imposed on it for improper conduct. (*See, e.g.*, *Siemens, KBR/Halliburton*, *Ingersoll-Rand, Baker Hughes, BAES*).

FOCUS ISSUES

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.

Wal-Mart Investigation[1]

On December 8, 2011, Wal-Mart disclosed that, as a result of a voluntary internal review of its anti-corruption policies, procedures, and internal controls and information from other sources, it had begun an internal investigation with the assistance of outside counsel into whether certain matters, including permitting, licensing and inspections, were in compliance with the FCPA. The company further disclosed that it had voluntarily reported the fact of its investigation to the DOJ and SEC.

On May 17, 2012, Wal-Mart further disclosed that its Audit Committee was conducting an internal investigation with the assistance of outside counsel into alleged violations of the FCPA and other alleged crimes or misconduct in connection with foreign subsidiaries, including Wal-Mart de México, S.A.B. de C.V. ("Walmex"). Wal-Mart further disclosed that the Audit Committee was also investigating "whether prior allegations of such violations and/or misconduct were appropriately handled by the Company." Wal-Mart also was continuing its voluntary global review of its policies, practices, and internal controls for FCPA compliance.

Previously, on April 21, 2012, *The New York Times* had reported on allegedly improper payments to Mexican officials by Walmex and on the company's handling of its response to the allegations, which according to *The New York Times* had initially been raised in September 2005 by a former executive to the then-General Counsel of Wal-Mart International. According to the *Times*, the former executive had left the company after being passed over for the General Counsel position at Walmex. The *Times* reported that he had alleged that Walmex had paid bribes in connection with building new stores in Mexico, such as improper payments for zoning approvals, reductions in environmental impact fees, and the allegiance of neighborhood leaders. The *Times* further reported that the former executive had implicated Walmex's CEO, board chairman, general counsel, chief auditor, and top real estate executive in relation to the payments. According to the *Times*, some of the payments were made through local lawyers and had been recorded on Walmex's books and records as legal fees.

The *Times'* report also included a significant amount of details concerning the company's handling of the internal investigation that resulted from the former executive's allegations. According to the *Times*, responsibility for the internal investigation was ultimately transferred to Walmex's General Counsel—who had been named by the former executive in connection with

[1] *Disclosure: Kevin Abikoff, an author of this Alert, was interviewed in connection with several media reports connected to this investigation, including reports by The Wall Street Journal, the Associated Press (picked up by at least 1,800 affiliated publications), Bloomberg, Bloomberg TV Hong Kong, and Law360. The authors are not involved in the reported investigations, and the author's comments to media concerned FCPA compliance practices generally and were not based on any personal knowledge of the underlying conduct or resulting investigation.*

the payments. This transfer occurred, according to the *Times*, despite the concerns raised by the then-General Counsel of Wal-Mart International with "assigning any investigative role to management of the business unit being investigated." According to the *Times*, the Walmex General Counsel concluded the investigation a few weeks after he took control and reportedly concluded based on the denials of other Walmex executives that there was no evidence or clear indication of bribery.

The *Times* also reported on the breadth and timing of its own reporting. According to the *Times*, Wal-Mart's voluntary disclosure to U.S. authorities occurred after Wal-Mart learned of *The New York Times'* reporting in Mexico. The *Times* claimed to have obtained hundreds of internal company documents tracing the evolution of Wal-Mart's initial internal investigation, to have a draft work plan proposed by outside counsel, to have spoken with undisclosed "participants in Wal-Mart's investigation" and the former executive, and to have obtained e-mails between Wal-Mart executives about the handling of the investigation. The *Times* also appeared to quote directly from the notes prepared by the former Wal-Mart International General Counsel during her meeting with the former executive.

Following the report by the *Times*, the news media questioned whether the allegations (if true) would provoke tens of millions of dollars in costs, billions in lost market capitalization and force changes at the highest levels of the company. To use a popular phrase: the matter went viral, with reporting in literally thousands of publications in virtually every corner of the globe.

- *Key Preliminary Take-Aways*

If *The New York Times'* allegations are borne out, the legal consequences for Wal-Mart could be severe. Regardless of the legal outcome for Wal-Mart, the fact of the *Times'* reporting carries valuable lessons for companies about to embark on, or already engaged in, compliance investigations:

  - ***An investigation's conclusion is only as valuable as the perceived independence and qualifications of the investigators.*** Even if the Walmex General Counsel had held impeccable qualifications to conduct an independent, thorough internal anti-corruption investigation, the allegation—even if ultimately unfounded—of his own and his fellow executives' involvement in the conduct at issue likely permanently and incurably tainted the results of his investigation. Particularly given the high public profile of Wal-Mart, enforcement authorities would never have been able to base a resolution on any investigative work done by the alleged wrongdoers. Thus, a critical first step before embarking on any internal compliance investigation is to ensure that the credibility and qualifications of the investigators will be above reproach from a potentially skeptical enforcement authority.

  - ***It's the cover-up that kills.*** To quote a familiar Washington, D.C. refrain, it is not the crime, it is the cover-up that ultimately results in the most severe consequences. If the *Times'* reporting is ultimately confirmed, the severity of penalties meted out by U.S. authorities could turn on whether the involved executives were able to use their control over the internal investigation in an attempt to cover up their or others' culpability.

- ***The process for scoping and staffing an investigation should itself be beyond reproach.*** Not every reported incident requires a company to respond with an exhaustive, unlimited, and disruptive global investigation. The appropriate staffing and resources will turn on the nature of the wrongdoing and requires proper sculpting to ensure a reasonable review is conducted of required matters. Thus, companies will likely face a range of reasonable scoping and staffing options for an internal investigation. But just as the objectivity of the investigators themselves must be unassailable, so too must the objectivity of the process by which the scope and staffing of an internal investigation is determined, and by whom.

- ***Failure to provide internal compliance personnel and purported whistleblowers confidence in the company's handling of alleged misconduct may cause some to report their allegations outside the company.*** If a company's policies and practices for handling internal investigations do not give those involved or purported whistleblowers comfort in the objectivity and sincerity of the process, then they are less likely to rely on the company and let the internal investigation take its course before reporting the matter outside of the company. If true, the *Times*' reported breadth of cooperation and documentation it apparently received from both persons involved in conducting the internal investigation and the former executive has placed Wal-Mart in the unenviable position of facing a storm of public criticism and debate over its initial handling of an investigation at the same time it is endeavoring to cooperate with U.S. authorities going forward.

- ***Costs Associated with Mishandled Investigations Can be Prohibitive As They Include Reputational Damage, Enhanced Investigative Costs, Potential Fines and Potentially Forced Management Changes.*** There should be no doubt that the costs of fixing a broken investigation are significantly higher than doing it right in the first place — particularly if the initial investigation is properly scoped and conducted by experienced and independent counsel. Once the *Times* story broke, Walmart's stock fell nearly 5% the next trading day, raising the specter of whether billions of dollars of market capitalization can be eroded from lost shareholder confidence or concern. Similarly, it is axiomatic that investigative costs in the context of governmental concern are significantly higher than the cost of an investigation conducted in good faith but outside the purview of governmental concern.

The eventual resolution of Wal-Mart's current investigative efforts and any related resolution with U.S. authorities will likely provide further valuable lessons for companies regarding the design and execution of an effective and efficient internal investigation.

World Bank Group Anti-Corruption Enforcement

On May 30, 2012, the World Bank Sanctions Board issued its first seven publicly available decisions. Although the Bank has sanctioned more than 530 firms and individuals since 1999, until now the bases for the determination of the appropriate sanction in contested Bank proceedings had not been publicly disclosed. These public decisions demonstrate the Sanctions Board's awareness of and appreciation for broader global compliance trends. These decisions also emphasize the Board's willingness to take an independent view of the submissions presented to them and to provide a detailed analysis of the matters under submission. Several key points emerge from the published decisions.

First, the Sanctions Board expects internal investigations to be undertaken by persons with sufficient independence, expertise, and experience. The Sanctions Board refused to give mitigating credit in a case where the persons conducting the investigation were not sufficiently independent from the misconduct at issue and where such persons lacked the necessary expertise and experience to conduct a competent and thorough investigation. (Decision No. 50 ¶ 67) This finding puts the Board on equal footing with other regulatory agencies inside and outside the United States that have insisted on similar criteria for crediting corporate investigations of potential misconduct.

Second, the Sanctions Board recognizes an effective compliance program defense to vicarious corporate liability. Amidst the ongoing debate over whether there should be an "effective compliance program" defense in the context of U.S. Foreign Corrupt Practices Act violations, the Sanctions Board's decisions emphasize the Board's recognition of such a defense to the imposition of corporate liability for the acts of employees. If an employer can demonstrate to the Board's satisfaction that it had implemented, prior to the conduct at issue, controls reasonably sufficient to prevent or detect the conduct, the employer would appear to have a defense from liability for its employees' actions. (Decisions No. 46 ¶ 29; No. 47 ¶ 32; No. 48 ¶ 28) The availability of the defense would appear to be more problematic in cases where high-level managers are found to have been involved in the misconduct. (Decisions No. 50 ¶¶ 50-52; No. 51 ¶ 42) For companies that have or may seek World Bank Group-financed contracts, these decisions create a substantial incentive to review and, as necessary, recalibrate existing compliance programs to both anticipate likely compliance risks and to generally meet the World Bank's expectations for compliance programs.

Third, the Sanctions Board gives credit for compliance program modifications implemented in response to alleged misconduct. Even if a pre-existing compliance program had not been reasonably designed to prevent or detect the conduct at issue, the Sanctions Board has indicated that it will also provide mitigation credit for post-conduct compliance modifications designed to prevent or detect recurrence of the alleged misconduct. (Decision No. 51 ¶¶ 51-52) The Sanctions Board's decisions caution, however, that such post-conduct compliance program modifications should be largely implemented before the respondent company appears before the Board (Decision No. 51 ¶ 52), must be reasonably designed to prevent the misconduct (Decision No. 47 ¶ 51), and should be applied throughout the company as appropriate (not just to the specific contract or project at issue) (Decision No. 52 ¶ 40). Disciplining responsible employees is also important to the Board, which in one case declined to provide mitigation credit for voluntary corrective measures that did not include putting in place an effective compliance program and disciplining the involved employees. (Decision No. 49 ¶ 38)

Finally, mitigation credit is meaningful. The seven decisions demonstrate that mitigation credit can indeed be meaningful. Even though the World Bank's sanctioning guidelines set a three-year debarment with conditional release as a "baseline" sanction, one decision imposed as sanctions a six-month debarment with unconditional release in the presence of substantial mitigating factors. (Decision No. 46)

- *History of the World Bank's Anti-Corruption Efforts*

The publication of these Sanctions Board decisions is an important milestone in the World Bank's fight against corruption. Since former World Bank Group President James D. Wolfensohn's "cancer of corruption" speech on October 1, 1996, the World Bank has dramatically expanded its anti-corruption capabilities and has been a leader of similar efforts among the other international financial institutions. In 2001, the Bank's Department of Institutional Integrity ("INT"), now a full Vice Presidency within the Bank, was established as an independent investigative unit reporting directly to the Bank's president. In 2006, the Bank implemented several reforms to the process approved by its Board in 2004. One of these reforms was the launching of a voluntary disclosure program that permits companies who have engaged in past sanctionable practices to continue to compete for World Bank-financed contracts if they disclose the conduct to the World Bank before they are under investigation. In return, the program provides the World Bank with valuable information about misconduct on the projects it finances. Also in 2006, the Bank established the position of an independent Evaluation and Suspension Officer to perform an initial assessment of the sufficiency of INT's evidence against a respondent. In 2009, INT began to resolve some of its investigations through negotiated resolution agreements. Finally, the recent publications of the World Bank Sanctions Board's decisions follows the adoption of new Sanctions Procedures effective January 2011 and the December 2011 publication of a law digest summarizing prior, non-public Sanctions Board decisions.

Although the World Bank alone is a significant driver of international development—in its fiscal year ended June 30, 2011, it approved more than $42 billion in financial assistance—its leadership of similar anti-corruption reforms across the other international financial institutions has already had a significant impact. On September 17, 2006, the World Bank Group, the African Development Bank ("AfDB") Group, the Asian Development Bank ("ADB"), the European Bank for Reconstruction and Development ("EBRD"), the European Investment Bank ("EIB") Group, the Inter-American Development Bank ("IDB") Group, and the International Monetary Fund ("IMF") entered into a landmark agreement that, among other things, harmonized their definitions of fraudulent and corrupt practices and their investigative processes, as well as promoted the exchange of information relating to investigations of such practices. The resulting cooperation among several of these institutions was enhanced by the April 9, 2010, *Agreement for Mutual Enforcement of Debarment Decisions* between the AfDB Group, ADB, EBRD, the IDB Group, and the World Bank Group. Under this agreement, each participating institution would enforce debarment decisions by another participating institutions (*i.e.*, "cross-debar") when the period of debarment is more than one year. From the mid-2011 formal implementation of this cross-debarment agreement by most of the signatories (except for the AfDB Group) up to August 11, 2011, the World Bank cross-debarred 16 firms and individuals, the ADB cross-debarred 21 entities, and the EBRD recognized all of the debarments by the World Bank Group and the ADB.[2]

- *Conclusion*

The growing sophistication and frequency of international financial institutions' anti-corruption enforcement activity is an important aspect of anti-corruption enforcement, and attention and adherence to these institutions' standards and expectations are critical components of corporate governance for any entity providing goods or services that are—or even may later be—financed even in part by international development funds. Additionally, it is possible that the World Bank's and its fellow multinational development banks' efforts, backed by developing countries' need for the billions of dollars in development funding these institutions provide, could play an important role in encouraging increased anti-corruption enforcement activity by developing countries.

Challenges to State-Owned Entities as "Instrumentalities" of Foreign Governments

The FCPA's anti-bribery provisions prohibit corruptly making certain payments to "foreign officials" and define foreign officials as officers and employees of, in relevant part, a foreign government or any "department, agency, or instrumentality thereof." Perhaps nothing has done more to expand the reach of the FCPA's anti-bribery provisions than the U.S. government's expansive interpretation of what amounts to a foreign government "instrumentality" to include state-owned or -controlled enterprises ("SOEs").

Complicating matters are the varying levels of direct economic involvement by governments and the varied use of commercial enterprises to achieve government purposes. Unsurprisingly, only a few years after the FCPA's 1977 enactment, the U.S. Government Accountability Office reported that defense lawyers it had surveyed "questioned whether employees of public corporations, such as national airlines or nationalized companies, are considered foreign officials."

- *Broad Interpretation of "Instrumentalities" in Settled FCPA-Enforcement Actions*

Despite these potential ambiguities, the meaning of "instrumentality" of a foreign government under the anti-bribery provisions had not been litigated before a U.S. court until 2009. Until then, the resolutions of FCPA-related investigations included admissions (or have not included a challenge by the defendant to the allegation) that such instrumentalities included enterprises that a foreign government owned or influenced, not simply instrumentalities that

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2 Stephen S. Zimmerman and Frank A. Fariello, Jr., Coordinating the Fight Against Fraud and Corruption: Agreement on Cross-Debarment among Multilateral Development Banks, 3 World Bank Legal Review 189, 202 (2011).

perform "governmental" functions (whatever those might be). For example, foreign government "instrumentalities" in settled enforcement actions have included:

- Airlines;
- Banks;
- Chemical plants;
- Design or engineering institutes;
- Hospitals;
- Hotel construction oversight committees;
- Media concerns;
- Oil, gas, or other energy companies;
- Public transportation companies;
- Shipyards;
- Steel mills;
- Telecommunications companies; and
- Utility companies.

Prior resolutions of FCPA-related investigations also indicated there is no limit on the type of organization or entity that may be an instrumentality—all that matters is the existence of influence or control by the governmental authority. For example, foreign instrumentalities identified in settled investigations included a liquid natural gas company in which a foreign government indirectly owned only 49%, but the foreign government was deemed to control the company through its control (indirectly, through another SOE) over board member appointments and its ability to block the award of any contracts, and the Comverse settlement, while slightly ambiguous, can be read to lower that threshold even further, to approximately 33% ownership where control is present.

- *<u>Courts Have Rejected All Challenges to the Meaning of Instrumentality</u>*

Finally, starting in 2009, defendants in several prosecutions formally challenged the government's broad interpretation of what constitutes an instrumentality in motions to dismiss the charges against them. In this procedural posture, judges were not required to conclude whether the particular state enterprises involved were actually instrumentalities, only whether the particular state enterprises alleged in the respective indictments *could* be shown to be instrumentalities at trial if the facts alleged in the indictments were established.

All of the defendants' challenges were rejected, some summarily. In *United States v. Esquenazi*, the indictment charged that the recipients of improper payments were foreign officials because these individuals were employees of a telecommunications entity owned by the Republic of Haiti. The U.S. government defended against the defendants' motion to dismiss on the grounds that the FCPA's text, judicial interpretation of this text, legislative history, and U.S. treaty obligations all "confirm that the definition of 'foreign official' includes officials of state-owned . . . companies." The court summarily rejected defendants' motion to dismiss. The defendants have appealed this, and other, aspects of their ultimate convictions.

Similarly, the superseding indictment in *United States v. Nguyen* included allegations that the Vietnamese government controlled particular entities and that some, but not all, of the entities performed government functions. The court rejected the defendants' argument that performance of a government function was required for an entity to be considered an instrumentality under the anti-bribery provisions.

Other courts more fully explained their holdings and interpreted the meaning of instrumentality extremely broadly, arguably even more broadly than the foreign government ownership analysis suggested in the DOJ's Layperson's Guide to the FCPA.[3] In *Aguilar*, the allegations involved an entity that was owned by the government of Mexico and was responsible for "supplying electricity to all of Mexico other than Mexico City." The *Aguilar* defendants' pre-trial motion to dismiss the indictment had challenged "whether *any* entity's status as a state-owned corporation—of any kind, with any characteristics—disqualifies it as an entity" that can be an instrumentality under the anti-bribery provisions. The defendants, in support of their motion, invited the court to "look for defining similarities between agencies and departments" — the other government entities whose officials and employees are prohibited recipients under the anti-bribery provisions — "and consider only entities that share these qualities to fall within the definition of 'instrumentality.'" The court responded with a "non-exclusive list" of similarities, all of which were shared by the entity in question:

1. The entity provides a service to the citizens, in many cases to all the inhabitants of the jurisdiction;

2. The key officers and directors of the entity are, or are appointed by, government officials;

3. The entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such as entrance fees to a national park;

4. The entity is vested and exercises exclusive or controlling power to administer its designated function; and

5. The entity is widely perceived and understood to be performing an official governmental function.

Under this framework, SOEs like the one at issue in the *Aguilar* case could be considered instrumentalities, and the court dismissed defendants' challenge to the indictment. Another court hearing a similar challenge regarding the same SOE simply took judicial notice of the facts that, under Mexican law, electricity is a public service, a Mexican ministry sets requirements for the SOE, the President of Mexico appoints the SOE's General Director, and the SOE's governing board included ministry secretaries.

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[3] U.S. DOJ, Layperson's Guide ("You should consider utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure for particular questions as to the definition of a 'foreign official,' such as whether . . . an official of a state-owned business enterprise would be considered a 'foreign official.'").

Similarly, in *Carson,* the involved SOEs were various energy-related businesses in China, South Korea, Malaysia, and the U.A.E. The *Carson* defendants argued that instrumentalities did not include state-owned businesses. The court, however, after announcing the dispositive holding that "the question of whether state-owned enterprises qualify as instrumentalities . . . is a question of fact"—meaning that the question could not be decided as a matter of law before trial—announced several factors that would "bear on the question of whether a business entity constitutes a government instrumentality":

1. The foreign state's characterization of the entity and its employees;
2. The state's degree of control over the entity;
3. The purpose of the entity's activities;
4. The entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designed functions;
5. The circumstances surrounding the entity's creation; and
6. The foreign state's extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment and laws).

Interestingly, the court also suggested the possibility that neither foreign government ownership nor control would be necessary, by opining that "[s]uch factors are not exclusive, and no single factor is dispositive." The same court even indicated that, under certain circumstances, mere government ownership would be insufficient to establish that an entity is an instrumentality:

> Admittedly, a mere monetary investment in a business entity by the government may not be sufficient to transform that entity into a governmental instrumentality. But when a monetary investment is combined with additional factors that objectively indicate the entity is being used as an instrument to carry out governmental objectives, that business entity would qualify as a governmental instrumentality.

These opinions not only demonstrate that at least some federal courts are comfortable with the U.S. government's broad interpretation of "instrumentality," but also that U.S. judges endorse definitions of instrumentality that expand the definition even beyond that currently asserted by the U.S. government. Under the frameworks suggested by *Aguilar* and *Carson*, neither state ownership, state control, nor performing a governmental function is a necessary factor in the instrumentality analysis, and arguably there could be circumstances in which an entity is a foreign instrumentality under the FCPA even in the absence of all three of these traditional factors. However by contrast, such decisions leave open the possibility that in appropriate circumstances, courts might weigh the facts differently and conclude that a company, despite significant government investment (such as by way of government bailout), is not in fact an instrumentality. Such views only further complicate business organizations' task of evaluating compliance risks and performing due diligence.

- *Courts have Found the Legislative History to be Inconclusive or Unnecessary*

In determining the meaning of "instrumentality," U.S. courts have found the legislative history to be inconclusive. The parties to the *Carson* case extensively briefed the legislative history, including the defendants' reliance on what the court described as a "comprehensive" 144-page declaration by Professor Michael J. Koehler on the subject. But the *Carson* court concluded that "the statutory language of the FCPA is clear, . . . the statutory scheme is coherent and consistent, and . . . resort to the legislative history of the FCPA is unnecessary." The court implied in a footnote that even had it considered the legislative history, it would have failed to decide the issue.

Similarly, the *Aguilar* court held that it was "unnecessary" to base its denial of the defendants' challenge on the FCPA's legislative history, "given that the meaning of 'instrumentality' under Defendants' definition of the term clearly encompasses [the entity]." Nonetheless, and apparently out of sympathy to the amount of attention the defendants devoted to the legislative history, the court reviewed the parties' arguments based on the legislative history and determined that the legislative history was "inconclusive."

- *The Potential Relevance of U.S. Treaty Obligations*

U.S. courts long ago adopted a canon of statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Under this *Charming Betsy* rule, the "law of nations" includes the international agreements of the U.S. The U.S. prosecutors in the *Aguilar* case appeared to rely on the *Charming Betsy* doctrine to argue that the FCPA's definition of "instrumentality" was inclusive of the OECD Anti-Bribery Convention's definition of public officials. Specifically, they argued that OECD Convention "require[s] [the U.S.] to criminalize bribes made to officials of state-owned enterprises, and Congress clearly indicated its conformity with those obligations through [the 1998 amendments to] the FCPA." The U.S. asserted that "[i]f this Court were to interpret the FCPA in such a way that officials of state-owned and state-controlled enterprises *could not be* foreign officials, the United States would be out of compliance with its treaty obligations under the OECD Convention." The prosecutors emphasized that "the FCPA's definition of foreign official was considered [by Congress] to be inclusive of the definition in the OECD convention."

Ultimately, the *Aguilar* court did not deem the government's *Charming Betsy* argument necessary for its decision, because it and other arguments regarding the "structure, object, and purpose of the FCPA—even as posited by Defendants—are consistent with a definition of 'instrumentality' that includes at least some state-owned corporations." In *dicta*, the court noted that, "[i]n any event, . . . the Government's *Charming Betsy* analysis in light of Congress's embrace of the OECD Convention is persuasive, notwithstanding Congress's failure to include the phrase 'state-owned corporation' in the FCPA." Going forward, this discussion — and the

Aguilar court's favorable consideration of the government's argument — suggests that any future challenges to the meaning of "instrumentality" will have to contend with courts' unwillingness to undermine U.S. treaty obligations if any other possible interpretation of an act of Congress is available.

- *The Practical Approach*

While these litigations largely represent a validation of regulators' expansive reading, they resist the bright-line rule that companies attempting to comply with the FCPA and design appropriate internal controls might prefer. Instead, companies must still make their own fact-specific judgments as to what would or would not be viewed as an instrumentality.

Arguably, despite the litigation, such distinctions are becoming less, not more, important, as U.S. and foreign enforcement agencies and regulatory bodies seek to root out and punish misconduct regardless of government involvement, including by commercial bribery prohibitions, related prohibitions such as wire fraud, and the FCPA's internal controls and books and records provisions.

FCPA SETTLEMENTS AND CRIMINAL MATTERS[4]

2012[5]

Garth Peterson

On April 25, 2012, Garth R. Peterson, who was a managing director in Morgan Stanley's real estate investment and fund advisory business and head of the Shanghai office's real estate business, settled and pleaded guilty to SEC and DOJ charges of FCPA-related violations. The SEC complaint asserted that Peterson violated the anti-bribery and internal controls provisions of the FCPA and aided and abetted violations of the anti-fraud provisions of the Investment Advisers Act of 1940, while the DOJ charged him with conspiracy to circumvent the system of internal accounting controls Morgan Stanley was required to maintain under the FCPA.

According to the court documents, Peterson had a personal friendship and secret business relationship with the former Chairman (the "Chairman") of Yongye Enterprise (Group) Co. Ltd. ("Yongye"), a large real estate development arm of Shanghai's Luwan District and the entity through which Shanghai's Luwan District managed its own property and facilitated outside investment in the district. During the relevant period, Morgan Stanley partnered with Yongye in a number of significant Chinese real estate investments and recognized Yongye as one of Morgan Stanley's most significant partners in China.

According to the DOJ's charging documents, the corruption scheme began when Peterson encouraged Morgan Stanley to sell an interest in a Shanghai real estate deal relating to one tower ("Tower Two") of a building ("Project Cavity") to a shell company controlled by him, the Chairman, and a Canadian attorney. Peterson and his co-conspirators falsely represented to Morgan Stanley that Yongye owned the shell company, and Morgan Stanley sold the real estate interest in 2006 to the shell company at a discount equal to the interest's actual 2004 market value. As a result, Peterson and his co-conspirators realized an immediate paper profit. Even after the sale, Peterson and his co-conspirators continued to claim falsely that Yongye owned the shell company, which in reality they owned. Not only did the real estate appreciate in value, but Peterson and his co-conspirators periodically received equity distributions relating to the real estate.

The DOJ charging documents further alleged that, "[w]ithout the knowledge or consent of his superiors at Morgan Stanley," Peterson sought to compensate the Chairman for his assistance to Morgan Stanley and Peterson in Project Cavity. In particular, in 2006, Peterson arranged for the Chairman personally to purchase a nearly six-percent stake in Tower Two at the

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.

lower 2004 basis rather than the current 2006 basis. Peterson concealed the Chairman's personal investment from Morgan Stanley and, as a result, others within Morgan Stanley falsely believed that, consistent with Morgan Stanley's internal controls and the desire to foster co-investment with Yongye, Yongye itself was investing in Tower Two. The SEC complaint also asserted that, in negotiating both sides of the transaction, Peterson was engaging in secret self-dealing and thereby breached the fiduciary duties Peterson and Morgan Stanley owed to their fund client. The SEC also alleged that Peterson never disclosed his own stake in the transaction, in annual disclosures of personal business interests Morgan Stanley required him to make as part of his employment or otherwise, until around the time of his termination in late 2008.

The SEC complaint additionally alleged that Peterson and the Canadian Attorney secretly acquired from Morgan Stanley an interest in another Luwan District real estate deal called Project 138 by buying 1% of the Project as part of an investment group. Peterson failed to disclose his stake in Project 138 in annual disclosures of personal business interests Morgan Stanley required him to make as part of his employment. As in Project Cavity, Peterson negotiated both sides of this Project 138 sale to himself. The SEC complaint alleged that this secret self-dealing breached the fiduciary duties Peterson and Morgan Stanley owned to their fund client.

Finally, the SEC complaint alleged that Peterson devised a system to incentivize the Chairman to help Morgan Stanley win business on projects involving Yongye and to reward the Chinese Official for all he had done for Morgan Stanley and Peterson personally. Under this incentive deal, known as the 3-2-1 deal, Morgan Stanley would sell the Chinese Official a 3% interest in each deal he brought to Morgan Stanley for the cost of 2%, providing the Chinese Official a 1% discount Peterson called a "finder's fee." Peterson also promised to pay the Chinese Official an added return he called a "promote," on any completed purchase to incentivize the Chinese Official to help make any acquired investments profitable.

Peterson disclosed the proposed 3-2-1 arrangement to his supervisors in April 2006. Less than a month later, however — before the official had been paid anything — a Morgan Stanley controller warned of the bribery implications of paying the Chinese Official personally for help obtaining business. One of Peterson's Morgan Stanley supervisors then instructed Peterson to abandon the 3-2-1 deal with the Chinese Official. Peterson ignored his supervisor's instructions and secretly shared with the Chinese Official part of a finder's fee. Specifically, in March 2007, six months or so after the Chinese Official retired from Yongye, Peterson caused Morgan Stanley to pay a $2.2 million finder's fee to a private investor who had been involved in the various schemes ("the Shanghai Investor"). The Shanghai Investor transferred $1.6 million of this fee to Peterson, who gave nearly $700,000 to the Chinese Official and kept the rest for himself. The Shanghai Investor agreed to help Peterson steal these funds in exchange for his promise to help the Shanghai Investor get future business from Morgan Stanley. Peterson kept his payment to the Chinese Official and his own kickback a secret from his Morgan Stanley supervisors.

Peterson, who was terminated in 2008 for his misconduct, agreed to a settlement of the SEC's charges in which he will be permanently barred from the securities industry, pay $254,589 in disgorgement, and relinquish the interest he secretly acquired in the valuable Shanghai real estate — currently valued at approximately $3.4 million. Peterson's sentencing in the DOJ action is pending.

Neither the SEC nor the DOJ opted to charge Morgan Stanley. Both the SEC and DOJ complaints contained significant discussions of Morgan Stanley's internal controls that were in place at the time. Specifically:

- *Compliance personnel*: Morgan Stanley employed over 500 dedicated compliance officers, and its compliance department had direct lines to Morgan Stanley's Board of Directors and regularly reported through the Chief Legal Officer to the Chef Executive Officer and senior management committees. In addition, Morgan Stanley employed regional compliance officers who specialized in particular regions, including China, in order to evaluate region-specific risks.

- *Due diligence on its foreign business partners*: Morgan Stanley conducted due diligence on the "Chinese Official" and Yongye (the state-owned enterprise) before initially doing business with them.

- *Payment approval process*: Morgan Stanley maintained a substantial system of controls to detect and prevent improper payments and required multiple employees to be involved in the approval of payments.

- *Training*: Morgan Stanley trained Peterson on anti-corruption policies and the FCPA at least seven times between 2002 to 2008 in both live and web-based sessions. Between 2000 and 2008, Morgan Stanley held at least 54 training programs for various groups of Asia-based employees on anti-corruptions policies, including the FCPA.

- *Written compliance materials*: Morgan Stanley distributed written training materials specifically addressing the FCPA, which Peterson kept in his office.

- *Audit and periodic review of compliance*: Morgan Stanley randomly audited selected personnel in high-risk areas and regularly audited and tested Morgan Stanley's business units. Morgan Stanley conducted, in conjunction with outside counsel, a formal review annually of each of its anti-corruption policies and updated the policies and procedures as necessary.

- *Hotline*: Morgan Stanley provided a toll-free compliance hotline 24/7, staffed to field calls in every major language including Chinese.

- *Frequent compliance reminders*: Peterson personally received more than 35 FCPA compliance reminders during the time he was working for Morgan Stanley in China. These included a distribution of the Morgan Stanley Code of Conduct, reminders concerning policies on gift giving and entertainment and guidance on the engagement of consultants.

- *Written certifications*: Morgan Stanley required Peterson on multiple occasions to certify, in writing, his compliance with the FCPA. These written certifications were maintained in Peterson's permanent employment record.

- *Disclosure of outside business interests*: Morgan Stanley required Peterson, along with other employees, to annually disclose his outside business interests.

- *Specific instruction*: An in-house compliance officer specifically informed Peterson in 2004 that employees of Yongye, a Chinese state-owned entity, were government officials for purposes of the FCPA.

Morgan Stanley voluntarily disclosed this matter and cooperated throughout the DOJ and SEC investigations. According to the SEC press release: "[t]his case illustrates the SEC's commitment to holding individuals accountable for FCPA violations, particularly employees who intentionally circumvent their company's internal controls." The SEC press release further characterized Peterson as "a rogue employee who took advantage of his firm and his investment advisory clients."

Biomet

On March 26, 2012, Biomet Inc., a medical device maker based in Indiana, settled FCPA charges with the DOJ and SEC for conduct occurring between 2000 and 2008. For most of the period of the misconduct, Biomet was listed on NASDAQ; it was acquired in 2007 by a consortium of private equity firms but, while no longer publicly traded, it continues to file reports with the SEC and thus remains an "issuer" under the FCPA. Biomet was targeted as part of the government's ongoing investigation into medical device companies for bribes paid to health care providers and administrators employed by government institutions.

The SEC complaint alleged violations of the FCPA anti-bribery, books and records, and internal control provisions, while the DOJ charged Biomet with one count of conspiracy to violate the FCPA's anti-bribery and books and records provisions and four counts of violations of the anti-bribery provisions. According to DOJ and SEC charging documents, between 2000 and 2008, Biomet and four subsidiaries located in Argentina, China, Sweden, and Delaware, paid more than $1.5 million in bribes to health care providers in China, Argentina, and Brazil in order to secure business with hospitals. These payments were disguised in the company's books and records as "commissions," "royalties," "consulting fees," and "scientific incentives." According to the government, bribes involved employees and managers at all levels of Biomet, its subsidiaries, and its distributors. The payments were not stopped by Biomet's compliance and internal audit functions even after they became known.

In China, Biomet sold medical device products through two subsidiaries, Biomet China (a Chinese company and wholly owned subsidiary of Biomet) and Scandimed (a wholly owned Swedish subsidiary that sells in China and elsewhere). The DOJ and SEC alleged that Biomet

China and Scandimed funneled bribes through a distributor who offered money and travel to publicly employed doctors in exchange for Biomet purchases. One e-mail from the Chinese distributor, sent on May 21, 2001, indicated that:

> [Doctor] is the department head of [public hospital]…Many key surgeons in Shanghai are buddies of his. A kind word on Biomet from him goes a long way for us. Dinner has been set aside for the evening of the 24th. It will be nice. But dinner aside, I've got to send him to Switzerland to visit his daughter.

A separate April 21, 2002 email from the Chinese distributor stated:

> When we say "Surgeon Rebate included," it means the invoice price includes a predetermined percentage for the surgeon. For example, a vendor invoices the hospital for a set of plate & screws at RMB 3,000.00. The vendor will have to deliver RMB 750.00 (25% in this case) in cash to the surgeon upon completion of surgery [sic].

Employees at Biomet China and Scandimed were allegedly made aware of the bribes from at least 2001, due to e-mail exchanges with the distributer that explicitly described the bribes. Biomet's President of International Operations in Indiana and employees in the U.K. were also allegedly made aware of the bribes in 2001. For example, one e-mail sent from the Chinese distributor copying the Associate Regional Manager stated "[Doctor] will become the most loyal customer of Biomet if we send him to Switzerland." And, in 2005, the Director of Internal Audit instructed an auditor to code as "entertainment" the payments being made to doctors in connection with clinical trials.

In 2006, Biomet ended its relationship with the Chinese distributor and hired staff to sell devices directly, a change that did not serve to end the misconduct. In October 2007, Biomet China sponsored 20 surgeons to travel to Barcelona and Valencia for training; the trips included substantial sightseeing and entertainment at Biomet's expense. Additionally, in October 2007, Biomet China's product manager sent an email to the Associate Regional Manager in which he discussed ways to bypass anti-corruption efforts by the Chinese government.

In Brazil, Biomet's U.S. subsidiary, working through a distributor, allegedly paid an estimated $1.1 million in the form of 10 to 20% "commissions" to doctors at publicly owned and operated hospitals in order to sell Biomet products. The government alleged that Biomet employees were aware of these payments as early as 2001. Payments were openly discussed in documents between Biomet's executives and internal auditors in the U.S., Biomet International, and its distributor. For example, in August 2001 the Brazilian distributor sent an email to Biomet's Senior Vice President in Indiana, copying the Director of Internal Audit, stating it was paying "commission [sic] to doctors." Yet the SEC concluded that, "no efforts were made to stop the bribery." In April 2008, following its acquisition by the private equity groups, Biomet decided to purchase the Brazilian distributor and sent accountants and counsel to conduct due diligence. Accountants identified certain payments to doctors, raising red flags of bribery. In May 2008, Biomet terminated its relationship with its distributor and withdrew from the Brazilian market.

The government alleged that, with respect to Argentina, employees of Biomet paid doctors at publicly owned and operated hospitals directly, with kickbacks as high as 15 to 20 percent of sales. In total, Biomet allegedly paid approximately $436,000 to doctors in Argentina. In order to conceal payments, Biomet Argentina (a wholly owned Biomet subsidiary incorporated in Argentina) employees used false invoices from doctors, which stated that the payments were for professional services or consulting. Prior to 2000, the payments were falsely recorded as "consulting fees" or "commissions." In 2000, the Argentine tax authorities forbade tax-free payments to surgeons, and Biomet Argentina employees began recording the payments as "royalties" or "other sales and marketing." Auditors and executives at Biomet's headquarters in Indiana were aware of these payments as early as 2000. For example, in 2003, during the company's audit of Biomet Argentina, the audit report stated that "[R]oyalties are paid to surgeons if requested. These are disclosed in the accounting records as commissions." The internal audit did not make any effort to determine why royalties were being paid to doctors, amounting to some 15-20% of sales. Later in 2008, Biomet distributed new compliance guidelines related to the FCPA, and the Managing Director of Biomet Argentina informed Biomet's attorneys of the company's payments to doctors. Biomet reacted by suspending the payments and sending outside counsel to investigate.

Biomet entered into a deferred prosecution agreement with the DOJ, which requires that Biomet implement a rigorous system of internal controls and retain a compliance monitor for 18 months. Biomet also agreed to pay a criminal fine of $17.28 million to the DOJ and $5.5 million in disgorgement of profits and prejudgment interest to the SEC. The deferred prosecution agreement recognized Biomet's cooperation during the DOJ's investigation, as well as the company's self-investigation and remedial efforts. Biomet also received a penalty reduction in exchange for its cooperation with ongoing investigations in the industry.

BizJet

On March 14, 2012, BizJet International Sales and Support, Inc. ("BizJet") entered into a three-year deferred prosecution agreement with the DOJ in connection with allegations that BizJet made improper payments to government officials in Mexico and Panama in violation of the FCPA. As part of the deferred prosecution agreement, BizJet agreed to pay $11.8 million in criminal fines, to cooperate with the department in ongoing investigations, and to periodically update the DOJ on the company's compliance efforts.

BizJet, headquartered in Tulsa, Oklahoma, provides aircraft maintenance, repair and overhaul services to customers in the U.S. and abroad. According to the one-count criminal information, between 2004-2010, executives and managers from BizJet authorized wire and cash payments to key employees of potential government clients, including the Mexican Federal Police, the Mexican President's aircraft fleet, the Governor of the Mexican State of Sinaloa's aircraft fleet, and the Panama Aviation Authority. The purpose of the payments was to directly obtain and retain services contracts with these potential clients.

The payments were referred to within BizJet as "commissions," "incentives," or "referral fees" and were either paid directly to the foreign officials or disguised through use of a shell company owned by a BizJet sales manager. Through the latter method, payments were made from BizJet to the shell company and then passed on to government officials, often delivered by hand in cash. Although the information contained just one count of conspiracy, the deferred prosecution agreement lists at least 12 recorded bribe payments (ranging from $2,000 to $210,000) made by BizJet and recorded as "commission payments" or "referral fees."

The information alleges that the highest levels of the company were aware of the improper conduct, which was carried out or authorized by at least three senior executives and one sales manager. According to the information, the BizJet Board of Directors was informed in November 2005 decisions as to where to send aircrafts for maintenance were often made by the potential customer's "director of maintenance" or "chief pilot." The Board was also informed that these individuals had requested commissions from BizJet ranging from $30,000 to $40,000. and that BizJet would "pay referral fees…to gain market share."

BizJet's German indirect parent company, Lufthansa Technik AG ("Lufthansa"), wholly owned by Deutsche Lufthansa, the largest airline in Europe, entered into a three-year non-prosecution agreement in with the DOJ in December 2011 in connection with BizJet's unlawful payments. Lufthansa agreed to provide ongoing cooperation and continued implementation of rigorous internal controls. It is not clear from the charging documents what the basis for Lufthansa's liability was, as Lufthansa was not mentioned in the Bizjet DPA and the Lufthansa NPA contains no factual basis other than the following statement:

> It is understood that Lufthansa Technik admits, accepts, and acknowledges responsibility for the conduct of its subsidiary set forth in the Statement of Facts contained in the Deferred Prosecution Agreement between the Department and BizJet (the "BizJet DPA"), and agrees not to make any public statement contradicting that Statement of Facts.

The $11.8 million fine paid by Bizjet falls well below the minimum range suggested by using the Federal Sentencing Guidelines factors. The reduction may be due in part to what the DOJ perceived to be "extraordinary" cooperation by BizJet and Lufthansa in the investigation. The DOJ expressly commended BizJet and Lufthansa for this cooperation, which included an extensive internal investigation, voluntarily making U.S. and foreign employees available for interviews, and collecting, analyzing and organizing voluminous evidence and information for the agency.

Both companies agreed to engage in extensive remediation, including termination of the employees responsible for the corrupt payments, enhancing their due-diligence protocol for third-party agents and consultants, and heightening review of proposals and other transactional documents for all BizJets contracts. Neither company was required to retain a compliance monitor.

Smith & Nephew plc

On February 6, 2012, U.K. medical device company Smith & Nephew plc ("S&N ") resolved DOJ and SEC investigations into alleged FCPA violations relating to payments to doctors of state-owned hospitals in Greece. S&N is an issuer covered by the U.S. FCPA, because its American Depositary Receipts ("ADRs") trade on the New York Stock Exchange. The underlying conduct also involved S&N's wholly owned U.S. subsidiary, Smith & Nephew Inc. ("S&N US"); although S&N US is not subject tot the SEC's jurisdiction, because it is not an issuer, it is subject to DOJ enforcement of the FCPA as a domestic concern. Accordingly, the SEC settled with S&N, while the DOJ entered into a deferred prosecution agreement with S&N US.

The enforcement action is noteworthy because it related to S&N US's use of a distributor. While in some circumstances distributors may pose different risk profiles than consultants or representatives, this enforcement action demonstrates that the use of distributors is not without compliance risks. Until in or around late 1997, S&N US had a standard distributorship relationship with a Greek distributor, through which it sold products at a discount from its list prices to the distributor's entities, who would then resell the products at profit to Greek healthcare providers. But beginning in or around 1998, and continuing until in or around December 2007, S&N US and a German subsidiary of S&N entered into various "marketing" relationships with two offshore shell companies controlled by the Greek distributor, by which a percentage of the sales made by the Greek distributor would be paid to the shell companies. Further arrangements with a third offshore shell company provided for increased discounts to generate a pool of cash that could be used for improper purposes. No "true services" were provided by any of the shell companies.

Despite several questions raised by S&N US's internal legal and audit personnel about the propriety of the payments, including discussions of the fact that surgeons in Greece were being paid to use S&N US's medical devices products, the relationships continued. Electronic mail communications were also sent between the U.S. and Greece in which the Greek distributor rejected a proposal to reduce the marketing payments to the shell companies, because the payments were "already not sufficient to cover my company's cash incentive requirements at the current market level, with major competitors paying 30-40% more than [the Greek distributor]. As I explained to you [during a recent trip to Memphis], <u>I absolutely need this fund to promote my sales with surgeons, at a time when competition offers substantially higher rates</u>" (emphasis in original). The distributor continued, "In case it is not clear to you, please understand that I am paying cash incentives right after each surgery . . . ." S&N US entered into relationships with a series of shell companies, and even continued to use the Greek distributor until June 2008, even though its distribution contract had expired in December 2007. S&N US further admitted that in its books and records, which were incorporated into the books and records of S&N and reflected in S&N's year-end financial statements filed with the SEC, it falsely characterized the payments to the Greek distributor as "marketing services" and false characterized the discounts provided.

Additionally, in early 2007, S&N US acquired a company with a competing subsidiary in Greece and was informed by the Greek distributor that the Greek subsidiary of the newly acquired company paid Greek healthcare providers at an even higher rate than did the Greek distributor on behalf of S&N US.

S&N and S&N US agreed to pay a total of $22.2 million to resolve these investigations. In its settlement with the SEC, S&N agreed to disgorge $4,028,000, pay prejudgment interest of $1,398,799, and agreed to retain an independent compliance monitor for 18 months. Under its deferred prosecution agreement, S&N US agreed to pay a $16.8 million penalty, which the DOJ calculated to be a 20% reduction off the lower-end of the fine range recommended by the U.S. Sentencing Guidelines. The DOJ believed that this reduction was appropriate given S&N US's internal investigation, the nature and extent of its cooperation, and what the DOJ characterized as extensive remediation (including improvements to its ethics and compliance program).

Marubeni Corporation

On January 17, 2012, Marubeni Corporation ("Marubeni"), a Japanese trading company headquartered in Tokyo, Japan, entered into a DPA with the DOJ to resolve FCPA-related charges in connection with its participation in a conspiracy to bribe Nigerian officials. Under the two-year DPA, Marubeni agreed to pay a $54.6 million criminal penalty, to cooperate with the DOJ's ongoing investigations, to review and improve its compliance and ethics program, and to engage an independent compliance consultant for two years. The $54.6 million penalty represented the lowest limit of the DOJ's calculated fine range, which ranged up to $109.2 million.

According to the criminal information, Marubeni was involved in the corruption scheme implemented by the TSKJ joint venture between 1995 and 2004 to unlawfully obtain contracts to build liquefied natural gas facilities in Bonny Island, Nigeria (*see KBR/Halliburton, Tesler and Chodan*). As part of the scheme, TSKJ (operating through a corporate entity based in Madeira, Portugal) hired U.K. attorney Jeffrey Tesler and Marubeni as agents to arrange and pay bribes to high-level and working-level government officials, respectively. In that context, Marubeni met Albert Stanley (the former head of KBR) and other TSKJ officers in Houston and exchanged correspondence with them to discuss its contracts and fees. Throughout the course of the scheme, Marubeni received $51 million from TSKJ, of which $17 million was transferred by KBR from the Netherlands, in part for use in corrupting Nigerian officials. On two occasions preceding the award of engineering, procurement and construction ("EPC") contracts to TSKJ, a Marubeni employee met with officials of the executive branch of the Government of Nigeria to identify a representative to negotiate bribes with TSKJ.

The DOJ ultimately charged Marubeni with one count of conspiracy to violate the FCPA and one count of aiding and abetting KBR in violating the FCPA. It should be noted that, given that Marubeni negotiated its contract with TSKJ through correspondence directed to the U.S. and an in-person meeting in Houston, there were seemingly grounds to prosecute Marubeni for a direct violation of the statute, as it arguably took acts in furtherance of the scheme while in the territory of the U.S.

2011

Magyar Telekom and Deutsche Telekom

On December 29, 2011, Magyar Telekom Plc. ("Magyar") and its majority owner, German telecommunications giant Deutsche Telekom AG ("Deutsche Telekom"), announced that they would pay approximately $95 million to resolve criminal and civil charges brought by the DOJ and SEC for FCPA violations. The DOJ's investigation followed a February 2006 internal investigation initiated by Magyar after its auditors identified two suspicious contracts during an audit of the company's financial statements.

In 2005, the Macedonian parliament enacted a new Electronic Communications Law that authorized telecommunications regulatory bodies in Macedonia to hold a public tender for a license that would allow a third mobile phone company to enter the Macedonian telecommunications market. This new mobile phone company would have competed directly with a Magyar subsidiary, Makedonski Telekommunikacii AD Skopje ("MakTel"). According to charging documents, Magyar and its executives entered into secret agreements — referred to internally at Magyar as "protocols of cooperation" — with high-ranking Macedonian officials to delay or preclude the issuance of this new license in order to help MakTel retain a dominant share of the Macedonian telecommunications market. The Macedonian officials also exempted MakTel from having to pay increased licensing fees required by the Electronic Communications Law. To effect the scheme, Magyar paid over $6 million to a Greek intermediary under sham consulting contracts with the knowledge or belief that the funds would be passed on to Macedonian officials. These payments were recorded as legitimate expenses on MakTel's books and records (including by the use of backdating and fabricated documentation), which Magyar consolidated into its own financial records and which were eventually incorporated into Deutsche Telekom's financial statements.

The DOJ and the SEC also alleged that Magyar made approximately $9 million in improper payments to acquire state-owned telecommunications company Telekom Crne Gore A.D. ("TCG") in Montenegro. In exchange for these payments, Magyar acquired an approximately 51% interest in TCG from the Montenegrin government. Magyar was also able to acquire an additional 22% interest in TCG — giving Magyar supermajority control over the telecommunications company — after the Montenegrin officials committed the Government of Montenegro to supplement Magyar's offer to minority shareholders by €0.30 per share. Magyar attempted to conceal these payments through sham contracts with third-party consultants, including one based in Mauritius and another based in the Seychelles, neither of which had ever provided services to Magyar or Deutsche Telekom, and one of which was not even legally incorporated at the time. A third sham contract with a counterparty in New York was designed to funnel money to the sister of a Montenegrin official, while a fourth, to a London-based shell company, was purportedly to provide strategic reports. The reports received were not original work and were valued by Magyar's auditors at €20,000, far less than the €2.3 million paid for them. The ultimate beneficiary was not identified. Magyar's payments were each recorded as consulting expenses in Magyar's books and records.

Magyar agreed to pay a $59.6 million criminal penalty to the DOJ as part of a two-year DPA to resolve charges of one count of violating the FCPA's anti-bribery provisions and two counts of violating the FCPA's books and records provisions. Magyar also agreed to implement an enhanced compliance program and submit annual reports regarding its efforts in implementing those enhanced compliance measures and remediating past problems. Additionally, Magyar agreed to pay $31.2 million in disgorgement and prejudgment interest to the SEC. Deutsche Telekom will pay an additional $4.36 million in criminal penalties as part of a NPA for one count of violating the FCPA's books and records provisions.

- *SEC Action Against Former Magyar Executives*

The SEC also brought civil charges against three former Magyar executives: former Chairman and CEO Elek Straub; former Director of Central Strategic Organization Andras Balogh; and former Director of Business Development and Acquisitions Tamas Morvai. The SEC alleges that the executives personally authorized Magyar's payments to the Macedonian officials. The SEC further alleged that, from 2005 through 2006, Straub, Balogh, and Morvai authorized at least six other sham contracts through the Greek intermediary. According to the SEC, these sham contracts were all designed to channel funds to government officials — a process referred to by the former executives as "logistics" — in a manner that circumvented Magyar's internal controls. The executives also proposed, though ultimately did not follow through on, a plan to secure political support by having Magyar construct a telecommunications infrastructure in a neighboring country that could be run for the benefit of a minor Macedonian political party. Finally, the SEC alleged that the former executives authorized and implemented the sham consultancy contracts Magyar used to facilitate its acquisition Telekom Crne Gore A.D.

The SEC accused Straub, Balogh, and Morvai of authorizing or causing all of the payments described above with "knowledge, the firm belief, or under circumstances that made it substantially certain" that all or a portion of the payments would be channeled to government officials. The SEC also alleged that the former executives caused these payments to be falsely recorded in Magyar's books and records and mislead auditors in charge of preparing Magyar's financial statements. Consequently, the SEC charged Straub, Balogh, and Morvai with violating or adding and abetting violations of the FCPA's anti-bribery, books and records, and internal controls provisions; knowingly circumventing internal controls and falsifying books and records; and making false statements to auditors. The cases against these individuals are ongoing.

- *Investigation by German Authorities*

German authorities also investigated Magyar. In late August 2010, German prosecutors raided Deutsche Telekom's offices, as well as the homes of several employees, as part of an investigation into the activities of Deutsche Telekom subsidiaries in Hungary and Macedonia. Although commentators have suggested that the raids stemmed from the SEC's request for assistance in the U.S. enforcement actions described above, German prosecutors insisted that the raids were not requested by the SEC and were ordered after a German investigation raised suspicions that a violation of German anti-corruption law may have occurred. The focus of these investigations was Deutsche Telekom's CEO, Renee Obermann, whose home was one of the residences searched as part of the raids. Deutsche Telekom strongly denied that Obermann was involved in any wrongdoing, however, and in January 2011, citing a lack of evidence, German prosecutors dropped all charges against Obermann.

Aon

On December 20, 2011, Aon Corporation ("Aon"), a Delaware corporation and one of the largest insurance brokerage firms in the world, entered into a two-year non-prosecution agreement with the DOJ that required the company to pay a $1.76 million penalty to resolve violations of the FCPA's anti-bribery, books and records, and internal controls provisions. Simultaneously, the company entered into an agreement with the SEC to pay approximately $14.5 million in disgorgement and interest to resolve books and records and internal controls charges. While the DOJ's charges were limited to conduct in Costa Rica, the SEC alleged additional misconduct in Egypt, Vietnam, Indonesia, UAE, Myanmar, and Bangladesh.

According to stipulated facts, in 1997, Aon's U.K. subsidiary, Aon Limited, acquired the British insurance brokerage firm Alexander Howden and took over management of a "training and education" fund ("the Brokerage Fund") set up by Alexander Howden in connection with its reinsurance business with Instituto Nacional De Seguros ("INS"), Costa Rica's state-owned insurance company. From 1999 through 2002, at INS' request, Aon Limited managed another training account ("the 3% Fund") that was funded by premiums paid by INS to reinsurers.

The ostensible purpose of both the Brokerage Fund and the 3% Fund was to provide education and training for INS officials. However, between 1997 and 2005, Aon Limited used a significant portion of the funds to reimburse INS officials for non-training related activity, including travel with spouses to overseas tourist destinations, travel to conferences with no apparent link to the insurance industry, or for uses that could not be determined from Aon's books and records. Many of the invoices and other records for trips taken by INS officials did not provide any business purpose for the expenditures, or showed that the expenses were clearly not related to a legitimate business purpose. A majority of the money paid from the funds was disbursed to a Costa Rican tourism company for which the director of the INS reinsurance department served on the board of directors. Aon's records included only generic descriptions of the expenses, such as "various airfares and hotel."

The SEC's complaint alleged further improper practices in Egypt, Vietnam, Indonesia, UAE, Myanmar, and Bangladesh, which the company has neither admitted nor denied. In Egypt, Aon subsidiary Aon Risk Services agreed by written contract to sponsor annual trips to various U.S. cities for Egyptian officials from the Egyptian Armament Authority ("EAA") and the Egyptian Procurement Office ("EPO"). According to the SEC complaint, the trips' non-business segments unjustifiably outweighed the legitimate business segments. Also in Egypt, Aon made several payments to third parties without performing appropriate due diligence to ensure or prevent the payments from ending up in the hands of government officials. The SEC noted that the fact that the third parties appeared to perform no legitimate services, "suggest[ed] that they were simply conduits for improper payments to government officials in order to obtain or retain business."

In Vietnam, Aon Limited allegedly paid a third-party facilitator $650,000 between 2003 and 2006 to obtain and retain an appointment as insurance broker with Vietnam Airlines, a government owned entity. The facilitator, however, did not provide legitimate services and passed portions of the Aon Limited funds on to unidentified individuals referred to as "related people."

In Indonesia, the SEC alleged that, between 2002 and 2007, Aon Limited paid $100,000 as a retainer to a consultant as part of a kickback scheme to secure accounts with Pertamina, a state-owned oil and gas company. The scheme did not come to fruition however. Aon Limited also paid $100,000 to a company recommended by officials of another state-owned oil company, BP Migas, to assist in securing Pertamina and BP Migas accounts. Another $100,000 was paid by two Aon brokers to a "third-party introducer" to assist in obtaining the BP Migas account.

In the UAE, Aon Limited allegedly acquired a broker that had, from 1983 to 1997, made payments to the general manager of a private insurance company to secure and retain the Aon account. Aon Limited then continued to make these payments, which totaled $588,000, to the general manager for 10 years after the acquisition in 1997. The payments were disguised as payments to a third-party consultant.

In Myanmar, Aon Limited's records show that, between 1999 and 2005, a portion of the $3.25 million paid to an "introducer" was transferred to an employee at Myanmar Insurance for protection of Aon's business interests at Myanmar Insurance and Myanmar Airways, two state-owned entities.

Finally, in Bangladesh, the SEC alleged that a former Aon Limited employee and another company were paid $1.07 million as consultants to secure accounts for Aon Limited with Biman Bangladesh Airways and Sudharam Bima Corporation, both of which are government-owned. A portion of the fees paid to the consultants were forwarded as "finder's fees" to the son of a former high-ranking government official with important political connections.

In 2009, the UK Financial Services Authority ("FSA") determined that between 2005 and 2007 Aon Limited violated Principle 3 of the FSA's Principles for Business when it failed to take reasonable care to organize and control its affairs responsibly and effectively with adequate risk management systems. Because of these gaps in controls, the FSA found that a number of "suspicious" payments were made by Aon Limited to foreign third parties in Bahrain, Bangladesh, Bulgaria, Burma, Indonesia, and Vietnam. Aon Limited entered into a settlement agreement with the FSA in 2009 and paid a penalty of £5.25 million. The DOJ stated that this settlement and the FSA's close supervision over Aon Limited contributed to its decision to grant a non-prosecution agreement and a reduced financial penalty.

Watts Water

On October 13, 2011, the SEC imposed a cease-and-desist order and civil penalties totaling more than $3.8 million against Watts Water Technologies, Inc. ("Watts") and Leesen Chang for violating the books and records and internal controls provisions of the FCPA. The SEC alleged that Watts, a Delaware corporation headquartered in Massachusetts, established a wholly owned Chinese subsidiary, Watts Valve Changsha C., Ltd., ("CWV"), for the purpose of purchasing Changsha Valve Works ("Changsha Valve") in 2005. Prior to purchasing Changsha Valve, Watts was not heavily involved in business with state owned entities.

The SEC charged that employees of CWV made improper payments between 2006 and 2009 to influence state owned design institutes to recommend CWV products to state owned entities and to draft specifications that favored CWV products.

Several compliance failings led to the payments being made. First, the SEC noted that, while Watts introduced an FCPA policy following its acquisition of Changsha Valve in 2006, it failed to conduct adequate FCPA training for its employees until Spring of 2009 and otherwise failed to implement adequate internal controls considering the risks involved in sales to state owned entities. More dramatically, the sales were "facilitated by a sales incentive policy" in place at Changsha Valve that incentivized and directly provided for the improper payments. This policy, which was never translated into English or submitted to Watts' U.S. management following the purchase of Changsha Valve, provided that all travel, meals, entertainment and "consulting fees" would be borne by the sales employees out of their own commissions. Further, the policy specifically provided that sales personnel could utilize commissions to make payments of up to 3% of the total contract amount (nearly half of the regular commissions) to the design institutes. The improper payments were recorded in CWV's books and records as sales commissions.

Chang, the former interim General Manager of CWV and Vice President of Sales for Watts' management subsidiary in China, approved many of the improper payments to the design institutes. Watts' senior management in the U.S. had no knowledge that these improper payments were being made. Chang knew and relied on their unawareness. In fact, the SEC found that Chang actively resisted efforts to have the Sales Policy translated and submitted to Watts' senior management for approval. Nevertheless, in March 2009, Watts General Counsel learned of an SEC enforcement action against another company, ITT, that involved unlawful payments to employees of Chinese design institutes. Considering the similarities between ITT and Watts' business model in the same region, Watts' senior management implemented anti-corruption and FCPA training for its Chinese subsidiaries. In July 2009, following FCPA training in China and through conversations with CWV sales personnel who participated in the training, Watts' in-house corporate counsel became aware of the potential FCPA violations in China. On July 21, 2009, Watts retained outside counsel to conduct an internal investigation of CWV's sales practices. On August, 6, 2009, Watts self-reported its internal investigation to the SEC.

When the conduct was discovered, Watts took several immediate remedial steps including conducting a worldwide anti-corruption audit that included additional FCPA and anti-corruption training at its Chinese and European locations, a risk assessment and anti-corruption compliance review of their international operations in Europe, China, and any U.S. location with international sales, and conducted anti-corruption testing at seven international Watts sites, including each of the manufacturing and sales locations in China.

Bridgestone

On September 12, 2011, Bridgestone Corporation ("Bridgestone") entered into a plea agreement with the DOJ for conspiring to violate the FCPA with respect to payments to foreign officials in Mexico and other Latin American countries, and for conspiring to violate the Sherman Act (governing anti-competitive practices) with respect to its marine hose business. In the wake of the DOJ investigation into the conspiracies, which lasted from 1999 to 2007, Bridgestone decided (i) to close the Houston office of Bridgestone Industrial Products of America ("Bridgestone USA"), (ii) to withdraw entirely from the marine hose business, (iii) to take disciplinary action against certain employees, and (iv) to terminate many of its third-party agent relationships. In addition, Bridgestone agreed to pay a $28 million criminal fine and to adopt a comprehensive anti-corruption compliance program.

Tokyo-based Bridgestone is the world's largest manufacturer of tires and rubber products. The company was also, during the time of the events alleged by the DOJ, in the business of making and selling marine hose, a flexible rubber hose used to transfer oil between tankers and storage facilities. The marine hose was made and sold by Bridgestone's International Engineered Products Department ("IEPD"), which was also responsible for the export and sales of other industrial products, such as marine fenders, conveyor belts, and rubber dams.

In many countries, including throughout Latin America, IEPD sold various products through local third-party sales agents, after coordinating such activities with the help of Bridgestone's various subsidiaries. For countries in Latin America—including Brazil, Ecuador, Mexico, and Venezuela—IEPD coordinated its sales via third-party agents with coordinating assistance from Bridgestone USA.

In certain Latin American countries, Bridgestone (through the IEPD division, assisted by Bridgestone USA) developed relationships with employees of Bridgestone customers that were state owned entities. The United States classifies the employees of these state owned entities as "foreign officials" under the FCPA. For example, in Mexico, Bridgestone cultivated a relationship with an employee of the state owned oil company, Petroleos Mexicanos ("PEMEX"). Bridgestone arranged to improperly pay these foreign officials bribes calculated on the total volume of sales by overpaying the third-party sales agent commissions, with the understanding that the agent would keep a portion of the commission while conveying the remainder to the foreign official. Bridgestone took steps to conceal these payments by communicating orally and via telephone to avoid creating written records, and by avoiding e-mail, instead using faxes that contained information about the bribes and handwritten instructions to "**READ AND DESTROY**."

The DOJ Criminal Information details the acts surrounding one improper transaction involving a PEMEX employee. It describes a 2004 e-mail from a Bridgestone employee in Japan to one in Houston explaining that a "source" at PEMEX could help Bridgestone win a contract for marine hose, and a subsequent e-mail from a Japan employee instructing the Houston employee to cease communicating on the subject by email in favor of voice and fax communication. In 2005, a Houston employee suggested sending a PEMEX employee on a trip to Japan to "have him at our side," and in 2006, a Houston employee faxed a "**READ AND DESTROY**" document to Japan which discussed reserving 24% of a PEMEX contract for commissions, with 5% for "top level" commissions, and another 5% for commissions to other PEMEX employees. Two weeks later, a Houston employee emailed an employee in Japan first with confidential information received from PEMEX sources, and then with a description of steps being taken by certain PEMEX employees to help Bridgestone win the contract. In January 2007, Bridgestone won the contract and invoiced PEMEX for $324,200, an amount from which PEMEX employees would receive kickbacks.

The DOJ also charged Bridgestone with conspiring to suppress and eliminate competition by rigging bids, fixing prices, and allocating market shares for sales of marine hose in the United States and elsewhere, all in violation of the Sherman Act (15 U.S.C. §1). The DOJ alleged that Bridgestone, in combination with other unnamed co-conspirators, used a third-party individual to act as a central point of coordination for price fixing and bid rigging activities. The Criminal Information alleged that Bridgestone, with other companies, discussed how to allocate shares of the marine hose market, set prices for marine hose, and refrained from competing for other conspirators' customers by either not bidding or submitting purposefully inflated bids to specific customers. All of these activities were apparently coordinated through a third-party individual who arranged the price fixing and bid rigging activities.

Bridgestone did not enter into a deferred prosecution agreement or a non-prosecution agreement, but instead pleaded guilty to criminal charges. The application of the U.S. Sentencing Guidelines produced a fine range of $6.72 to $13.44 million for the antitrust charge, and a range of $39.9 to $79.8 million for the FCPA charges.

Departing from the guidelines, the DOJ agreed to a combined fine of $28 million, with no term of organizational probation. The DOJ stated that it agreed to the greatly discounted fine in response to Bridgestone's level of cooperation, which included "conducting an extensive worldwide internal investigation, voluntarily making Japanese and other employees available for interviews, and collecting, analyzing, and organizing voluminous evidence and information…" as well as "extensive remediation, including restructuring the relevant part of its business" which included dismantling its IEPD and closing its Houston office (Bridgestone USA). The DOJ also stated that Bridgestone's remedial actions included "terminating many of its third-party agents and taking remedial actions with respect to employees responsible for many of the corrupt payments." Bridgestone additionally "committed to continuing to enhance its compliance program and internal controls…."

In 2011, Japanese companies including Bridgestone, JGC, and Marubeni paid significant FCPA fines to the U.S. government. Although Japan is a signatory of the OECD Convention and therefore has its own anti-corruption law, the Japanese law does not include criminal liability for corporations, and civil enforcement is generally perceived as being less aggressive than in the United States.

Diageo

On July 27, 2011, the SEC charged London-based beverage company Diageo plc ("Diageo"), the world's largest producer of spirits, with widespread FCPA books and records and internal controls violations stemming from more than six years of improper payments to government officials in India, Thailand, and South Korea. The SEC alleged that Diageo's subsidiaries paid more than $2.7 million to obtain lucrative sales and tax benefits relating to its Johnnie Walker and Windsor Scotch whiskeys, among other brands. Diageo, which is listed on the New York Stock Exchange as well as the London Stock Exchange, agreed to cease and desist from further violations and pay over $16 million in disgorgement, prejudgment interest, and financial penalties without admitting or denying the SEC's findings.

Diageo's anti-corruption issues stemmed in part from a series of worldwide mergers and acquisitions. In 1997, Guinness plc and Gran Metropolitan plc merged to create Diageo. Following the merger, Diageo acquired Diageo India Pvt. Ltd. and an indirect majority interest in and operational control of Diageo Moët Hennessy Thailand, a Thai joint venture. In 2001, Diageo acquired the spirits and wine business of the Seagram Company Ltd., which included Diageo Korea Co. Ltd. After acquisitions Diageo identified — but did little to strengthen — the weak compliance programs of the acquired subsidiaries until mid-2008 in response to the discovery of the illicit payments made in India, Thailand, and South Korea.

According to the SEC, Diageo and its subsidiaries made more than $1.7 million in illicit payments to Indian government officials between 2003 and 2009. The officials were responsible for purchasing or authorizing the sale of Diageo's beverages in India; these payments yielded more than $11 million in profit for the company. Specifically, Diageo's Indian subsidiary used distributors to make over $790,000 in payments to an estimated 900 employees of government liquor stores to obtain orders and more prominent product placement in stores. The distributors themselves received "cash service fees" totaling 23% of the illicit payments from Diageo for their efforts. Diageo also reimbursed sales promoters for improper cash payments made to the Indian military's Canteen Stores Departments ("CSD"). In exchange, Diageo received better product promotion within the stores, annual label registrations, price revision approvals, favorable inspection reports, the release of seized products, and favorable promotion of Diageo holiday gifts to CSD employees. Diageo also made improper payments, through third parties, to officials responsible for label registrations and import permits. These payments were improperly recorded in Diageo's books and records with vague descriptions such as "incentive," "promotions," miscellaneous," "traveling expense," or "special rebates."

In Thailand, Diageo, through a joint venture, paid approximately $12,000 per month from 2004 to 2008 to retain the consulting services of a Thai government and political party official. This official lobbied senior commerce, finance and customs officials extensively on Diageo's behalf in connection with pending multi-million dollar tax and customs disputes, contributing to Diageo's receipt of certain favorable decisions by the Thai government. Payments for the consulting services were provided in monthly disbursements of $11,989 and described as advisory fees and out-of-pocket expenditures in various accounts labeled "Outside Services," "Corporate Social Responsibility," "Corporate Communications," "External Affairs Project," and "Stakeholder Engagement." According to the SEC, the joint venture's senior management was aware of the consultant's governmental and political positions as he was the brother of one of the joint venture's senior officers.

The SEC also alleged that Diageo paid more than $86,000 to a customs official in South Korea as a reward for the key role that he played in the government's decision to grant Diageo approximately $50 million in tax rebates. The rebates were supposedly justified by millions of dollars Diageo had overpaid due to use of a less advantageous transfer pricing formula of Windsor Scotch whiskey imported to South Korea. Sixty percent of the custom official's reward was paid by Diageo by way of on an inflated invoice from a customs brokerage firm that was charged to a professional services and consulting fees account. The remainder was paid from the personal funds of a Diageo subsidiary manager, a fact that was not recorded in its books and records.

In addition, a South Korean Diageo subsidiary improperly paid travel and entertainment expenses for customs and other government officials involved in the tax negotiations. In one instance, several officials travelled to Scotland to inspect production facilities. While this trip was "apparently legitimate," on its face, senior employees of the Diageo joint venture also took the officials on purely recreational side trips to Prague and Budapest. The cost of these trips was improperly recorded in Diageo's "Entertainment-Customer" account.

Further, Diageo's South Korean subsidiary routinely made hundreds of gift payments to South Korean military officials in order to obtain and retain liquor business in the form of gifts known either as "rice cakes" or "Mokjuksaupbi." The so-called "rice cake" payments were customary gifts made at various times during the year for holidays and vacations (in the form of cash or gift certificates) to officials responsible for purchasing liquor and ranged in value between $100 and $300. At times, the company used fake invoices to generate the cash for the "rice cake" payments. Diageo also paid military officials an estimated $165,287 in "Mokjuksaupbi" payments, or "relationships with customer" payments. These payments were recorded in sales, promotion, and customer entertainment accounts. Diageo and its subsidiaries failed to properly account for these payments in their books and records. Instead, they concealed the payments to government officials by recording them as legitimate expenses for third-party vendors or private customers, or categorizing them in false or overly vague terms or, in some instances, failing to record them at all.

Diageo cooperated with the SEC's investigation and implemented remedial measures, including the termination of employees involved in the misconduct and significant enhancements to its FCPA compliance program.

Armor Holdings, Inc. & Richard Bistrong

On July 13, 2011, Armor Holdings, Inc. ("Armor"), now a subsidiary of BAE Systems Inc. but at the time of the relevant conduct an issuer of securities listed on the New York Stock Exchange, entered into a non-prosecution agreement ("NPA") with the DOJ and a settlement agreement with the SEC to resolve FCPA violations relating to bribes paid to obtain contracts from the U.N. To resolve anti-bribery, books and records, and internal controls allegations, Armor agreed to pay a $10.29 million monetary penalty under the NPA and under its settlement with the SEC agreed to disgorge $1,552,306, pay prejudgment interest of $458,438, and pay a civil penalty of $3,680,000. At the time of the conduct at issue, Armor manufactured security products, vehicle armor systems, protective equipment and other products primarily for use by military, law enforcement, security and corrections personnel. Prior to its acquisition by BAE, Armor was a Delaware corporation headquartered in Jacksonville, Florida with shares listed on the NYSE. Although Armor was not required to admit or deny the SEC's allegations, it did admit to the facts underlying its NPA. Accordingly, the factual summary below is based on the facts stated in the NPA unless otherwise noted.

Armor accepted responsibility for more than $200,000 in payments made by its wholly owned subsidiary Armor Products International ("API") to a third-party intermediary. API was awarded the two contracts after it used an agent to obtain competitors' confidential bid prices and adjust its bid based on this information. Armor acknowledged that employees involved knew that a portion these funds was to be passed on to a U.N. procurement official to induce the official to award two separate U.N. contracts for body armor that were collectively worth approximately $6 million and, once awarded, produced a profit for the subsidiary of approximately $1 million.

In 2001, Richard Bistrong, the Vice President for International Sales of Armor's wholly owned division Armor Holdings Products Group (the "Products Group"), and an API managing director retained an agent to assist the company in obtaining a contract to supply body armor for U.N. peacekeeping forces.

Upon the agent's advice, Bistrong and the API managing director submitted two pricing sheets, one of which was signed but was otherwise blank. The blank pricing sheet was to be used if API's price needed adjustment after the bidding was closed. After submitting API's bid, the agent obtained the prices of competitors' non-public bids and used the information to adjust API's bid price on the blank pricing sheet. When the U.N. awarded the 2001 body armor contract to API, Bistrong and the API authorized the payment of a commission to the agent, knowing that some portion of this money would be paid to the U.N. official for providing the confidential information used by API and the agent to secure the bid. Using the same bidding procedures, API worked with the same agent to secure another U.N. contract in 2003. According to the SEC's complaint, API authorized at least 92 payments to its agent that totaled approximately $222,750.

Under the NPA, Armor also admitted that Bistrong and another employee caused it to keep off of its books and records approximately $4.4 million in payments to third-party intermediaries used to obtain business from foreign governments from 2001 to 2006. Specifically, Armor's Products Group would submit an invoice to customers that included a fee for the Products Group's payment to an agent. Simultaneously, Bistrong and other employees caused the Products Group to create a false invoice that did not include the agent's commission. According to the SEC settlement, this accounting approach is commonly referred to by the SEC as a "distributor net" transaction. Under such an approach, the false internal invoice results in a credit balance in the client's accounts receivable that amounts to the commissions paid. The credit balance can be used to pay intermediaries through non-client accounts before finally being paid to the third-party consultants. Consequently, the commission payments are never recorded on a company's books and records.

The SEC further alleged that Armor was on notice of its improper accounting practices due to 2001 comments made by an outside auditor and a 2005 refusal by the comptroller of another Armor Holdings subsidiary to institute Armor's distributor net accounting practices in his division. The SEC alleged that, despite these warnings, Armor continued these accounting practices until 2007. Finally, under the NPA, Armor also admitted that it had failed to devise and maintain an adequate system for internal accounting controls.

Bistrong was also separately indicted for his involvement in several bribery schemes, including in regards to the U.N. contracts. On September 16, 2010, Bistrong pleaded guilty to a single conspiracy with several objects relating to the U.N. contracts described above: to violate the anti-bribery provisions (Bistrong himself was a domestic concern due to his U.S. citizenship), to falsify books and records, and to export controlled goods without authorization. This plea was pursuant to a plea agreement with the U.S. that Bistrong had accepted on February 17, 2009, ten months before the indictment of 22 defendants in the military enforcement products sting (discussed separately) — a sting in which Bistrong played a key role.

In addition to the allegations related to the U.N. contracts, Bistrong's plea was also based on improper payments to officials in the Netherlands and Nigeria, as well as the unlawful export of Armor materials to Iraq. 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. 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. 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 inkpads 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.

The parties agreed, although such an agreement is not binding on the court, that the U.S. Sentencing Guidelines recommended a sentence including between 70 and 87 months, which is automatically overridden by the statutory maximum of five years. Bistrong currently is awaiting sentencing.

Tenaris S.A.

On May 17, 2011, the DOJ and SEC announced resolutions of their respective FCPA-related investigations of Tenaris S.A. ("Tenaris"), a Luxembourg-based manufacturer and supplier of steel pipe products and related services to oil and gas companies relating to payments to Uzbekistani officials to obtain confidential information about competitors' bids. Tenaris is subject to the FCPA as an issuer because its American Depositary Receipts ("ADRs") trade on the New York Stock Exchange

In total, Tenaris agreed to pay $8.9 million to resolve the investigations. The SEC entered into its first-ever DPA to resolve its investigation of Tenaris, under which Tenaris agreed to disgorge $4,786,438, pay prejudgment interest of $641,900, and commit to several compliance-related undertakings. The latter included providing the SEC with a written certification of compliance with the DPA between 45 and 60 days before its expiration, to annually review and update, as appropriate, its Code of Conduct, to require all directors, officers, and managers to certify annually their compliance with the Code of Conduct, and to conduct effective training for certain groups of employees. Tenaris was not required to admit or deny the SEC's allegations and did not contest the SEC's statement of facts included in the DPA. Robert Khuzami, Director of the SEC's Division of Enforcement, explained that Tenaris was "an appropriate candidate for the Enforcement Division's first Deferred Prosecution Agreement" following the SEC's January 2010 authorization of its Enforcement Division to enter into DPAs, because of "[t]he company's immediate self-reporting, thorough internal investigation, full cooperation with SEC staff, enhanced anti-corruption procedures, and enhanced training."

The DOJ entered into an NPA with Tenaris. Tenaris agreed to pay a $3.5 million monetary penalty and admitted to truth and correctness of the statement of facts included in the NPA. The DOJ considered an NPA to be appropriate based on Tenaris's timely, voluntary, and complete disclosure of the conduct, its extensive, thorough, and real-time cooperation with the DOJ and SEC, its voluntary investigation of its business operations throughout the world, specifically including the thorough and effective manner in which the investigation was carried out and information was disclosed to the Department and SEC, and its remedial efforts already undertaken and to be undertaken, including voluntary enhancements to its compliance program and others to which it committed under the NPA.

Tenaris ran its business operations in Uzbekistan through its offices in Azerbaijan and Kazakhstan. Its operations in the Caspian Sea region, including Uzbekistan, amounted to 5% of its global oilfield services sales and only 1% of its total global sales and services from 2003 to 2008. It secured such business in part by bidding on contracts tendered by state-owned enterprises or government agencies, often with the assistance of third-party agents.

The conduct at issue related to potential Tenaris business with OJSC O'ztashquineftgas ("OAO"), a wholly owned subsidiary of Uzbekneftegaz, the state holding company of Uzbekistan's oil and gas industry. Both Uzbekneftegaz and OAO were wholly owned by the Uzbekistani government during the relevant time periods. In or around December 2006, Tenaris was introduced to a third-party agent (the "OAO Agent") to help Tenaris bid on OAO contracts.

The OAO Agent offered Tenaris access to competitors' confidential bidding information obtained from officials in OAO's tender department. These officials would then permit Tenaris to submit a revised bid. Tenaris employees described the OAO Agent's services in e-mails, noting that such a "dirty game" was "very risky" for the complicit OAO employees, "because if people caught while doing this they will go automatically to jail. So as [OAO Agent] said, that's why this dirty service is expensive." With the assistance of OAO Agent, whom Tenaris agreed to pay a 3% commission, Tenaris won four contracts.

After competitors complained that the bidding process on three of these contracts had been corrupted, Tenaris employees authorized payments to the Uzbekistani authority conducting an investigation. According to the NPA, no evidence was uncovered that the payments were actually made, however. Ultimately, OAO cancelled one of the contracts on which payments had not been made and cancelled the outstanding portions of the other three contracts. Before these cancellations, OAO had paid Tenaris approximately more than $8.9 million, of which approximately more than $4.7 million was profit.

Rockwell Automation Inc.

Rockwell Automation Inc. ("Rockwell"), whose shares trade on the NYSE, is a Wisconsin-based company that provides industrial automation power, intelligent motor control products, and information solutions for a range of sectors. On May 3, 2011, Rockwell settled an SEC administrative proceeding to resolve an investigation of alleged violations of the books and records and internal control provisions of the FCPA. The SEC's allegations involved a former Rockwell subsidiary, Rockwell Automation Power Systems (Shanghai) Ltd. ("RAPS-China"). Rockwell, without admitting or denying the SEC's allegations, agreed to disgorge $1,771,000, pay $590,091 in prejudgment interest, and pay $400,000 penalty. The DOJ declined to bring a parallel enforcement action for the same conduct, which Rockwell had disclosed to both the SEC and DOJ in 2006.

The SEC alleged that, between 2003 and 2006, employees of RAPS-China paid $615,000 to state-owned design institutes that provided design engineering and technical integration services. These institutes, which have been at the center of other FCPA-related enforcement activity (*see*, *e.g.* Watts Water), have the ability to influence contract awards by end-user state-owned customers. The SEC alleged that the payments were made through third-parties at the direction of RAPS-China's Marketing and Sales Director in order that design institute employees would pass on the payments to employees at state owned entities to influence purchasing decisions. The SEC further alleged that Rockwell failed to properly record the payments in the company's books and records and failed to implement an adequate system of internal accounting controls sufficient to prevent and detect the improper payments.

During the relevant period, RAPS-China also paid $450,000 to fund "sightseeing and other non-business trips" for design institute employees and for employees of other state-owned entities. Trip destinations included the U.S., Germany, and Australia. According to the SEC, some of these trips did not appear to have any direct business component "other than the development of customer good will." Trips were nevertheless recorded as business expenses in

Rockwell's books and records without any indication that they were not directly connected to the company's business.

Rockwell was able to take in $1.7 million of net profit from sales contracts with Chinese state-owned entities that were related to RAPS-China's payments to the Design Institutes and other entities. Rockwell's improper payments to design institutes were discovered in 2006 during a normal financial review as part of the company's global compliance and internal controls program. Rockwell responded to this discovery by hiring counsel to investigate the payments, voluntarily self-reported the payments to the SEC and DOJ, and took several remedial measures (including employee termination and discipline). According to the SEC, the civil fine was not greater than $400,000 due to the extent of Rockwell's cooperation with the Commission's investigation.

Johnson & Johnson

On April 8, 2011, Johnson & Johnson ("J&J"), a multinational pharmaceutical and medical device company headquartered in New Jersey, along with its subsidiaries, entered into a "global" settlement with the DOJ, SEC, and SFO to conclude enforcement actions regarding corrupt practices under the U.N. Oil for Food Program, as well as in Greece, Poland, and Romania. Under the DPA, J&J admitted and accepted responsibility for the acts of its officers, employees, agents, and wholly owned subsidiaries, including DePuy, Inc. ("DePuy"), an Indiana-based subsidiary against whom the DOJ filed a two-count complaint, and DePuy's U.K subsidiary, DePuy International Limited ("DPI"). In total, J&J and its subsidiaries agreed to pay over $76.9 million to resolve the charges, which included a $21.4 million criminal penalty under J&J's DPA with the DOJ, disgorgements of $38.2 million in profits and $10.4 million in prejudgment of interest by J&J to the SEC, and a £4.8 million civil recovery order (plus prosecution costs) as imposed on DPI by the SFO. In parallel, Greek authorities froze the assets of J&J subsidiary DePuy Hellas worth €5.7 million.

The criminal information filed against DePuy alleged one count of conspiracy to violate the FCPA and one count of violating the FCPA's anti-bribery provisions. Similarly, the SEC charged J&J with violating the FCPA's anti-bribery, books and records, and internal control provisions. The U.K. authorities only exercised jurisdiction over the conduct carried out in Greece. Working with the U.S. agencies, as to avoid double jeopardy, the SFO limited its enforcement action to a civil recovery order under the Proceeds of Crime Act 2002. Recalling that "[t]he DOJ Deferred Prosecution Agreement has the legal character of a formally concluded prosecution and punishes the same conduct in Greece that had formed the basis of the Serious Fraud Office investigation," the Director of the SFO considered that a "a [criminal] prosecution was therefore prevented in this jurisdiction by the principles of double jeopardy," for "[t]he underlying purpose of the rule against double jeopardy is to stop a defendant from being prosecuted twice for the same offence in different jurisdictions." He concluded, "[c]ombined criminal and civil sanctions have therefore been imposed in the United States in respect of DePuy International Limited's parent and assets have been frozen in the ongoing Greek investigation, all relating to the same conduct in Greece. Consequently the Serious Fraud Office is satisfied that the most appropriate sanction is a Civil Recovery Order."

When reaching the settlement figures, apart from the existence of multiple enforcement actions, the authorities considered that J&J voluntarily and timely disclosed the misconduct, cooperated fully with the DOJ's investigations, conducted thorough internal investigations, and implemented extensive remedial measures.

- *Greece*

According to the facts as stipulated in the DPA, from 1998 through 2006, DePuy and its subsidiaries authorized improper payments of approximately $16.4 million to two agents while knowing that a significant portion would be passed on to publicly employed Greek healthcare providers. DePuy and its subsidiaries sold products to Company X (an agent and distributor for DePuy and its subsidiaries in Greece that was later acquired by DePuy in 2001 and ultimately named DePuy Hellas) at a 35% discount, then paid 35% of sales by Company X to an offshore account of Company Y (a consultant for DePuy International, based in the Isle of Man) as a way of providing off-the-books funds to Agent A (a Greek national and beneficial owner of Companies X and Y) for the payment of bribes to Greek healthcare officials, in exchange for the purchase of DePuy products.

In 2000, three senior DPI officials recommended terminating Company X because Agent A was making cash payments to Greek surgeons to induce them to purchase DePuy products. However, after the meeting DPI instead began efforts to purchase Company X in a fashion that would allow Agent A to continue his payments so as not to lose sales. Correspondence during this period between senior DPI employees repeatedly demonstrated their awareness of Agent A's activities, and at one point the DPI VP Finance wrote that he was "very disappointed to read in [a] proposal that it contains reference to [Agent A's] activities which cannot be mentioned in written correspondence with [DPI]." The acquisition was concluded shortly thereafter and Agent A signed a consulting agreement with DePuy Hellas where he received an advance commission of 27%, which was deemed "sufficient to cover [DPI] and J&J cash incentives." Agent A ultimately received nearly €8 million under this and subsequent agreements before being replaced by Agent B, who received both a 15% commission from DPI and a 16% commission from DePuy Hellas. When concerns were raised about Agent B's activities, DPI's VP Marketing responded by email that if DePuy ceased making improper payments it would lose 95% of its business. The issue eventually reached a senior DePuy executive in the US who conducted discussions about continuing the Greek business without intermediaries but conducted no investigation of past conduct. Agent B received over €7 million, "a significant portion of which" was used to induce Greek healthcare professionals to purchase DePuy products.

Finally, between 2002 and 2006, £500,000 was withdrawn by employees and directors of Company X/DePuy Hellas to cover payments owed to Greek healthcare officials and not yet paid. According to the SEC Complaint, the issues in Greece had been raised to an internal audit team in 2003 via an anonymous letter, but the auditors focused their investigation on conflict of interest issues rather than bribery. The issue was raised again in 2006 by a whistleblower complaint to a separate internal audit group.

- *Poland*

From 2000 to 2007, wholly owned subsidiary J&J Poland authorized the improper payment of approximately $775,000 in Poland to publicly employed healthcare professionals. According to the DOJ, J&J Poland bribed publicly employed Polish healthcare professionals, in particular members of tender committees, by making payments in the form of phantom civil contracts (professional service contracts for which payment was made, but no proof of actual performance was ever required) or sponsoring travel and attendance to conferences, in order to unduly influence the officials to select or favor J&J Poland in tender processes. J&J Poland entered into approximately 4,400 of the civil contracts totaling approximately $3.65 million.

J&J Poland also made approximately 15,000 payments totaling $7.6 million to sponsor travel for Polish HCPs to attend conferences, "a portion of which were improper." Certain of these were directly targeted at officials who previously had or could positively influence J&J Poland business. The DOJ stated that many of these trips, "included spouses and family members to what amounted to vacations." Faked travel expenses were also used to generate cash to funnel to doctors as bribes.

- *Romania*

From 2005 to 2008, wholly owned J&J Romania authorized the improper payment of approximately $140,000 in Romania. According to the criminal information, J&J Romania employees arranged for its distributors to make cash payments and provide gifts to publicly employed Romanian healthcare professionals, in exchange for prescribing pharmaceutical products manufactured by J&J and its subsidiaries. Payments were made in the form of envelopes of cash, electronics, laptops, and other gifts and were funded through discounts of 10 to 12% given to the distributors. On some occasions, though the payments were funded through the distributors, J&J Romania employees themselves delivered the payments.

When J&J's internal auditors uncovered the improper payments in Romania, J&J Romania employees shifted their schemes to provide improper travel benefits to doctors rather than cash, including by having travel agents overcharge J&J Romania so as to generate surplus cash for "pocket money."

- *Iraq*

In addition, J&J also admitted that its wholly owned subsidiaries Janssen Pharmaceutica, NV (headquartered in Belgium) and Cilag AG International (headquartered in Switzerland) had secured 18 contracts with the Iraqi Ministry of Health State Company for Marketing Drugs and Medical Appliances ("Kimadia") through the payment of approximately $857,387 in kickbacks between 2000 and 2003, under the United Nations Oil for Food Program. The total contract value amounted to circa $9.9 million, with approximately $6.1 million in profits. The payments were made through an agent whose commission was inflated from 12% to 22% to accommodate the kickbacks to Kimadia.

- *Robert John Dougall*

In a related enforcement action in the U.K., on December 1, 2009, Robert John Dougall, the former Vice President of Market Development of 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 entirely to judges.

JGC

In April 2011, JGC Corporation ("JGC"), a Japanese engineering and construction company headquartered in Yokohama, Japan, entered into a two-year DPA with the DOJ, agreeing to pay a criminal penalty of $218.8 million to resolve charges of participating in a conspiracy to bribe Nigerian officials in violation of the FCPA.

JGC was the last of the four companies in the TSKJ joint venture to settle with the DOJ in the series of enforcement actions regarding the corruption scheme carried out between 1995 and 2004 to unlawfully obtain contracts to build liquefied natural gas facilities in Bonny Island, Nigeria (*see KBR/Halliburton, Tesler and Chodan, Marubeni*). According to the DOJ, JGC authorized TSKJ (operating through a corporate entity based in Madeira, Portugal) to hire U.K. attorney Jeffrey Tesler and the Japanese company Marubeni Corporation as agents to arrange and pay bribes to high-level and working-level government officials, respectively. Over the course of the scheme, the joint venture caused wire transfers of over $180 million for use in part to corrupt Nigerian officials. On several occasions preceding the award of engineering, procurement and construction ("EPC") contracts to TSKJ, JCG's co-conspirators met with officials of the executive branch of the Government of Nigeria to identify a representative to negotiate bribes with TSKJ or to determine their amount.

JGC was ultimately charged with, and plead guilty to, one count of conspiracy to violate the FCPA and one count of aiding and abetting violations to the FCPA. Under the DPA, in addition to paying the criminal penalty, JGC agreed to cooperate with the DOJ's ongoing investigations, to review and improve its compliance and ethics program, and to engage an independent compliance consultant for two years.

Comverse

On April 6, 2011, the New York-based Comverse Technology Inc. ("CTI") entered non-prosecution and settlement agreements with the DOJ and SEC, respectively, in connection with improper payments made by CTI's Israel-based, second-level subsidiary, Comverse Ltd. ("Comverse") between 2003 and 2006. CTI agreed to pay a combined $2.8 million to the enforcement agencies, including a $1.2 million criminal fine to the DOJ for violating the FCPA's books and records provisions and an additional $1.6 million in disgorgement and prejudgment interest to the SEC for violating those provisions as well as the FCPA's internal controls provisions.

According to both the settlement and non-prosecution agreement, Comverse engaged an Israeli agent to help the company pay bribes to its customers, including Hellenic Telecommunications Organisation S.A. ("OTE"), an Athens-based telecommunications provider partially owned by the Greek government, as well as other purely private customers.

In February 2003, several Comverse employees conspired with the unnamed agent to incorporate Fintron Enterprises Ltd. ("Fintron"), a Cyprus-based entity established "purely [as] a money laundering operation," according to one witness quoted by the DOJ. The agent also opened a Cyprus bank account in Fintron's name. Comverse employees used the new company and its bank account in a scheme to funnel bribes to OTE and other customers. Under the scheme, Comverse executed consultancy services contracts with Fintron, agreeing to pay "commissions" in connection with the purchase orders that the shell company purportedly helped to procure. Upon receipt of a purchase order, Comverse employees notified the agent of the value for a fraudulent "commission" invoice. The agent then issued an invoice to Comverse under Fintron's name for the pre-agreed "commission" amount. Comverse submitted the invoices for payment and subsequently transferred the requested funds to Fintron's bank account in Cyprus, falsely recording the transactions in the company's books and records as legitimate commission payments. The agent—or in some cases Comverse employees themselves—travelled to Cyprus to withdraw the money from Fintron's account. The agent would hand deliver the funds—minus his own 15% commission—to one of three Comverse employees, who provided the cash to various Comverse customers in Israel, Italy, and Greece.

The scheme first came to light after the agent had been questioned at an airport in December 2005 about a same-day, round-trip flight he had taken between Rome and Tel Aviv. Because Comverse had purchased the agent's ticket, an airline representative reported the matter to Comverse's Director of Security, who undertook further investigation. The investigation revealed that the agent had taken sixteen same-day, round-trip flights between Israel and either Rome or Cyprus—as well as numerous other flights to Greece—over a period of eight months. Comverse had booked and paid for all the flights directly.

In a memorandum dated January 1, 2006, the Director of Security advised the President of the Europe, Middle East, and Africa ("EMEA") division and the Head of Human Resources of his findings. Specifically, he explained that Comverse had arranged for the agent's frequent same-day, round-trip flights so that he could transport large amounts of cash to Comverse employees, and that such actions could violate money laundering laws.

Rather than suggesting that the agent's relationship be terminated with immediate effect, however, the memorandum recommended certain steps to minimize the risk that the agent's actions could be traced back to the company. Thus, for example, the memorandum recommended that: (i) a separate travel agent make the agent's bookings, (ii) the agent stay at hotels where he would not be recognized as a Comverse employee, and (iii) the agent return to Tel Aviv on a different flight than he had taken to leave Israel. Although the Director of Security argued that the agent should eventually be terminated (because "he knows too much"), he advised that "as long as the current system exists, [the agent] will need an appropriate cover story, that is grounded and backed-up with documents that Comverse has no part in."

The incidents described in the memorandum were not reported to anyone else at Comverse, such as senior Comverse or CTI executives, nor did the company have a policy at the time that directed the employees to do so. Partly as a result, Comverse continued to make improper payments through the end of 2006. In total, Comverse made payments of $536,000 to individuals connected to OTE (obtaining over $1.2 million in profit through improperly obtained purchase orders), as well as unspecified amounts to other Comverse customers. Comverse voluntarily disclosed the matter to the SEC and DOJ on March 16, 2009.

Neither the DOJ nor the SEC directly argued that the employees of OTE were "foreign officials" under the FCPA, although the DOJ did characterize OTE as controlled by the Greek government, which owns slightly more than one-third of the issued share capital. OTE is listed currently on the Athens Stock Exchange and the London Stock Exchange, and it was listed on the NYSE until September 2010. While this may explain why the enforcement agencies did not allege that Comverse had violated the FCPA's anti-bribery provisions, the charging documents' vague characterization leaves open the possibility that the agencies did (or would, if pushed) consider OTE a state instrumentality, even at its one-third ownership level. In any event, the lack of such a direct argument—combined with references to other bribes that Comverse paid to indisputably private entities—suggests that the DOJ and SEC remain willing to prosecute "private bribery," by focusing on books and recordkeeping violations.

Interestingly, this marks OTE's second appearance in three years in an FCPA settlement. In 2008, the DOJ referenced the company (then characterized as a state-owned entity) in the *Siemens* case, stating that a Siemens employee "had received substantial funds to make 'bonus payments' to managers at the Greek national telephone company, OTE."

In its Form 20-F filed on June 17, 2011, OTE stated that it had "launched an internal audit within the Group in order to fully investigate the [Comverse] issue and safeguard the Group's interests. The internal audit is ongoing." Given that OTE subsequently filed a Form 15F to terminate its reporting requirements with the SEC, it remains to be seen whether the results of that audit will ever be made publicly available.

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 nor 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 continuing 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 was 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 simply as "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 customs 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 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, 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 enjoined it from violating the books and records and internal control provisions of the FCPA. The DOJ has not indicated that it intends to bring a parallel enforcement action.

- *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 who had 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 LG-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 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.

Tyson Foods, Inc.

On February 10, 2011, Tyson Foods, Inc. ("Tyson") entered into a 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 México ("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 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, took the form of 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 amount equivalent to 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 the 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 the U.S. authorities' investigations, 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 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.

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 does not provide for a private cause of action. Nevertheless, enterprising shareholders, employees, competitors, and even foreign governments have sought alternative means to use allegations of bribery to their litigious advantage through derivative actions, class action securities suits, whistleblower complaints, and other creative legal theories.

Derivative Actions

When a publicly traded company resolves FCPA investigations by the DOJ and SEC or discloses that such investigations are underway, the company's shareholders or pension plans oftentimes file derivative suits. These suits typically seek to establish that the company's board of directors breached its fiduciary duty by failing to implement or monitor adequate internal anti-bribery controls.

Under Delaware law, to establish such oversight liability, a plaintiff "must show with particularized facts that the directors *knew* they were not discharging their fiduciary obligations or that the directors demonstrated a *conscious* disregard for their responsibilities such as failing to act in the face of a known duty to act." *Freuler v. Parker*, 803 F. Supp. 2d 630, 638 (S.D. Tex. 2011) (quoting *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996) (italics in original). Moreover, plaintiffs must show that "(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, [they] consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *Midwestern Teamsters Pension Trust Fund v. Baker Hughes, Inc.*, 2009 WL 6799492, *4 (S.D. Tex. May 7, 2009) (quoting *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006), *adopted*, 2010 WL 3359560 (S.D. Tex. May 26, 2010). Therefore, the mere fact of a violation does not demonstrate bad faith by directors. *Id.*

Plaintiffs therefore have a high hurdle to clear if they wish to pursue such claims successfully. Indeed, courts have regularly noted that a breach of the directors' "duty of attention or care in connection with the on-going operation of the corporation's business . . . is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *Id.* at 639 (citing *Caremark*, 698 A.2d at 969).

Accordingly, many shareholder derivative actions have been dismissed, including (i) an ironworkers' pension fund's claim in the Western District of Pennsylvania against current and former Alcoa officers and directors based on the alleged bribes to Bahraini government officials (dismissed in July 2008) (*see Dahdaleh infra*); (ii) a derivative claim against current and former directors of BAES by the city of Harper Woods (Michigan) Employees' Retirement System in the District Court for the District of Columbia (dismissal affirmed in December 2009) (*see BAES infra*); (iii) a lawsuit filed by a teamsters pension trust fund in the Southern District of Texas against current and former officers and directors of Baker Hughes (magistrate judge's memorandum and recommendation of dismissal adopted in May 2010) (*see Baker Hughes infra*); (iv) a derivative suit by the Rohm and Haas Company ("R&H"), which sought specific performance against the Dow Chemical Company regarding an aborted acquisition by the defendant of the plaintiff (dismissed by a Delaware Chancery court in January 2010) (*see Dow Chemical infra*); (v) a case against the officers and directors of Parker Drilling Company by shareholders, filed in a Texas state court, alleging that the plaintiff shareholders had not been sufficiently informed that the company was under investigation by the DOJ and the SEC for its use of "customs and freight forwarding agents" in Kazakhstan and Nigeria in March 2012; and (vi) a shareholder derivative suit brought against Hewlett Packard Company ("HP") on October 19, 2010 in the Northern District of California (dismissed in March 2012) (*see Hewlett Packard infra*).

A few derivative suits, however, have resulted in settlements in which the defendant companies adopted enhanced anti-corruption programs and provided for the attorneys fees of the plaintiff shareholders, such as with *SciClone Pharmaceuticals* and *Maxwell Technology*.

First, in December 2011, a California state court approved a settlement agreement to resolve consolidated derivative lawsuits against SciClone Pharmaceuticals, which had disclosed previously that it was under investigation by the SEC and DOJ in connection with its interactions with government-owned entities in China. In addition to agreeing to pay $2.5 million in plaintiffs' attorneys' fees, SciClone agreed to adopt enhanced corporate governance measures, including: (i) the engagement of a compliance coordinator, fluent in English and Mandarin, who would conduct annual compliance reviews, report directly to the company's audit committee, and file quarterly reports with SciClone's legal counsel, CEO, CFO, and internal and external auditors; (ii) an enhanced "Global Anti-Bribery & Anti-Corruption Policy" designed to prevent and detect violations of the FCPA and other applicable laws; (iii) maintaining the company's internal audit and control function; (iv) due diligence review in connection with the hiring of all "foreign agents and distributors;" (v) mandatory employee compliance training; and (vi) modifications to the company's whistleblower program.

Second, in February 2012, Maxwell Technology entered into a proposed settlement to resolve consolidated derivative actions filed by shareholders in connection with allegations that the company bribed officials of a Chinese state-owned electric utility company (*see Maxwell supra*). As with the SciClone settlement, Maxwell Technology agreed to pay attorneys' fees ($3 million) and adopt enhanced compliance measures. Although the settlement did not require a Mandarin-fluent compliance coordinator, the company did agree to establish a new FCPA and Anti-Corruption Compliance department, spearheaded by a Chief Compliance Officer. In addition to other enhanced governance measures, such as due diligence procedures, training, and audit control testing, the settlement agreement also provided for changes to the company's executive compensation policy. The proposed settlement is pending final approval by a California state court.

The high legal burden and historical lack of success in eliciting large monetary settlements or judgments have not precluded plaintiff shareholders from trying their hand at similar lawsuits, and a number of shareholder derivative actions are pending.

Perhaps most prominently, the California State Teachers' Retirement System filed a lawsuit in Delaware Chancery court against Wal-Mart on May 3, 2012, in connection with the allegations that the company bribed Mexican government officials and later sought to conceal the evidence (*see Wal-Mart supra*). In particular, the complaint alleges that the board of directors' "conscious failure to implement an internal controls system to detect and prevent the illegal payment of bribes in Mexico, their conscious failure to act once the bribery scheme was exposed, and certain . . . affirmative acts to cover-up the scheme, have severely damaged and will likely in the future damage Wal-Mart and its business, goodwill and reputation." The allegations regarding certain directors' "cover-up" of the bribery scheme may well work in favor of the shareholder plaintiffs, helping them succeed where others have failed.

Other pending shareholder derivative actions include: (i) an action brought by a police and firefighter pension fund in Texas state court 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 (abated in September 2010, but with numerous status conferences resuming in March 2012) (*see KBR infra*); (ii) a lawsuit filed by shareholders against officers and directors of Smith & Wesson Holding Corporation in the U.S. District Court for the District of Massachusetts in connection with alleged improper payments made to the Minister of Defense of an African country (hearing on Smith & Wesson's motion to dismiss was held in April 2012) (*see Smith & Wesson infra*); (iii) consolidated claims brought against officers and directors of Las Vegas Sands Corporation in the U.S. District Court for the District of Nevada in connection with potential improper payments to government officials in Macau (motion to dismiss pending); (iv) a lawsuit filed in the U.S. District Court for the District of Eastern Louisiana against officers and directors of Tidewater, Inc., in connection with alleged bribes paid to Azerbaijani and Nigerian government officials (motion to dismiss pending) (*see Tidewater infra*); and (v) an action brought in the U.S. District Court for the District of New Jersey against Johnson & Johnson, based on allegations of bribery and kickbacks in Greece, Poland, Romania, and Iraq (motion to dismiss pending) (*see Johnson & Johnson supra*).

Securities Suits

Plaintiffs have had much more success with class action security lawsuits, which current or former shareholders typically bring pursuant to § 10(b) of the Exchange Act and Rule 10b-5,[6] which makes it "unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue

[6] Less commonly, plaintiffs also have brought "control person" liability claims under § 20(a) of the Exchange Act.

statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

To state a claim under §10(b) or Rule 10b-5, shareholder plaintiffs must plead initially that the defendant company or directors "made a false statement or omitted a material fact, with scienter, and that plaintiff's reliance on defendant's action caused plaintiff injury." *Johnson v. Siemens AG*, 2011 WL 1304267, *12 (E.D.N.Y. March 31, 2011) (*quoting San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos*., 75 F.3d 801, 808 (2d Cir.1996)). Additionally, the Private Securities Litigation Reform Act ("PSLRA") established more stringent pleading standards, requiring that the complaint must (i) "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed," and (ii) "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id.* (quoting 15 U.S.C. § 78u–4(b)(1) and (2)).

In the context of these cases, plaintiffs have had the most difficulty proving that the defendants acted with the necessary scienter. To meet the "strong inference" requirement, the pleaded facts must be cogent and create an inference—"at least as compelling as any opposing inference of nonfraudulent intent"—that the defendant sought to deceive, manipulate, or defraud. *Tellabs v. Makor Issues & Rights*, 551 U.S. 308, 314 (2007).

This requirement, however, has proven too strong for many plaintiffs, such as: (i) a capital management fund that filed a suit following GE's acquisition of InVision (dismissal affirmed in November 2008) (*see InVision infra*); (ii) shareholders who filed a suit in the Eastern District of New York against Siemens, claiming that that the company had misrepresented the scope and magnitude of the corruption discovered by multiple ongoing investigations (dismissed in March 2011) (*see Siemens infra*); and (iii) class action plaintiffs in the Northern District of California who alleged that the stock of SciClone Pharmaceuticals, Inc. ("SciClone") had 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 (voluntarily dismissed on December 1, 2010).

Additionally, in 2010, the U.S. Supreme Court made it even more difficult for plaintiffs to file such claims. In *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), the Court rejected previous federal jurisprudence and held that § 10(b) and Rule 10b-5 do not apply extraterritorially. The Court specified that plaintiffs could only bring such cases if "the purchase or sale is made in the United States, or involves a security listed on a domestic exchange." *Id.* at 2886. Thus, plaintiffs who make purchases outside the United States of securities that are listed on a foreign exchange may no longer bring § 10(b) and Rule 10b-5 claims in U.S. courts.

Despite these difficulties, plaintiffs have still been able to obtain lucrative court-approved settlements ranging as high as $61.5 million. Such cases include: (i) a securities fraud suit against UTStarcom, Inc., which included allegations of FCPA violations involving the company's activities in China, India, and Mongolia ($30 million settlement in August 2010) (*see UTStarcom infra*); (ii) an action filed in the District of Utah against Nature's Sunshine Products in connection with false statements made by the company's CEO, who allegedly himself had made illegal payments under the FCPA ($6 million settlement in September 2009) (*see Nature's Sunshine infra*); (iii) a class action lawsuit alleging that Faro Technologies had overstated sales, understated the cost of goods sold, and concealed its overstatement of profit margins through violations of the FCPA ($6.875 settlement in October 2008) (*see Faro Technologies infra*); (iv) a securities fraud suit that claimed violations of §§ 10(b) and 20(a) of the Exchange Act by Willbros Group, whose inflated stock price enabled the company to complete a $70 million offering of Convertible Senior Notes and enter into a $150 million credit agreement ($10.5 million settlement in February 2007) (*see Willbros infra*); (v) a securities complaint filed in the Northern District of Georgia against Immucor, Inc., wherein the plaintiffs claimed that the company made false or misleading statements about the scope and gravity of investigations in Italy ($2.5 million in May 2007) (*see Immucor infra*); and (vi) a class action lawsuit against Titan Corporation, in which plaintiff shareholders argued that the company's FCPA violations prevented it from entering into a definitive merger agreement with Lockheed Martin ($61.5 million settlement in December 2005) (*see Titan infra*).

As with the shareholder derivative suits, the most news-prominent, FCPA-related securities fraud case involves the one against Wal-Mart. Plaintiffs filed the class action lawsuit in the Middle District of Tennessee on May 7, 2012. The complaint details the alleged "unlawful and unethical conduct" in which the company engaged in Mexico, "contrary to the legacy of [Wal-Mart founder] Sam Walton," whose picture is included on the first page. The complaint seeks to establish liability under §§ 10(b) and 20(a) of the Exchange act by alleging that, during the class period, Wal-Mart knew but concealed that it was making bribery payments in Mexico in violation of the FCPA and Mexican law (*see Wal-Mart supra*).

Civil Actions Brought by Partners or Competitors

As the following cases demonstrate, one need not be a shareholder to file an FCPA-related lawsuit. Competitors—who may allege to have lost lucrative contracts because of bribes paid by others—have brought claims under various federal and state laws. Other plaintiff corporations—who executed agreements with companies prior to the onset of FCPA investigations by the DOJ and SEC—have filed lawsuits based on breach of contract claims.

Competitors have brought claims under the RICO Act or other federal and state legislation that prohibits anticompetitive practices. Notably, two plaintiffs successfully acquired large settlements in connection with such cases: First, NewMarket Corporation ("NewMarket") filed a lawsuit against Innospec in the Eastern District of Virginia on July 23, 2010 (*see Innospec infra*). Bringing claims under the Sherman Act, the Robinson-Patman Act, the Virginia Antitrust Act, and the Virginia Business Conspiracy Act, NewMarket claimed that Innospec's bribes were intended to prevent its customers from purchasing fuel additives from NewMarket. On

September 13, 2011, Innospec agreed to pay NewMarket a total of $45 million through a combination of cash payments, promissory notes, and common stock.

Second, on October 21, 2008, the Dubai-based Supreme Fuels filed suit in the U.S. District Court for the Southern District of Florida against International Oil Trading Company ("IOTC") and its co-owners, Harry Sargeant (then Finance Chairman of the Republican Party of Florida) and Mustafa Abu-Naba'a (a Jordanian resident of the Dominican Republic), asserting multiple claims under the RICO Act, the Clayton Act, and various Florida state laws. The suit alleged 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. On May 6, 2011, the court ruled in Supreme Fuels' favor, ordering the defendants to pay $5 million plus post-judgment interest.

Harry Sargeant and Mustafa Abu-Naba'a lost a separate breach of contract and fraud case that had been filed by their former business partner in IOTC Jordan, Mohammad Al-Saleh. According to the testimony, Messrs. Sargeant and Abu-Naba'a had contracted with Al-Saleh—a member of the Jordanian royal family by virtue of his marriage to Princess Alia Al Hussein, the half-sister of King Abdullah II—to curry favor with the royal family, but they later sought to replace him with a former CIA agent after the lucrative contracts had been secured. Following the two-and-a-half week trial in Palm Beach Florida Circuit Court in July 2011, the jury awarded Al-Saleh over $40 million in damages, including prejudgment interest.

Sargeant—who was accused of participating in "a reprehensible form of war profiteering" by Representative Henry Waxman (D-CA), the Chairman of the Committee on Oversight and Government Reform—could face additional troubles. According to reporters, the long trial (ridden with bribery allegations) was "watched by note-taking men who said they worked for the federal government."[7]

Other companies too have brought breach of contract claims, including (i) the Ohio-based Argo-Tech Corporation, which sued its Japanese distributor, Yamada Corporation, to seek compensatory damages and a declaratory judgment that the company "obey the letter and spirit" of the FCPA and comply with Argo-Tech's policy against giving bribes and kickbacks; and (ii) eLandia International, which filed a lawsuit against the previous owner of Latin Node in connection with the latter's failure to disclose its pre-acquisition FCPA violations (*see Latin Node infra*). Both cases settled.

Lawsuits by Foreign Governments and State-Owned Entities

Companies that have resolved charges with the DOJ and SEC sometimes face additional U.S.-based lawsuits from the countries or state-owned entities implicated in the action. The mere fact that those government entities may themselves have solicited or received the bribes in

7 Jane Musgrave, "Jury awards $28.8 million to king of Jordan's brother-in-law," *The Palm Beach Post* (July 27, 2011), http://www.palmbeachpost.com/news/jury-awards-28-8-million-to-king-of-1660759.html.

question does not prevent them, much like Captain Louis Renault in *Casablanca*, from being "shocked, shocked to find [corruption] going on in this establishment."

The cases brought by the Republic of Iraq and a state-owned entity of Costa Rica, discussed below, well illustrate this point. The courts have appeared reluctant, however, to allow such entities to bring successful claims when the foreign entities could themselves be considered co-conspirators in the matter. As U.S. District Judge Marcia G. Cooke has indicated, if the foreign entity's own involvement in the scheme suggests that its unofficial motto is "bribery is us", it is unlikely to receive much legal sympathy.

- *<u>The Republic of Iraq v. ABB AG., et al.</u>*

On June 27, 2008, the Iraqi government filed suit in the United States District Court for the Southern District of New York based on the allegations of bribery in connection with the Oil-for-Food Programme ("OFFP"). The Iraqi Government brought the suit against over 90 corporations (almost 50 parent companies and over 40 of their affiliates), including the companies discussed in this Alert in connection with the OFFP settlements. Many of the other companies named in the lawsuit are under investigation by the DOJ and/or SEC. The lawsuit seeks damages in connection with Racketeering Influenced Corrupt Organizations ("RICO"), common law fraud and breach of fiduciary duty claims, which the Iraqi government asserts both directly and as *parens patriae* on behalf of the Iraqi people.

On January 15, 2010, defendants filed a consolidated motion to dismiss the claims, arguing that Iraq lacks standing because (i) it was the mastermind behind the alleged conspiracy, (ii) any injury that Iraq suffered was the result of its own conduct, and (iii) only U.S. states—not foreign nations—may seek redress for injuries under the doctrine of *parens patriae*. In addition these issues of standing and others regarding statutes of limitations, the defendants argue that Iraq's own misconduct bars the claims, because "a primary wrongdoer may not recover from secondary participants in the alleged scheme."

Much of the jockeying between the parties centers on the issue of whether the current Iraqi government and that under the "Hussein Regime" are one and the same. On the one side, the defendants cite case law to argue that, "a change in government, regime or ideology has no effect on that state's international rights and obligations because the state continues to exist despite that change." *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 731 F. Supp. 619, 621 (S.D.N.Y. 1990). On the other, the Iraqi government agrees that its nation has continued to exist, but it instead asserts that the "Hussein Regime was not the nation, but the nation's self-proclaimed ruler (that is, its self-appointed agent)."

On April 30, 2012, the Second Circuit affirmed the district court's opinion to deny Iraq's motion to compel arbitration. The defendant's consolidated motion to dismiss remains pending.

- *<u>Alcatel-Lucent.</u>*

As discussed herein, on December 27, 2010, Alcatel-Lucent resolved investigations by the DOJ and SEC into FCPA violations in a number of countries. (*See Alcatel-Lucent infra*) In

Costa Rica, Alcatel-Lucent earned a profit of more than $23.6 million on more than $300 million in contracts with Instituto Costarricense de Electricidad ("ICE"), the state-owned telecommunications company.

Shortly after Alcatel-Lucent disclosed the tentative agreements earlier in 2010, ICE sued the French company in Florida state court, seeking damages relating to Alcatel-Lucent's bribery of ICE's own personnel under Florida's racketeering statutes. After the state court dismissed that suit on the ground of *forum non conveniens*, ICE sought to have the federal courts reject the plea agreements by petitioning to be given "victim" status and awarded appropriate restitution.

In its papers, ICE argued that it was rogue employees who solicited the bribes—not the company itself—and that the DOJ's decision not to provide the Costa Rican company with the monetary fines it obtained was "the product of the same imperialist view of Latin America, the Caribbean and lesser-developed nations that spawned Alcatel's fraudulent scheme."

At a subsequent status conference, the DOJ made clear, however, that it was not mere ICE "employees", but that it was "nearly half of ICE's board of directors [that] were soliciting and taking hundreds of thousands of dollars in bribes." The district court agreed, rejecting ICE's petition for victim status and restitution because of the company's "co-conspirator" involvement in the scheme at the top level:

> I think you have, even though not a charged conspirator co-conspirator relationship, that's essentially what went on here; that given the high-placed nature of the criminal conduct within [ICE's] organization, the number of people involved, that basically it was 'Bribery Is Us,' meaning that everybody was involved in it. Even though you didn't know specifically, it's enough to say that the principals were involved here.

- *Aluminium Bahrain.*

As discussed above, Bahrain's state-owned steel company, Aluminium Bahrain ("Alba"), initially filed a suit in federal court in Pittsburgh on February 27, 2008 (and again on November 28, 2011 after the end of a DOJ-requested stay) against Alcoa, claiming that the company had engaged in conduct such as overcharging, fraud, and bribery of Bahraini officials over a period of 15 years. Alcoa filed a motion to dismiss on January 27, 2012, which is currently pending.

Alba filed a second, similar suit on December 18, 2009, in the Southern District of Texas, against the Sojitz Corporation and its American subsidiary. In that case, Alba described a 12-year scheme in which Sojitz's two predecessor entities paid over $14 million in bribes to two Alba employees in exchange for unauthorized discounted prices. In May 2010, the DOJ intervened and sought a stay in the Sojitz action. The enforcement agency noted that it had been investigating FCPA violations by Alcoa and stated that, although it did "not mean to overstate the relationship between the government's investigation into Sojitz and its investigation into Alcoa, the Fraud Section believes that some individuals may have been involved in both alleged bribery schemes." There have been no additional filings in the case since the DOJ's application to intervene and stay discovery was granted in June 2010.

Whistleblower Complaints

On February 3, 2012, Khaled Asadi filed a complaint against his former employer, General Electric subsidiary, G.E. Energy (USA), LLC ("GE Energy"), alleging that he had been wrongfully terminated in violation of the whistleblower protections put in place by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Specifically, Asadi alleges that GE Energy fired him shortly after he notified his supervisors and the company's ombudsman of potential FCPA violations, including that GE Energy may have been "pimping its way" to winning a contract by hiring a female employee as its "point of contact" with a senior Iraqi official, who had specifically requested that GE hire her for that purpose.

Khaled Asadi served as GE Energy's Country Executive in Iraq from September 2006 until he was fired in June 2011. According to an amended complaint filed on April 24, 2012, that position required him "to maintain close interaction and coordination with Iraq's governing bodies in securing and managing energy service contracts" for GE Energy.

In June 2010, GE Energy was negotiating a "lucrative" sole-sourced joint venture agreement with the Iraqi Ministry of Electricity. In the amended complaint, Asadi alleges that he met with an Iraqi government contact at that time, who alerted him of possible FCPA violations in connection with that contract. In particular, Asadi alleges that he learned that the Iraqi Senior Deputy Minister of Electricity, Raad al Haris, had requested that GE Energy hire a female employee with whom he was "closely associated." Allegedly, GE Energy subsequently hired the female employee and designated her as its main point of contact with al Haris during the negotiations. Although the amended complaint does not specify the nature of this relationship, Asadi adds that his contact specifically warned him that the female employee had been hired "in order to curry favor . . . [and] that G.E. was 'pimping its way to the agreement'." A publicly available Linked-In profile with the female employee's name provides that she currently works as a Senior Sales Manager for GE Energy in Iraq.

Concerned that the hiring of the female employee could "potentially violate the FCPA," Asadi states that he raised the issue with GE Energy's Regional Executive as well as the company's ombudsman. Following an interview with the ombudsman, Asadi received a negative performance review, and he alleges that his supervisors pressured him to step down from his position before firing him by email.

On June 24, 2011—a month before GE agreed to pay $23.4 million to settle SEC charges relating to illegal kickbacks in Iraq in connection with the Oil for Food Program—Asadi received an email from GE Energy's human resources department, informing him that "as of today, June 24, 2011, GE is exercising its right to terminate your employment as an at-will employee."

In court filings, however, GE Energy has referenced misconduct that may have prompted Asadi's firing. GE Energy argues that, "Asadi unlawfully downloaded thousands of confidential and proprietary GE Energy files several weeks before he was terminated, and again on the date he was terminated. A Jordanian court has convicted Asadi of the crime of breach of trust and sentenced him in absentia to a term of imprisonment of two years." Importantly, however, GE declined to state explicitly that it fired Asadi for this reason.

As to the potential FCPA violations, GE Energy has denied any wrongdoing. In court filings, the company stated that, "it vigorously disputes Asadi's contentions." In a separate statement, the company provided that "regarding our contracts in Iraq, GE followed all requirements and his allegations are false."

GE Energy may soon need to substantiate those statements with evidence. In addition to the pending lawsuit, Asadi's lawyer has stated that he is also representing his client in presenting these allegations to federal prosecutors. The amended complaint notes that GE Energy and the Iraqi Ministry of Electricity signed the seven-year joint venture agreement—which included an exclusive materials and repairs provision estimated at $250 million—in December 2010.

In the meantime, Asadi's case remains pending in U.S. District Court for the Southern District of Texas. Recall that GE Energy had settled separate whistleblower retaliation claims in January 2009 by its former in-house counsel, Adriena Koeck, who claimed she was fired for reporting a potential FCPA violation to her superiors.

Other whistleblower actions remain pending as well, including a case filed by Steven Jacobs, former President of the Macau Operations of Las Vegas Sands Corporation, who alleged that he was fired for, among other things, his repeated refusal to (i) withhold business from Chinese banks that refused to exercise influence with government officials, (ii) investigate senior government officials in order to blackmail them, and (iii) continue to retain a Macau attorney despite concerns that he "posed serious risks under the criminal provisions" of the FCPA. The company's motion to dismiss was denied in March 2011.

Additionally, Sempra Global continues to face a retaliatory dismissal complaint that was initially filed in November 2010 in state court in San Diego County, California. Rodolfo Michelon, who served for five years as the company's Director and Controller in Mexico before his termination, alleges that he repeatedly questioned and protested against "miscellaneous frauds and bribes," including one case of bribing Mexican police to evict a private landowner. Michelon alleged his protests were met with "open hostility and threats of termination."

In quixotic fashion, however, Michelon also filed a lawsuit against the SEC in April 2012 for allowing Sempra Global to hire an external law firm to investigate his claims, rather than investigating them itself. In the complaint, Michelon alleges that this "outsourcing program has effectively nullified the whistleblower provisions in the Dodd-Frank Act" and that it is "a major reason the SEC has not made a single whistleblower award, or at least not disclosed such an award, since the whistleblower incentive provisions in the Dodd-Frank Act became operative on July 22, 2010."

Suits Against Former Employees

There is another side to the company vs. employee coin: the corporations that face FCPA investigations or charges sometimes bring lawsuits themselves against the employees who allegedly caused the violations. Most prominently, in late 2009, Siemens agreed to settle potential claims against two former CEOs and nine other former executives for alleged breaches of organizational and supervisory duties relating to the massive bribery scandal discussed above. The two former CEOs, Heinrich von Pierer, who ran the company from 1992-2005, and his successor, Klaus Kleinfeld, while denying any wrongdoing, will pay €5 million and €2 million in their respective settlements. Other former board members who have reached a settlement with Siemens include Uriel Sharef, who agreed to pay €4 million, Juergen Radomski and Johannes Feldmayer, who each agreed to pay €3 million, former Chairman Karl Hermann, who agreed to pay €1 million, and Klaus Wucherer, Rudi Lamprecht, and Edward Krubasik, who each settled for €500,000. Still pending are potential agreements with former management board member Thomas Ganswindt and former Chief Financial Officer Heniz-Joachim Neubuerger. None of Siemens' claims was filed in a U.S. court.

<u>International Guidance and Developments</u>

SFO Whistleblower Service

On November 1, 2011, the U.K.'s Serious Fraud Office launched a new whistleblowing service, known as "SFO Confidential," for the anonymous reporting of suspected fraud and corporate corruption. Suspicious activities may be reported to SFO Confidential via an online reporting form or hotline staffed by SFO personnel.

A whistleblower may choose to remain anonymous when submitting their report. Calls to SFO Confidential are not recorded or traced, but it is unclear whether the identity of a whistleblower will be protected from disclosure if a reported matter becomes the subject of an investigation, particularly if the investigation extends beyond the SFO's jurisdiction. The SFO has indicated that it would reveal a whistleblower's identity only on a "strictly need-to-know basis" or if ordered to do so by a judge. Furthermore, while the SFO has indicated that information provided to the hotline may be shared with other law enforcement agencies, the SFO stated that details that might reveal the identity of the information's source would be removed prior to sharing.

The SFO's new confidential reporting system bears some similarity to the SEC's whistleblowing program. However, there are several key differences between the two regimes. For example, SFO Confidential does not offer any financial incentive to whistleblowers, instead appealing to the reporting individual's civic duty or self-interest in preventing fraud and corruption. By comparison, under U.S. whistleblower rules, an individual who voluntarily provides the SEC with original information that leads to a successful enforcement action resulting in a monetary sanction of more than $1 million may be entitled to receive an award of between 10% and 30% of the total sanction. The lack of similar incentives in the U.K. may limit the number of people willing to come forward with information. Additionally, U.S. legislation limits the ability of legal, audit, and compliance personnel to collect a reward. There is no similar exclusion for the SFO's hotline; even professional advisors can use the service, although lawyers' and accountants' use of the service may be limited by their respective professional rules. Finally, if the SFO investigates a complaint from a whistleblower and finds that there are no grounds for prosecution, it appears that there would be no protection for the whistleblower from a potential defamation claim, should his identity be disclosed to the alleged wrongdoer.

FSA Warning

The U.K. Financial Services Authority ("FSA") September 2011 Financial Crime Newsletter included a stark warning to companies that the FSA wields anti-corruption authority that is separate and distinct from the UK Bribery Act, and is seemingly more than willing to exercise its enforcement power. The FSA wrote that firms are "under a separate, regulatory obligation to identify and assess corruption risk" and to institute adequate policies and procedures, adding that the FSA "can take regulatory action against firms who fail to adequately address corruption risk…." The FSA warned that it does "not need to find evidence of corruption to take action against a firm."

Explaining that, "the scope of the Bribery Act is different from [the FSA's] rules and Principles," the FSA provided a guide to its expectations in a publication available online, "Financial Crime: A Guide for Firms." The Guide for Firms is divided into two parts. Part 1, "A Firm's Guide to Preventing Financial Crime," consists of eight chapters, and includes guidance on topics such as data security and terrorist financing. Part 2 is the "Financial Crime Thematic Review," a more detailed analysis with eleven chapters covering topics ranging from anti-money laundering laws to mortgage fraud against lenders.

Part 1 contains a chapter titled "Combating Bribery and Corruption," which begins by declaring that the chapter is relevant to all firms subject to the FSA's rules. It contains examples of good and poor practices in the areas of governance, risk assessment, policies and procedures, and in dealing with third parties. For example, in the risk assessment category, the FSA suggests that firms review the remuneration structures of its staff to understand whether those structures may increase the risk of bribery and corruption, and states that "good practice" in risk assessment includes continually evaluating risk "in all jurisdictions where the firm operates and across all business channels." In contrast, poor practices in risk assessment include having compliance departments that are ill equipped to identify and assess risks, and misclassifying a high-risk jurisdiction as a low-risk jurisdiction to avoid harm to the business. The chapter also contains a case study that summarizes the FSA's January 2009 enforcement actions against Aon Limited (fined £5.25 million). More recently, in July 2011, the FSA fined Willis Limited £6.9 million for failures in their anti-bribery controls and systems.

Part 2 of the Guide for Firms contains a thematic review chapter that is also, despite appearances, highly relevant to all firms. Although the thematic review entitled "Anti-Bribery and Corruption in Commercial Insurance Broking" ostensibly focuses on commercial insurance brokers, the FSA pointedly states that "the findings are relevant in other sectors." A perusal of the chapter illustrates why the advice it contains is pertinent to all companies, not only insurance brokers.

While the topical examples of "good practice" and "poor practice" are in some cases highly similar to those in the general chapter on "Combating Bribery and Corruption" in Part 1, the Part 2 chapter is relevant and instructive to all firms because it is more detailed. It addresses good and poor practices in additional categories such as payment controls, staff recruiting and vetting, training and awareness, risks arising from remuneration structures, incident reporting, and the roles of compliance and internal audits. After its survey of 17 insurance brokerage firms—but writing to an audience of all companies under FSA jurisdiction—the FSA concluded that "many firms' approach towards high-risk business was not of an acceptable standard and that there was a risk that firms are not . . . able to demonstrate that adequate procedures [were] in place to prevent bribery from occurring." The FSA also "found that there was a general failure to implement a risk-based approach to anti-bribery and corruption and very weak due diligence and monitoring of third-party relationships and payments."

Although much of the attention forced on the U.K. has rightfully been geared towards the Bribery Act and the role of the SFO in enforcing that Act, it is clear with the FSA's pronouncements—and its two enforcement proceedings to date—that it is willing to strike out on its own in pursuing companies aggressively for failing to have in place adequate procedures and controls to limit corrupt activities.

2011 OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises (the "Guidelines") are a multilaterally agreed set of non-binding principles and standards for responsible business conduct promoted by the adhering governments to the OECD. The adhering governments include the 34 OECD members as well as Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania. The aim of the Guidelines is to "promote positive contributions by enterprises to economic, environmental and social progress worldwide." In this pursuit, the Guidelines lay out sets of corporate principles in areas including "Employment and Industrial Relations," "Environment," "Consumer Interests," "Combating Bribery," and "Taxation," among others.

The Guidelines include a mechanism—agencies established by adhering governments (known as "National Contact Points")—to aid in the promotion and implementation on the various principles of the Guidelines. Each adhering country is required to establish a National

Contact Point. Moreover, the Guidelines call on adhering countries to: (i) provide necessary human and financial resources to National Contact Points; (ii) enable National Contact Points to cooperate with each other; and (iii) enable National Contact Points to regularly communicate with the OECD Investment Committee, the OECD body responsible for overseeing the Guidelines.

On May 25, 2011, updated Guidelines were adopted by the adhering governments. The Guidelines have been in place since 1976, but the 2011 update represents the first since 2000 and includes several noteworthy changes including: (i) a chapter devoted to human rights responsibilities of companies; (ii) modifications to the chapter on Combating Bribery, Bribe Solicitation, and Extortion; and (iii) significant new responsibilities in due diligence and supply chain management.

- *Human Rights*

In a new chapter on human rights, the Guidelines call on enterprises to respect human rights in all countries in which they operate and formalize the commitment to respect human rights through written company policy. Moreover, the Guidelines encourage enterprises to conduct "human rights due diligence," by assessing actual and potential human rights impact of various business decisions and acting upon the results of that due diligence. The Guidelines encourage companies to integrate the human rights due diligence into a broader risk assessment and reiterate that this due diligence, like due diligence for third-party business partners, is an ongoing commitment.

- *Combating Bribery, Bribe Solicitation and Extortion*

The Guidelines chapter on combating bribery was updated from the 2000 version and now follows closely with the provisions of the OECD Convention on Combating Bribery. For instance, where the previous version of the Guidelines was silent on facilitation payments, the updated Guidelines were specifically modified to encourage enterprises to prohibit facilitation payments through internal controls and internal policy. In addition, the Guidelines instruct that enterprises should:

  - Not offer, promise or give any undue advantage to public officials and should not use third-party business partners to do the same;

  - Develop adequate internal controls and compliance programs—based on a risk assessment for each individual enterprise—to prevent and detect bribery. Such internal controls should include financial and accounting procedures and all controls and procedures must be regularly monitored and re-assessed as necessary;

  - Ensure proper due diligence systems are in place for the hiring and regular oversight of agents;

- o Enhance the transparency of the enterprise's efforts against corruption through actions such as making public commitments against paying bribes and publicly disclosing ethics and compliance programs;
- o Appropriately distribute company policies and ethics guides to promote employee awareness of company policies and internal controls; and
- o Not make illegal contributions to candidates for public office or to political parties.

- *Due Diligence and Supply Chain Management*

In a change from the previous iteration, the updated Guidelines not only call on enterprises to conduct risk assessments and due diligence with respect to business partners such as agents, but also encourage enterprises to conduct a similar exercise with respect to its suppliers. The Guidelines specifically instruct enterprises with large numbers of suppliers to assess the associated risks of each supplier and prioritize its due diligence of suppliers based on this assessment.

Moreover, in a significant move from the previous version, the updated Guidelines explain that the responsibility of the enterprise to prevent and mitigate "adverse impacts" applies not only to the actions of the enterprise, but also to all activities in the supply chain. Thus, the Guidelines make enterprises responsible for preventing and mitigating adverse impacts caused by the various actors in the supply chain. Accordingly, the Guidelines require that a company use its leverage to prevent actors in the supply chain from violating the Guidelines' principles. Recognizing the practical limitations on the ability of companies to always affect the actions of their direct or indirect suppliers (or even become aware of those actions), the Guidelines encourage companies to influence suppliers through contractual provisions and arrangements (such as pre-qualification requirements).

While observance of the Guidelines by enterprises is voluntary, many of the matters covered by the Guidelines are also regulated by various domestic and international laws.

Transparency International Progress Report

On May 23, 2011, Transparency International ("TI") released its 2011 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 parties, and efforts under it are an important bellwether of the global investigatory and enforcement environment.

TI classifies seven countries—Denmark, Germany, Italy, Norway, Switzerland, the 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: Argentina, Belgium, Finland, France, Japan, the Netherlands, South Korea, Spain, and Sweden. The Progress Report criticized 21 other countries for having little or no enforcement. Included in this group is one G8 member, Canada. Transparency International does not have a chapter in Iceland and thus it was not included in the Progress Report findings.

The major finding of the 2011 Progress Report was that there was no progress in 2011 in the number of countries with active enforcement or with moderate enforcement. Whereas the number of countries considered "active enforcers" increased from four to seven in 2010, 2011 saw no additions to this group. According to the Report, the lack of progress raises concerns that the OECD Convention may be losing momentum. With little to no enforcement in 21 of the 38 participating countries, the Report found that potential backsliding by enforcing governments is a real possibility.

The Progress Report indicates that 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 notes that action will have to be taken by the OECD Ministerial Council, Secretary-General, and government leaders and CEOs from countries with active enforcement. The Progress Report lays out a 12-month action plan for the OECD Ministerial Council to strengthen enforcement of the OECD Convention. This action plan involves:

- Preparation by governments with lagging enforcement of plans to strengthen enforcement, including timetables for such action;
- A meeting between the OECD Secretary-General and the Chairman of the Working Group on Bribery and top leaders of the countries lacking enforcement to review the plans for strengthening enforcement;
- A review of the status of foreign bribery enforcement at the May 2012 OECD Ministerial Council; and
- Publication by the Working Group on Bribery of a list of governments with lagging enforcement to alert companies that a higher level of due diligence is required to do business in those countries.

In addition to assessing enforcement, the Progress Report made country-specific findings on the two biggest impediments to a successful anti-corruption effort: inadequacies in legal framework and inadequacies in enforcement system. TI identified twenty-six countries with legal inadequacies (down from 29 in the 2010 Progress Report). Among the legal inadequacies were: (i) insufficient definition of foreign bribery (eight countries), (ii) jurisdictional limitations (eight countries), (iii) lack of corporate criminal liability (12 countries), (iv) inadequate sanctions (19 countries), and (v) inadequate statutes of limitations (10 countries). TI identified 32 countries as having inadequate enforcement systems including: (i) inadequate resources (19 countries), (ii) decentralized or uncoordinated enforcement (10 countries), (iii) inadequate whistleblower and complaint systems (23 countries), (iv) inadequate accounting and auditing standards (six countries), and (v) lack of awareness-raising (17 countries).

Finally, TI took particular note of how members were treating activities by subsidiaries, agents and other intermediaries in foreign countries. According to the Progress Report, 15 countries (Argentina, Australia, Belgium, Bulgaria, Chile, France, Hungary, Ireland, Japan, Mexico, Poland, South Africa, Sweden, Switzerland, and Turkey) continue to have inadequate laws to hold parent companies responsible for bribery in foreign countries by subsidiaries, agents, and other intermediaries.

Russian Anti-Corruption Legislation

By itself and in collaboration with the OECD Working Group on Bribery, Russia has steadily improved and strengthened its legal framework against the bribery of foreign officials. 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 are 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, was silent on the issue of applicability to bribery of foreign officials. Its emphasis was 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 provided 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." U.S. Assistant Attorney General Lanny A. Breuer also 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."

On May 4, 2011, Russia enacted Federal Law No. 97-FZ, which took effect the same month. Federal Law No. 97-FZ increased the penalties for violating Russia's anti-bribery laws and amended existing laws to make them applicable to bribery of foreign government officials. As amended, Article 291 of the Criminal Code makes the punishment of a bribe to a public official, domestic or foreign, proportional to the amount of the bribe. For example, the fine for a bribe of between 25,000-150,000 rubles (approximately €600 to €3,600) ranges from twenty to forty times the amount of the bribe, or imprisonment of up to three years with a fine of fifteen times the bribe amount. If the bribe is more than 1 million rubles (€25,000), the fine is seventy to ninety times the amount of the bribe, or imprisonment of up to twelve years with a fine of seventy times the amount of the bribe.

Following Russia's criminalizing foreign bribery in May 2011 and the signing of Russia's Accession to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in February 2012, the OECD invited Russia to join the Working Group on Bribery and become a party to the OECD Anti-Bribery Convention. As part of the accession to the Convention, Russia's foreign bribery laws must undergo three phases of OECD peer review prior to acceptance. In March 2012, OECD published its Phase 1 report on Russia's implementation of the OECD Anti-Bribery Convention. OECD noted several areas where the Russian Federation may strengthen its laws to better comply with the Convention. The Phase 1 Report indicated that those areas highlighted for improvement in Phase 1 will receive further analysis during the Phase 2 consultation. For example, OECD recommended that Russia criminalize the offering or promising of a bribe, in addition to the actual payment of a bribe, under the anti-bribery laws. Russia currently criminalizes offers or promises to bribe under its attempt laws. The OECD also indicated that Russia's anti-bribery laws should be revised to more clearly cover payments to intermediaries when bribes are attempted and not merely completed.

On April 17, 2012, Russia became the OECD Anti-Bribery Convention's 39th signatory thereby fulfilling one of the conditions for joining the OECD.

Developments in China

Companies operating in China face heightened anti-bribery risks, not least of all because of the predominance of state-owned and quasi 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. On May 1, 2011, China joined 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 came into effect May 1, 2011, 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 gives 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. Importantly, there are no affirmative exceptions, exemptions, or defenses to the new law.

The amendments also bring China closer to compliance with the OECD Anti-Bribery Convention. China now remains the most prominent economy to have not signed the Convention.

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 and high-ranking officials and executives at state-run companies as well. For example, Zhang Chunjiang, the former vice chairman of China Mobile, the world's largest mobile phone operator, was charged in July 2011 with allegedly accepting more than $1.15 million in bribes while working at a series of state-run telecom companies from 1994 and 2009. One month later, Li Hua, the former chairman and general manager of the Sichuan branch of China Mobile, was convicted of accepting more than $2.5 million in bribes. Li apparently returned the bribes to the unnamed local companies from which he accepted them. For both executives, the death sentence could be commuted to life in prison if they demonstrate good behavior.

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 from 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.

Foreign Investigations of Note

Munir Patel

On October 14, 2011, Munir Yakub Patel, a former court clerk at the Redbridge Magistrates' Court in London, became the first individual to be convicted under the U.K. Bribery Act of 2010. The U.K. Bribery Act entered into force on July 1, 2011 — the conduct that lead to Patel's indictment occurred shortly afterwards in August 2011.

The Patel case was brought by the Crown Prosecution Service ("CPS"), which has the authority to bring cases under the Bribery Act and which investigates, charges, and presents criminal cases investigated by the police in England and Wales. Because of the simplicity of the case and the small value, it was not prosecuted by the Serious Fraud Office ("SFO"), which focuses on cases that exceed £1M in value or that are significantly complex.

Jayraj Singh, a U.K. motorist, received a speeding ticket and called the Magistrates' Court with questions regarding his summons. It is reported that, shortly after Singh contacted the court, Patel phoned Singh and told the him that he (Singh) could pay £500 to make the situation "go away" or that he should expect to have penalty points added to his driving record and to pay a hefty fine. Patel allegedly sent text messages to Singh to warn him that his insurance would go up if he were convicted of a moving violation. In August 2011, Patel solicited and received a bribe — he promised to use his access to the Magistrates' Court system to tamper with the official databases on behalf of Singh, in exchange for a payment of £500. The transaction that led to his conviction required that he prevent a traffic penalty from being entered into a court database.

Instead of paying the solicited bribe, Singh contacted *The Sun*, a popular British tabloid, which developed the idea to catch Patel's solicitation and acceptance of a bribe on film. According to *The Sun*'s exclusive article on its sting operation, Patel met with an undercover investigator who posed as Singh. *The Sun* arranged for the exchange between Patel and the investigator to be recorded by a hidden video camera within the vehicle where the two arranged to meet. *The Sun* also managed to take photographs of Patel leaving the rendezvous with the bribe money in his hand. Ironically, *The Sun* acknowledges that, technically, it had itself violated the Bribery Act by setting up and following through on the sting operation. In making such an acknowledgement, *The Sun* argued that there should exist a public interest defense to the Bribery Act although the Justice Secretary instead stated that prosecutors would simply dismiss such technical breaches as not being within the public interest to prosecute.

Patel pled guilty to two counts of the indictment brought against him. Under Count 1, Patel pled guilty to the violation of Section 2 of the Bribery Act, which declares that a person is guilty of an offence if that person "requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly." For violation of the Bribery Act, Patel could have been sentenced to imprisonment for a maximum of 10 years, or could have been fined, or both. As currently written, the Act does not set an upper limit on the amount of the fine.

Under Count 2, Patel pled guilty to the charges for misconduct in a public office, a common law offense. A charge for misconduct in public office applies where a public officer, acting in an official capacity, willfully neglects to perform that officer's duty and/or willfully misconducts themselves, such that it rises to the level of an abuse of the public's trust in that officer, without reasonable excuse or justification. For the common law violation related to misconduct in a public office, Patel faced a maximum sentence of life imprisonment.

Though Patel admitted to and was convicted of only one count of bribery, CPS believes that he earned approximately £20,000 and "helped" approximately 53 offenders. During the trial, it is reported that the court heard that £53,814 in cash was deposited into Patel's bank account while £42,383 was transferred into the same account. However, Patel's salary from the courts was just £17,978 per year, and no suitable explanation was provided for the large sums of money in his account.

While much of the detail of Patel's case has not been released publicly, there were reports that Patel provided drivers with blank invoices from a garage to use to suggest that their vehicles were at the garage at the time of their alleged offenses. Investigators found blank garage receipts within Patel's possession. Related to this discovery, the CPS brought seven charges for possession of false garage receipts for use in fraud; however, these charges were ordered to "lie on file." (In the U.K., if a defendant pleads not guilty to certain charges, those charges may "lie on file" and be marked "not to be proceeded with without the leave of this Court or the Court of Appeal.'" In rare circumstances, these charges may be reactivated.)

Regarding Patel's guilty plea, Gaon Hart, Senior Crown Advocate for the CPS Special Crime and Counter Terrorism Division, stated,

> This prosecution is the first of its kind under the Bribery Act 2010 which has provided a significant weapon in the armoury of prosecutors that enables us to focus on the bribery element rather than general misconduct behaviour. We will continue to target those who act corruptly purely for personal gain and tailor the charge to reflect their wrong-doing.

On November 18, 2011, Patel was sentenced to three years in prison for the Count 1 bribery offense and six years in prison for the Count 2 misconduct in a public office charges. The two prison sentences are to be served concurrently. Additionally, Patel was also order to pay back £7,500, an amount that police believe is a mere fraction of the bribes that he received. Patel's sentence was reduced based on several factors, including that he plead guilty "at the earliest reasonable opportunity", that he was young (22 years old at the time of sentencing) and that he was even younger when he began his criminal conduct; and finally, that he had previously had a good character. Judge Alistair McCreath weighed these factors with the nature and seriousness of Patel's offenses and the length and incidence rate of Patel's activities to determine the sentence.

During sentencing, Judge McCreath stated, "[i]t hardly needs saying that these were very serious offences. They involved a very substantial breach of trust. Your position as a court clerk had at its heart a duty to uphold and protect the integrity of the criminal justice process. What you did was to undermine it in a fundamental way." Judge McCreath continued to explain the wide-ranging harm that has resulted from Patel's actions—harms ranging from the damage to the integrity of the criminal justice process and the public's trust in the integrity of that system, to the bad drivers who were able to pay their way out of the "wake-up" call that the penalty system provides and auto insurers that have been carrying higher risks at an inappropriate cost due to their lack of information on driver behavior as recorded by the courts.

As to Patel's culpability, Judge McCreath remarked that Patel was the "prime mover" or the mastermind and main actor in his scheme. He stated, "[t]hese were not instances in which you were approached and corrupted by others. On the contrary, you sought out people and suggested to them that for payment you could help them out of their difficulties." Just before announcing Patel's sentence, Judge McCreath stated,

> It is important that those who are tempted to behave in this way understand that there will be serious consequences. Sentences for this sort of offence must act to deter offending of this kind. They must also reflect the determination of the courts to protect the process from corrupt practices and to maintain public confidence in the justice system.

Although the Patel case does not involve the types of commercial activity typically seen in anti-corruption enforcement actions, it is nonetheless significant in illustrating the Bribery Act's applicability in the domestic context.

News Corporation

Perhaps the most widely discussed corruption story of 2011 and 2012 is the News Corporation ("News Corp") phone hacking scandal. News Corp is an international media corporation—one of the world's largest in terms of revenue—based in New York City. Although News Corp is publicly traded on the U.S. and Australian stock exchanges, its voting stock is controlled primarily by Chairman and CEO Rupert Murdoch and his family. News Corp may be liable under the FCPA for the actions of employees at several of its tabloid subsidiaries. These employees appear to have bribed U.K. police officers and military officials to get access to newsworthy information before their competitors.

Although the News Corp scandal has not yet resulted in any FCPA-related charges, it presents an excellent example of how various forms of employee misconduct can potentially expose a parent organization—and its management—to substantial criminal and civil liability under the FCPA.

- *News of the World Phone Hacking Scandal*

The News Corp scandal began at the now-defunct U.K. tabloid *News of the World* ("NOTW"). In August 2006, U.K. detectives arrested NOTW editor Clive Goodman and private investigator/freelance researcher Glenn Mulcaire on suspicions that they had hacked mobile phones owned by or related to members of the U.K. royal family. These suspicions emerged after NOTW broke a story on a knee injury suffered by Prince William that appeared to directly quote information discussed in a private voicemail message. Goodman and Mulcaire eventually admitted to hacking into hundreds of messages on mobile phones belonging to aides of the Royal family and pleaded guilty to conspiracy to intercept communications.[8] In January 2007, Goodman and Mulcaire were sentenced to four months and six months in prison, respectively.

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8 Mulcaire, who was paid over £100,000 a year by NOTW to conduct his "research," also pleaded guilty to five charges of unlawful interception of communications for accessing voicemails belonging to supermodel Elle Macpherson, famed publicist Max Clifford, football agent Skylet Andrew, the Chairman of the Professional Footballers' Association Gordon Taylor, and Liberal Democrat MP Simon Hughes. News Corp, under James Murdoch's management, later paid Gordon Taylor £700,000 in connection with the phone hacking.

Andy Coulson, then-editor of NOTW, took "ultimate responsibility" for the incident and resigned shortly after Goodman and Mulcaire were sentenced.

News International Limited ("News International"), which owned NOTW on behalf of News Corp., conducted an internal review of NOTW. According to News International, the investigation found "no evidence" that Coulson or other NOTW executives were aware of Goodman's and Mulcaire's misconduct. By June 2009, however, reports had emerged that senior NOTW staff were aware that NOTW reporters had illegally accessed the mobile phones of celebrities and politicians from 2003 through 2007. In February 2010, the U.K. House of Commons Culture, Media, And Sports Committee issued a report that rejected News International's initial review, stating that "evidence we have seen makes it inconceivable that no-one else at the *News of the World*, bar Clive Goodman, knew about the phone-hacking."

The U.K. Metropolitan Police Force (known as "Scotland Yard") was also criticized for its response to allegations of NOTW's phone hacking. In September 2010, the *New York Times* published an exposé on the News Corp scandal that suggested Scotland Yard was unwilling to investigate beyond the cases of Goodman and Mulcaire. The *New York Times* suggested that Scotland Yard's reluctance to investigate stemmed, in part, from a "close relationship" with NOTW.

In January 2011, in response to allegations that NOTW staff was continuing to hack cell phones, Scotland Yard opened a second investigation into NOTW.[9] By April 5, 2011, Ian Edmondson (former NOTW editor), Neville Thurlbeck (NOTW Chief Reporter), and James Weatherup (senior NOTW journalist) were arrested on suspicion of conspiring to intercept mobile phone messages. Three days later, News International issued "an unreserved apology and an admission of liability" for illegally accessing people's cell phones. The statement came as News International agreed to resolve some of the 24 civil cases then filed against it, which it hoped to resolve for less than £20 million in civil settlements. News International also acknowledged that its "previous inquiries failed to uncover important evidence" and "were not sufficiently robust." News International continued to insist that its upper management was unaware of the illegal actions of its reporters.

NOTW printed its last edition on July 10, 2011, and was subsequently replaced by a Sunday edition of another News Corp tabloid, *The Sun*. As of May 17, 2012, Scotland Yard has arrested 29 people in relation to the phone hacking scandal, including an employee at the British Ministry of Defense, a member of the British military, and current and former U.K. police officers.

9 This investigation continued to expand, as NOTW's cell phone hacking was alleged to include: the cell phones of numerous celebrities, politicians, and public officials; members of the royal family; two 10-year old murder victims; victims of the 2005 "7/7" bombings; the relatives of British soldiers killed in Iraq and Afghanistan; and "9/11" victims.

- *Alleged Bribery of U.K. Police Officers*

Shortly after News International issued its apology, information and media reports emerged suggesting that members of the News Corp organization may have bribed U.K. police officers and members of the U.K. military to obtain "scoops" on news stories. *The Guardian* reported that documents showed NOTW employees paid more than £100,000 in cash to several U.K. Metropolitan Police officers in 2003 alone. In July 2011, U.S. Senator Jay Rockefeller described News Corp's behavior as an "offensive and a serious breach of journalistic ethics" that "raise[d] serious questions about whether [News Corp] has broken US law." Senator Rockefeller joined fellows Senators Barbara Boxer and Frank Lautenberg in personally calling upon Attorney General Eric Holder and SEC Chairman Mary Shapiro to investigate News Corp. Since then, an FBI probe, launched initially over fears that NOTW and News International employees may have hacked the voicemails of 9/11 victims, has expanded its focus to include bribery allegations. The DOJ and the SEC have also reportedly begun investigating News Corp for potential FCPA violations. These investigations are operating separately from—though likely in cooperation with—the U.K.'s "Operation Elveden" inquiry into allegations of inappropriate payments to its police officers.

The alleged bribery of U.K. police officers, if true, could constitute violations of the FCPA as News Corp is listed on the U.S. NASDAQ stock exchange. U.K. police officers and members of the U.K. military would be considered "foreign officials" under the FCPA, and enforcement agencies would likely interpret a bribe paid to obtain marketable information prior to its public release as an effort to obtain or retain business as defined by the FCPA. As discussed, the fact that the potential violations occurred outside of the United States and through a subsidiary does not prevent the DOJ and the SEC's jurisdictional reach; News Corp's own FCPA policies cautions that, "[b]ecause News Corporation is a U.S. corporation, the FCPA may apply to all Company employees everywhere in the world, regardless of their nationality or where they reside or do business."

If the allegations of bribery turn out to be true, News Corp could also face liability for violations of the FCPA's books and records provisions if it failed to properly record the payments its subsidiary employees made to U.K. officials. In addition, News Corp may be liable for violating its internal controls obligations even if the DOJ and the SEC are unable to prove that the alleged bribery occurred; as SEC Director of Enforcement Robert Khuzami pointed out in April 2012, U.S. prosecutors have charged companies for compliance failures "even where there were no underlying violations."

Thus far, the DOJ and the SEC have not pressed charges against News Corp or its employees. U.S. enforcement agencies may ultimately defer to their U.K. counterparts, which may press charges against News Corp and its executives for domestic bribery violations. Regardless, the fallout of the News Corp scandal is a stark reminder of how the actions of a foreign subsidiary can create liability under the FCPA for their U.S.-based parent corporations.

EADS

In May 2011, it was reported that the U.K.'s Serious Fraud Office ("SFO") opened an investigation into allegations that a European Aeronautic Defence and Space Company N.V. ("EADS") subsidiary had been involved in illegal practices in Saudi Arabia. The entity involved in the alleged wrongdoing—GPT Special Project Management ("GPT")—is based in Riyadh and is owned by U.K.-based Paradigm Services Ltd., which is owned by another EADS subsidiary—a company called Astrium.

Allegations of impropriety were brought by a former employee of GPT, Lieutenant Colonel Ian Foxley. According to the U.K. newspaper *The Telegraph*, Foxley alleged that he was fired after raising concerns over potential improper payments and gifts to Saudi government officials that included—Foxley is said to have reported that luxury cars, jewelry and briefcases full of cash, were given through the use of an intermediary. These gifts were allegedly given in connection with GPT's £2 billion communications contract to upgrade the satellite and intranet systems of the Saudi National Guard, the 125,000-strong force that protects the Saudi royal family.

A key element of Foxley's evidence is the allegation that £11.5 million was sent to two offshore companies in the Cayman Islands and routed to a Swiss bank account. It has been reported that the SFO was able to trace a Swiss bank account that may be linked to a member of the Saudi royal family. Since the time that Foxley's allegations became public, a second whistleblower has alleged that he notified EADS of "possible illegal transactions" and was told to "keep quiet." GPT allegedly also used subcontractors to provide the payments. EADS has not identified the subcontractor(s) but reported that it has terminated the relevant subcontracts. An EADS spokesman stated, "[t]his termination has led recently to an unquantified claim from the subcontractor group for monetary damages." EADS is reportedly carrying out an internal investigation into the allegations and will report its findings to the SFO.

The SFO has thus far declined to comment or make a public statement about the investigation for confidentiality reasons. The U.K. Ministry of Defence ("MoD"), which helped to coordinate the £2 billion communications contract, is assisting the SFO with the investigation. A MoD spokesman has gone on record as stating, "[w]e take such allegations very seriously and we are looking at them carefully. It would be inappropriate to comment further while this process takes place." It was reported that representatives from the British Foreign Office have had a number of talks with Saudi officials regarding the GPT allegations.

In reports surrounding the EADS investigation, there is frequent mention of the diplomatic theatre surrounding the 2006 BAE investigation into the payment of bribes to a Saudi official to obtain a £40 billion arms deal. The BAE investigation was halted by former Attorney General Lord Goldsmith after he was pressured by then Prime Minister Tony Blair. After being challenged in the courts, two years later, the British High Court ruled that ending the investigation had been unlawful.

In October 2011, *The Telegraph* reported that the SFO's investigation into allegations of bribery by EADS was being delayed while the U.K. Government considered the political implications of moving forward with the probe. By the end of 2011, the preliminary inquiries into the matter were completed; however, Dominic Grieve, the Attorney General, was to make the decision as to whether to proceed with a full criminal investigation of the bribery and corruption case. Thus far, Grieve has not blocked the investigation.

It was further reported in October 2011 that the SEC was investigating whether the payments made by the Cayman Islands company were made through a New York bank, which could bring the matter within the jurisdiction of U.S. authorities.

FIFA

The international governing body of soccer, Fédération Internationale de Football Association ("FIFA"), is currently dealing with allegations of corruption in relation to the organization of both the 2014 World Cup in Brazil and the 2022 World Cup in Qatar. Ricardo Teixeira, head of the 2014 World Cup Organising Committee, president of the Brazilian Football Confederation and member of the FIFA Executive Committee, resigned in March 2012 from all positions in light of investigations targeting him on suspicion of corruption. Teixeira and another individual were reportedly paid $9.5 million by ISL, a marketing company, in the 1990's to secure lucrative contracts for television rights. Teixeira's resignation occurred shortly before the publication of a settlement between FIFA and ISL before the court of the Swiss Canton of Zug, in connection with the alleged bribery affair.

The Teixeira affair drew the attention of certain political organizations, as evidenced by a report drafted by the Parliamentary Assembly of the Council of Europe entitled "Good governance and ethics in sport" published on April 25, 2012. The report suggested that it was "difficult to imagine" that FIFA's leadership would not have known of significant sums paid to certain FIFA officials in the context of the ISL contracts. The report also criticized FIFA for what it characterized as its extraordinary failure to take extraordinary steps, internally or via the courts, to enable itself to obtain reparation of the sums in question.

The 2022 World Cup in Qatar is also subject to controversy, as two significant representatives of the Confederation of African football have been accused of accepting bribes of $1.5 million each to vote for Qatar during the World Cup 2022 bidding process. FIFA also banned two other officials, one from Nigeria and the other from Tahiti, after undercover reporters exposed their offering to sell their support in the World Cup 2022 bidding process.

Aside from the 2014 and 2022 World Cup corruption affairs, FIFA has been embroiled in a variety of other scandals. For instance, the reelection of Joseph "Sepp" Blatter as president of FIFA in June 2011 sparked a wave of criticism and allegations. Mohammed Bin Hammam, Blatter's sole opponent, was barred from running for office in May 2011 and banned for life from FIFA activities in July 2011 after the FIFA ethics committee found him guilty of bribing presidential election voters. Jack Warner, a FIFA vice president and president of the CONCACAF confederation (which encompasses North and Central America, and the Caribbean) also stepped down in June 2011 from his duties after FIFA initiated proceedings against Warner and Bin Hammam concerning corruption and bribery charges. In addition, Warner was accused by the England Football Association of asking for compensation in return for votes in favor of England's unsuccessful 2018 World Cup bid. As a consequence of Warner's resignation, the FIFA Ethics Committee discontinued the internal proceedings it had launched against him.

Article 64 of the FIFA Statutes prohibits the recourse to ordinary courts of law to resolve disputes related to members of the soccer organization, stipulating instead that all matters should be submitted to arbitration, mainly before the Court of Arbitration for Sport (CAS). FIFA also has its own internal dispute resolution mechanisms, such as the ethics committee, to conduct investigations and sanction individuals guilty of violating FIFA rules. To date, no national law enforcement agency has taken legal actions against any of the previously mentioned individuals.

After several months of turmoil, FIFA implemented a new Independent Governance Committee to address its corruption issues. The head of this new committee, Mark Pieth, is chairperson of the OECD Working Group on Bribery and will advise FIFA on the reorganization of FIFA's governance. On September 19, 2011, Pieth submitted his first report to FIFA and recommended (i) the implementation of term limits for top FIFA and continental confederation officials, (ii) the establishment of due diligence procedures, and (iii) the introduction of a conflict of interest regulation capable of removing individuals from office. In March 2012, days before publication of his second report to FIFA, Pieth declared that the new report would be firm in its analysis, pointing out that, "They [FIFA] have rules, they have sanctionable offenses. They have just not applied them." He also stressed that, "They [FIFA] have a horrible reputation. They should know that." During FIFA's executive committee on March 30, 2012, Pieth recommended that the ethics committee be divided into two chambers and that it be provided with adequate resources, including the ability to prepare its own budget, in order to initiate and conduct investigations independently. The report also suggested increasing the scope of FIFA's audit committee to include compliance, and the creation of a best practices compliance program that would encompass issues such as conflicts of interest and gifts and hospitality. FIFA president Sepp Blatter hailed Pieth's report as a "historic day" in FIFA's ongoing reform efforts. However, several analysts and experts described Blatter's stance as unconvincing because the executive committee avoided several key issues, such as revising the ethics code and requiring greater transparency in FIFA's commercial deals, which are worth $1 billion annually.

On April 26, 2012, FIFA published a Draft Code of Conduct, which includes eleven core principles "for behavior and conduct of the FIFA family." Core principles include, among other elements, the "avoidance of conflicts of interest" as well as "zero tolerance of bribery and corruption." The code is meant to prevent any methods or practices that might jeopardize the integrity of matches or competitions or give rise to abuse of the game of soccer. At its May 2012 Congress in Budapest, Hungary, FIFA followed Pieth's recommendations to create an audit and compliance committee and to divide the ethics committee into two chambers. The remaining reforms suggested in the March 2012 report are scheduled for consideration at the 2013 FIFA Congress in Mauritius.

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 U.K.'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 Bribery Act, 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 U.K. 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 then-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, 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. On July 27, 2011, the AFP formally charged Securency and seven former staff in Melbourne Magistrates Court in connection with alleged bribes paid to officials in Indonesia, Malaysia, and Vietnam. Throughout the second half of 2011, three additional former Securency executive were charged. Each defendant was charged with conspiracy to bribe a foreign public official, a charge carrying a maximum penalty of 10 years in prison and a $1.1 million fine.

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 the Reserve Bank of Australia (the "RBA") and the British firm Innovia Films. The 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.

In March 2012, following a review of materials provided by the AFP, the Australian Securities and Investments Commission ("ASIC"), the government body charged with corporate regulation, announced that it would not conduct a formal investigation into whether Securency and/or its directors violated the Corporations Act or any other securities laws in connection with the alleged bribery.

Victor Dahdaleh and Bruce Allan Hall

On April 6, 2010, the *Wall Street Journal* reported that U.S. and U.K. authorities were investigating the activities of Victor Dahdaleh, a Canadian citizen suspected of bribing officials at Bahrain's state-owned steel company, Aluminium Bahrain ("Alba"), on behalf of Alcoa (formerly "Aluminum Company of America"). Dahdaleh lives in London and is the owner and chairman of the Dadco Group, a privately owned investment, manufacturing, and trading group operating in Europe, North America, Africa, the Middle East, and Australia. The *Wall Street Journal* indicated that prosecutors obtained financial records they believe show that the Dadco Group made millions of dollars in payments to the personal bank account of a former Alba senior executive between 2001 and 2005.

On October 24, 2011, Dahdaleh voluntarily traveled to a U.K. police station to be arrested by the SFO for allegedly making illicit payments to Alba officials on behalf of Alcoa. Dahdaleh's voluntary surrender has caused speculation that he may have "chosen" to face charges in the U.K. rather than the U.S. in order to leverage his strong presence in the U.K. business community and British high society. The SFO alleged that Dahdaleh made these payments to guarantee shipments of alumina from Bahrain to Australia and as part of a scheme to overcharge Alba by hundreds of millions of dollars for the purchase of alumina. Additionally, the SFO accused Dahdaleh of making payments in connection with contracts to supply goods and services to Alba. The SFO charged Dahdaleh with violations of corruption under the Prevention of Corruption Act, conspiracy to corrupt contrary to the Criminal Law Act and the Prevention of Corruption Act, and acquiring and transferring criminal property contrary to the Proceeds of Crime Act. When the SFO announced Dahdaleh's arrest, it indicated that the SFO investigation into Dahdaleh's activities in July 2009—much earlier than was reported in the April 2010 *Wall Street Journal* article—and noted that it has investigated Dahdaleh in liaison with the DOJ and Swiss authorities. The DOJ and the SEC have not indicated whether they will bring criminal or civil enforcement action against Alcoa or Dahdaleh.

Similarly, and in the same month, Australian authorities arrested former Alba CEO Bruce Allan Hall in Sydney on corruption charges related to the U.K. investigation. Hall was extradited from Australia to the U.K. and charged on February 15, 2012 with conspiring to violate and violating the Prevention of Corruption Act and of committing money laundering in violation of the Proceeds of Crime Act. According to the SFO, Hall received more than $5 million in bribes while working at Alba from 1998 through 2006.

Both Hall and Dahdaleh are expected to contest the charges. Dahdaleh, for example, has issued statements through his lawyer that he "believes the investigation into his affairs was flawed and that he has done absolutely nothing wrong," noting that he "will be vigorously contesting these charges at every stage, confident in clearing his good name." Dahdaleh and Hall are scheduled for trial in 2013.

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 Programme, 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]."

On January 12, 2012, the SFO took action against Mabey Engineering (Holdings) Ltd. ("Mabey Engineering"), the parent company of Mabey & Johnson. The U.K. High Court issued an Order that Mabey Engineering pay £131,201 under Part 5 of the U.K. Proceeds of Crime Act 2002 in recognition of sums it received through share dividends derived from contracts won through unlawful conduct by Mabey & Johnson and former officers Mabey, Forsyth, and Gledhill. The Director of the SFO noted that the SFO initiated the civil action to recover the proceeds of the Mabey & Johnson-related crimes even though "[i]n this particular case…[Mabey Engineering] was totally unaware of any inappropriate behavior." The Director stated that this reinforced the SFO's position that investors are obligated to satisfy themselves with the business practices of the companies they invest in.

The Director acknowledged the Mabey Group's cooperation throughout the SFO's enforcement action and stated that the SFO had been "very impressed by [the Mabey Group's] attitude and the clear commitment of [its] new management to ethical trading." The SFO Director added that "it appears that in many ways the Mabey Group is now leading the way in implementing controls and procedures to ensure that it is able to trade ethically in high-risk jurisdictions." According to the SFO, the January 2012 civil action represents the "final piece in an exemplary model of corporate self-reporting and cooperative resolution."

- *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 that Hibbert later approved. The contract was valued at £13.9 million but later increased in value to £14.9 million, 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

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. 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 required the SEC to adopt final implementing regulations within 270 calendar days of Dodd-Frank's enactment. On November 3, 2010, the SEC proposed rules for the expanded whistleblower program. The proposed rules generated substantial public comment by business associations, companies, interest groups, and individuals. After evaluating the comments on the proposed rules, on May 25, 2011, the SEC formally adopted final rules ("Rules").

As mandated by the Dodd-Frank Act, the 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.

- 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 Rules limit the aggregate award that multiple whistleblowers would receive to the same boundaries and the SEC will allocate the aggregate amount across several whistleblowers based on the same considerations used to determine the aggregate award.

Under the Rules, the SEC will 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, protect 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 will 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.

- *Protections Against Unintended Consequences*

When she announced the proposed rules in November 2010, SEC Chairman Mary Schapiro noted, "[w]ith the potential for substantial awards comes the possibility for unintended consequences." The 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 Rules demonstrate an attempt to limit these unintended consequences.

- *Preserve the Effectiveness of Internal Compliance Programs*

Chairman Schapiro, in announcing the proposed rules, emphasized the importance of effective internal controls and compliance programs, and aspects of the Rules are intended to incentivize whistleblowers to work within their employers' compliance programs. First, under the Rules a whistleblower is eligible for an award if the company informs the SEC about violations after the whistleblower reported the violation internally. Second, the Rules treat an employee as a whistleblower as of the date the employee reports the information internally, as long as the employee provides the same information to the SEC within 120 days. The idea, according to the SEC, is that employees will be able to report the information internally while at the same time preserving their "place in line" for a potentially recovery from the SEC. Finally, the Rules provide that a whistleblower's voluntary participation in an company's internal compliance reporting structure is a factor that can increase the amount of an award and that interference with internal compliance reporting is a factor that can decrease the amount.

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 Rules 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. This is specifically aimed at auditors, attorneys, employees with "legal, compliance, audit, supervisory, or governance responsibilities," and anyone who received the disclosed information from such persons. The Rules 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 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 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 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 Rules also enable whistleblowers to submit information anonymously through counsel.

- *Future Developments and Challenges*

Even though the final Rules have been adopted, they may still evolve in response to legal challenges. For example, persons denied whistleblower awards under the 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.

Pending DOJ Guidance

In November 2011, Assistant Attorney General Lanny A. Breuer announced, with little further detail, that the DOJ would be publishing new guidance on the FCPA's criminal and civil enforcement provisions. Since then, the DOJ has been largely silent about what the new guidance will look like, but has welcomed the views and concerns of the business community, particularly the U.S. Chamber of Commerce. In April 2011, Assistant Attorney General Breuer and SEC Director of Enforcement Robert Khuzami participated in a discussion with Commerce Department General Counsel Cameron Kerry, the U.S. Chamber Institute for Legal Reform (the "Chamber," an advocacy arm of the U.S. Chamber of Commerce), as well as leaders of various trade groups on the forthcoming guidance. Of course, it is unclear to what extent the DOJ will incorporate any of the concerns and suggestions of the Chamber. However, in anticipating what guidance the DOJ may provide to clarify the law, it is at least a useful starting point to evaluate what the business community finds unclear.

The U.S. Chamber of Commerce has been a prominent advocate for clarity in the FCPA. On October 27, 2010, the Chamber released "Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act." In it, the Chamber took the position that, as interpreted by enforcement agencies, the FCPA is often unclear what is and is not a violation. Furthermore, the Chamber argued that the FCPA fails to take into account the realities of companies doing business in countries with endemic corruption or in which many companies are state-owned. Accordingly, the Chamber proposed five major amendments to the FCPA: (i) add a compliance defense to protect companies from the actions of "rogue" employees; (ii) limit successor liability by, among other things, abolishing criminal successor liability regardless of the level of due diligence performed; (iii) add a willfulness requirement for corporate criminal liability; (iv) limit liability of parent company for acts of a subsidiary where the parent did not direct, authorize or know of the improper behavior; and (v) better define "foreign official" under the statute.

In addition, in February 2012, the Chamber, along with thirty-six business-focused organizations, sent a letter to Assistant Attorney General Breuer and to Director Khuzami providing formal suggestions for inclusion in the government's impending guidance. The Chamber's suggestions, discussed below, largely flow from their proposed 2010 amendments:

- *Definition of "Foreign Official"*: Categorizing the current interpretation of "foreign official" and "instrumentality" (as those terms are used in the FCPA) as "highly fact-dependent" and "discretionary," the Chamber suggested that the guidance should: (1) identify the percentage ownership or level of control by a foreign government that ordinarily will qualify a corporation as an "instrumentality"; (2) "clarify that, in order for a company to be considered an 'instrumentality,' it typically must perform governmental or quasi-governmental functions" as specified by the DOJ; and (3) identify any exceptions to the above-proposed clarifications.

- *Consideration of an Effective Compliance Program*: The Chamber suggested that the DOJ provide guidance on what is considered to be an effective compliance program and make transparent how the DOJ and the SEC weigh a company's voluntary disclosure of FCPA violations in their enforcement decisions. In its 2010 proposed amendments, the Chamber argued 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 argued 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.

- *Parent-Company Liability*: The Chamber requested a clarification on a parent corporation's liability for the acts of its foreign subsidiaries. The Chamber first highlighted the apparent differences in the way that the DOJ and the SEC have held parent companies liable for the activities of their foreign subsidiaries. According to the Chamber, the DOJ has taken the position that a parent corporation may be held liable for the acts of a foreign subsidiary only where the parent has authorized or otherwise controlled the improper activity. On the other hand, the Chamber indicated that the SEC has filed civil complaints against parents even when the parent was entirely ignorant of the activities of its subsidiary. Thus, the Chamber requested that the guidance confirm that both the DOJ and the SEC consider the FCPA's anti-bribery provisions to extend parent company liability only to circumstances where the parent company "authorized, directed or controlled the improper activity of its subsidiary."

- *Successor Liability*: The Chamber suggested that the DOJ and SEC make clear that they will not pursue an enforcement action against a successor company for pre-acquisition violations by the acquired company, particularly where the successor company has undertaken reasonable due diligence. Furthermore, the Chamber stated that the government should set standards for what diligence is "reasonable" and identify the rubric that will be used to make the determination that such diligence was adequate. The

Chamber requested that the rubric for post-acquisition due diligence be determined for circumstances where pre-acquisition due diligence could not be done or was impaired.

- *De Minimis Gifts*: The Chamber, specifically citing the U.K. Ministry of Justice Guidance on the same topic, called on the DOJ and SEC to provide a clear standard for *de minimis* gifts and hospitality and to address how common business interactions with foreign officials (such as inviting a foreign official to a sporting event, or inviting the official's spouse to a business dinner) will be treated by enforcement bodies.

- *Intent Requirement for Corporate Criminal Liability*: The Chamber suggested that the DOJ clarify its position on whether a company may be criminally sanctioned where the company had no direct knowledge—through a manager or other person of authority—of the FCPA bribery violations underlying the charges.

- *Non-prosecution Decisions*: The Chamber requested that the DOJ consider providing information about its decisions to close FCPA investigations without bringing an enforcement action, as such information could be useful to companies attempting to comply with the law.

Finally, the Chamber highlighted three other recurring issues regularly confronting compliance officials at businesses and requested that any guidance from the DOJ and SEC address those issues. First, the Chamber suggested that the guidance should outline recommended "best practices" and examples of "prophylactic measures" that the DOJ and SEC would expect in the case that a company's business partner was *related to* a foreign government official. Second, the Chamber requested that the government clarify the standards that govern corporate donations to charitable organizations where such organizations may have connections to foreign government and what level of due diligence is expected prior to making the donation. Third, the Chamber requested that the DOJ address how a U.S. company should consider apprentice programs and secondment arrangements where the company's employees work for the foreign customer.

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. 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.

Several corporations in the extractive industry have publicly opposed the SEC's Proposed Rules. Affected companies have expressed concern that the bill would place U.S. firms at a competitive disadvantage and noted that large companies already participate in the Extractive Industries Transparency Initiative, a voluntary-disclosure regime. In comments submitted to the SEC, Royal Dutch Shell argued that the disclosure requirements should only apply to material projects, noting that "if it were to adopt rules requiring disclosure for immaterial projects . . . our marginal costs for this additional disclosure, with the required changes to our financial systems, needed to gather, assure and disclose the proposed information, would be in the tens of millions of dollars." Shell additionally requested an exemption for those countries where disclosures would be prohibited by law. It noted that both China and Qatar, for example, prohibit the kind of disclosures required by Section 1504. Without such an exemption, Shell argued that the Rules would place billions of dollars at risk.

In May 2012, Oxfam America filed a lawsuit in the District of Massachusetts against the SEC alleging that its delay in issuing a Final Rule implementing Section 1504 was unlawful. Congress had set the deadline for the Final Rule at April 17, 2011, which the SEC has missed by more than a year. Several key members of Congress had previously urged the SEC to comply with the statutory deadline. The lawsuit is currently pending.

New York City Bar Association Report

The New York City Bar Association ("City Bar") is a voluntary association founded in 1870 in response to public concern over corruption among judges and lawyers in New York City.

Many of the country's most prominent lawyers have been members, including Elihu Root and Charles Evans Hughes. Today, the New York City Bar Association has over 23,000 members.

In December 2011, the City Bar released a report that recommended the reassessment of the FCPA, claiming that the government's aggressive anti-corruption enforcement placed U.S.-regulated companies at a competitive disadvantage. The report stressed that in 1977 when the FCPA was enacted, Congress was concerned with preventing corrupt U.S. companies from having a competitive edge over ethical companies. Foreign competition, on the other hand, "was not perceived as a meaningful threat in 1977." In today's environment of fierce international competition, FCPA enforcement has created added costs for U.S.-regulated companies in the form of FCPA related internal investigations as well as due diligence into target acquisitions. The report also notes that penalties for violations have increased dramatically: as of January 2007, the largest-ever FCPA-related fine was $28.5 million; as of April 2011, the tenth-largest fine was $70 million and five fines had exceeded $300 million.

The report identifies mergers and acquisitions as an area of business activity particularly effected by current FCPA enforcement activity. According to the report, "Companies that are subject to the FCPA—including all U.S. companies and non-U.S. companies that have equity securities listed on a U.S. exchange—have become increasingly wary of purchasing businesses that have not operated under the Act for fear of acquiring very costly liabilities. Similarly, companies that are not subject to the FCPA express substantial reservations about engaging in transactions that would bring them under the Act's jurisdiction, including listing their equity securities on a U.S. exchange through an IPO or capital raising transaction or by acquiring a U.S. company in a stock-for-stock merger or exchange offer."

The report applies modern game theory to conclude that the "zealous enforcement of the FCPA by the U.S." could increase corruption in certain overseas markets where compliance with the law becomes so costly that companies falling under the FCPA's jurisdiction pull out of the market altogether. The report suggests that aggressive enforcement by the U.S. provides other countries with an economic incentive to take a "lighter touch" to anti-corruption. According to the report, there should be a recognition that "in today's global economy, meaningful international alignment of the world's leading economic powers is a necessary condition for combating foreign bribery."

The report ultimately suggests that the government reduce the regulatory cost for companies covered by the FCPA by focusing on the prosecution of individuals as opposed to companies. The Committee also suggests cooperating with other countries in investigations, extradition, and information sharing.

Hollywood Sweep

The SEC has requested information from several prominent Hollywood studios, including Twentieth Century Fox, the Walt Disney Company, DreamWorks Animation, Paramount Pictures, Sony Pictures, and Warner Bros. about their dealings with government officials in China. In April 2012 Reuters reported, on information supplied by an insider, that the SEC had sent inquiries to several notable film companies concerning potential violations of the Foreign Corrupt Practices Act. No official investigation has been announced; however, investigations are often preceded by inquiries of this kind. Authorities already successfully prosecuted Gerald and Patricia Green on film festival-related FCPA related charges.

China has become increasingly important to Hollywood, in both movie financing and sales. In February 2012 China's vice president, Xi Jinping, visited Hollywood executives during his visit to the United States, and China lifted a few notable restrictions in its film industry following the visit. For example, the China Film Group (CGF), a state-owned entity that controls much of the Chinese film market, announced it was exempting 14 premium format films (which includes 3D films) from the usual cap of 20 foreign films per year.

Kleptocracy Asset Recovery Initiative

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 was 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. The family's U.S. lawyers have unsuccessfully attempted to both dismiss the civil forfeiture actions based on the acquittal in the Taipei court and stay the proceedings pending the appeal in Taipei. The DOJ has maintained 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.

In another Kleptocracy Initiative action, on October 25, 2011, the DOJ announced that it had filed civil forfeiture complaints in Los Angeles and D.C. against approximately $70.8 million in real and personal property of Teodoro Nguema Obiang Mangue (known as Teodorín), a government minister in Equatorial Guinea and the son of the president of Equatorial Guinea. The complaints allege that Teodorín amassed a fortune of over $100 million solely on a government salary of less than $100,000 per year. His assets include a Gulfstream jet, a large estate in Malibu, and nearly $2 million in Michael Jackson memorabilia. Teodorín allegedly used third parties and corporate entities to acquire assets in the United States. The DOJ is seeking to seize these U.S.-based assets that they allege are the proceeds of corruption derived largely from Equatorial Guinea's lucrative extractive industries. Teodorín has also been under investigation in France, where an arrest warrant was issued for him in April 2012 on money laundering charges initially brought by Transparency International (as is permitted under French criminal procedure).





FCPA/Anti-Bribery Alert
Summer 2012
Part II

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PART II

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")[10] and in Title 15, United States Code,[11] and (2) the Books and Records and Internal Accounting Control Provisions in Sections 13(b)(2)(A)[12] and 13(b)(2)(B)[13] 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,[14] 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.[15]

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.[16] 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."[17] In addition, knowledge of a circumstance can be found when there is a "high probability" of the existence of such circumstance.[18] According to the legislative history,

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10 Codified at 15 U.S.C. §§ 78dd-1(a).
11 15 U.S.C. §§ 78dd-2(a), 78dd-3(a).
12 Codified at 15 U.S.C. § 78m(b)(2)(A).
13 Codified at 15 U.S.C. § 78m(b)(2)(B).
14 The FCPA further prohibits payments to foreign political parties and officials thereof.
15 *See* 15 U.S.C. §§ 78dd-1(a).
16 15 U.S.C. §§ 78dd-1(f)(1).
17 *Id.*
18 *See* 15 U.S.C. § 78dd-1(f)(2)(B).

> [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 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.[19]

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.[20] 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.[21] Such extended jurisdiction is not dependent upon the use of U.S. mails or means or instrumentalities of U.S. interstate commerce.[22]

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.[23]

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.[24] 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.[25] 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.[26] 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,

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19 H.R. Rep. No. 100-576, at 920 (1987) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1953.
20 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).
21 15 U.S.C. §§ 78dd-1(g), 78dd-2(i), 78dd-3(a).
22 *Id.*
23 15 U.S.C. §§ 78dd-1(a), (g), 78dd-2(a), (i), 78dd-3(a).
24 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).
25 15 U.S.C. §§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B), 78dd-3(f)(4)(B).
26 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).

demonstration, or explanation of products or services, or to the execution or performance of a contract with a foreign government or agency.[27] Both defenses, however, are narrow in practice and, because they are affirmative defenses, it would be the defendant's burden to prove their applicability in the face of an FCPA prosecution.

Accounting Provisions

The FCPA's Accounting Provisions apply to issuers who have securities registered with the SEC or who file reports with the SEC.[28] 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.[29] 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.[30] 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.[31]

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.[32] 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.[33] Individuals also face up to five years' imprisonment for willful violations of the Anti-Bribery violations.[34] Anti-bribery violations also carry civil penalties of up to $10,000 for organizations or individuals, per violation.[35] These fines may not be paid by a person's employer or principal.[36]

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27 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

28 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.

29 15 U.S.C. § 78m(b)(2)(A).

30 15 U.S.C. § 78m(b)(2)(B).

31 15 U.S.C. § 78m(b)(7).

32 15 U.S.C. §§ 78ff(c), 78dd-2(g), 78dd-3(e); 18 U.S.C. § 3571(b)(3), (e).

33 18 U.S.C. § 3571(d), (e).

34 15 U.S.C. §§ 78ff(c)(2)(A), 78dd-2(g)(2)(A), 78dd-3(e)(2)(A).

35 15 U.S.C. §§ 78ff(c), 78dd-2(g), 78dd-3(e).

36 15 U.S.C. §§ 78ff(c)(3), 78dd-2(g)(3), 78dd-3(e)(3).

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.[37] Individuals face up to 20 years' imprisonment for willful violations of the Accounting Provisions.[38] 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.[39]

FCPA SETTLEMENTS AND CRIMINAL MATTERS[40]

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.)—have pleaded 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

37 15 U.S.C. § 78ff(a); 18 U.S.C. § 3571(d), (e).
38 15 U.S.C. § 78ff(a).
39 15 U.S.C. § 78u(d)(3), (5).
40 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.

"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 penalty 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.[41] Many of the admissions provide concrete examples of facts and circumstances 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.

- *<u>Business Practices and Internal Controls</u>*

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

41 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.

- 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.

- *Instituto Costarricense de Electricidad*

In May 2011, ICE, became the first party to seek victim status under U.S. law in an FCPA enforcement action. In June 2011, the Southern District of Florida denied ICE's petition, and the Eleventh Circuit denied ICE's subsequent petition for a writ of mandamus requesting that the appellate court direct the district court to grant victim status to ICE.

On May 3, 2011, ICE objected to the DPA and the plea agreements by Alcatel-Lucent's subsidiaries. ICE claimed that it was a victim of Alcatel-Lucent's bribery scheme and that the agreements violated the victims' rights to which it was entitled by statute, including mandatory restitution. Thus, ICE petitioned the court for "the protection of its rights as a victim of [Alcatel-Lucent] and for appropriate sanctions resulting from the [DOJ's] failure to protect those rights." In addition, ICE objected to the DPA plea agreements on the grounds they failed the satisfy the legal standards required for court approval, including those related to victim restitution under 18 U.S.C. § 3771.

In order to establish its right to restitution as a victim, ICE faced the preliminary hurdle of establishing that is was actually a victim. Prior to ICE's petition, both the SEC and DOJ had rejected ICE's claim that it was a victim. The SEC had denied without explanation ICE's request to create a "Fair Fund" for the benefit of victims. Similarly, the DOJ rejected ICE's claim of victim status apparently, in part, because it considered ICE to be a participant in Alcatel-Lucent's bribery scheme through the ICE employees that accepted bribes. In its memorandum of law in support of its petition and objections, ICE argued that it was a victim because it "suffered massive harm as a result" of Alcatel-Lucent's criminal conduct. Specifically, ICE alleged that it incurred losses due to contractual "obligations [Alcatel-Lucent] never satisfied, services it never rendered, and hardware that was inferior to what was promised or never delivered." Furthermore, ICE challenged the suggestion by DOJ that is was a participant, stating, "[t]he notion that acceptance of bribes by five of ICE's more than 16,500 employees, managers, and directors necessarily renders ICE an active participant in Alcatel's admitted bribery scheme is nonsense."

As a victim, ICE argued, it was entitled to certain statutory rights under the Crime Victims' Rights Act and the Mandatory Victim Restitution Act. The Crime Victims' Rights Act provides certain rights to crime victims, including restitution as provided by law. Further, the Act imposes an obligation on DOJ employees to make their best efforts to notify victims of and accord victims these statutory rights. The Mandatory Victim Restitution Act requires courts to order restitution to victims of Title 18 crimes, including conspiracy.

Specifically regarding the plea agreements, ICE argued in its memorandum that they were flawed, in part, because they failed to account for victim losses or restitution and waived a pre-sentence investigation and report upon which the court could order restitution. More generally, ICE argued that the court should reject the DPA and plea agreements because they "fail[ed] to satisfy the best interests of justice [and] the public" and failed to provide assurances that the punishment was commensurate with the defendants' history and conduct. Thus, ICE concluded it was entitled to restitution under the Mandatory Victim Restitution Act.

In its petition, ICE also noted that the SEC settlement called for the "illegal proceeds obtained from *victims* [to] be distributed to the federal government."

On May 23, 2011, the U.S. and Alcatel-Lucent filed oppositions to ICE's petition and objections. In response to ICE's request for victim status, both the government and Alcatel-Lucent argued that ICE could not be considered a victim because it was a participant in the underlying conduct, and consequently, it was not entitled to restitution. The government alternatively argued that, regardless of whether ICE was a victim, the government had afforded ICE the rights provided to victims under the Crime Victims' Rights Act. On the same day, the government filed a separate sentencing memorandum in support of the plea agreements and DPA. The government argued that, even if ICE were a victim, the Crime Victims' Rights Act did not "give [ICE] veto power over prosecutorial decisions, strategies, or tactics." The government also questioned in a footnote whether ICE had standing to challenge the DPA.

On May 27, 2011, ICE filed replies. In its reply to the United States, in relevant part, ICE argued that the government's contention that ICE was a co-participant should fail because "(1) as a matter of law, ICE cannot be imputed with the conduct of its few personnel who accepted Defendants' bribes; and (2) ICE did nothing to warrant the label of 'co-participant.'" Furthermore, on May 31, 2011, ICE submitted a sworn statement by Edgar Valverde Acosta, Alcatel's former president in Costa Rica, who was incarcerated for his conviction in the Costa Rican criminal court of corruption allegations related to Alcatel-Lucent's sales to ICE. Acosta stated that "no one at ICE, other than the individuals who were receiving the payments had knowledge of these matters, nor, do I believe, they could have known of these matters. . . ."

At a hearing on June 1, 2011, Judge Marcia G. Cooke found that ICE was not a victim to Alcatel-Lucent's bribery, and thus, was not entitled to restitution. Judge Cooke explained that corruption was rampant at ICE, and the issues regarding whether ICE was a victim or an offender were too intertwined.

On June 15, 2011, the ICE filed a petition for mandamus asking the Eleventh Circuit to effectively overturn Judge Cooke's ruling. ICE argued that the district court's determination that ICE was not a victim was incorrect because the court wrongly found that ICE was a co-conspirator. On June 17, 2011, the U.S. Court of Appeals for the Eleventh Circuit denied ICE's petition for mandamus. The Court of Appeals held that the district court did not clearly err in finding that ICE functioned as a co-conspirator, explaining that the "district court identified the pervasive, constant, and consistent illegal conduct conducted by the 'principals' (*i.e.* members of the Board of Directors and management) of ICE." The court also held that ICE failed to show it was directly and proximately harmed by Alcatel-Lucent's criminal conduct.

- *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 then 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.

- *Kenya*

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 canceled.

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 on 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.[42] 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.

[42] 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.

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.

- *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 minimis* 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 Azerbaijani 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 Azerbaijani 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 one recommended 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 of the money 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 emailed 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 email 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, to 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 $116,000 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 Azerbaijani 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 Azerbaijani 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 and 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 voluntary, 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.

- *SEC Enforcement Action against Noble Executives*

On February 24, 2012, the SEC filed charges against Noble's former President, CEO and Chairman (and previously, CFO and COO), Mark A. Jackson; Noble's highest executive in Nigeria, James J. Ruehlen (Division Manager of Noble Nigeria); and former Noble Director of Internal Audit, Vice President of Internal Audit, and Corporate Controller, Thomas F. O'Rourke, in the U.S. District Court for the Southern District of Texas. The SEC complaints allege that the Noble executives violated and/or and aided and abetted violations of the FCPA's anti-bribery, books and records, and internal controls provisions among other offenses. The SEC charged Jackson and Ruehlen together and O'Rourke separately.

According to the SEC complaint, Jackson and Ruehlen were directly involved in arranging, facilitating, approving, making, or concealing payments made by Noble to NCS officials in connection with the paper process Noble Nigeria used to secure TIPs and TIP extensions. The SEC alleged that Ruehlen would obtain a price proposal from customs agents detailing the costs associated with obtaining a TIP or a TIP extension, including the "special handling" or "procurement" charges that would not have any supporting documentation. Ruehlen then allegedly sought authorization for, and Jackson authorized, payments to NCS officials. According to the SEC, Jackson and Ruehlen were aware that portions or all of the "special handling" charges were being passed along to NCS officials. Altogether, the SEC alleged that Jackson and Ruehlen participated in paying hundreds of thousands of dollars in bribes to obtain 11 permits and 29 permit extensions.

Jackson and Ruehlen allegedly concealed payments to government officials by orchestrating an elaborate trail of false invoices that disguised the payments as shipping fees, handling charges, and tax. Despite orchestrating this false paperwork, Jackson and Ruehlen signed quarterly representation letters to Noble's upper management falsely stating that Noble Nigeria had complied with Noble's code of business conduct and internal controls, not violated any laws or regulations, and not violated the FCPA. Jackson, as CFO of Noble Nigeria, also signed quarterly and annual certifications that falsely represented that he had maintained effective internal controls and was unaware of any material weakness or fraud or suspected fraud affecting Noble and signed false personal certifications that were attached to Noble's quarterly annual public filings. When Noble's internal audit contacted Ruehlen expressing concern over FCPA compliance in its West Africa Division, Ruehlen had the customs agent involved in the payment scheme sign false, backdated FCPA compliance certifications. Even after Noble hired a new CFO to replace Jackson, Ruehlen was able to continue to receive CFO approval for payments to government officials by representing the payments as "the same as we have paid in the past for [the temporary import] process." The SEC alleged that, by making false certifications and by concealing payments to government officials as legitimate operating expenses, Jackson and Ruehlen knowingly circumvented Noble's internal controls, knowingly created false books and records, and caused Noble's financial statements to be inaccurate.

The SEC complaint alleged that Jackson and Ruehlen directly violated the FCPA's anti-bribery and internal controls and false records provisions and aided and abetted Noble's violations of the FCPA's books and records and internal controls provisions. Additionally, the SEC alleged that Jackson signed false personal certifications attached to annual and quarterly Noble public filings, violated the provision of the Exchange Act that deals with issuing false or misleading statements to investors, and that Jackson was liable as a control person for violations of the anti-bribery, books and records, and internal controls provisions by Noble, Ruehlen, and O'Rourke.

Jackson and Ruehlen have both denied the SEC's allegations. Ruehlen's lawyer also stated that he was "disappointed" in the SEC for charging Ruehlen when Ruehlen himself was the individual who had initially raised concerns about the paper process internally at Noble and had "fully cooperated throughout the [SEC's] investigation." On May 8, 2012, Jackson and Ruehlen both filed motions to dismiss that, separately, accuse the SEC of ignoring the FCPA's exception for facilitation payments. Ruehlen's motion to dismiss states:

> Despite the repetition of the word "bribe" fifty-three times in its Complaint, Plaintiff fails to allege a violation of law. The FCPA distinguishes between prohibited corrupt payments made to obtain or retain business (*i.e.*, bribes) … and permissible payments to 'secure the performance of a routine governmental action,' such as 'obtaining permits, licenses, or other official documents' or for 'processing governmental papers' (*i.e.*, facilitation payments) . . . . The Complaint assumes that all payments to foreign officials are *per se* illegal bribes, never acknowledging the FCPA's exception for facilitation payments.

These motions to dismiss have received significant press coverage, as Jackson and Ruehlen are among the few executives who have ever chosen to contest SEC allegations of FCPA violations in court.

Their former coworker, O'Rourke, took the far more common approach and settled with the SEC. The SEC complaint against O'Rourke alleged that he directly violated the FCPA's internal controls and false records provisions and aided and abetted Noble's violations of the FCPA's anti-bribery, books and records, and internal controls provisions. Specifically, the SEC alleged that O'Rourke permitted and/or failed to prevent "special handling charges" from being improperly entered into Noble Nigeria's books and records as legitimate operating expenses. The SEC also emphasized that O'Rourke's positions within Noble Nigeria (Director of Internal Audit, Controller, and Vice President of Internal Audit) indicate that he personally reviewed and approved requests from Noble Nigeria to pay "special handling charges" for false paperwork TIPs. Without admitting or denying the SEC's allegations, O'Rourke consented to the entry of a court order requiring him to pay a $35,000 penalty and permanently enjoying him from future violations of the FCPA.

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 NM"), 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 NM, 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 NM 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 NM's primary business involved providing electrical products and services to electrical utilities around the world, many of which are described as state-owned. ABB NM 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 NM, 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

NM 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 NM 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 NM. 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 NM 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 NM received the Evergreen Contract, an extension of the earlier SITRACEN Contract, and that the contract contained certain terms that were favorable to ABB NM. 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 NM.

Over the course of the Evergreen Contract, ABB NM 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 NM, 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 NM 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 NM, 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 NM, 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, backdated correspondence that was designed to show a legitimate history of business relationships between ABB NM 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."

In March 2011, O'Shea filed a motion to dismiss, challenging the DOJ's assertion that CFE employees are "foreign officials" under the FCPA. In opposition, the DOJ argued that O'Shea's challenge was premature at pre-trial because it was premised on a question of fact. The DOJ further argued that its definition of "foreign official" was supported by the plain language and legislative history of the FCPA as well as relevant case law. On January 3, 2012, Judge Hughes denied O'Shea's motion to dismiss in a single sentence, without explanation, as part of a management order addressing several other issues. In the same management order, the Court took judicial notice of three facts relating to the governmental nature of the CFE, including that the CFE holds a monopoly over the public service of electricity, that the President of Mexico appoints the General Director of the CFE, and that the governing board of the CFE includes Secretaries of the Mexican Ministry of Energy, Mines, and State-Owned Industry. Along with (i) Nguyen & Nexus Technologies, (ii) Haiti Teleco, (iii) Lindsey Manufacturing, and (iv) Carson, the O'Shea case marked the fifth challenge to the definition of "foreign official" under the FCPA. All five challenges have failed.

Although he lost on his motion to dismiss based on the definition of "foreign official," O'Shea soon won his case. After one week of trial in January 2012, the Court granted O'Shea's motion to dismiss the twelve FCPA counts and one conspiracy count against him. Pinpointing the weakness in the government's case, Judge Hughes explained that, "The problem here is that the principal witness against O'Shea is Basurto, Jr., who knows almost nothing . . . His answers were abstract and vague, generally relating gossip. And as I indicated, even hearsay testimony must be something other than a conclusion." On February 9, 2012, the remaining counts against O'Shea for conspiracy, money laundering, and obstruction were dismissed.

Basurto — the star witness who knew "almost nothing" — was O'Shea's and ABB's sales agent in Mexico. A January 2009 criminal complaint alleged that Basurto, a Mexican citizen, illegally structured transactions to avoid triggering financial institutions' reporting requirements. In June 2009, Basurto was indicted for that offense. In November 2009, however, he 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. While he faced up to five years of incarceration, Basurto was released on bail in July 2011 after spending 22 months in prison. In April 2012, after all charges against O'Shea had been dropped, Basurto was sentenced to time served and released. According to the terms of his plea agreement, Basurto will forfeit roughly $2 million in illegal profits.

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 May 21, 2011, Lindsey Manufacturing Company ("Lindsey Manufacturing"), Dr. Keith E. Lindsey (President and majority owner, Lindsey Manufacturing), and Steve K. Lee (Vice President, Lindsey Manufacturing) (collectively, "Lindsey Defendants") were convicted by a federal jury on one count each of conspiracy to violate the FCPA and five substantive counts of violating the FCPA in connection with bribes paid to officials of the Mexican state-owned electric utility company, Comisión Federal de Electricidad ("CFE"). The jury conviction of Lindsey Manufacturing was the first ever conviction of a company by jury trial under the FCPA. However, on December 1, 2011, following a post-conviction motion from the Lindsey Defendants, U.S. District Judge Howard Matz vacated the convictions of the Lindsey Defendants and dismissed the case with prejudice, citing pervasive government misconduct in the investigation and prosecution of the case. While he did not make a finding of actual innocence, Judge Matz found that the conduct of the government, taken as a whole, was egregious and that dismissal could serve as a deterrent for similar behavior on the part of the government.

Judge Matz focused in particular on his findings that the government allowed a key FBI agent to provide material false testimony to the grand jury, included material falsehoods in affidavits in support of search warrants, improperly reviewed potentially privileged information between a defendant in her lawyer, improperly withheld documents from the defense, and engaged in questionable behavior in examining witnesses and providing closing arguments. Although the DOJ initially appealed Judge Matz's dismissal of its case, on May 25, 2012, the DOJ voluntarily dismissed its appeal and thereby officially dropped its prosecution of the Lindsey Defendants.

Despite the ultimate failure of the prosecution, a review of the substantive allegations underlying the charges against the Lindsey Defendants is a valuable exercise, particularly considering the relative rarity of FCPA cases proceeding to jury trial.

On October 21, 2010, a federal grand in Los Angeles returned a superseding indictment against the Lindsey Defendants as well as Enrique Faustino Aguilar Noriega and his wife, Angela Maria Gomez Aguilar, both directors of Grupo Internacional de Asesores S.A. ("Grupo"). Grupo is a Panamanian company serving as a commercial agent for transactions with CFE, a government owned Mexican electrical utility. 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 CFE.

The FCPA conspiracy for which the Lindsey Defendants had been convicted 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 alleged 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.

The government had alleged that 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 had also alleged 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 contended 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 government alleged that the Aguilars created false invoices to Lindsey Manufacturing purporting to show that only 15% of the contract price as 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 contended were fictitious. Specifically, the government identified 29 separate wire transfers from Lindsey to Grupo that included more than $5.9 million in allegedly improper payments for CFE officials.

The government further alleged several improper payments beyond these wire transfers. In July 2006, Mr. Aguilar began using funds from Grupo's Houston brokerage account to pay the monthly American Express credit card bill of a CFE executive, Nestor Moreno. 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 Mr. Moreno. 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"), which was also controlled by the Aguilars.

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 Mr. Moreno to take possession of the new Ferrari. Mr. Aguilar also purchased a car insurance policy for the Ferrari in his name, but that listed Mr. Moreno 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 Moreno's half brother.

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

On February 28, 2011, the Lindsey Defendants filed a motion to dismiss arguing that the officers of CFE are not foreign officials under the FCPA. The motion is substantially similar to those filed by John O'Shea discussed above and in the *Control Components* case discussed below. 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.

Mr. Aguilar remains a fugitive, and is reportedly believed to be in Mexico. Mrs. Aguilar was tried along with the Lindsey Defendants and convicted on one count of conspiracy to launder money in May 2011. Mrs. Aguilar did not join her co-defendants in their motion to vacate. In June 2011, the court approved a sentencing agreement that recognized the prison time that Mrs. Aguilar had already served (approximately nine months) and called for her release from detention and return to Mexico. She was sentenced to probation. She also agreed not to contest the government's $3 million asset forfeiture and to withdraw her motion to acquit. However, in December 2011, the government agreed to vacate Mrs. Aguilar's conviction as a result of the District Court's decision to vacate the judgment against the Lindsey Defendants.

The Lindsey prosecution was 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 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."[43] But Giffen's defense strategy was both bold 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.

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

The discovery requests, sustained over government objection, triggered the Classified Information Procedures Act ("CIPA")[44] 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.[45] As the Second Circuit recognized, "regulating Giffen's access to classified information has presented the district court with a significant challenge."[46]

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

44 18 U.S.C. App. § 3.

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

46 *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.").

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 between 2000 and 2002 on nine contracts that 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 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 email 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 canceled 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.

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 it 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 that 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.[47] 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.

- *Kyrgyzstan*

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 owned subsidiary of DIK, which 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

47 The DOJ's charges were limited to Universal's conduct in Thailand.

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 of authorized transfers to the Special Account from Dimon subsidiaries. The regional finance director had 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 email 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 from 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 from 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.

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 the 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 included 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 companies Terra Telecommunications Corp. ("Terra") and Cinergy Telecommunications Inc. ("Cinergy") 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 Officials*

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. Two of the 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. Other officials — including former Haiti Teleco director Patrick Joseph — were also involved in the conspiracy.

In return for the corrupt payments, the 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 to Haiti Teleco.

The prosecutions of Antoine, Duperval, and Joseph are notable because they are among the few foreign officials have been charged in connection with an FCPA matter. Because the officials could not be charged with violations of the FCPA insofar as the statute criminalizes the provision but not the receipt of bribes, Antoine, Duperval and Joseph were instead 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. After years of cooperating against other defendants, Antoine's sentence was reduced in May 2012 to 18 months on a Rule 35 motion by the government. Duperval pleaded not guilty but was convicted of two counts of conspiracy to commit money laundering and 19 counts of money laundering on March 13, 2012. From 2003 to 2006, Duperval used Florida-based Cinergy Telecommunications ("Cinergy") and Uniplex Telecom Technologies ("Uniplex") to launder $500,000 paid to him in exchange for various business advantages, including the issuance of preferred telecommunications rates, a continued telecommunications connection with Haiti and the continuation of a particularly favorable contract with Haiti Teleco. Duperval concealed these payments by having the shell companies and their executives create false documents describing the payments as "consulting services," despite the fact that no actual services were performed. When the shell companies channeled the money to Duperval and his family, Duperval continued to conceal the payments by describing them as "commissions" and "payroll." Duperval was sentenced on May 21, 2012, to 9 years' imprisonment and was ordered to forfeit $497,331.

Joseph, on the other hand, agreed to cooperate with prosecutors. After initially pleading not guilty to a superseding indictment, on February 8, 2012, Joseph agreed to plead guilty to one count of conspiracy to commit money laundering in exchange for a potentially lighter sentence. Joseph agreed to forfeit $955,000 and faces up to 20 years in prison. Joseph awaits sentencing.

Former Haiti President Jean-Bertrand Aristide has also been implicated. Commentators suggest that Aristide is the "Official B" described in the DOJ's January 19, 2012 second superseding indictment. According to that indictment, Official B was among those who received over $2 million in payments through the shell-companies Cinergy and Uniplex.[48] According to the second superseding indictment, Official B received his share of the payments through "Company A," which commentators believe to be Digitek, a suspected front owned by Aristide's brother-in-law Lesly Lavelanet. To date, neither Aristide nor Digitek have been charged by the DOJ.

[48] DOJ enforcement action against Cinergy and the now-desolved Uniplex are discussed in greater detail below.

- *Terra Telecommunications*

The DOJ has also charged several former executives at Terra. 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. As a result of his cooperation with law enforcement, Perez's sentence was reduced to a total term of ten months in December 2011.

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.

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 [would be] more than willing to elaborate on how the FCPA's plain text, its current interpretation by courts, its legislative 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 and, on August 5, 2011, Esquenazi and Rodriguez were convicted on all counts.

On August 24, 2011, Esquenazi and Rodriguez filed a motion for judgment of acquittal or a new trial based on a July 26, 2011, signed statement sent to the DOJ by Haitian Prime Minister Jean Max Bellerive on behalf of Haiti's Ministry of Justice, which asserted that Haiti Teleco "has never been and until now is not a State enterprise." Prime Minister Bellerive made this statement in connection with the Patrick Joseph case described below. In a surprising development, the day after Equenazi and Rodriguez filed their motion, Bellerive signed a declaration filed by DOJ that retracted his prior statement that asserted that his prior statement was "strictly for internal purposes" and that his prior statement had "omit[ted] the fact that, after the initial creation of Teleco and prior to its modernization, it was fully funded and controlled by [the Bank of the Republic of Haiti], which is a public entity of the Haitian state."

The district court summarily denied the defendants' motion, noting simply that it "properly instructed the jury through a non-exclusive multi-factor definition that permitted the jury to determine whether Teleco was an instrumentality of a foreign government." The jury instructions permitted the jury to consider factors including, but not limited to, whether Teleco provides services to the public, whether its "key officers and directors" are government officials or are appointed by government officials, the extent of Haiti's ownership interest in Teleco, Teleco's obligations and privileges under Haitian law, and whether Teleco is "widely perceived and understood to be performing official or governmental functions." Esquenazi and Rodriguez have appealed, among other things, the district court's holding regarding Haiti Teleco's status as a foreign instrumentality.

On October 25, 2011, the Court sentenced Esquenazi to 15 years' imprisonment, a record for an FCPA-related conviction (10 of the 15 years were consecutively imposed for Esquenazi's conviction on a related money-laundering count), and Rodriguez was sentenced to 7 years' imprisonment. Both defendants were further ordered to jointly and severally forfeit $3.09 million and pay $2.2 million in restitution. Assistant Attorney General Lanny Breuer called the record-setting sentence "a stark reminder to executives that bribing government officials to secure business advantages is a serious crime with serious consequences," and proof that the DOJ "will continue to hold accountable individuals and companies who engage in such corruption."

Esquenazi and Rodriguez continued to make FCPA history through their appeal. On May 9, 2012, Esquenazi and Rodriguez filed the first-ever appeal to challenge the definition of a "foreign official" under the FCPA. They argued that, "[b]ecause no evidence was presented at trial that Haiti Teleco performed governmental functions, Esquenazi's conviction for violation of, and conspiracy to violate, the FCPA should be reversed." The appellants further argued that the DOJ's current interpretation of a government instrumentality — which includes employees at state-owned enterprises — is overbroad and beyond the scope intended by Congress.

The DOJ also indicted several individuals who served as intermediaries for Terra's corrupt payments. On May 15, 2009, Juan Diaz (President of J.D. Locator Services) 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. On May 22, 2012, Diaz's sentence was reduced to a term of 20 months, with three years of supervised release.

In addition, on February 19, 2010, Jean Fourcand (former President and Director of Fourcand Enterprises, Inc.) 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. On April 16, 2012, the court agreed to reduce Fourcand's sentence to two months in prison, followed by two years of supervised release.

The DOJ also indicted Marguerite Grandison (former President of Telecom Consulting Services Corp. ("Telecom Consulting")) for allegedly assisting in directing payments from Terra to J.D. Locator. Grandison, who is Duperval's sister, was initially charged in February 2010 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. In a July 13, 2011 superseding indictment, Grandison was charged with two counts of conspiracy to commit money laundering and 19 counts of money laundering. Grandison pleaded not guilty to all charges in February 2012.

- *Cinergy Telecommunications Inc.*

On July 12, 2011, the DOJ filed a superseding indictment that charged Cinergy Telecommunications Inc. ("Cinergy"), a privately owned telecommunications company incorporated in Florida, for its alleged role in the foreign bribery, wire fraud, and money laundering scheme related to Haiti Teleco. The July superseding indictment similarly charged Washington Vasconez Cruz (President of Cinergy and Uniplex Telecom Technologies, Inc. ("Uniplex")), Amadeus Richers (then-director of Cinergy and Uniplex), and Marguerite Grandison (former President of Telecom Consulting Services Corp.). The superseding indictment also included allegations against "Co-conspirator CZ;" on January 19, 2012, the DOJ filed a second superseding indictment that identified "co-conspirator CZ" as Cecilia Zurita (former Vice President of Uniplex and Cynergy).

The indictments alleged that, from December 2001 through January 2006, Cinergy, Uniplex, Cruz, Richers, and Zurita (among others) participated in a conspiracy to pay approximately $2.65 million in "fictional 'consulting services'" to shell companies. The DOJ alleged that these "consulting services" payments were actually payments used to bribe foreign officials at Haiti Teleco in exchange for contracts that allowed Uniplex and Cinergy customers to place calls to Haiti. Cruz and Richers allegedly authorized these payments to help Cinergy and

Uniplex to secure preferred telecommunications rates and to obtain credits towards money owed to Haiti Teleco. The indictment identifies 19 separate deposits of "Telecom Consulting checks" into bank accounts owned by Duperval from March 2004 through the end of March 2005.

Cinergy, Cruz, and Richers were each charged with one count of conspiracy to violate the FCPA and to commit wire fraud, six counts of violating the FCPA's anti-bribery provisions, one count of conspiracy to commit money laundering, and 19 counts of money laundering. Zurita is charged with one count of conspiracy to violate the FCPA and to commit wire fraud, four counts violating the FCPA's anti-bribery provisions, one count of conspiracy to commit money laundering, and 19 counts of money laundering.

On February 24, 2012, the DOJ prepared and received an Order for Dismissal dismissing, with prejudice, the indictment as to Cinergy. In the Order, the DOJ claimed that it had been misled into believing that Cinergy was an active company rather than, as described by the DOJ, a "non-operational entity that effectively exists only on paper for the benefit of two fugitive defendants, Washington Vasconez Cruz and Cecilia Zurita." The trials against Cruz, Richers, and Zurita are pending their arrests.

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, the market for TEL has steadily declined. 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 charged 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 ("OFFP") 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 arising under the Cuban Assets Control Regulations.

As a result of its settlements with the U.S. and U.K. enforcement agencies, Innospec committed to pay up to $40.2 million to the various agencies. A portion of the fines was 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.

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 disgorged $810,076 plus prejudgment interest of $67,030 and paid a civil penalty of $438,038. Both Turner and Naaman also faced criminal charges. In October 2011 Turner was charged by the SFO and in January 2012 he pleaded guilty to three counts of conspiring to bribe public officials with respect to Indonesia and Iraq. In June 2010, Naaman pleaded guilty in U.S. district court to conspiring to violate the books and records provision of the FCPA in connection with securing OFFP contracts and to conspiring to violate and violating the anti-bribery provisions with respect to other payments to Iraqi officials. In March 2012, Naaman was sentenced by a U.S. court to thirty months in prison and fined $250,000.

Paul W. Jennings, Innospec's former CFO and CEO, also settled with the SEC on January 24, 2011. As part of his settlement, Jennings agreed to disgorge $116,092 plus $12,945 in prejudgment interest and to pay a civil penalty of $100,000. In October 2011, the SFO charged Jennings and another former CEO, Dennis Kerrison, in relation to corrupt payments made to gain public contracts in Indonesia and Iraq. The charges against Jennings and Kerrison are pending. In February 2012, Miltos Papachristos, a former Innospec Regional Sales Director, was also charged by the SFO with corruption-related offenses. The SFO's case against Papachristos is pending.

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 someone called "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. In March 2012, the SFO announced that BAES, the SFO, and Tanzania had reached an agreement that the money would be spent on textbooks, teacher's guides, syllabi, and syllabus guides; the SFO also stated that the procurement process would be monitored to ensure that the funds are "used solely for the benefit of the Tanzanian people." As part of its settlement with BAES, the SFO agreed not to pursue further action against BAES for prior conduct, with a 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 connection with BAES's sales to European countries.

On May 16, 2011, the U.S. State Department entered a civil settlement with BAES for alleged violations of the Arms Export Control and the International Traffic in Arms Regulations, under which BAES would pay a civil penalty of $79 million. The State Department charges related in part to front companies set up in the British Virgin Islands through which BAES funneled corrupt payments.

- <u>*Specific Allegations*</u>

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, to circumvent laws of countries that do not allow agents, or to 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 so that the bid processes would 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, 2010 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 were 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. Together, these charges covered the waterfront of U.S. FCPA jurisdiction. Sixteen individuals were charged as domestic concerns because they are U.S. citizens. Four U.K. citizens and one Israeli citizen were charged as "other persons" subject to the FCPA for acts in U.S. territory. And one U.S. citizen was 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 at the time the charges were announced that this sting operation was only the beginning of the DOJ's use of traditional law enforcement techniques in FCPA investigations, stating that the DOJ was prepared "to bring all the innovations of our organized crime and drug war cases to the fight against white-collar criminals."

However, what began as an innovative sting operation to prosecute these nearly two dozen individuals collapsed. 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 asserted that documents, audio recordings, and video recordings that support this theory. According to media reports, among these materials was a video of all 22 defendants, a cooperating witness, 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. Accordingly, 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. Prior to trial, two other defendants changed their pleas to guilty: Jonathan Spiller pleaded guilty to a single count of conspiracy to violate the FCPA on March 29, 2011, and Haim Geri pleaded guilty to one count of conspiracy to violate the FCPA on April 28, 2011.

Regarding the defendants who pleaded not guilty, the government divided the original 22 defendants into four groups for trial. The trial of the first four defendants started in May 2011, but ended on July 7, 2011, when the jury failed to reach a verdict after five days of deliberations and the judge declared a mistrial and set retrial for May 2012. The second trial, of six defendants, also failed to result in any guilty verdicts: one defendant who had only been charged with conspiracy was acquitted in December 2011 prior to the case went to the jury when the judge ruled the government had presented insufficient evidence of the "single conspiracy" theory to sustain a conviction; in January 2012, the jury acquitted two defendants and failed to reach a verdict on the remaining three, resulting in the judge declaring a mistrial as to the latter. The government ultimately determined in February 2012 that continuing its prosecution would be a waste of government resources, and the judge granted its motions to dismiss the still-pending charges and, later, to dismiss with prejudice the indictments against the three defendants who had pleaded guilty.

Despite the government's failure to secure convictions in this case, the defendants still suffered the reputational and financial costs of fighting the charges at trial and had their personal and professional lives severely affected. Accordingly, there are still valuable lessons to learn from the tactics the DOJ employed and allegations it made. The DOJ alleged 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 alleged 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.

- *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.

A sale to Chemring Group PLC subsequently 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." Dissolution is not expected to be finalized until 2013.

- *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, Amaro Goncalves, was its Vice President in charge of sales to U.S. and international law enforcement agencies, and that it was served with a grand jury subpoena for documents. Smith & Wesson further disclosed that the SEC is conducting a "fact-finding inquiry" that "appears" to have been "triggered in part" by the DOJ's FCPA investigation. Smith & Wesson stated that it is cooperating with the DOJ and SEC investigations and has undertaken a comprehensive review of its policies and procedures. 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.

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 an 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, 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.

- <u>*Specific Allegations*</u>

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, i.e. 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 appealed his conviction on the grounds that the district court's jury instructions erroneously characterized the definition of an "official act" and the "*quid-pro-quo*" element of U.S. law prohibiting the bribery of public officials, that Jefferson's failure to disclose his and his family's interest in business he promoted did not constitute honest services wire fraud, and that the venue was improper on one of the wire fraud offenses. Among Jefferson's arguments was that the definition of an "official act" under the domestic bribery statute should be narrowly interpreted and limited to those acts that "concern a question resolvable through the formal legislative process or, at most ... through a governmental process." On March 27, 2012, however, a three-judge panel at 4th Circuit Court of Appeals unanimously affirmed ten of the eleven counts of Jefferson's conviction, including the count of conspiracy to commit (among other offenses) a violation of the FCPA. The appellate panel rejected Jefferson's "official act" argument by noting that the U.S. Supreme Court has long-held that official acts can include activities that have been clearly established by settled practice as part of a public official's position. The appellate panel also affirmed the district court's "*quid pro quo*" jury instruction and rejected Jefferson's argument that the government need to demonstrate that payments he received were tied to specific official acts (or omissions). The appellate panel confirmed the district court's reasoning that services performed on an "as needed" basis could still be linked to payments Jefferson received. Jefferson's singular victory was the appellate panel's dismissal of a single wire fraud count, which it found to be improperly prosecuted in Virginia because the misconduct involved a phone call between Africa and Kentucky.

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 was unable to obtain registration for several of its products. 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 about 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 that such forms be 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 weapons, defense items, services and training from the U.S.

Government 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, and Juan Vasquez, a former senior commercial executive, 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. Salvoch was arrested on January 11, 2011, and Juan Vasquez was arrested on January 20, 2011. The charges against these individuals relate only to the payments to government officials in Honduras. According to the court documents, Caceres' principal role was to negotiate the payment of bribes with the Honduras officials, Granados' principal role was to authorize and direct the bribe payments; and Vasquez and Salvoch were responsible for facilitating the payment of bribes.

These four former Latin Node executives all pleaded guilty and three of these executives have been sentenced. Jorge Granados pleaded guilty on May 19, 2011 and in September 2011 was sentenced to 46 months in prison. Manual Caceres pleaded guilty on May 18, 2011 and in April 2012 was sentenced to 23 months, followed by one-year supervised release. Juan Vasquez pleaded guilty on January 21, 2011, and in April 2012, was sentenced to 3 years probation, community service, home detention and monitoring, and ordered to pay a $7,500 criminal fine. Manuel Salvoch pleaded guilty on January 12, 2011, but as of this writing, has not yet been sentenced. Salvoch faces up to five years in prison, three years of supervised release, and a criminal fine of $250,000 or more.

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 Delaware company based in California 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 the company’s admissions in connection with its plea of guilty, the conspiracy began in approximately 1998 and lasted through 2007. From 2003 to 2007 alone, Control Components made 236 corrupt payments totaling approximately $6.85 million to foreign officials at state-owned entities in more than 36 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 specifically 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. The company admitted that these payments resulted in net profits of $46.5 million.

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 admitted to a detailed scheme for making improper payments to foreign officials. 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, the Company admitted that it: (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.

Control Components also admitted that its employees sought to, and did, frustrate an internal audit in 2004 by its parent, IMI plc, 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 e-mail 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, had 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 related specifically to one particular payment of almost $58,000 to Korean company KHNP, Morlok 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.

Covino also admitted that he caused other employees and company agents to make corrupt payments to FICs 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. When sentenced, which likely will not occur until after the cases against the remaining individual defendants have been resolved, Covino and Morlok could 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.

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 enterprises should not be considered to be "foreign officials." Their motion, reminiscent of previous unsuccessful motions filed in the *Nguyen* and *Esquenazi* cases, argued 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. They further argued that, particularly given the DOJ's continued refusal to provide specific guidance on the definition of "instrumentality," the term is unconstitutionally vague. On May 18, 2011, the court denied their motion, and in doing so suggested that the criteria for establishing a state-owned enterprise is an instrumentality of a foreign government are even broader than expected. According to the court:

> Several factors bear on the question of whether a business entity constitutes a government instrumentality, including:
>
> - The foreign state's characterization of the entity and its employees;
> - The foreign state's degree of control over the entity;
> - The purpose of the entity's activities;
> - The entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
> - The circumstances surrounding the entity's creation; and
> - The foreign state's extent of ownership of the entity, including the level of financial support by the state (*e.g.*, subsidies, special tax treatment, and loans).
>
> Such factors are not exclusive, and no single factor is dispositive.

This holding, and other contemporaneous rejections by federal district courts of similar challenges to the meaning of "foreign official," are stark reminders of the importance of identifying which foreign customers of an organization subject to the FCPA are state-owned and imposing internal accounting controls and conducting due diligence on third parties reasonably designed to detect and prevent corrupt payments.

Flavio Ricotti was arrested in Frankfurt, Germany and was extradited to the United States in 2010 and, on April 29, 2011, Ricotti pled guilty to a single count of conspiracy to violate the FCPA and the Travel Act. Ricotti admitted to conspiring with other CCI employees to bribe an official of Saudi Aramco, as well as an employee of a private company in Qatar in an effort to secure contracts. Kim, also a fugitive at the time of the indictment, remains in Korea and the U.S. government is seeking his extradition. On April 4, 2011, the court denied a request by

Kim's attorneys that he be granted a special appearance to engage in motions practice without consenting to the court's jurisdiction.

On March 5, 2012, the remaining defendants in the indictment — all but Ricotti — filed both a Motion to Dismiss and a Motion to Suppress. They cited Control Components' cooperation with DOJ during the company's 2007 internal investigation, in which Control Components compelled the defendants to "answer all questions regardless of their Fifth Amendment right against self-incrimination or be fired." The court held that Control Components' counsel were not acting as government agents in conducting their internal investigation and denied the motion.

Several of the remaining defendants ultimately entered pleas of guilty. Stuart and Rose Carson pleaded guilty on April 16, 2012, to single-count superseding criminal informations. Stuart Carson pleaded guilty to corruptly causing to be sent a single e-mail authorizing a $16,000 payment to state-owned Turow Power Plant in Poland. Rose Carson pleaded guilty to corruptly causing to be sent an e-mail authorizing a $40,000 payment to officials at Taiwan's Kuosheng Nuclear Power Plant. Stuart and Rose Carson are scheduled to be sentenced on October 15, 2012. On May 29, 2012, Cosgrove also pleaded guilty to a single anti-bribery provision violation relating to payments to officials in China. There are thus only two remaining defendants: Kim remains a fugitive overseas, and Edmonds' trial is scheduled for late-June 2012.

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 FCPA. 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 in February 2009, the DOJ charged both individuals with one count of conspiracy to violate the FCPA and ten counts of violating the FCPA, and sought forfeiture of over $132 million from them. The London Metropolitan Police arrested Tesler, a lawyer, in March 2009 at the request of United States authorities. According to the charging document, Tesler, Chodan, KBR's Albert "Jack" Stanley and other co-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 was 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. On February 22, 2012, he was sentenced to serve one year of probation and to pay a $20,000 fine. His sentence, which can be considered light given that he faced up to 5 years in prison for the conspiracy charge, took into account his assistance in the investigation and prosecution of Tesler.

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. On February 23, 2012, he was sentenced to serve 21 months in prison, followed by two years of supervised release, and to pay a $25,000 fine. In parallel, Tesler is also being prosecuted in France on charges of corruption of foreign public officials, and is expected to be sentenced by the Criminal Court of Paris on June 11, 2012. His defense denies that corruption took place.

The Tesler and Chodan cases exemplify increasing cross-border cooperation in anti-corruption investigations and prosecutions. In its press releases regarding 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. Fifty-five 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.[49]

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 subsidiaries altered their relationships with their agents/distributors "to conceal their involvement in the sales of its products to Iraq in which ASSF payments were made" and the "extent and duration of the improper ASSF payments." As a result, the SEC charged that Fiat and CNH Global failed to maintain adequate internal controls or properly maintain their books and records.

Siemens

On Monday, December 15, 2008, U.S. 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.

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[49] 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.

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 would 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 those related to the 2004 Athens Olympics. Greece estimated the bribery cost Greek taxpayers €2 billion. On April 5, 2012, the Greek Parliament approved a settlement agreement between Siemens and the Greek State which includes the following: Siemens waives public sector receivables in the amount of €80 million; Siemens agrees to spend a maximum of €90 million on various anti-corruption and transparency initiatives, as well as university and research programs; and Siemens agrees to provide €100 million of financial support to Siemens A.E. to ensure its continued presence in Greece. In exchange, the Greek State agrees to waive all civil claims and all administrative fines related to the corruption allegations and to utilize best efforts to resolve all pending disputes between Siemens and the Greek state-companies or its public 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' conduct. As the charging documents describe, Siemens traces its origins to the mid-1800s 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' 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' year-end financial statements.

- *Nigeria*

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

- *Russia*

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

In a separate scheme involving Russia, Siemens' MED unit allegedly made over $55 million in improper payments to a Dubai-based consultant between 2000 and 2007 in connection with medical equipment sales in Russia. The consultant was apparently used as an intermediary for bribes to government-owned customers, such as public hospitals, in Russia. In at least one instance — which consisted of over $285,000 in payments being made in connection with a $2.5 million contract — payments were routed through both the Dubai consultant and a second consultant registered in Des Moines, Iowa. The corruption was so pervasive within this unit that senior Siemens officials estimated that up to 80% of the MED unit's business in Russia involved illicit payments.

- *China*

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

- *Israel*

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

In addition to the above conduct, as noted above, the DOJ also entered into plea agreements with three Siemens subsidiaries: Siemens Venezuela, Siemens Bangladesh, and Siemens Argentina. Siemens Venezuela and Siemens Bangladesh pleaded guilty to conspiracy to violate the FCPA's anti-bribery and books and records provisions. Siemens Argentina pleaded guilty to a single count of conspiracy to violate the FCPA's books and records provision. All three entities are described in charging documents as "person[s] other than an issuer or domestic concern," and thus were required to make "use of the mails or any means or instrumentality of interstate commerce or [] do any other act in furtherance of" prohibited conduct "while in the territory of the United States" to satisfy the FCPA's jurisdictional requirements.[50] It appears that the DOJ failed to charge Siemens Argentina with an anti-bribery violation because it was not (unlike in the case of Siemens Venezuela and Siemens Bangladesh) able to establish a sufficiently "strong nexus" between its alleged improper payments and the U.S. The conduct for which these entities were charged is summarized below.

- *<u>Venezuela</u>*

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

50 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).

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 canceled. 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' 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 canceled, 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, the 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*

Facing pressure from the media and Congress that the DOJ wasn't prosecuting individuals from big companies, on December 13, 2011, the DOJ indicted eight former Siemens executives and agents. The indictment charges that defendants committed to paying nearly $100 million in bribes to a series of Argentine government officials beginning in 1994 for ten years to win a billion dollar contract to produce national identity cards (the Documentos Nacionales de Identidad or "DNI" project). After the DNI contract was suspended in 1991, the defendants allegedly paid additional bribes to old and new Argentine officials in an attempt to reinstate the contract. Despite these efforts, the DNI project was terminated in 2001. At this point, the defendants caused Siemens AG to file a fraudulent ICSID arbitration claim against Argentina in Washington, D.C. The claim alleged wrongful termination of the contract for the DNI project and demanded nearly $500 million in lost profits and expenses. The defendants continued to pay bribes to suppress evidence during the arbitration proceedings and actively hid from the tribunal the fact that the contract for the DNI project had been secured by bribery and corruption, which included tampering witness statements and pleadings that falsely denied the existence of corruption. As a result of the bribe payments it made, Siemens prevailed in the Washington arbitration and received an arbitration award in 2007 against the government of Argentina of over $217 million plus interest for the DNI contract. However, in August 2009, after settling bribery charges with the U.S. and Germany, Siemens waived the arbitration award.

The DOJ alleged that the defendants filtered money to the Argentine government officials in various ways, including offshore shell companies, fake consulting contracts, and large amounts of cash carried across national borders. Defendants also caused Siemens to pay $8.8 million in 2007 under the legal cover of a separate arbitration initiated in Switzerland by their co-conspirator intermediaries to enforce a sham $27 million contract that involved a company controlled by those intermediaries, which consolidated existing bribe commitments. The defendants caused Siemens to quietly settle the arbitration, keeping all evidence of corruption out of the proceeding.

The defendants named in the DOJ's indictment were: Uriel Sharef, a former member of the central executive committee of Siemens AG; Herbert Steffen, a former chief executive officer of Siemens Argentina; Andres Truppel, a former chief financial officer of Siemens Argentina; Ulrich Bock, Stephan Signer and Eberhard Reichert, former senior executives of Siemens Business Services; and Carlos Sergi and Miguel Czysch, who served as intermediaries and agents of Siemens in the alleged bribe scheme. The defendants live in Germany, Switzerland, or Argentina. The defendants were charged with conspiracy to violate the anti-bribery, books and records, and internal control provisions of the FCPA; conspiracy to commit wire fraud; conspiracy to commit money laundering; and substantive wire fraud. They have not yet been arrested or extradited.

In 2009, following a change in management and the initiation of proceedings by the Munich prosecutor's office, Siemens began cooperating with the DOJ and SEC as well as German prosecutors. The scheme was revealed at that time and the company decided to forego the right to the arbitration award.

The DOJ's press release that accompanied the indictment praised Siemens' laudable actions in disclosing these potential FCPA violations, noting that "Siemens AG disclosed these violations after initiating an internal FCPA investigation of unprecedented scope; shared the results of that investigation; cooperated extensively and authentically with the department in its ongoing investigation; and took remedial action, including the complete restructuring of Siemens AG and the implementation of a sophisticated compliance program and organization."

Also on December 13, 2011, the SEC filed a civil action in the U.S. District Court for the Southern District of New York in connection with the Argentina DNI project, charging seven former senior executives of Siemens AG and its regional company in Argentina with violations of the anti-bribery, books and records, and internal controls provisions of the FCPA. According to the SEC complaint, Siemens paid an estimated total of over $100 million in bribes, approximately $31.3 million of which were made after March 12, 2001, when Siemens became subject to U.S. securities laws. The SEC alleges that in furtherance of the scheme, the defendants falsified documents, including invoices and sham consulting contracts, participated in meetings in the United States to negotiate the terms of bribe payments, and made use of U.S. bank accounts to pay bribes.

Six of the individuals charged in the SEC complaint were included in the DOJ's indictment (Uriel Sharef, Herbert Steffen, Andres Truppel, Ulrich Bock, Stephan Signer, and Carlos Sergi); two were not (Everhard Richert and Miguel Czysch) In addition, the SEC complaint includes Bernd Regendantz (CFO of Siemens Business Services from February 2002 to 2004), who was not included in the DOJ complaint. The complaint alleges that Regendantz violated Rule 13b2-2 by signing false internal certifications pursuant to the Sarbanes Oxley Act. Bernd Regendantz settled the SEC charges without admitting or denying the allegations by consenting to the entry of a final judgment that permanently enjoins him from committing future violations. He agreed to pay a civil penalty of $40,000 which was deemed satisfied by the payment of a €30,000 administrative fine ordered by the Munich prosecutor. As of the date of this publication, there has not been any other activity with respect to the other defendants in the SEC case.

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 anti-bribery 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 U.K. 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 U.K. 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 anti-bribery 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 LU.K.as ("LU.K.as"), Kim Nguyen ("Kim") and An Nguyen ("An"), were arrested in connection with the charges.

LU.K.as 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. LU.K.as 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 email 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. LU.K.as 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.

Jack Stanley

On September 3, 2008, Albert "Jack" Stanley, former CEO and Chairman of KBR, pleaded guilty to a 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 faced as much as ten years in prison and a fine of twice his pecuniary gain for his actions, and his original plea agreement with the DOJ contemplated a prison term of approximately 7 years. His sentencing was delayed several times, potentially to allow him to finish cooperating with the DOJ's prosecution of other individuals and companies involved in the scheme. On February 23, 2012, he was sentenced to serve 30 months in prison, followed by three years of supervised release, and to pay restitution to KBR in the amount of $10.8 million to compensate for his kickback scheme with LNG Consultant. Stanley has already paid KBR $9.25 million as partial restitution, and, per the judgment, he will be allowed to pay the remaining $1.55 million in monthly installments of $1,000 after his release.

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." Email 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 ("U.K.-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 U.K.-MOD official's relative. The marketing agreement provided for the relative to receive commission payments, from which he made payments to the U.K.-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 U.K.-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 U.K.-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 U.K.-MOD official for the purchase of a villa in Spain. In return, the U.K.-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 of imprisonment followed by six months of home confinement and three years of supervised release. He 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, ill health, and 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 of 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, Jordan. The embassy contacted the U.N. regarding the kickback demands, indicating that VCEI (which was not identified by name) had informed the embassy that it would refuse to sign the contract. Nevertheless, VCEI went forward with the transaction, which included the ASSF payments.

Initially, VCEI made the ASSF payments on its own behalf through its agent. Later, VCEI attempted to distance itself from the scheme by having the agent act as its distributor in Iraq. In this capacity, the agent would purchase vehicles from VCEI and then resell 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 that 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 had sought significant prison sentences and had argued that the appropriate Sentencing Guidelines range (if not necessarily the sentence imposed) for Mr. Green should have been calculated at life in prison. The Greens' attorneys pled for clemency based on a number of factors, including Mr. Green's age and health issues.

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 cross-appealed their underlying convictions.

On August 23, 2011, the Justice Department filed a Motion for Voluntary Dismissal of the previously filed protective notice of appeal with the Ninth Circuit Court of Appeals ending its efforts to overturn the District Court's sentencing decision. Prosecutors had requested a 90-day extension to file an appellate brief — during the extension period, it was reported that the Solicitor General was determining whether to authorize the appeal. The Department's dismissal included this statement: "After consideration of this matter within the United States Attorney's Office, the Criminal Division of the Department of Justice, and the Office of the Solicitor General, the government now moves to dismiss its appeal of the district court's determination of sentence." The Government provided no further explanation for the decision and reportedly declined to provide comments to media outlets. The Greens have served their six-month sentences and have been released from custody.

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 Ms. 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 Ms. Siriwan.

One of the Greens' business entities made a $30,000 payment to a United Kingdom bank account held by Ms. Siriwan's daughter for the benefit of Ms. 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 Ms. Siriwan's benefit in connection with these contracts. The payments typically ranged between ten and twenty percent 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 Ms. Siriwan, although the Greens also made cash payments directly to Ms. 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 Ms. 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 Ms. 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 Mr. 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 Ms. Siriwan and her daughter for money laundering and conspiracy to commit money laundering relating to the Greens' conduct. Ms. Siriwan's daughter, Jittisopa "Jib" Siriwan, was alleged to have been 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 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. In the fall of 2011, the Siriwans filed a motion to dismiss the indictments on various grounds. In January 2012, the Federal Court in the Central District of California (Western Division – Los Angeles) held hearings for oral arguments on the motion to dismiss. The case was stayed until a decision on the motion to dismiss the indictment, although the DOJ has stated its intent to renew its request for extradition and the court scheduled a status report conference in July 2012.

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. Email 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 resell 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 he 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 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 U.K."), 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 U.K. manager that signed the 2002 NNPC contract indicated that the commission payment was being shared with an NNPC official. A separate York U.K. manager who signed the second NNPC contract admitted that the agent's approximately 30% commission was unusually high. York U.K. 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 shipyards, 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 shipyard 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 that 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 above, 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

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,"[51] 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.

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

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

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

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

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

Delta & Pine Land Company

On July 25 and 26, 2007, the SEC filed two settled enforcement proceedings charging Delta & Pine Land Company ("Delta & Pine"), a Mississippi-based company engaged in the production of cottonseed, and its subsidiary, Turk Deltapine, Inc. ("Turk Deltapine"), with violations of the FCPA. On July 25, 2007, the Commission filed a federal lawsuit charging the companies with violating the anti-bribery and books and records and internal controls provisions of the FCPA. On July 26, 2007, the SEC issued an administrative order finding that Delta & Pine violated the books and records and internal controls provisions and that Turk Deltapine violated the anti-bribery provisions of the FCPA. In the lawsuit, the companies agreed to pay jointly and severally a $300,000 penalty. In the administrative proceeding, the companies agreed to cease and desist from further FCPA violations and Delta & Pine agreed to retain an independent consultant to review and make recommendations concerning the company's FCPA compliance policies and procedures and submit such report to the SEC.

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

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

Baker Hughes

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

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

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

The agency agreement called for Baker Hughes to pay a commission of 2% on revenues from the Karachaganak project. From May 2001 through November 2003, Baker Hughes made 27 commission payments totaling approximately $4.1 million to the agent (approximately $1.8 million was made by Baker Hughes on behalf of subcontractors). Baker Hughes was also charged with pressuring one of its subcontractors to make a $20,000 payment to the same agent in connection with an unrelated contract.

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

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

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

Baker Hughes self-reported its violations to the DOJ and the SEC. In its sentencing memorandum, the DOJ highlighted the company's "exceptional" cooperation. In addition to self-reporting, Baker Hughes terminated employees and agents it believed to be involved in the corrupt payments and spent $50 million on an internal investigation of its activities in twelve countries. The investigation included independent analysis of financial records by forensic accountants, review by outside counsel of tens of millions of pages of electronic data, hundreds of interviews and the formation of a blue ribbon panel to advise the company on its dealings with the government that included the late Alan Levenson, former director of the SEC's division of corporation finance, Stanley Sporkin, retired federal district judge and ex-director of the SEC's division of enforcement, and James Doty, former general counsel to the SEC. Baker Hughes met repeatedly with the DOJ in the course of its investigation, made its employees available for interviews, and provided a "full and lengthy report of all findings." These efforts led to a $27 million reduction in fines under the sentencing guidelines and avoided a potential criminal trial and the prospect of Baker Hughes being disbarred from government contracts or losing export licenses.

On May 4, 2007 and May 15, 2007, The Sheetmetal Workers' National Pension Fund and Chris Larson, respectively, instituted shareholder derivative lawsuits against Baker Hughes, certain current and former Baker Hughes officers and members of the Board of Directors related, in part, to the FCPA violations. On August 17, 2007, the Alaska Plumbing and Pipefitting Industry Pension Trust instituted a similar lawsuit, and on June 6, 2008, the Midwestern Teamsters Pension Trust Fund and Oppenheim Kapitalanlagegesellschaft mbH also instituted a shareholder derivative lawsuit. On May 15, 2008, the consolidated complaint of the Sheetmetal Workers' National Pension Fund and The Alaska Plumbing and Pipefitting Industry Pension Trust was dismissed for lack of subject matter jurisdiction. The lawsuit brought by Larson was dismissed on September 15, 2008. The lawsuit brought by the Midwestern Teamsters Pension Trust Fund and Oppenheim Kapitalanlagegesellschaft mbH was dismissed on May 26, 2009. These cases are discussed 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.[52]

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

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

taped call, an El Paso official reminded an El Paso trader of past conversations with SOMO officials regarding the surcharges in which "they told us—blatantly—that we would have to pay."

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

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

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

Vetco International Ltd.

On February 6, 2007, the DOJ settled cases against three wholly owned subsidiaries of Vetco International Ltd. and entered into a 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 U.K., pleaded guilty to violating the FCPA. In 2004, Vetco Gray U.K. (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 U.K. 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.[53] In calculating the fine against Vetco Gray U.K., which totaled $12 million of the $26 million in fines, the DOJ "took into account" Vetco Gray U.K.'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.

2006

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

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

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. 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 and $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 the 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, as well as 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. 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 to 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 overcharging 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 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 it 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 accounting provisions. Although providing few details on the specific nature of the illicit payments, the SEC complaint concluded 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 their personal uses.

- *New FCPA Issues*

In the midst of its settlement discussions with the SEC, Tyco engaged outside counsel in 2005 to conduct a global anti-corruption compliance review. The review, which Tyco says has been completed, uncovered additional FCPA violations that prompted a new round of negotiations with the DOJ and SEC beginning in February 2010. In its September 2011 Form 10-K filing, Tyco disclosed that its global review had revealed certain practices that were potentially noncompliant with Tyco's policies and relevant anti-corruption laws. Although Tyco does not provide specifics about those practices, the same disclosure references conduct for which it was prosecuted for, yet acquitted of, in Italy. The disclosure also implicates the company's former medical device unit, Covidien, and its former electronics unit, TE Connectivity, both of which have since been divested. Finally, the disclosure also references certain potential anti-competitive practices in Germany for which it is being prosecuted by the German Federal Cartel Office. Tyco's disclosure states that its "best estimate of probable loss for [the new] compliance matters is $34 million."

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, D.C. 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 of imprisonment, three years of 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.[54]

Robert E. Thomson & James C. Reilly

On May 20, 2005, the DOJ suffered a then-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.

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

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

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

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

DPC (Tianjin) Co. Ltd

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

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

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

In addition to the FCPA anti-bribery provisions, DPC Tianjin also violated the books and records provisions by recording the illicit payments as legitimate sales expenses. DPC 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 Azerbaijani 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 Azerbaijani 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 Azerbaijani government officials to secure a controlling stake in SOCAR. The officials included a senior official of the Azerbaijani government, a senior official of SOCAR, and two senior officials at the Azerbaijani 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.[55] On August 21, 2007, the DOJ filed an appeal of the dismissal of the remaining counts, but the U.S. Court of Appeals for the Second Circuit affirmed the dismissal.

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. On March 28, 2012, the Privy Council unanimously ruled that Kozeny could not be extradited from the Bahamas to the United States to face FCPA charges. The Council held that because Kozeny's alleged bribery did not break any Bahamian laws, the courts there lacked jurisdiction to order his extradition.

The United States is not the only country that would like Kozeny to leave the Bahamas. The Czech Republic is also apparently seeking the extradition of Kozeny, who was once dubbed by Fortune Magazine as the "Pirate of Prague" for his alleged conduct in connection with the privatization of the Czech Republic's formerly state-owned enterprises. According to Czech prosecutors, Kozeny embezzled $1.1 billion from mutual funds that he established in the Czech Republic in the early 1990s. The Czech Republic tried and convicted Kozeny in absentia in 2010.

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[55] 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, an application to discontinue the criminal charges, as to Pinkerton 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. The judge held that "[i]t 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."

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 in prison and fined $1 million.

On December 14, 2011, the Second Circuit Court of Appeals upheld Bourke's conviction of conspiring to violate the FCPA and the Travel Act and of making false statements. According to the brief filed in his appeal, Bourke's trial focused on two related issues: "whether Bourke knew that Kozeny was bribing the Azerbaijanis, and whether he willfully and corruptly joined the bribery conspiracy." Given the case's focus on his state of mind, Bourke argued that the government had not established a factual basis for the trial court's instruction to the jury that he could be guilty for consciously avoiding learning the truth about Kozeny's payments to Azerbaijani officials. He argued that such instruction prejudiced the jury towards conviction on the basis of negligence despite the absence of evidence that Bourke sought to avoid learning of bribery. Similarly, Bourke argued that testimony describing the due diligence of a company that decided not to invest in Kozeny's enterprise was irrelevant, further shifting the emphasis to "what [Bourke] should have known, rather than what he actually knew."

In upholding Bourke's conviction, the Second Circuit concluded that there had been a sufficient factual basis for instructing the jury on conscious avoidance of learning of Kozeny's improper payments, including: (i) his knowledge of the pervasive corruption in Azerbaijan and Kozeny's reputation for corrupt business practices, which was the same knowledge that led other similarly sophisticated investors to refuse to finance Kozeny's operations; (ii) his decision to join the board of American advisory companies rather than Kozeny's company, thus avoiding knowledge of its undertakings; (iii) tape recordings by his attorneys of conversations between Bourke and other investors in which Bourke speculated as to Kozeny's methods but deliberately eschewed actual knowledge thereof; and (iv) conversations between Bourke and his attorneys (over which Bourke had previously waived his attorney-client privilege as part of a proffer to prosecutors) demonstrating that he failed to follow-up on concerns about possible FCPA liability that he voiced to his attorneys. In the Court's opinion, "a rational juror could conclude that Bourke deliberately avoided confirming his suspicions that Kozeny and his cohorts may be paying bribes." Bourke remains free on bail while he continues to pursue his appeal.

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 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 required Martin to pay a civil monetary penalty of $30,000.

OTHER FCPA AND RELATED DEVELOPMENTS

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 President of Nigeria 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 third-party candidate. 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.

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 U.K. 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 U.K.

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-U.K. 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.

- *<u>Alamieyeseigha</u>*

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 U.K. 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 33 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.[56]

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 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 has 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.

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56 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.

- *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 U.K. 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 U.K. 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 was 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 U.K. 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 U.K. 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.

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, began releasing enforcement statistics of the OECD Convention signatories. The most recent annual report, released in April 2011, showed that, between the time the OECD Convention entered into force in 1999 and March 2011, 199 individuals and 91 entities were sanctioned under criminal proceedings for foreign bribery. The statistics indicated that 51 individuals and 14 entities had been sanctioned under criminal proceedings since the previous year's report. 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 countries 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 countries 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.

United Kingdom Anti-Bribery Developments

The revolutionary U.K. Bribery Act 2010 is still causing ripples of uncertainty in the U.K. and global business communities, despite the SFO's efforts to enforce the Act in such a way that "ethical companies have nothing to fear." Because the Bribery Act is not retroactive, the SFO has not yet prosecuted enough cases to provide the global business community with extensive guidance to this end. Adding to this confusion is the recent departure of two significant SFO figures — former director Richard Alderman and former chief executive Phillippa Williamson. While the end of Alderman's tenure was expected, Williamson's resignation resurrected speculation that the SFO could be absorbed into another U.K. agency. Newly appointed SFO director David Green, however, has pledged that the SFO is "here to stay" and has vowed to continue Alderman and Williamson's efforts to "maximize [the SFO's] impact" within the "emerging counter-fraud landscape."

Below are discussions of the Bribery Act and 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"). 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.K. Bribery Act 2010

On April 8, 2010, the House of Commons passed legislation to consolidate, clarify and strengthen U.K. anti-bribery law. The previous U.K. anti-bribery legal regime 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 presents 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 development 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 and 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, sector 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 good corporate 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 continually monitor 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 Bribery 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."[57] 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.

- *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 Bribery 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.

Foreign Investigations of Note

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

[57] 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.

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 Limited, 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 of 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

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 allegedly improper payments in various countries, and that these investigations may result in fines, exclusion from public tenders, and third-party actions. Alstom disclosed that these investigations included an investigation by the World Bank and the European Investment Bank. In February 2012, the World Bank announced the three-year debarment of Alstom Hydro France and Alstom Network Schweiz AG (Switzerland) along with their affiliates as part of a Negotiated Resolution Agreement between Alstom and the World Bank related to an alleged improper payment in connection with a World Bank-financed project in Zambia. Alstom further agreed to make a restitution payment of $9.5 million. The debarment period can be reduced to 21 months if the entities comply with the terms of the Agreement.

Total

Total S.A. ("Total"), the fifth largest publicly traded integrated international oil and gas company in the world, has disclosed in its annual reports and filings several investigations by national authorities regarding possible violations of applicable anti-corruption laws.

Total has reported that it will face trial in France during the first quarter of 2013 over allegations of bribery relating to the Oil-for-Food Program. In August 2011, the investigating judge decided to send the case against Total to trial, despite recommendations from the prosecutor's office in France that the cases against both Total employees and the company itself be dropped. Total has also disclosed that a judicial inquiry in France was launched regarding an agreement relating to the South Pars gas field in Iran. However, as of March 26, 2012, Total reported that it had "not been notified of any significant developments in the proceedings since the formal investigation was launched" in 2006. Previously, the SEC and DOJ had also directed an investigation into the South Pars gas field contract. In 2010, Total opened settlement discussions, which are ongoing, with the SEC and DOJ, without acknowledging any alleged facts. Finally, Total disclosed on March 26, 2012, that the SEC had issued a formal request for information related to the operations in Libya of certain oil companies, including Total. Total reported that it "is cooperating with this non-public investigation."

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 the 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.

U.S. 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." Then-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." Andres cited the fact the DOJ had prosecuted 50 individuals since January 2009 with 35 defendants awaiting trial on FCPA related matters. He contrasted these statistics with the fact that, in 2004 the 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 22 individuals were part of one case — the failed SHOT Show case, discussed above — and that 24 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, 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 whether a statutory clarification of the term "foreign official" might help clarify the business community's understanding of and compliance with the FCPA. 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. Andres also argued that DOJ Opinion Procedure Releases provide businesses "clear guidance" on actions that potentially expose them to civil and criminal penalties.

One area that 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. 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, Andres identified the OECD Anti-Bribery Convention as an area of growing success in global anti-corruption enforcement.

Sens. Klobuchar and Coons later indicated they were 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.

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 cooperation with foreign authorities, it is rare for other countries to initiate cooperation 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.

- *Implementation and Further Recommendations*

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 its FCPA enforcement efforts, including a compilation and analysis of relevant statistics.

While generally commending U.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: (i) "Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery" and (ii) "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 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.

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 in order 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, consorting with hip hop stars and other audacious activities, 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 a 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[58] 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 Obiang's fund transfers into accounts at six different banks, including Bank of America and Citibank. The lawyers opened bank accounts for shell companies, while either failing to disclose or actively hiding the identity and PEP status of the beneficiary owners of the shell companies. The attorneys also used their own attorney-client and law office accounts as *de facto* checking accounts for shell companies. For example, in one

[58] "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.

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. Efforts by U.S. authorities to reclaim Obiang's property through the Kleptocracy Asset Recover Initiative are discussed *supra*.

- *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 to 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 an $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 minimis* balance and scant activity since 2007.

- *Nigeria*

Jennifer Douglas, a U.S. citizen and wife of the former Vice President of Nigeria Atiku Abubakar, is a former Nigerian television journalist who dated Abubakar in the 1980s before moving to the United States and marrying another man. That first marriage ended in divorce, and Douglas reestablished a relationship with Abubakar, who began to spend significant time with her in the United States, and the couple was "officially married" in 2003. From 2000 to 2007, she opened more than 30 bank accounts to help her husband import over $40 million in suspect funds into the United States, mostly from offshore corporations. As discussed below, the money included $2 million in bribes related to the Siemens scandal. She used some of the money to fund an extravagant lifestyle in the United States, including monthly credit card bills ranging from $10,000 to $90,000. The transfers also included $14 million wired to the American University in Washington, D.C. related to the establishment and development of the new American University of Nigeria, which Douglas helped found. The University accepted all transfers without asking questions, and when one of her banks closed an account for suspicious offshore wire transfers, Douglas' U.S. lawyer helped her open new accounts to facilitate further transactions.

Atiku Abubakar derives much of his wealth from his co-ownership of a powerful Nigerian company called Intels, which he owns along with Italian Billionaire Gabriele Volpi. Intels is one of Nigeria's largest oil services companies, operating oil terminals and oil services ports in Nigeria, Angola, Equatorial Guinea, Gabon, and elsewhere, with hundreds of millions of dollars in revenues. In 1996, Nigeria's then-President Abacha seized Abubakar's Intels shares, but the Report indicates that Volpi maintained a gentlemen's agreement to restore Abubakar's ownership when politics allowed. When President Abacha died in 1998, Volpi lived up to the gentlemen's agreement. When 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. U.K. L" and "Peniel Inc. U.K. 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 canceled 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."

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

Pfizer

On November 10, 2011, Pfizer disclosed in an SEC filing that it had reached an agreement in principle with the DOJ and SEC to resolve "potentially improper payments" made by Pfizer and Wyeth subsidiaries in connection with sales outside the United States. *The Wall Street Journal* reported that, according to its sources, Pfizer would pay over $60 million under the terms of the settlement. Pfizer's consolidated financial statements for the fiscal year that ended December 31, 2011 stated that the settlement is still in the process of being finalized.

Because doctors overseas are often employed by the government or are affiliated with state-run hospitals, U.S. authorities consider them to be foreign officials under the FCPA. The DOJ is currently conducting a wide-ranging probe of potential FCPA violations by pharmaceutical and medical device companies, and has settled enforcement actions with a number of companies. In April 2011, Pfizer competitor Johnson & Johnson agreed to a $77 million global settlement to resolve criminal and civil charges from the DOJ and the SEC relating to improper payments made to public sector healthcare professionals in Greece, Poland, and Romania by Johnson & Johnson subsidiaries. The DOJ and SEC credited Johnson & Johnson for voluntary disclosure of the violations and conducting a thorough internal investigation to determine the scope of the improper payments. Johnson & Johnson first disclosed the existence of improper payments in February 2007.

Avon

On October 20, 2008, global manufacturer and marketer of beauty and related products Avon Products Inc. disclosed in an SEC filing that in June 2008 it had commenced an internal investigation relating to certain travel, entertainment, and other expenses in connection with its China operations, with a focus on compliance with the FCPA, after it received an allegation that the payment of such expenses was improper. Avon disclosed further that it had reported the fact of its investigation to the DOJ and the SEC. In July 2009, Avon disclosed that, in connection with the internal investigation, it had commenced compliance reviews to evaluate its compliance the FCPA and related U.S. and foreign laws in additional countries selected to represent each of the Company's international geographic segments. The company further disclosed that its internal investigation and related compliance reviews are focused on travel, entertainment, gifts, the use of third-party vendors and consultants and related due diligence, joint ventures and acquisitions, and payments to third-party agents and others, all in connection with Avon's business dealings with foreign governments and their employees.

Avon's internal investigation and cooperation with authorities remain ongoing, and Avon has taken several related disciplinary measures. On February 24, 2011, Avon disclosed that its Senior Vice President for Western Europe, Middle East & Africa, Asia Pacific, and China had retired two days after being placed on administrative leave in connection with the investigation.

On May 3, 2011, Avon disclosed that in connection with the internal investigation, it had terminated four individuals previously placed on administrative leave in 2010 (the former general manager for China, the former head of corporate affairs for China, the former head of finance for China, and the former head of global internal audit and security (who was previously head of finance for Asia Pacific)). On January 30, 2012, Avon disclosed, in connection with the internal investigation, that its Vice Chairman since 2005 and CFO from 2005 to May 2011 was no longer with the Company.

Avon has already incurred substantial financial and reputational costs related to the investigation, even while the legal costs, if any, have yet to be determined. According to company filings, the internal investigation and related compliance reviews have cost Avon more than $247 million from 2009 through 2011. It is unclear when the matter will end: in October 2011, Avon was informed that the SEC had opened a formal investigation of possible FCPA and other securities-related violations; and in February 2012 *The Wall Street Journal* attributed to anonymous "people familiar with the matter" a report that U.S. prosecutors had presented evidence to a federal grand jury regarding whether current or former Avon executives ignored a 2005 internal Avon audit report relating to payments to Chinese officials or third-party consultants.

Additionally, several shareholders have brought derivative lawsuits against the company alleging breach of fiduciary duty and, in certain complaints, abuse of control, waste of corporate assets, unjust enrichment, and/or proxy disclosure violations.

Lauren Stevens

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 did not suggest that Stevens participated in the marketing of the drug for unapproved, "off-label" uses. Instead, the charges were limited to her response to the FDA's inquiry. The government alleged that Stevens obtained, but concealed and failed to disclose, evidence of off-label marketing by GSK promoters. The government charged 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 would have faced a statutory maximum term of 60 years in prison.

Yet after the close of the government's case, on May 10, 2011, the court granted Stevens' motion for judgment of acquittal. The court concluded, based on privileged documents that had been ordered disclosed by a magistrate judge, that Stevens had undertaken a "studied, thoughtful analysis of an extremely broad request" from the FDA and, although "[t]he responses that were given . . . may not have been perfect [or] may not have satisfied the FDA," the statements were sent in the course as Stevens' "bona fide legal representation of a client and in good faith reliance [on] both external and internal lawyers" for GSK, thereby qualifying for a safe harbor exception under the federal obstruction of justice statutes. Because the court found that Stevens had made full disclosure to external and internal counsel and "[e]very decision she made and every letter she wrote was done by a consensus," she acted with good faith that negated the intent element of both the obstruction and false statement charges against her.

Despite Stevens' acquittal in this particular case, the government's willingness to charge Stevens and bring her case to trial highlight several risks attendant in preparing any response to government inquiries. 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. Stevens personally handled GSK's response, in which 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.

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, leading to the failed trial.

- *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 the DOJ does not believe that individual culpability is limited to the underlying alleged misconduct. It can also attach to those individuals responsible for responding to a government inquiry. 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.

With proper focus, expertise, and independence, internal investigators can reduce the risk that their handling of an internal investigation will land them in unfortunate circumstances.

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 canceled 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 canceled 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 and implement and maintain an effective compliance and ethics program, and the company 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.

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 revised review procedures 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 indicated 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 was essentially part time and it was common for legislators to hold outside employment. Finally, the Release noted 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 indicated 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 indicated 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 indicated that Olayan devoted an insubstantial amount of his business activity to his position on the Saudia board, and he held no other position within the Saudi government (in fact, the release indicated 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 indicated 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 also stated 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 had 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 spelled 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, officers, 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 specified 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 in violation 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 expense occurred 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 stated 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 stated that all these expenses were to be paid from Missouri DOA funds and contributions from private individuals within the state. The Release also indicated 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 stated 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 a 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 his relationship with Shoup, Inc. did not violate Nigerian conflict of interest laws.

The Release noted 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 that 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 costs, such 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 that indicated the agent's possible intent to make a "small gratuity" to low-level government employees to facilitate the foreign government approval needed for the transaction.

In deciding not to take enforcement action, the DOJ emphasized several factors:

- The employee of the foreign company represented that no payments were ever made to officials of the foreign government; the American firm confirmed this fact to the best of its knowledge. At the time the "gratuity" statement was made, the American firm discouraged any payments. Both parties subsequently represented that they would not violate the provisions of the FCPA.

- The American firm was to assume a minority interest in the foreign company after the transaction, with proportionate representation on the foreign company's Board of Directors so long as it was a shareholder. Once it assumed that interest, the requestor represented that it would retain the rights to have the foreign company's books and records audited by a major U.S. accounting firm to determine if violations of the FCPA had occurred.

- If the American firm were to learn that the foreign company violated (or intended to violate) the FCPA, it represented that it would notify DOJ and responsible foreign government authorities. Furthermore, the American firm represented that it would retain the right (but not the obligation) to end the relationship if FCPA violations were discovered.

DOJ Review Procedure Release 85-01

Opinion Release 85-01 was released on July 16, 1985. Atlantic Richfield Company ("ARCO"), doing business through a wholly owned subsidiary, announced plans to build a chemical plant in France. ARCO intended to invite officials of French Government Ministries responsible for industrial finance and development programs and for the issuance of permits and licenses necessary for the project to Texas and Philadelphia to meet with ARCO management and to inspect a plant.

The French government was to designate the officials for the trip. ARCO obtained an opinion that the proposed conduct did not violate French law. Further, it represented that the travel would occur only during one week and ARCO would pay the necessary and reasonable expenses of the French delegation, which will include those for air travel, lodging and meals.

The DOJ indicated that based on the facts and circumstances as represented, it did not intend to take any enforcement action with respect to trip.

DOJ Review Procedure Release 85-02

Release 85-02 was a press release concerning the W.S. Kirkpatrick settlement, which related to allegations that the company made approximately $1.7 million in improper payments through a Nigerian agent to obtain a $10.8 million contract to provide medical equipment to the Nigerian government. W.S. Kirkpatrick pleaded guilty to a single count of bribery in violation of the FCPA violation and was fined $75,000. Harry Carpenter, the Chairman of the Board and

CEO of W.S. Kirkpatrick, pleaded guilty to one count of FCPA bribery and was sentenced to three years probation, community service, and a fine of $10,000.

DOJ Review Procedure Release 85-03

On January 20, 1987, the DOJ released Opinion Procedure Release 85-03. The requestor, an American company, had been attempting to resolve a claim against a foreign country and wished to enter into a settlement agreement. The requestor was unable, however, to identify the agencies or officials in the foreign country most responsible for and capable of settling the claim. The company wished to hire a former official of the foreign government as an agent to locate the correct agency. The requestor proposed paying the agent $40 per hour, plus expenses, up to a limit of $5,000.

The DOJ issued no action comfort in light of the representations that the proposed agent would enter into a written agreement specifying that the agent, among other things: (i) was not presently an official of the foreign country's government or an official of a political party or candidate for political office in the foreign country; (ii) understood and would abide by the FCPA; (iii) would not pass on his compensation to any official of the foreign government or government official; and (iv) would perform only those functions specifically authorized by the requestor.

The Release notes that action in the matter was taken in December 1985, although the Release was not published until January 1987.

DOJ Review Procedure Release 86-01

On July 18, 1986, the DOJ issued Opinion Procedure Release 86-01. The subject of the release was three United States corporations' intentions to employ members of the Parliaments of Great Britain and Malaysia to represent the firms in their business operations in the respective nations.

The first U.S. Corporation wished to retain a British Member of Parliament, described as a backbencher, as a consultant at a rate of $6,000 per month for six months. The Member occupied no other government position and did not have any authority with respect to the business of the U.S. corporation in Britain.

The second U.S. corporation wished to enter into a joint venture also with a British Member of Parliament who held no other position in the British Government. The joint venture was to purchase and operate airports in Great Britain. The Member would receive compensation in the range of $40,000 to $60,000 per year, and would be involved in the actual conduct of the joint venture's business operations.

The third U.S. corporation sought to retain a Member of the Malaysian Parliament as its representative in the purchase and sale of commodities in that nation. The MP occupied no position in the Malaysian government other than his seat in the Parliament, was to be paid $4,000 per month for a period of one year and would receive 30% of the net profits generated by his representation, to the extent that amount exceeded his basic compensation.

All companies represented the compensation paid to the Members was reasonable and would be paid directly.

The Release noted that each Member of Parliament in the three requests occupied no special legislative position of influence other than that possessed by any single member in a large legislative body (Great Britain, over 600 members; Malaysia, over 350 members). Furthermore, each Member had entered into a written employment agreement in which he agreed to make full disclosure of his representation relationship with the U.S. corporation and agrees not to vote or conduct any other legislative activity for the benefit of the corporation. Each corporation and member also agreed that the Member would not use his position as a Member of Parliament to influence any decisions that would benefit the U.S. corporation.

Based on the facts and circumstances as represented, the DOJ issued no action comfort.

DOJ Review Procedure Release 87-01

On December 17, 1987 the DOJ issued Opinion Procedure Release 87-01, relating to a request from Lantana Boatyard, Inc. ("Lantana"), a company wishing to sell military patrol boats to an English corporation, Milverton Holdings, Ltd. ("Milverton"), owned by a Nigerian, Tayo Amusan. Milverton intended to resell the boats to the Nigerian government.

By the terms of the proposed transaction, Lantana was to be fully paid before any of the boats were delivered to Milverton, and Lantana would have no involvement in negotiations between Milverton and the Nigerian government except that Lantana was to send a representative to give a technical briefing to the Nigerian officials at Milverton's expense.

Lantana represented that the contract between Lantana and Milverton would include provisions to the effect that neither Milverton nor any of its shareholders, directors, officers, employees or agents would perform any act in violation of the FCPA. Lantana also represented that it would obtain written certifications from each of its officers, directors and employees involved in the transaction, stating that he or she had no knowledge that Amusan, or any entity which he controls, has done or will do any act in violation of the FCPA. Lantana further represented that, if requested, it would disclose to any authorized official of the Nigerian government the price and term of the sales contract with Milverton.

Lantana also intended to pay a 10% commission to an international marketing organization that brought the opportunity to Lantana, which would be paid at the organization's principal place of business. Lantana represented that the payment was consistent with normal business practices. Lantana further represented it would obtain written FCPA certifications from the marketing organization and the responsible officials.

The DOJ indicated that based on the facts and circumstances as represented, it did not intend to take any enforcement action with respect to proposed arrangements.

DOJ Review Procedure Release 88-01

On May 12, 1981 the DOJ issued Opinion Procedure Release 88-01 responding to a request from Mor-Flo Industries, Inc. and two of its subsidiaries ("Mor-Flo"), which intended to construct a facility for the production of gas and electric water heaters in Baja California, Mexico. As part of the project, Mor-Flo intended to participate in a Mexican Government program under which Mor-Flo would acquire certain deeply discounted debt instruments of the Government of Mexico or agencies thereof and exchange that debt paper with the Government of Mexico at a government-determined exchange rate. The funds received by Mor-Flo in exchange for the debt paper would then be restricted to expenditures in Mexico for plant and equipment.

Mor-Flo represented that it paid a fee to an agency of the Government of Mexico and that it would also be required to pay a fee to the financial institution serving as the Mexican Government's financial agent in the United States. Those fees, approximately $42,000 and $320,000, respectively, were to be nonrefundable and paid without the assurance that Mor-Flo would be accepted into the program.

The DOJ issued no action comfort based on several representations from Mor-Flo. Mor-Flo represented that it would secure written confirmation from the financial institution that it was the duly authorized representative of the Government of Mexico and that none of the fees would be used in violation of the FCPA. Mor-Flo also represented that it would secure a written opinion of Mexican counsel that the payment of fees to the Government of Mexico and to its financial representative were not in violation of any Mexican law, rule or regulation.

DOJ Review Procedure Release 92-01

In February 1992, the DOJ issued Review Procedure Release 92-01 granting no action comfort in response to a request of Union Texas Pakistan, Inc. ("UTP"). UTP wished to enter into a joint venture agreement with the Ministry of Petroleum and Natural Resources of the Government of Pakistan under which it would provide training, travel and subsistence expenses to officials and employees of the Government of Pakistan.

According to UTP, under Pakistan law, the Government of Pakistan may require petroleum exploration and production companies to provide training to government personnel to assist them in performing their duties of supervising the Pakistan petroleum industry. The joint venture agreement proposed to UTP by the Ministry of Petroleum and Natural Resources contained a provision implementing this provision of law and obligating UTP to expend a minimum of $200,000 per year for such training. UTP represented that the training would take place in Pakistan as well as at seminars, symposia and workshops in the United States and Europe. UTP proposed to pay the officials' training expenses, including seminar fees, airfare, lodging, meals, and ground transportation. UTP also agreed that, in the event it proposed to exceed $250,000 in annual expenditures for training outside Pakistan, it would request further review by the DOJ.

DOJ Opinion Procedure Release 93-01

On April 20, 1993, the DOJ issued Opinion Procedure Release 93-01 at the request of a major commercial organization based in Texas. The requestor had entered into a joint venture partnership agreement to supply management services to a business venture owned and operated by a quasi-commercial entity owned and supervised by the government of a former Eastern Bloc country (the “Foreign Partner”).

The partnership was registered as a separate legal entity in the foreign state, and the companies proposed to select a board of directors, some representing the requestor and the others drawn from the Foreign Partner. The directors’ fees to the foreign directors would be approximately $1,000 per month, which would approximate their regular income from the Foreign Partner.

The requestor represented that although the requestor or another entity owned by the requestor would pay the directors’ fees in the first instance, the fees ultimately would be reimbursed by the Foreign Partner either from its share of the profits or from its other funds. The requestor also represented that it would educate the foreign directors regarding the FCPA.

The DOJ indicated that based on the facts and circumstances as represented by the requestor, it did not intend to take any enforcement action with respect to directors’ fee payments described in the request.

DOJ Opinion Procedure Release 93-02

On May 11, 1993, the DOJ issued Opinion Release 93-02. The Release concerned an American company which sought to enter into a sales agreement with a foreign government-owned business that held an exclusive license to manufacture, sell, purchase, import, and export all defense equipment for that country’s armed forces. The law of that country required the military to deal only through the government-owned business.

The government-owned business acted as an agent for the foreign military. However, in order to do business with the military in that country, all foreign suppliers were required to enter into written agreements with the government-owned business, under which the supplier agreed to pay to the government-owned business a commission.

Nevertheless, the company represented that it would not enter into such an agreement, but rather would pay all commissions directly to the country’s treasury or, in the alternative, the commissions would be deducted and withheld by the government customer from the purchase price. Therefore, the company would make no payments to the government-owned business or to any foreign officials. Under these circumstances, the DOJ issued no action comfort.

DOJ Opinion Procedure Release 94-01

On May 13, 1994, the DOJ issued Opinion Procedure Release 94-01 in response to a request from an American company, its wholly owned subsidiary and a foreign citizen. The subsidiary manufactures clinical and hospital laboratory products. Its manufacturing operations are located on property acquired from a state-owned enterprise that, at the time of the request, was being transformed into a joint stock company.

The subsidiary desired to enter into a contract with the general director of the state-owned enterprise, a longtime resident of the area who possessed experience dealing with the local authorities and public utility service providers. The subsidiary intended to obtain direct electric power service for its plant by constructing a substation, which required the subsidiary to enter into a service agreement with the local power authority and obtain authorization from the authority to connect to its power grid. Also, in order to gain direct access to the substation, the subsidiary planned to perform minor road construction and install fences, which would require certain abutter consents and incidental governmental approvals.

The company wished to engage the individual to assist in obtaining the relevant permits and authorizations for these projects, which the company represented would be far more difficult to complete without his assistance. For the individual's consulting assistance, the subsidiary would pay him $20,000 over twelve months.

Local counsel advised the company that, under the nation's law, the individual would not be regarded as either a government employee or a public official. Nevertheless, for the purposes of the Release, the DOJ considered him to be a "foreign official" under the FCPA.

The DOJ provided the requested no action comfort based on these circumstances and a series of representations by the foreign official.

- He would enter into the consulting agreement in his personal and private capacity and not as an officer, employee, or agent of the enterprise, or any other entity or individual. This included a representation that the consulting did not violate any rules of, or applicable to, the enterprise, and that his consultancy would not interfere with his duties as an officer and employee of the enterprise, and that he obtained approval from the enterprise.

- He would abstain from voting or taking any action in the event that any corporate actions or approvals of the state-owned enterprise were necessary for the subsidiary to seek or obtain consents, and instead he would refer all such matters to the governing body of the enterprise.

- He would not use his position as a director of the enterprise to influence any act or decision of the government on behalf of the subsidiary.

- No payments which he would receive under the consulting agreement would be used directly or indirectly to offer, pay, promise, give, or authorize payment of money or anything of value to any governmental or public official for the purpose of influencing any act or decision of such public official in his official capacity.

- The proposed relationship was lawful under the written laws and regulations of the nation, and all applicable reporting or disclosure laws would be satisfied.
- Payment would only be for consulting services and his compensation was not dependent on the success of the subsidiary in securing direct electric power service or the incidental access approvals. Also, he represented that he had no right to any future relationship with the subsidiary beyond that set forth in the consulting agreement.
- He would not appear on behalf of the subsidiary before any agency of the local government, and any communication to him concerning the approvals from representatives of any local governmental agency would be referred for response to the subsidiary.
- He would serve as an independent contractor for the subsidiary without authority to legally bind the subsidiary.
- If he violated these representations or breached the consulting agreement in any manner, the agreement would automatically be rendered void *ab initio* and he would surrender any claim for payment under the consulting agreement, even for services previously performed.

DOJ Opinion Procedure Release 95-01

On January 11, 1995, the DOJ issued Opinion Procedure Release 95-01 granting no action comfort in response to a request submitted by a U.S. energy company with prospective operations in a South Asian country. The requestor planned to acquire and operate a plant in a region of the foreign country that lacked modern medical facilities. A modern medical complex, with a budget in excess of one hundred million dollars, was then under construction and the requestor proposed donating $10 million to the project for construction and equipment costs. The requestor represented that this donation would be made through a charitable organization incorporated in the U.S. and through a public limited liability corporation located in the South Asian country.

The requestor represented that prior to releasing any funds it would require all officers of the charitable organization and the foreign limited liability corporation to certify that none of the funds would be used in violation of the FCPA, and that none of the persons employed by either organization were affiliated with the foreign government. In addition, the requestor represented that it would require audited financial reports from the charitable organization, "accurately detailing the disposition of the donated funds."

DOJ Opinion Procedure Release 95-02

On September 14, 1995, the DOJ issued Opinion Procedure Release 95-02 in response to a joint request from two companies ("Company A" and "Company B"). Company A had acquired offset obligations through contracts with the government of a foreign country. Offset obligations were handled by an Offset office that is part of the foreign country's Ministry of Defense. Company B was owned by a U.S. citizen who established a program in the foreign country to generate offset credits for sale. In October 1993, Company B received an oral agreement from the Offset office's chairman that Company B would receive millions of dollars in offset credits in exchange for the establishment of a new company ("Newco") in that country. Company A then intended to purchase offset credits from Company B generated by the development of Newco.

A majority of the investors in Newco were to be foreign government officials. However, no official of the Ministry of Defense would be an investor, nor would the investors be in positions to grant or deny offset credits. Under the arrangement, Company B would receive offset credits from Newco by meeting certain program milestones. Company B represented that the milestones triggering the credits would not be tied to Newco's profitability and that Company B and the chairman of the Offset office would negotiate a written agreement stating that the offset credits will not be contingent upon the success of Newco.

Company A would not be an investor in Newco, but, under a management services agreement, Company A would provide a general manager and would subcontract out the remaining services necessary to operate Newco to a third company ("Company C"). Company B would provide financing to Newco for its operations. Company A would be paid a fee equal to a percentage of Newco's gross revenues and a percent of Newco's profits. Out of this fee, Company A would compensate Company C and Company B for their services and Company B's loan to Newco. None of the companies would have an equity interest in Newco.

Companies A and B certified to the DOJ that neither company had made or would make any improper payments in violation of the FCPA in connection with the organization or operation of the proposed Newco, nor any payments to government officials in connection with the proposed transactions. The companies further warranted that Company B had not paid and would not pay any funds from Company A for the sale of the offset credits to any investors in Newco or to any government officials.

The shareholders of Newco — some of who 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 action 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.[59] 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 paid in part by the foreign governments and in part by the nonprofit.[60] 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

[59] 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.

[60] 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.

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.

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, the 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 (the "Representative") in that same foreign country. An unsubstantiated allegation of a past unlawful payment by Representative led the requestor to seek DOJ guidance.

According to the Release, the requestor represented that the Representative was a privately held company and that none of the owners, officers, or employees of the company was a government official. The requestor initially selected the Representative after interviewing several other prospective companies and determining that the Representative had the most experience and expertise with projects involving similar technology. The requestor also represented that the commission rate payable to the Representative was commensurate with the rates it paid for similar services in comparable sales. The requestor further obtained an opinion from local counsel in the foreign country that the Representative Agreement complied with local law.

The requestor represented that it had conducted a due diligence investigation of the Representative and that this investigation did not uncover improper conduct. However, subsequent to the requestor's initial due diligence investigation, the requestor learned of an allegation that the Representative had been involved in an improper payment more than fifteen years ago. The requestor undertook a second due diligence investigation in response to this allegation, including hiring an international investigative firm, interviewing principals of the Representative, the Commercial Counselor at the U.S. Embassy in the foreign country, and other persons with extensive commercial and other experience in the country. The second investigation did not uncover evidence substantiating the allegation, but did reveal that a number of persons might have been motivated, for political reasons, to disparage the Representative or its associated person.

The Representative warranted to its familiarity and compliance with the FCPA and indicated that the Representative would execute a certificate, a copy of which would be filed with the DOJ, stating that: (i) it had not made any improper payments in violation of the FCPA; (ii) it would not make any such improper payments in connection with its agreement with requestor's subsidiary; and (iii) it would notify requestor's subsidiary immediately if subsequent developments caused any of its representations to no longer be accurate or complete.

The DOJ granted the requestor the no-action comfort sought, but advised the requestor to closely monitor the performance of the Representative "in light of the unsubstantiated allegations."

DOJ Opinion Procedure Release 97-02

On November 5, 1997, the DOJ issued Opinion Procedure Release 97-02 in response to a request submitted by a U.S. utility company with operations in an Asian country. The requestor had commenced construction of a plant in a region with inadequate primary-level educational facilities. An elementary school construction project had been proposed and the requestor was considering donating $100,000 directly to the government entity responsible for the project. This donation amount was less than the proposed budget of the project. The requestor represented that, prior to releasing any funds, it would require a written agreement from the government entity setting forth promises to fulfill a number of conditions, including that the funds be used solely to construct and supply the school.

Granting the requested no-action comfort, the DOJ noted that because the requestor's donation would be made directly to a government entity and not to any foreign official, the provisions of the 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 cleanup.

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 (the "Representative"). The requestor sought DOJ's guidance regarding several agreements it intended to make with the Representative and the intended payments to the Representative for past and future services.

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 the Representative, requestor proposed two new agreements with the Representative: an International Consultant Agreement and a Teaming Agreement. The requestor's obligations under all three of these proposed agreements were conditioned on a favorable response from DOJ under the FCPA Opinion Procedure.

In relation to the 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) the 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's response 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 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 by 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 (U.K.) 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 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, and (d) providing for 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 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 nine 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 *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 by 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 representation. 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 that the 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 on-site inspections of operations, all of which were "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 she 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.[61] 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

[61] The requestor is described as a Fortune 500 United States company with annual revenues of several billion dollars and operations in over 35 countries.

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.

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 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").[62] 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

[62] 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.

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.

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.[63] The U.S. requestor feared that, in entering into the joint venture, it might violate the FCPA should it later

63 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.

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 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 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 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 micro financing 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 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 were 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.

DOJ Opinion Procedure Release 11-01

On June 30, 2011, the DOJ issued Opinion Procedure Release 11-01 in response to a request submitted by an adoption service provider that facilitates foreign adoptions. The requestor, a domestic concern, proposed to pay the expenses for a trip to the United States by one official from each of two foreign government agencies to educate the officials about the operations and services of U.S. adoption service providers.

The requestor made several representations that are now a common refrain in similar requests for DOJ advisory opinions. The requestor represented that it had no "non-routine business" (such as licensing or accreditation) before the relevant foreign government agencies and that the respective agencies — not the requestor — would select which officials would travel. The requestor would pay all costs directly to the service providers and that costs and expenses would be only those necessary and reasonable to educate the visiting officials about the operations and services of U.S. adoption service providers. The requestor represented that any gifts would be nominal in value and reflect the requestor's business and/or logo and that it would not host officials' spouses or family members. The requestor also represented that its routine business with the relevant foreign government agencies is guided by international treaty and administrative rules with defined standards, and that it had invited another adoption service provider to participate in the visit. The DOJ determined that the proposed expenses were reasonable under the circumstances and directly related to promotion of the requestor's services.

Similar sponsorship of trips to familiarize foreign officials with the requestors' business operations, in which requestors made substantially similar representations, were approved under Opinion Procedure Releases 07-01 and 07-02. The fact that the requestor sought guidance for a relatively straightforward set of circumstances may reflect heightened FCPA compliance sensitivity even among smaller entities conducting international operations. Although the DOJ expressly disavows that its opinion procedure releases (including 11-01) carry precedential value, Opinion Procedure Release 11-01 is noteworthy in that it specifically cited to Opinion Procedure Releases 07-01 and 07-02 as "instances, with appropriate protections, [in which] the Department . . . recently issued favorable Opinion Releases with respect to sponsoring travel and related expenses for foreign officials . . . ."

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