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FCPA News and Insights

An Update on Recent Foreign Corrupt Practices Act and Global Anti-Corruption Enforcement, Litigation, and Compliance Developments

KBR PLEADS GUILTY TO FCPA VIOLATIONS IN CONNECTION WITH CONSTRUCTION CONTRACTS IN NIGERIA

On February 6, 2009, Kellogg Brown & Root, Inc. (KBR), a global engineering, procurement and construction services company, pleaded guilty to four counts of violating the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA) and to one count of conspiracy to violate the Act. As part of its plea in connection with its involvement in a joint venture that was awarded contracts to construct natural gas facilities in Nigeria, KBR agreed to pay a fine of US$402 million. Additionally, the US Securities and Exchange Commission (SEC) announced on February 11, 2009, that KBR and Halliburton Co., KBR's former parent company during the relevant time period, agreed to settle related SEC cases, which also included claims for books and records and internal controls violations, by paying

TABLE OF CONTENTS

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US$177 million in disgorgement and prejudgment interest.[1] The KBR and Halliburton settlement of US$579 million represents "the largest combined settlement ever paid by US companies since the FCPA's inception."[2]

KBR was a member of a joint venture formed to bid on and acquire contracts to design and build liquefied natural gas (LNG) facilities at Bonny Island, Nigeria.[3] The company tasked with awarding these contracts, Nigeria LNG, Limited (NLNG), is jointly owned by the Nigerian National Petroleum Corporation (49%) and other multinational oil companies.[4] NLNG was incorporated as a limited liability company on May 17, 1989, to harness Nigeria's vast natural gas resources and produce liquefied natural gas and natural gas liquids for export.

In an effort to obtain contracts to construct "trains" (a series of structures that take LNG from its source at a wellhead, purifies it and delivers it to tankers) at Bonny Island, KBR and its co-conspirators allegedly made illicit payments to certain Nigerian government officials.[5] Albert "Jack" Stanley, an executive with KBR, purportedly authorized KBR's participation in the bribery scheme.[6] As part of the scheme, Stanley supposedly met with senior government officials to discuss and arrange for the illicit payments.[7] In order to conceal the illicit payments, the joint venture hired two consulting firms to act as agents, and used the consulting firms to funnel illicit payments to Nigerian government officials.[8] While the joint venture allegedly paid a total of approximately US$180 million to the two consulting firms over the course of the scheme, a portion of which was used to make illicit payments, KBR itself was charged with paying the consulting firms approximately US$94 million.[9]

1 Litigation Release No. 20897, US Sec. and Exch. Comm'n, SEC Charges KBR, Inc. with Foreign Bribery; Charges Halliburton Co. and KBR, Inc. with Related Accounting Violations—Companies to Pay Disgorgement of $177 Million; KBR Subsidiary to Pay Criminal Fines of $402 Million; Total Payments to be $579 Million (Feb. 11, 2009).

2 *Id.*

3 *See* Information, *United States v. Kellogg Brown & Root LLC*, No. 4:09-CR-00071-1, Dkt. Entry No. 1 (S.D. Tex. Feb. 6, 2009), ¶ 4.

4 *See id.* ¶ 14.

5 *See id.* ¶¶ 15, 19.

6 *See id.* ¶ 19.

7 *See id.*

8 *See id.* ¶¶ 10-12.

9 *See id.* ¶¶ 22, 24.

In September 2008, Stanley pleaded guilty to conspiring to violate the FCPA for his role in the KBR bribery scheme.[10] Stanley may face seven years in prison and a fine of US$10.8 million at his May 6, 2009 sentencing.[11] Stanley also consented to the entry of a final judgment in a related SEC enforcement proceeding that permanently enjoins him from violating the FCPA.[12] Stanley also agreed to cooperate with the SEC's ongoing investigation. The civil settlement was approved on September 25, 2008.[13]

FORMER EXECUTIVES OF VALVE MANUFACTURER PLEAD GUILTY TO CONSPIRACY TO VIOLATE THE FCPA

On February 3, 2009, Richard Morlok, the former finance director of an unnamed company that manufactures valves for use in various energy applications, pleaded guilty to conspiring to violate the anti-bribery provisions of the FCPA.[14] According to the one-count information filed in the US District Court for the Central District of California, from 2002 through 2007, Morlok and others made payments (also known as flowers) to foreign officials employed in state-owned entities who were in a position to award the valve company contracts, or who could "influence" the design specifications of work orders in such a way as to favor the company.[15] Payments allegedly authorized or caused to be made by Morlok totaled approximately US$628,000, resulting in approximately US$3.5 million in profits for the valve company.[16] Foreign officials allegedly receiving the payments worked for enterprises owned by China, Korea, Romania, and Saudi Arabia.[17]

10 *See* Press Release No. 08-772, US Dep't of Justice, "Former Officer and Director of Global Engineering and Construction Company Pleads Guilty to Foreign Bribery and Kickback Charges," Sept. 3, 2008.

11 *See id.*; *see also* Notice of Setting, *United States v. Stanley*, No. 4:08-CR-00597-1, Dkt. Entry No. 16 (S.D. Tex. Nov. 19, 2008).

12 Litigation Release No. 20700, US Sec. and Exch. Comm'n, SEC Charges Former CEO of Kellogg, Brown & Root, Inc. with Foreign Bribery (Sept. 3, 2008).

13 *See* Final Judgment As To Defendant Albert Jackson Stanley, *SEC v. Stanley*, No. 4:08-CV-2680, Dkt. Entry No. 7 (S.D. Tex. Sept. 25, 2008).

14 *See* Press Release No. 09-089, US Dep't of Justice, "Former Finance Director of California Valve Company Pleads Guilty to Bribing Foreign Government Officials," Feb. 3, 2009 (Morlok Release).

15 *See* Information, *United States v. Morlok*, No. 8:09-CR-00005-JVS, Dkt. Entry No. 1 (C.D. Cal. Jan. 7, 2009), ¶ 7.

16 *See id.*

17 *See id.*

Morlok's plea follows the December 2008 guilty plea of Mario Covino, the valve manufacturer's former head of worldwide factory sales.[18] Like Morlok, Covino pleaded guilty to conspiring to violate the FCPA.[19] Payments allegedly made or caused to be made by Covino totaled approximately US$1 million and resulted in approximately US$5 million in profits.[20] Covino's payments were allegedly made to foreign officials working in companies owned by China, the United Arab Emirates, Brazil, India, Korea, and Malaysia.[21] As part of their plea agreements, Morlok and Covino have agreed to cooperate in the government's continuing investigation, and each faces a maximum sentence of five years at their July 20, 2009 sentencing hearings.[22]

FIAT SpA SETTLES OIL-FOR-FOOD RELATED FCPA ENFORCEMENT ACTION

On December 22, 2008, Italian automotive and equipment manufacturer Fiat SpA (Fiat) agreed to pay disgorgement and prejudgment interest and criminal and civil penalties in the amount of US$17.8 million to settle criminal and civil charges arising out of allegations that it and three of its subsidiaries, Iveco SpA (Iveco), CNH Italia SpA (CNH Italia), and CNH France S.A. (CNH France), conspired to and paid illegal kickbacks to the government of Iraq under the Saddam Hussein regime.

The United States Department of Justice charged that, between 2000 and 2002, Iveco, CNH Italia, and CNH France, paid a combined total of approximately US$4.4 million in kickbacks to the Iraqi government under Saddam Hussein. According to the Justice Department, the three subsidiaries inflated Oil-for-Food Program (OFFP) contract prices by 10%, thereby concealing the fact that the contract price included a kickback to the Iraqi government.[23] These alleged kickback payments were intended to help Fiat and its subsidiaries obtain contracts with Iraqi ministries to provide industrial pumps, gears, and other equipment. Two of the Fiat subsidiaries, Iveco and CNH Italia, were each charged with one count of conspiracy to commit wire fraud and to violate the books and records provisions of the FCPA.[24] In addition, CNH France was charged with conspiracy to commit wire fraud.[25]

The Justice Department agreed to defer prosecution of criminal charges against Fiat and its three subsidiaries for a period of three years, at which point the criminal charges will be dismissed if Fiat complies with the terms of the deferred prosecution agreement.[26] Fiat has also agreed to pay a US$7 million criminal fine in connection with this agreement.[27]

Fiat also agreed to pay US$3.6 million in civil penalties and disgorge US$7.2 million in profits, including prejudgment interest, to settle related civil charges brought by the SEC.[28]

SIEMENS PAYS RECORD US$800 MILLION TO SETTLE FCPA ENFORCEMENT ACTION

On December 15, 2008, Siemens paid the largest fine on record to settle its FCPA matters with the Justice Department and the SEC. Due to the breadth (over 4,000 illicit payments made in at least 10 countries totaling over US$1.4 billion), complexity (at least five different mechanisms for the illicit payments), and importance (first criminal prosecution for violations of the FCPA's internal control provisions) of this case, we will be addressing the case in detail in a separate publication. That publication can be found at: http://www.arnoldporter.com/public_document.cfm?id=14213&key=18D1#zoom=100. Briefly, however, the highlights of the settlement are: (1) US$450 million in penalties paid in the US; (2) US$350 million in disgorgement in the US; (3) approximately US$800 million in fines paid in Germany; and (4) retention for four years of an independent monitor.

18 *See* Press Release No. 01-08-08, US Dep't of Justice, "Former Executive at California Valve Company Pleads Guilty to Bribing Foreign Government Officials," Jan. 8, 2009 (Covino Release).

19 *See id.*

20 *See* Information, *United States v. Covino*, No. 8:08-CR-00336-JVS, Dkt. Entry No. 1 (C.D. Cal. Dec. 17, 2008), ¶ 7.

21 *See id.*

22 *See* Morlok Release, *supra* fn. 12; Covino Release, *supra* fn. 16.

23 *See* Press Release No. 08-1140, US Dep't of Justice, "Fiat Agrees to $7 Million Fine in Connection with Payment of $4.4 Million in Kickbacks by Three Subsidiaries Under the U.N. Oil For Food Program," Dec. 22, 2008; *United States v. Iveco SpA*, No. 1:08-CR-00377 (D.D.C. filed Dec. 22, 2008); *United States v. CNH Italia SpA*, No. 08-CR-00378 (D.D.C. filed Dec. 22, 2008).

24 *Id.*

25 *See* Press Release No. 08-1140, US Dep't of Justice, "Fiat Agrees to $7 Million Fine in Connection with Payment of $4.4 Million in Kickbacks by Three Subsidiaries Under the U.N. Oil For Food Program," Dec. 22, 2008.

26 *Id.*

27 *Id.*

28 Litigation Release No. 20835, US Sec. and Exch. Comm'n, SEC Files Settled Books and Records and Internal Controls Charges Against Fiat SpA and CNH Global N.V. for Improper Payments to Iraq Under U.N. Oil for Food Program (Dec. 22, 2008).

RECIDIVIST AIBEL GROUP LTD. PAYS US$4.2 MILLION TO SETTLE FCPA VIOLATIONS

On November 21, 2008, Aibel Group Ltd. (Aibel), a UK company, pleaded guilty to violating the anti-bribery provisions of the FCPA for making illicit payments to Nigerian custom officials and for violating the terms of its deferred prosecution agreement.

In February 2001, Aibel and other affiliated companies began providing engineering and procurement services, as well as subsea construction equipment services for Nigeria's first deepwater oil drilling operation, known as the Bonga Project.[29] From September 2002 to April 2005, Aibel allegedly conspired with others to make at least 378 corrupt payments, totaling approximately US$2.1 million, to Nigerian customs service officials in an effort to induce the customs officials to give Aibel and its affiliates preferential treatment during the customs process. The payments were coordinated largely through the office of an Aibel affiliate in Houston, Texas and were paid through a freight forwarding company.[30] Aibel pled guilty to conspiracy to violate the FCPA, along with one substantive violation of the FCPA.

Notably, Aibel also admitted that it was not in compliance with the deferred prosecution agreement it had entered into with the Justice Department in February 2007 regarding essentially the same underlying conduct.[31] In the FCPA context, this is the first time that a company has been charged with violating the terms of a deferred prosecution agreement. As part of the plea agreement, Aibel will pay a criminal fine of US$4.2 million and be placed on a two-year organizational probation, pursuant to which it will be required to submit periodic reports regarding its progress in implementing anti-bribery compliance measures.[32]

29 Press Release No. 08-1041, US Dep't of Justice, "Aibel Group Ltd. Pleads Guilty to Foreign Bribery and Agrees to Pay $4.2 Million in Criminal Fines," Nov. 21, 2008.

30 *Id.*

31 *Id. See also* Press Release No. 07-075, US Dep't of Justice, "Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines," Feb. 6, 2007.

32 *Id.*

ROCKET SCIENTIST PLEADS GUILTY TO FCPA VIOLATION

On November 17, 2008, Shu Quan-Sheng pleaded guilty to charges that he illegally exported space launch technical data and defense services to the People's Republic of China (PRC) and offered bribes to Chinese government officials. Shu was charged with a three-count criminal information: two counts under the Arms Export Control Act (AECA), and one under the FCPA.

Shu, a Chinese native, naturalized US citizen, and a PhD physicist, controls AMAC International, Inc. (AMAC), a high-tech company based in Newport News, Virginia, with offices in Beijing. While acting on behalf of AMAC and a French company that he also represented, Shu offered to make illicit payments to government officials of the PRC's 101st Research Institute (101 Institute) in order to obtain a contract for the development of a liquid hydrogen fuel propulsion system.[33] Specifically, Shu offered "percentage points" totaling US$189,300 on the contract on three separate occasions (February, April, and May of 2006) to PRC officials of the 101 Institute in order to secure the contract.[34] In January 2007, the US$4 million hydrogen liquefier project was awarded to the French company that Shu represented.[35]

Sentencing is scheduled for April 6, 2009, at which time Shu faces a possible maximum sentence of five years in prison and a fine of US$250,000 or twice the gross gain for violating the FCPA. Separately, Shu faces up to 10 years in prison and a fine of US$1 million for each violation of the AECA.[36] Shu will also forfeit at least US$378,840.27 in cash, plus unspecified amounts to be derived from the liquidation of various of his personal assets.[37] This prosecution offers further confirmation of the government's focus on individual defendants in FCPA cases.

33 Press Release No. 08-1020, US Dep't of Justice, "Virginia Physicist Pleads Guilty to Illegally Exporting Space Launch Data to China and Offering Bribes to Chinese Officials," Nov. 17, 2008.

34 *Id.*

35 *Id.*

36 *Id.*

37 *See* criminal information filed in *United States v. Quan-Sheng*, No. 2:08-CR-00194 (E.D. Va. 2008) (Dkt. Entry No. 17).

PHILADELPHIA AREA EXPORT COMPANY AND EMPLOYEES INDICTED FOR VIETNAM BRIBERY SCHEME

Nexus Technologies Inc. (Nexus), a Delaware export company with offices in Pennsylvania, New Jersey, and Vietnam, and four of its employees, Nam Nguyen, Joseph Lukas, Kim Nguyen, and An Nguyen, were arrested on charges that they conspired to bribe Vietnamese government officials in exchange for contracts to supply equipment and technology to government agencies.

Allegedly, Nexus purchased a variety of equipment and technology for export to agencies of the government of Vietnam, including the commercial arms of Vietnam's Ministry of Transport, Ministry of Industry, and Ministry of Public Safety. From 1999 through 2008, the defendants allegedly engaged in a conspiracy to bribe Vietnamese government officials in order to secure lucrative contracts for Nexus.[38] According to the government: Nam Nguyen negotiated bribes for contracts with Vietnamese government officials; Joseph Lukas negotiated with vendors in the United States; and Kim Nguyen and An Nguyen, at Nam Nguyen's direction, arranged for the transfer of funds to make the illicit payments.[39] Over the course of the scheme, the defendants supposedly paid at least US$150,000 in bribes to various Vietnamese government officials.[40]

CON-WAY, INC. SETTLES FCPA CHARGES

On August 27, 2008, the SEC filed a civil complaint against Con-way, Inc. (Con-way), a California-based international freight transportation and logistics services company, for violating the books and records and internal control provisions of the FCPA. The complaint alleged that, from 2000 through 2003, Emery Transnational (Emery), a Philippine-based company controlled by Con-way, made hundreds of small payments to Philippine customs officials and to 14 government-owned airlines that did business in the Philippines, totaling at least US$417,000.[41] According to the SEC, Emery's actions were intended to induce these foreign officials to (i) violate customs regulations; (ii) improperly settle Emery's disputes with the Philippines Bureau of Customs, including by reducing or failing to enforce otherwise legitimate fines for administrative violations; (iii) improperly reserve space for Emery on carriers' airplanes; and (iv) falsely underweigh shipments and consolidate multiple shipments into a single shipment, resulting in lower shipping charges.[42] The SEC alleged that none of the improper payments made by Emery was accurately recorded on Con-way's books and records. The SEC alleged further that Con-way knowingly failed to implement a system of internal accounting controls sufficient to ensure that Emery would comply with the FCPA, and that any payments made to foreign officials would be accurately reflected in its books and records.[43]

Con-way consented to a cease and desist order prohibiting it from committing or causing any future violations of the FCPA. Con-way also agreed to pay a US$300,000 civil penalty.[44] In accepting Con-way's offer of settlement, the SEC cited Con-way's remedial efforts and cooperation during the investigation.[45]

SECOND CIRCUIT UPHOLDS DISMISSAL OF FCPA CHARGES AGAINST BOURKE

In August 2008, the Second Circuit upheld the dismissal of several FCPA charges against defendant Frederic Bourke, holding that where (as the parties agreed) the government had failed to indict Bourke within the five-year statute of limitations, the government's subsequent filing of a request to the governments of the Netherlands and Switzerland for assistance in the investigation did not serve to revive the charges, contrary to the government's proposed interpretation of 18 U.S.C. § 3292.[46]

Section 3292(a)(1) provides, in relevant part, that:

> Upon application of the United States, filed before return

38 Press Release No. 08-782, US Dep't of Justice, "Philadelphia Export Company and Employees Indicted for Paying Bribes to Foreign Officials," Sept. 5, 2008.

39 *Id.*

40 *Id.*

41 *SEC v. Con-way, Inc.*, No. 1:08-CV-1478-EGS (D.D.C. 2008).

42 Compl. at 4.

43 *Id.*

44 *Id.*

45 *In the Matter of Con-way, Inc.*, Securities Exchange Act of 1934 Release No. 58433 (Aug. 27, 2008).

46 *United States v. Kozeny*, 541 F.3d 166 (2d Cir. 2008). A fifth FCPA count remains pending against Bourke, due to the district court's determination (not cross-appealed by Bourke) that this corruption allegation was not time-barred. *See id.* at 170.

> of an indictment, indicating that evidence of an offense is in a foreign country, the district court…shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

Pursuant to this statute, the district court had entered a sealed order on July 22, 2003 suspending the statute of limitations for the FCPA and other offenses (including money laundering and Travel Act violations) then under investigation.[47] After the indictment was unsealed, Bourke moved to dismiss the charges for which the statute of limitations had expired prior to the government's filing of the suspension request. Bourke argued that under the terms of the statute, this order could not revive already time-barred charges and, moreover, that a contrary reading of the statute would violate the *ex post facto* and due process clauses of the United States Constitution. The district court agreed with Bourke as to the proper construction of the statute. The government then appealed, relying on prior decisions of the Ninth Circuit and the District Court for the District of Columbia that had suggested, to the contrary, that "section 3292 imposed no requirement that the government apply for a suspension of the statute of limitations before the statute of limitations has run."[48]

The Court of Appeals affirmed the district court in a forceful decision, explaining that the statute's use of "the words 'suspend' and 'running' require that we agree with Bourke." Specifically, it reasoned that:

> 'to suspend' is to cause to stop, at least for a time, something that is otherwise in operation or effect. And a statute of limitations is only in operation or effect if it is running. It is equally obvious, we think, that a statute of limitations cannot be 'running' if it has already 'run,' i.e., if it has expired at the end of the prescribed period. It follows that a district court can 'suspend the running of [a] statute of limitations,' only if the limitations period has not yet expired. To restart the running of an expired statute of limitations would be to 'revive' it. We see no basis upon which to read the word 'suspend' in section 3292 to include the distinct concept of revival.[49] (Citations omitted)

This decision does not strictly concern the FCPA, and indeed is applicable to any federal criminal charge. However, given the frequency with which US enforcement authorities turn to foreign governments for assistance with FCPA investigations, the Second Circuit's opinion in this case is likely to have important ramifications for FCPA practitioners. Under the government's theory, the five-year statute of limitations for FCPA criminal charges would have been subject to a giant caveat—the government would have been able to revive otherwise time-barred FCPA charges through the simple expedient of securing an order (sealed and *ex parte*, no less) attesting that it had made an official request for assistance and that there was a reasonable probability that evidence of the crime being investigated would be located abroad. At least within the Second Circuit, that dubious and constitutionally suspect tactic will now be off limits to prosecutors.[50]

FARO TECHNOLOGIES RESOLVES SELF-DISCLOSED FCPA VIOLATIONS

In March 2006, Florida-based Faro Technologies (Faro), a company that designs, develops, and markets software and portable computerized measurement devices, self-reported potential FCPA violations relating to its China operations. On June 5, 2008, Faro reached a settlement with the SEC and the Justice Department with regard to illicit payments totaling US$444,492, which were made to employees of Chinese government-owned entities to secure contracts worth approximately US$4.9 million.[51] Faro's net profit from the contracts was reportedly US$1,411,306. Allegedly, Faro

47 *Id.* at 169-70.

48 *Kozeny*, 541 F.3d at 170-71 (citing *United States v. Bischel*, 61 F.3d 1429 (9th Cir. 1995) and *United States v. Neill*, 940 F. Supp. 332 (D.D.C.), *vacated on other grounds*, 952 F. Supp. 831 (D.D.C. 1996).

49 *Kozeny*, 541 F.3d at 172.

50 *See id.* at 176 (describing Bourke's constitutional objections, which the panel did not need to reach in light of its statutory interpretation, as "at least...non-frivolous").

51 Press Release No. 08-505, US Dep't of Justice,"Faro Techs. Inc. Agrees to Pay $1.1 Million Penalty and Enter Non-Prosecution Agreement for FCPA Violations," June 5, 2008; *In the Matter of Faro Tech., Inc.*, Securities Exchange Act of 1934 Release No. 57933 (June 5, 2008).

initially attempted to hide the illicit payments by using Faro Shanghai Co., Ltd., a Chinese subsidiary, to route the payments through a shell company. Faro employees also reportedly created fictitious service contracts that were designed to conceal the fact that money was being directed to employees of the Chinese government.[52] Faro's internal documents, the Justice Department alleged, revealed the extent of the bribery. These documents included "profit lists" reflecting the price of contracts and manufacturing costs, along with line items for "referral fees," representing 10-15% of the contract price, that were paid as kickbacks to employees of state-owned companies.

In settling with the government, Faro agreed to pay a US$1.1 million criminal penalty, to disgorge US$1,411,306 in ill-gotten profits, and to pay US$469,947.32 in prejudgment interest.[53] Notably, Faro entered into a two-year non-prosecution agreement, the terms of which include the appointment of an independent monitor. The typical duration of an FCPA non-prosecution agreement is three years, but it is likely that the Justice Department took into account the fact that Faro self-disclosed its actions and promptly worked with prosecutors to prevent any further violations of the FCPA.

AGA MEDICAL CORPORATION PAYS US$2 MILLION FINE FOR FCPA VIOLATION

On June 3, 2008, AGA Medical Corporation (AGA), a privately held company anticipating a June 24, 2008, initial public offering, entered into a three-year deferred prosecution agreement with the Justice Department to resolve FCPA violations.[54] The Justice Department alleged that, between 1997 and 2005, AGA, which manufactures and sells medical supplies designed to treat congenital heart defects, authorized payments of at least US$460,000 to doctors at Chinese government-owned hospitals in order to obtain supply contracts from these hospitals that ultimately netted AGA approximately US$13.5 million in sales.[55]

The Justice Department further alleged that, from 2000 to 2002, AGA bribed officials in the China State Intellectual Property Office to approve patent applications.[56] Both sets of payments were connected to a senior AGA corporate officer who advanced bribes to the Chinese doctors and State Intellectual Property Office officials through AGA's subsidiary in China.[57] AGA self-disclosed the violations to the Justice Department and provided emails that were exchanged between US-based officers and AGA's Chinese distributor that left little doubt of the illicit nature of the payments. These emails included excerpts such as:

> This week I have maken [sic] an appointment with one key person in China knowledge and Patent Protection Bureau, any action in China I must pay money to do.
>
> I am still in agreement with our prior discussions and will cover her fee as long as we can get the [sic] patent issued in a timely manner.[58]

Notably, AGA was subject to liability for its payments to Chinese doctors because the FCPA makes it unlawful to bribe any "foreign official,"[59] which term is broadly defined to include *any* employee of a foreign government, regardless of rank, position, or ability to shape the government's policy.[60] Accordingly, because the doctors to whom AGA directed payments were employees of state-owned hospitals, the payments disclosed to the government by AGA purportedly violated the FCPA.

Pursuant to the deferred prosecution agreement, AGA agreed to pay a US$2 million criminal fine and to designate an independent corporate monitor to ensure that the company does not further violate the FCPA.[61]

DEFENSE CONTRACTOR PLEADS GUILTY TO BRIBING BRITISH OFFICIAL

Martin Self, the former president of Pacific Consolidated Industries (PCI), on May 8, 2008, pleaded guilty to violating

52 *Id.*

53 *Id.*

54 *United States v. AGA Medical Corp.*, No. 08-cr-00172-1 (D. Minn. filed June 3, 2008).

55 *Id.*; Deferred Prosecution Agreement Attachment A at ¶ 2-3.

56 *United States v. AGA Medical Corp.*, No. 08-cr-00172-1 (D. Minn. filed June 3, 2008).

57 *Id.*

58 *Id*; Complaint at ¶ 17h, 17j.

59 15 U.S.C. § 78dd-1(a)(1).

60 15 U.S.C. § 78dd-1(f)(1).

61 *AGA Medical* Deferred Prosecution Agreement at 6-7.

the anti-bribery provisions of the FCPA.[62] PCI is an American company that manufactures air separation units—used to generate oxygen in airplanes and hospitals—as well as other military equipment for various governments around the world.[63]

According to the Justice Department, in October 1999, Self and another executive at PCI, Leo Winston Smith, entered into a fictitious marketing agreement with a relative of a British Ministry of Defense official.[64] Self admitted to knowing that payments to the British official's relative, totaling more than US$70,000, were being directed to the British government official.[65] The British official, in turn, awarded equipment contracts with the Royal Air Force to PCI worth approximately US$11 million.[66] Self's conduct was discovered in late 2003, after PCI was acquired by a private group of investors. The private group of investors self-reported their findings to the Justice Department.[67]

Self was sentenced on November 17, 2008 to a term of two years' probation, a US$20,000 fine, and a US$200 special assessment.[68] Although he faces a maximum sentence of five years, his plea agreement recommends a term of eight months. The British official pleaded guilty to related charges in England, and will serve a two-year prison term.[69] It appears that PCI will not face any civil or criminal charges, partly because its new owners disclosed the violation to the Justice Department immediately upon discovery.

EX-WORLD BANK OFFICIALS PLEAD GUILTY TO FCPA VIOLATIONS

On April 22, 2008, the first-ever federal criminal prosecution of World Bank officials culminated in the sentencing of Ramendra Basu, a World Bank Trust Fund Manager. Basu was sentenced to 15 months in prison, two years supervised release, and 50 hours of community service, for conspiring to commit wire fraud and violating the anti-bribery provisions of the FCPA.[70]

The Justice Department alleged that, from 1997 to 2002, in exchange for approximately US$127,000 in kickbacks, Basu conspired to award World Bank contracts to a Swedish consulting firm.[71] Basu allegedly also aided the same consulting firm in passing a US$50,000 bribe to a Kenyan official in order to obtain a contract.[72] Basu pleaded guilty to the FCPA violation and wire fraud in 2002 and cooperated in the Justice Department's investigation. Interestingly, in 2006, four years after having pleaded guilty, and after cooperating with the Justice Department's investigation by providing information about his involvement in the scheme, Basu sought to withdraw his plea.[73] That request was denied.[74]

In a parallel prosecution, Gautam Sengupta, also a World Bank Task Manager, pleaded guilty in 2002 to similar charges.[75] Sengupta was sentenced to six months in prison and fined US$6,500.[76] The Swedish consulting firm was charged and prosecuted in Sweden.[77]

The *Sengupta* and *Basu* cases marked the first time that federal prosecutors had received a criminal referral from the World Bank. The resulting plea agreements required the defendants to cooperate with the World Bank's investigation and with Swedish and Kenyan authorities.

SEC SETTLES CIVIL ENFORCEMENT ACTION AGAINST TELECOMMUNICATIONS EXECUTIVES

On April 18, 2008, the SEC announced that it had settled civil injunctive actions against three former executives of ITXC Corp. (ITXC), a telecommunications firm. In the

62 Press Release No. 08-394, US Dep't of Justice, "Former Pacific Consolidated Industries LP Executive Pleads Guilty in Connection with Bribes Paid to UK Ministry of Defence Official," May 8, 2008.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *United States v. Self*, 8:08-cr-00110-AG-1 (C.D. Cal.) (Dkt. Entry No. 23, Nov. 17, 2008).

69 *Id.*

70 *United States v. Basu*, No. 02-CR-475 (D.D.C. filed Nov. 26, 2002); Press Release No. 08-341, US Dep't of Justice, "Former World Bank Employee Sentenced for Taking Kickbacks and Assisting in the Bribery of a Foreign Official," Apr. 25, 2008.

71 Press Release No. 08-341, US Dep't of Justice, "Former World Bank Employee Sentenced for Taking Kickbacks and Assisting in the Bribery of a Foreign Official," Apr. 25, 2008.

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

settlement agreements, Yaw Osei Amoako, Steven J. Ott, and Roger Michael Young each consented to the entry of a final judgment enjoining them from future violations of the FCPA.[78] Separately, Amoako agreed to disgorge profits of US$188,483, plus prejudgment interest.[79]

According to the SEC, Ott was ITXC's vice president for global sales and Young was the company's managing director for the Middle East and Africa.[80] Amoako was the regional sales director for Africa.[81] The SEC alleged that, between August 2001 and May 2004, ITXC, through Amoako, Ott, and Young, violated the FCPA by paying US$267,468.95 to government officials in Nigeria, Rwanda, and Senegal who were involved in the operation of government-owned telephone companies.[82] These payments allegedly helped ITXC obtain more than US$11.5 million in business.[83] Amoako personally received approximately US$150,000 through kickbacks and embezzlement associated with the scheme.[84]

In a parallel criminal proceeding by the Justice Department, Amoako, Ott, and Young also pleaded guilty to criminal violations of the FCPA. In December 2006, Amoako was sentenced to 18 months in prison and a fine of US$7,500.[85] Ott and Young entered guilty pleas in July 2007. In July 2008, Ott was sentenced to serve five years probation (including six months of home confinement and six months in a community correction center, halfway house, or similar residential facility), a US$10,000 fine and a US$100 special assessment.[86] Young likewise was sentenced to five years probation (including three months each of home confinement and community correctional confinement), accompanied by a US$7,000 fine and a US$100 special assessment.[87]

THE EXPLOSION OF FCPA-RELATED CIVIL LITIGATION

The first half of 2008 saw the rise of a new trend of FCPA-inspired private civil litigation. Generally, these civil lawsuits have fallen into three broad categories: (i) claims under Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and/or shareholder derivative suits targeting companies with FCPA problems; (ii) lawsuits brought by sovereign governments whose employees or officials were allegedly corrupted by companies making illicit payments; and (iii) lawsuits brought by business partners of companies with FCPA problems.

It is well-settled that there is no private right of action under the FCPA. In *Lamb v. Philip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990), for example, the Sixth Circuit Court of Appeals noted that:

> The availability of a private right of action apparently was never resolved (or perhaps even raised) at the conference that ultimately produced the compromise bill passed by both houses and signed into law; neither the FCPA as enacted nor the conference report mentions such a cause of action. Because the conference report accompanying the final legislative compromise makes no mention of a private right of action, we infer that Congress intended no such result.[88] (Citations and footnotes omitted).

Rather, private litigants must pin their hopes on other theories of liability such as the civil provisions of the Racketeering Influenced Corrupt Organizations Act (RICO), common law fraud, or some other theory of liability, even if the conduct alleged sounds like a quintessential FCPA bribery offense. That is precisely what civil plaintiffs are beginning to do.

Section 10(b) of the Exchange Act and/or Shareholder Derivative Suits

As discussed above, on June 5, 2008, Faro entered into a settlement with the SEC and the Justice Department

78 *SEC v. Ott*, No. 06-CV-4195 (D.N.J. 2008); *SEC v. Amoako*, No. 05-CV-4284 (D.N.J. 2008); Litigation Release No. 20556, US Sec. and Exch. Comm'n (May 6, 2008).

79 *Id.*

80 *Ott*, Compl. at 2.

81 *Amoako*, Compl. at 3.

82 *Ott*, Compl. at 2.

83 *Id.*

84 *Amoako*, Compl. at 3.

85 Press Release No. 07-556, US Dep't of Justice, "Two Former Executives of ITXC Corp. Plead Guilty and Former Regional Director Sentenced in Foreign Bribery Scheme," July 27, 2007.

86 *United States v. Ott*, No. 07 CR 608-1 (D. N.J.) (Dkt. Entry No. 14). Ott has since moved for a reduction of this sentence in papers filed December 1, 2008, arguing that his sentence, in light of his parents' ill health, has created an undue hardship for his family. *Id.* (Dkt. Entry No. 17). Ott's motion was denied, however, the court did authorize Ott's custodians to grant him furloughs to visit and care for his father. *See id.* (Dkt. Entry 18).

87 *United States v. Young*, 3:07-cr-00609-GEB-1 (D. N.J.) (Dkt. Entry No. 15) (Sept. 4, 2008).

88 *Lamb*, 915 F.2d at 1029.

through which it agreed to pay US$2.95 million in fines for making US$444,492 in illicit payments to employees of Chinese government-owned entities in order to secure contracts worth approximately US$4.9 million.[89] Three days earlier, the United States District Court for the Middle District of Florida gave preliminary approval to a US$6.8 million settlement to resolve shareholder claims under Section 10(b) of the Exchange Act. The lawsuit alleged, in relevant part, that Faro "knowingly or recklessly attested to the accuracy of [its] internal controls system, when [it] knew that the system was, in fact, seriously inadequate," as a result of its FCPA problems.[90] Faro is continuing negotiations with counsel in the derivative action to settle those claims, which are also predicated on the FCPA violations.[91]

Suits by Foreign Governments

The second trend that has emerged in FCPA-inspired civil litigation is the filing of lawsuits by sovereign governments against US-based companies. These claims essentially assert that these companies corrupted the foreign government's own officials through the payment of bribes.

For example, on June 27, 2008, the Republic of Iraq filed suit in New York federal district court against 91 companies and two individuals alleging that the defendants conspired with Saddam Hussein's regime to corrupt the OFFP by diverting to Saddam Hussein's government as much as US$10 billion in funds intended for the humanitarian benefit of the Iraqi people.[92] Iraq claims that the defendants violated RICO, with mail fraud, wire fraud, money laundering, and violations of the Travel Act constituting the necessary predicate violations. Referring to the UN program as "the largest financial fraud in human history," the complaint seeks more than US$10 billion in damages.[93] Many of the defendants named in the complaint have already faced enforcement action for violating the FCPA, including ABB, AB Volvo, Flowserve, Akzo Nobel, Chevron, Ingersoll-Rand, and York International.

Broadly, the complaint alleges that kickbacks paid to representatives of Saddam Hussein were funded through illegal and undisclosed transportation and port fees, after-sales service fees, and overpricing of goods and services. The complaint alleged that no bona fide services were rendered in exchange for these payments. As a basis for jurisdiction, the plaintiffs assert that the OFFP was administered at the United Nations' headquarters located in New York City, that all funds related to the OFFP "were supposed to pass through an escrow account in New York," and that all OFFP contracts were "approved in New York."[94]

Iraq's OFFP lawsuit follows closely on the heels of another RICO action filed by the Kingdom of Bahrain against Alcoa, Inc. Bahrain's state-owned aluminum smelter, Aluminum Bahrain BSC (Alba), filed suit in federal district court in Pittsburgh, Pennsylvania, on February 27, 2008, alleging that Alcoa and its affiliates engaged in a 15-year conspiracy to corrupt one or more of Alba's senior officials, thereby influencing the officials to cause Alba to pay inflated prices for Alcoa's products and to favor the sale of a controlling interest in Alba to Alcoa.[95] The complaint alleges that Alba passed more than US$2 billion in illicit payments from Bahrain to tiny companies in Singapore, Switzerland, and the Isle of Guernsey, under supply contracts, and that some of the money was then used to bribe Bahraini officials involved in granting contracts. The complaint alleges further that Alcoa began assigning its supply contracts with Alba to a series of companies set up by Alcoa's agent, a Canadian businessman of Jordanian origin named Victor Dahdaleh. Supposedly, these assignments served no legitimate business purpose and were used as a means to secretly pay bribes and unlawful commissions as part of a scheme to defraud Alba.[96] Alba is seeking more than US$1 billion in damages, including punitive damages.

The lawsuit is currently stayed as a result of the Justice Department's intervention.[97] The Justice Department

89 DOJ Press Release No. 08-505 (June 5, 2008); "In the Matter of Faro Tech., Inc., Exchange Act Release No. 57933," June 5, 2008.

90 Stanford Law School Class Action Clearinghouse, *available at* http://securities.stanford.edu/1035/ FARO05_01/.

91 *See also City of Harper Woods Employees' Ret. Sys. v. Olver*, No. 1:2007cv01646 (D.D.C. filed Sept. 19, 2007).

92 *Republic of Iraq v. ABB AG*, No. 08-cv-05951 (S.D.N.Y. filed June 27, 2008).

93 Compl. at 3.

94 *Id.* at 4.

95 *Aluminum Bahrain B.S.C. v. Alcoa, Inc.*, No. 08-cv-00299 (W.D. Pa. filed Feb. 27, 2008).

96 Compl. at 5.

97 Federal prosecutors asked the US District Court to stay Alba's federal civil lawsuit because the United States has a "direct and substantial interest" in Alba's allegations. *See* Glenn R. Johnson, "U.S. Opens Alcoa Bribery Probe," *Wall Street Journal*, March 21, 2008.

sought a stay of the proceeding, which neither party opposed, so that it could conduct its own criminal investigation—which does not appear to have been open before the civil suit was filed—without the ongoing distraction of private litigation. According to *The Wall Street Journal*, the suit originated from an investigation commissioned by the government of Bahrain to uncover corruption in its state-owned enterprises.[98]

Commercial Litigation

On February 21, 2008, Jack Grynberg filed a RICO suit against, among others, StatoilHydro ASA (StatoilHydro) alleging that StatoilHydro bribed government officials in Kazakhstan to win oil rights for joint ventures in which he had an interest, thereby diverting his share of the joint venture profits.[99] Grynberg reportedly told *The Daily Telegraph* that he was bringing the civil suit to protect himself against FCPA charges. "Unless I assert that I was an unwilling participant in this, my neck could be on the line. I'm too old to go to prison," supposedly said Mr. Grynberg.[100] The complaint states: "This is a case about StatoilHydro's and [British Gas's] role—and the role of its executive leadership—in a massive scheme involving illegal bribes paid to various top government officials in Kazakhstan by several oil companies, and the scheme to cover up those bribes from public disclosure through a series of misrepresentations."[101] The complaint goes on to say that the defendants have "attempted to force [p]laintiffs, without their knowledge, consent or approval, to pay a portion of those illegal bribes out of the profits, thereby harming [p]laintiffs' hard-earned and well-justified reputation as a crusader against bribery and other corruption within the petroleum industry." [102] The lawsuit is currently pending.

PROPOSED LEGISLATION: LIMITED RIGHT OF PRIVATE ACTION UNDER THE FCPA

On June 4, 2008, Rep. Ed Perlmutter (D-CO) introduced the Foreign Business Bribery Prohibition Act of 2008 in the US House of Representatives, an act that would create a limited private right of action under the FCPA.[103] Specifically, Rep. Perlmutter's bill would amend the FCPA to permit US issuers and domestic concerns to file lawsuits seeking treble damages against "foreign concerns" for FCPA violations that both assist the foreign concern in obtaining or retaining business and prevent the US-issuer plaintiff from obtaining or retaining the same business. The bill would provide a right of action only against "foreign concerns," defined as any person other than a US issuer or domestic concern. Therefore, the class of potential defendants would be limited to foreign persons and businesses that corruptly use instrumentalities of interstate commerce within the United States "in furtherance" of an act of bribery involving a foreign government official. The bill has not been reintroduced in the current Congress.

HOSTING GOVERNMENT OFFICIALS: OPINION RELEASE 08-03

On July 11, 2008, the Justice Department issued an opinion release (Opinion Release 08-03) that no enforcement action would be taken against TRACE International, Inc. (TRACE) for potential FCPA violations stemming from the payment of stipends and reimbursements of travel-related expenses to reporters in the PRC.[104]

Facts and Representations

TRACE, a nonprofit membership association that specializes in anti-bribery due diligence reviews and compliance training for international commercial intermediaries (for example, sales agents and representatives, consultants, distributors, and suppliers), proposed to pay the expenses of approximately 20 Chinese journalists so that the journalists could attend a press conference in Shanghai. Under TRACE's proposal, journalists based in Shanghai would receive a cash stipend of approximately US$28 intended to cover lunch, local transportation costs, and incidental expenses for attendees. Journalists attending the press conference

98 *Id.*

99 No. 08-cv-00301 (D.D.C. filed Feb. 21, 2008).

100 http://www.telegraph.co.uk/finance/newsbysector/energy/2787886/BP-and-its-bosses-sued-over-alleged-bribery-of-officials.html

101 *Grynberg*, Compl. at 6.

102 *Id.* at 7.

103 Foreign Business Bribery Prohibition Act of 2008 (H.R. 6188), *available at* http://www.govtrack.us/ congress/billtext.xpd?bill=h110-6188.

104 Opinion Release No. 08-03, US Dep't of Justice, Foreign Corrupt Practices Act Review, (July 11, 2008), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0803.html.

from outside Shanghai would receive a cash stipend of approximately US$62 for similar expenses plus two additional meals. Upon submission of a receipt, journalists from outside Shanghai would receive reimbursement for economy-class transportation to Shanghai and would also be eligible to receive reimbursement for lodging expenses. These lodging expenses would be paid directly from TRACE to the hotel where the press conference was to be held and would not exceed US$229 for any individual journalist. TRACE also made the following representations:

- Media outlets in the PRC typically are wholly owned by the government;
- Members of PRC media outlets do not typically receive travel and expense reimbursements from their employers;
- TRACE would make payments equally available, and the stipends were reasonable approximations of the actual costs;
- TRACE would inform the employers of the attending journalists of all payments and their purposes;
- TRACE had no business pending with any PRC government agency;
- TRACE had received advice from counsel that the payments would not violate PRC law; and
- TRACE would accurately record the payments in its own books and records.

Analysis and Conclusion

Based on the above facts and representations, the Justice Department expressly concluded that the intended stipend payments and reimbursements fell within the "promotional expenses" affirmative defense of the FCPA because the expenses are reasonable under the circumstances and relate to "the promotion, demonstration, or explanation of products or services."[105] This Opinion Release marks the third time since mid-2007 that the Justice Department has spelled out that no action would be taken against a Requestor because the proposed conduct was shielded by the "promotion, demonstration, or explanation of products or services" affirmative defense.

105 15 U.S.C. § 78dd-2(c)(2)(A).

The first of these Releases (Opinion Release No. 07-01, dated July 24, 2007) addressed the proposal of an unnamed US company to pay the domestic economy class airfare, lodging, transportation, meals, and fixed amount of incidental expenses of a foreign governmental delegation during its four-day visit to one of the company's operations sites. In presenting its proposal, the unnamed company made the following representations:

- It did not then conduct operations in the foreign country or with the foreign government, although it was interested in pursuing such opportunities in the future;
- It had obtained written assurance, a copy of which was provided to the Justice Department, from an established law firm with offices in both the United States and the foreign country that the requestor's sponsorship of the visit and its payment of the expenses described in the request was not contrary to the law of the foreign country;
- It did not select the delegates who would participate in the visit; rather, the foreign government selected the delegates;
- To the company's knowledge, the delegates had no direct authority over decisions relating to potential contracts or licenses necessary for operating in the foreign country;
- It would host only officials working for the relevant foreign ministries and one private government consultant;
- It intended to pay all costs directly to the providers; no funds were to be paid directly to the foreign government or the delegates;
- It would not pay any expenses for spouses, family, or other guests of the officials;
- Any souvenirs that the requestor would provide to the delegates would reflect the requestor's name and/or logo and would be of nominal value;
- Apart from meals and receptions connected to meetings, speakers, or events that the company was planning for the officials, the company would not fund, organize, or host any entertainment or leisure activities for the officials, nor would it provide the officials with any stipend or spending money; and

- All costs and expenses incurred by the requestor in connection with the visit would be properly and accurately recorded in the company's books and records.

Just as in Opinion Release No. 08-03, the Justice Department concluded that this proposed conduct would fall within the affirmative defense for reasonable expenses related to the marketing or promotion of products and services, as set forth in 15 U.S.C. § 78dd-2(c)(2)(A).

Following shortly after Opinion Release 07-01, the second such release came in response to a request from a different unnamed company for guidance concerning its strikingly similar plan to pay expenses associated with the visit of a foreign governmental delegation to the company's US headquarters. In Opinion Release No. 07-02 (September 11, 2007), an unidentified company proposed to pay the domestic economy class airfare, lodging, transportation, meals, and incidental expenses of a foreign governmental delegation during a planned six-day visit. The company's additional representations included the following:

- The company would not pay any expenses related to the foreign officials' travel to or from the United States, or their participation in the National Association of Insurance Commissioners (NAIC) internship program;
- The company had no non-routine business under consideration by the relevant foreign government agency;
- The routine business before the relevant foreign government agency consisted primarily of reporting of operational statistics, reviewing the qualifications of additional agents, and performing onsite inspections of operations;
- The agency's routine business was guided by administrative rules with identified standards;
- The company's only work with other entities within the foreign government consisted of collaboration on insurance-related research, studies, and training;
- The company intended to pay all costs directly to the providers; in the event that an expense required reimbursement, the company would only do so up to a modest daily minimum, and only upon presentation of a written receipt; and
- The souvenirs given to the visiting foreign officials would be of nominal value (*e.g.*, shirts or tote bags).

Again, based on these representations, the Justice Department concluded that this proposal fell within the affirmative defense for reasonable expenses relating to the promotion and marketing of goods and services, and announced that it would not take any enforcement action if the proposal was carried out in accordance with the company's representations.

Opinion Release No. 08-03, like all Opinion Releases, is binding on the Justice Department only with respect to the requestor, TRACE, and only to the extent that the facts and representations made by TRACE are complete and accurate. Companies should therefore continue to treat with caution any activity that involves direct or indirect payments to foreign government officials at any level. However, this Opinion Release, in combination with Opinion Releases Nos. 07-01 and 07-02, signals that US enforcement authorities are not likely to target reimbursement activities in which the expenditures are modest, the requirements for reimbursement are clearly spelled out in advance and, at the very least, any non-*de minimis* cash disbursements are made directly to the service providers, rather than to government officials themselves. This message is consistent with the results of prior Opinion Releases, in which the Justice Department announced that it would not take enforcement action with respect to similar planned expenditures, but did not expressly spell out whether its conclusion rested on an interpretation of the statute or an exercise of its inherent discretionary authority to determine when enforcement action is warranted.[106]

JUSTICE DEPARTMENT FURTHER CLARIFIES THE LEVEL OF FCPA DUE DILIGENCE EXPECTED IN BUSINESS COMBINATIONS

On June 13, 2008, the Justice Department issued FCPA Opinion Release No. 08-02, in which it indicated that no enforcement action would be brought against Halliburton Company (Halliburton) for pre-acquisition violations of the FCPA committed by an unnamed target company (the British Company) that Halliburton was looking to acquire. Further,

106 *See, e.g.,* Opinion Release No. 04-01, US Dep't of Justice, Foreign Corrupt Practices Act Review (Jan. 6, 2004); Opinion Release No. 04-04, US Dep't of Justice, Foreign Corrupt Practices Act Review (Sept. 3, 2004).

the Opinion Release stated that, on a conditional basis, no enforcement action would be taken against Halliburton for any FCPA violations that might occur during a 180-day post-acquisition window during which Halliburton was to conduct the comprehensive FCPA due diligence that applicable UK laws had purportedly prevented it from conducting prior to closing the acquisition.[107]

While the facts outlined in Opinion Release No. 08-02 are relatively unique, the Justice Department's response demonstrates a welcome awareness of the competitive burdens that the FCPA places on companies subject to its terms, and an equally welcome willingness to adjust its FCPA compliance requirements accordingly. In addition, Opinion Release No. 08-02 serves to reinforce the major lessons of past FCPA cases stemming from mergers, acquisitions, and other business combinations. In the forthcoming sections, the substance of Opinion Release No. 08-02 is reviewed, as well as the lessons learned from past FCPA cases arising out of business combinations. Also included is an outline of the current best practices for addressing potential FCPA liability associated with business combinations, including due diligence, compliance, and deal structure.

I. FCPA OPINION RELEASE NO. 08-02

Opinion Release No. 08-02 relates to Halliburton's efforts to acquire a United Kingdom company. At the time of Halliburton's opinion request, a competing bidder had submitted a bid that, unlike Halliburton's bid, did not include terms and conditions relating to FCPA due diligence. Not surprisingly, the British Company's board recommended that shareholders approve the competing bid that did not include the FCPA terms and conditions. Under British law governing the bidding process, the British Company was not required to provide Halliburton with additional information that would enable Halliburton to conduct the kind of due diligence review contemplated by the FCPA. Nor was the British Company obligated to entertain an offer from Halliburton containing the vexing FCPA terms and conditions. Moreover, Halliburton was precluded, by the terms of a confidentiality agreement it signed with the British Company, from sharing information with the Justice Department about potential FCPA violations discovered during Halliburton's limited due diligence. Taken together, these facts meant that Halliburton could not require that the British Company provide the information Halliburton needed to conduct its FCPA pre-acquisition due diligence. Moreover, even if it could obtain the information necessary to conduct the due diligence, Halliburton was barred from disclosing to US authorities before closing the deal any potential violation that it managed to uncover.

Faced with this dilemma, Halliburton proposed to undertake a series of post-acquisition measures that would ensure FCPA compliance, and posed three questions to the Justice Department. *First*, Halliburton asked whether the proposed acquisition itself would violate the FCPA. *Second*, Halliburton asked whether it would be liable for the British Company's pre-acquisition conduct. *Third*, Halliburton asked whether it would be liable for any post-acquisition conduct by the British Company that Halliburton disclosed to the Justice Department within 180 days of the closing, and which conduct either did not continue beyond the 180-day period or if, in the judgment of the Justice Department, the alleged conduct could not be fully investigated within the 180-day period, would not continue beyond such time as it would take for the conduct reasonably to be stopped.

As to the first question, the Justice Department responded that it did not intend to take enforcement action against Halliburton for the proposed acquisition of the British Company, as the British Company was a public company listed on a major stock exchange and so therefore there was a very low probability that shareholders of the British Company (presumably including Halliburton) obtained their shares in corrupt transactions. The possibility that the proposed acquisition itself would violate the FCPA had been a concern to Halliburton because a previous release, FCPA Opinion Release No. 01-01, concluded that the funds a corporation contributes as part of a corporate combination transaction may be considered a

107 Opinion Release No. 08-02, US Dep't of Justice, Foreign Corrupt Practices Act Review (June 13, 2008), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0802.html.

"payment in furtherance of" a bribe within the meaning of Section 30A of the Exchange Act if those funds are used to make payments to an agent under a pre-existing unlawful contract that another corporation contributed to the joint venture.

The Justice Department's response to the second and third questions posed by Halliburton turned, in significant part, on the post-closing due diligence plan proposed by Halliburton.

A. Will Halliburton be liable for its British Company's pre-acquisition violative conduct?

In its request, Halliburton represented that it intended to take the following steps once it closed its acquisition of the British Company: (i) immediately disclose prior violations discovered in pre-closing investigations; (ii) submit an FCPA due diligence plan to the Justice Department within 10 days of closing that would be completed within 180 days of closing, and, no later than one year from the closing date, fully investigate any issues identified during this 180-day period; (iii) retain outside counsel, third-party consultants and forensic accountants; (iv) sign new contracts that incorporate anti-corruption provisions with all agents and other third parties associated with the British Company; (v) impose all of its Code of Business Conduct and FCPA anti-corruption policies on the British Company and conduct anti-corruption training immediately following closing; and (vi) disclose all FCPA and related violations discovered during the 180-day due diligence and follow any additional steps requested by the Justice Department.

After reviewing Halliburton's plan, the Justice Department stated, in response to Halliburton's second question, that it did not intend to take enforcement action against Halliburton for pre-acquisition conduct by the British Company so long as Halliburton followed its post-closing plan.

B. Will Halliburton be liable for post-acquisition violative conduct?

The fact that limitations imposed by British law left Halliburton with insufficient time and inadequate access to information to allow for complete FCPA due diligence also influenced the Justice Department's answer to Halliburton's third question—whether Halliburton would be liable for post-acquisition FCPA violations by the British Company. Perhaps not surprisingly, the Justice Department did not declare that it would forever refrain from enforcement actions relating to post-acquisition conduct. However, recognizing the very real limitations that British law imposed on Halliburton's ability to ensure that FCPA violations were not ongoing at the British Company, the Justice Department responded that it would refrain from taking enforcement action as long as Halliburton disclosed post-acquisition conduct within the 180-day review period outlined in Halliburton's proposed post-closing diligence plan and either halted and remediated any such conduct within the 180-day period, or, if the Justice Department found that the diligence review could not be completed within 180 days, stopped and remediated any violative conduct as soon as possible and completed its due diligence and remediation, including all investigations, within one year of the closing.

C. Justice Department reserves right to institute enforcement proceedings against Halliburton and others

The Justice Department's decision to refrain from enforcement action against Halliburton was expressly conditioned on adherence to the post-closing due diligence and self-reporting plan outlined above. The Justice Department also reserved the right to take enforcement action in the following circumstances: (i) if violations committed by the British Company during the 180-day period are not disclosed to the Justice Department; (ii) if violations are committed by the British Company with the knowing participation of Halliburton employees; or (iii) if violations identified within the 180-day period are not fully investigated within one year from closing. The Justice Department also expressly reserved the right to take enforcement action against the British Company itself for all FCPA and other criminal violations—irrespective of whether they occurred pre-acquisition or post-acquisition and irrespective of whether they were disclosed by Halliburton. However, in the event that Halliburton makes disclosures and enforcement action is taken against the British Company, the Justice Department would give those cases "voluntary disclosure" status under the Principles of

Federal Prosecution of Business Organizations, Section VII, and such disclosure may be considered when making the determination to charge the British Company.[108]

Opinion Release No. 08-02 underscores the usefulness of the opinion release procedure where unusual conditions prevent a potential acquirer from conducting the kind of comprehensive FCPA due diligence that the government has come to expect.[109] Moreover, it provides at least limited evidence that when presented with unusual circumstances of this kind, the Justice Department will permit an acquirer to substitute a post-closing investigation for the pre-closing diligence that ordinarily is expected. By the same token, however, Opinion Release No. 08-02 reinforces the lessons of past FCPA cases—acquisitions carry FCPA liability risks, and those risks can be reduced through careful and comprehensive due diligence and, where necessary, prompt disclosure of past violations. A discussion of the pertinent past cases follows. For a prior client advisory, *see* "New DOJ Opinion Expands Options for Minimizing FCPA Risk in International Mergers and Acquisitions," (July 2008) *available at* http://www.arnoldporter.com/resources/documents/CA_NewDOJOpinion_071708.pdf.

108 *See* US Dep't of Justice, United States Attorneys' Manual, § 9-28.750 Principles of Federal Prosecution of Business Organizations—Qualifying for Immunity, Amnesty, or Reduced Sanctions Through Voluntary Disclosures (Aug. 2008), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mrcm.htm.

109 Opinion Release No. 08-01, US Dep't of Justice, Foreign Corrupt Practices Act Review (Jan. 15, 2008), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0801.pdf. The due diligence conducted by the requestor included: (i) the requestor commissioned a report on the Foreign Private Company Owner by a reputable international investigative firm; (ii) the requestor retained a business consultant in the foreign municipality who provided advice on possible due diligence procedures in the foreign country; (iii) the requestor commissioned International Company Profiles on the Investment Target and Foreign Private Company from the US Commercial Service of the Commerce Department; (iv) the requestor searched the names of all relevant persons and entities, including the Foreign Private Company Owner, the Investment Target, and Foreign Private Company, through the various services and databases accessible to the requestor's international trade department—including a private due diligence service—to determine that no relevant parties are included on lists of designated or denied persons, terrorist watches, or similar designations; (v) the requestor met with representatives of the US Embassy in the foreign municipality and learned that there were no negative records at the Embassy regarding any party to the proposed transaction; (vi) outside counsel conducted due diligence and issued a preliminary report. An updated report is being prepared and will be completed before closing the proposed transaction; (vii) an outside forensic accounting firm has prepared a preliminary due diligence report, and a final report is being prepared and will be completed before closing the proposed transaction; and (viii) a second law firm has reviewed the due diligence.

II. CASES STEMMING FROM MERGERS, ACQUISITIONS, OTHER BUSINESS COMBINATIONS AND INITIAL PUBLIC OFFERINGS

Since 2001, the government has brought several FCPA cases arising from facts uncovered during or just after a business combination or an initial public offering, including an unprecedented average of one case per year arising from mergers and acquisitions and other business combinations activities alone. The government's heightened focus on this area drives home the point that US issuers and domestic concerns must pay particularly close attention to FCPA issues in connection with business combinations and, more generally, in their business dealings abroad. These cases, described below, demonstrate that companies can use due diligence to shield themselves from FCPA liability. Moreover, the cases demonstrate the broad variety of FCPA compliance issues that can arise in the context of business combinations, and the widely varying litigation outcomes that a company's actions in response to the unwelcome discovery of an FCPA violation can prompt. These cases are addressed in two parts. The first part provides an overview of the cases in which the pre-acquisition conduct of a target company has led to liability for the acquiring company. The second part explores the smaller group of cases in which post-acquisition conduct has been the principal focus of an enforcement action by the Justice Department or SEC.

A. Liability for pre-acquisition conduct of a target company

1. The Tyco settlement

A 2006 settlement by Tyco International Ltd. (Tyco) demonstrates that FCPA liability can be inherited when US issuers and domestic concerns acquire businesses that have an ongoing practice of making illicit payments, and suggests that principles of successor liability can create liability for the purchaser even under circumstances where the potentially illegal practices have ceased before the transaction is consummated.

In April 2006, the SEC announced that it had filed a settled civil injunctive action against Tyco for numerous securities laws violations, including violations of the anti-bribery provisions of the FCPA.[110] With respect to the FCPA violations, the SEC's complaint alleged that employees at two Brazilian and South Korean subsidiaries acquired by Tyco in the late 1990s made extensive illicit payments to government officials. According to the complaint, 60% of the contracts at the Brazilian subsidiary involved "some form of payment to a government official."[111]

The complaint highlighted that Tyco had decided to go through with the acquisitions even though its own due diligence had revealed that "illicit payments to government officials were common" in Brazil and South Korea, and with respect to the Brazilian acquisition, "were portrayed as necessary in the industries in which [the Brazilian acquisitions] conducted business."[112] The complaint also alleged that prior to 2003:

Tyco did not have a uniform, company-wide FCPA compliance program in place or a system of internal controls sufficient to detect and prevent FCPA misconduct at its globally dispersed business units. Employees at the Brazilian and South Korean subsidiaries did not receive adequate instruction regarding compliance with the FCPA, despite Tyco's knowledge and awareness that illicit payments to government officials were a common practice in the Brazilian and South Korean construction and contracting industries.[113]

Without admitting or denying the allegations in the complaint, Tyco consented to a permanent injunction against further securities laws violations, one dollar (US$1) in disgorgement and a US$50 million civil penalty.[114]

Several lessons can be learned from the Tyco settlement: (i) the theory of successor liability in the FCPA context is here to stay; (ii) US$50 million is a stiff price to pay for somebody else's violations, especially when such violations can be detected and fixed before the closing of the acquisition; (iii) any issuer with international business must have a robust FCPA compliance program that covers every aspect of the company's operations, no matter how remote; (iv) pre-acquisition due diligence is critical; (v) address pre-acquisition problems before closing the transaction; (vi) do not ignore known red flags; and (vii) devise and implement a plan to instill a culture of compliance once acquisition is completed.

2. Lockheed Martin Corporation abandons its planned merger with Titan Corporation

In 2004, Lockheed Martin Corporation (Lockheed), a major US defense contractor, walked away from a proposed merger with Titan Corporation (Titan), a military intelligence and communications company based in San Diego, California, following Lockheed's discovery during pre-acquisition due diligence that Titan had committed serious FCPA violations.[115] These violations stemmed from Titan's decision to employ a third-party agent to assist on a project to build a wireless telephone network in the Republic of Benin.

According to the government, Titan hired an advisor, who purportedly had close ties to the then-President of Benin, without performing adequate due diligence to determine if the advisor was complying with the FCPA.[116] Of the US$3.5 million that Titan paid the advisor, approximately US$2 million were indirect contributions to the President's re-election campaign.[117]Allegedly, the purpose of the payment was to influence the outcome of the presidential election in Benin in order to secure the President's assistance in developing a telecommunications project in Benin.[118] At the direction of a Titan senior officer, at least two payments of US$500,000 each were wired from Titan's bank account in San Diego to the agent's account in Monaco. The remaining payments were made in cash.[119] Titan characterized the payments on its books and records as "social program payments"

110 Litig. Release No. 19657, US Sec. and Exch. Comm'n, SEC Brings Settled Charges Against Tyco International Ltd. Alleging Billion Dollar Accounting Fraud (Apr. 17, 2006).

111 *SEC v. Tyco Int'l Ltd.*, 06-CV-2942, ¶ 49 (S.D.N.Y. filed Apr. 17, 2006).

112 *Id.* ¶¶ 48, 53.

113 *Id.* ¶ 55.

114 Litigation Release No. 19657, US Sec. and Exch. Comm'n, SEC Brings Settled Charges Against Tyco International Ltd. Alleging Billion Dollar Accounting Fraud (Apr. 17, 2006).

115 *SEC v. Titan Corp.*, No. 05-0411, ¶ 3 (D.D.C. filed Mar. 1, 2005); *United States v. Titan Corp.*, Case No. 05 CR 0314-BEN (S.D. Cal. filed Mar. 1, 2005); *see also* "International Client Alert," *Mondaq Bus. Briefing*, Nov. 18, 2004, at *6.

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

that were required by its contract with the government of Benin.[120] Additionally, Titan gave a US$1,850 pair of earrings to the President of Benin's wife.[121] Separately, Titan falsified documents to enable its agents to underreport local commission payments in Nepal, Bangladesh, and Sri Lanka.[122] Titan also falsely reported commission payments on equipment exported to Sri Lanka, France, and Japan.[123]

After Lockheed discovered evidence of this misconduct, Lockheed and Titan jointly disclosed their findings to the Justice Department and the SEC. The closing date of the merger was pushed back twice to give Titan time to settle the government's actions, but the merger ultimately collapsed when Titan was unable to resolve the government's investigation before a June 2004 deadline.[124]

Some nine months later, on March 1, 2005, the government announced that Titan had agreed to settle charges that it had violated the FCPA.[125] Titan pleaded guilty to substantive violations of the FCPA's anti-bribery and books and records provisions, as well as to a criminal tax violation. Titan was sentenced to three years of supervised probation and was ordered to pay a criminal fine of US$13 million. Additionally, Titan was ordered to institute a strict compliance program and internal controls designed to prevent FCPA violations.[126] In settling the SEC's charges that it had violated the FCPA's anti-bribery, books and records, and internal controls provisions, Titan agreed to pay US$15.5 million in disgorgement and prejudgment interest and also agreed to pay US$13 million in civil penalties, which amount was satisfied by payment of the criminal fines. Titan was also required to retain an independent consultant to review its FCPA compliance procedures and to adopt the consultant's recommendations. Additionally, the SEC issued a Section 21(a) Report criticizing Titan's proxy statement for incorporating what it deemed false FCPA representations and warranties.[127]

In addition to showing that conducting meaningful due diligence is essential in identifying and avoiding a potential FCPA liability, the Lockheed-Titan case also illustrates that parties to a planned transaction must be mindful of public representations regarding FCPA compliance in the course of due diligence, and they need to continually and carefully assess their disclosure obligations under the federal securities laws.

On the same day that the Titan settlement was announced, the SEC also released a Report of Investigation cautioning issuers to ensure that disclosures regarding material contractual provisions—such as representations regarding FCPA compliance—are not materially misleading.[128] The Report of Investigation noted that Titan had represented in its merger agreement with Lockheed that it was in compliance with the FCPA.[129] Titan then twice publicly disclosed this representation in a proxy statement and in the parties' merger agreement, which was attached to the proxy statement.[130] Although the merger agreement was amended at various times due to the government's investigation of potential FCPA violations, Titan's FCPA representation in the merger agreement remained unchanged.[131] The Report of Investigation cautioned that when an issuer makes a public disclosure, it is required to consider whether additional disclosure is necessary in order to put the information at issue in context so that it is not misleading.[132]

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 Renae Merle, "Lockheed Martin Scuttles Titan Acquisition," *Washington Post*, June 27, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/A8745-2004Jun26.html.

125 Press Release, US Attorney, S.D. Cal., "News Release Summary," Mar. 1, 2005, *available at* http://www.usdoj.gov/criminal/pr/press_releases/2005/03/2005_3859_titancorp030105.pdf (hereinafter Titan Press Release); *SEC v. Titan Corp.*, No. 05-0411 (D.C. filed Mar. 1, 2005); *United States v. Titan Corp.*, Case No. 05 CR 0314-BEN (S.D. Cal. filed Mar. 1, 2005).

126 *Id.*

127 *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on Potential Exchange Act Section 10(b) and Section 14(a) Liability*, Exchange Act Release No. 51283 (Mar. 1, 2005) (the Report of Investigation).

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

3. York International Corporation

A third case suggests, on the other hand, that Lockheed's response to the prospect of FCPA liability may have been overstated. Johnson Controls, which acquired York International Corp. (York), was not charged with any wrongdoing and was not prosecuted for any of York's actions. Johnson acquired York in 2005, yet the case settled in 2007. Following an internal investigation, York reported widespread FCPA violations to the Justice Department relating to bribes paid under the OFFP. York further reported paying kickbacks to government agents in Bahrain, India, Turkey, the United Arab Emirates, and China. Pursuant to the three-year deferred prosecution agreement, York, which provides heating and ventilation systems and services around the world, paid a US$10 million criminal penalty, cooperated with ongoing investigations and retained an independent compliance monitor to ensure that future FCPA violations did not occur.[133] York also settled with the SEC and agreed to disgorge about US$10 million in ill-gotten gains and pay US$2 million in civil fines.[134]

4. InVision Technologies, Inc.

In December 2004, in connection with a proposed merger, InVision Technologies, Inc. (InVision) entered into agreements with the Justice Department and the SEC to resolve charges that InVision violated the FCPA. Pre-acquisition due diligence on the part of InVision's merger partner was instrumental in uncovering potential FCPA violations, which were promptly reported to the government.

InVision allegedly marketed and sold its airport security/explosion detection systems via local sales agents and distributors. InVision was aware of the high probability that its agents or distributors in Thailand, China, and the Philippines had paid or offered to pay money (*i.e.*, travel expenses and/or gifts) to foreign officials or political parties in connection with the sale of airport security screening machines.[135] Certain of these payments were improperly accounted for in InVision's books and records as a "cost of goods sold," resulting in profits of approximately US$589,000 from the sale of two machines in China.[136] These violations occurred, at least in part, because InVision failed to develop an adequate process to select and train its foreign sales agents and distributors.[137]

InVision consented to a two-year non-prosecution agreement with the Justice Department in which it agreed to: (i) accept responsibility for its misconduct; (ii) pay an US$800,000 fine; (iii) negotiate in good faith with the SEC; and (iv) fully disclose any evidence of FCPA-related misconduct to the government.[138] InVision settled the SEC case approximately two months later by agreeing to pay US$500,000 in civil penalties and US$617,700 in disgorgement and prejudgment interest, totaling approximately US$1.2 million.[139] The merger subsequently closed successfully.[140]

Although notable for the fact that it was the first time a non-prosecution agreement was used to settle an FCPA action, the InVision FCPA investigation again demonstrates the importance of conducting thorough pre-acquisition due diligence to resolve any potential FCPA problems before the transaction closes. On the downside, as is to be expected, government investigations will slow down the closing of corporate merger and acquisition transactions. In InVision's case, the merger announced in March 2004 did not close until December 2004, after the agreement to settle the criminal charges was reached. Critical to the conclusion of the successful resolution of the government action was the fact that the FCPA violations were self-reported to the

133 *United States v. York Int'l Corp.*, No. 1:07-CR-00253 (D.D.C. filed Oct. 1, 2007); *see also* Press Release No. 07-783, US Dep't of Justice, "Justice Department Agrees to Defer Prosecution of York International Corporation in Connection with Payment of Kickbacks Under the U.N. Oil For Food Program," Oct. 1, 2007.

134 *SEC v. York Int'l Corp.*, No. 1:07-CV-01750 (D.D.C. filed Oct. 1, 2007); *see also* Litigation Release No. 20319, US Sec. and Exch. Comm'n, SEC Files Settled Foreign Corrupt Act Charges Against York International Corp. for Improper Payments to UAE Officials, to Iraq Under the U.N. Oil For Food Program, and to Others (Oct. 1, 2007).

135 *SEC v. GE InVision, Inc.*, C-05-0660 (N.D. Ca. filed Feb. 14, 2005).

136 *Id.*

137 *Id.*

138 Press Release No. 04-780, US Dep't of Justice, "InVision Technologies Inc. Enters into Agreement with The United States," Dec. 3, 2004.

139 *SEC v. GE InVision, Inc.*, C-05-0660 (N.D. Ca. filed Feb. 14, 2005).

140 Press Release No. 04-780, US Dep't of Justice, "InVision Technologies Inc. Enters into Agreement with The United States," Dec. 3, 2004 (discussing InVision's resolution of criminal FCPA liability and the acquisition of InVision).

government. Importantly, the self-disclosure successfully prevented an illicit payment in Thailand. Finally, the strength of InVision's merger partner's compliance program was instrumental in the manner the settlement was structured.

5. ABB Vetco Gray Limited

The acquisition of the upstream oil and gas business of Asea Brown Boveri Limited (ABB Limited), a Swiss corporation with American Depository Receipts (ADRs) listed on the NYSE, by JP Morgan Partners, Candover Partners Limited, and 3i Group (collectively, the Equity Club) led to the uncovering of potentially illicit payments during pre-acquisition due diligence. Prior to the acquisition, ABB Vetco Gray, Inc. and ABB Vetco Gray (UK) Ltd. paid more than US$1 million to officials of NAPIMS, a Nigerian government agency, to obtain confidential bid information and favorable recommendations from Nigerian government agencies in connection with seven oil and gas construction contracts in Nigeria for which the companies expected to realize profits greater than US$12 million.[141] These illicit payments included cash, gifts, travel, entertainment, and per diem provided to NAPIMS officials.[142] Additionally, illicit payments were made to foreign government officials in Angola and Kazakhstan prior to the acquisition for reasons similar to those made in Nigeria.[143]

On July 6, 2004, ABB Vetco Gray Inc., the US subsidiary, was charged as a "domestic concern," whereas ABB Vetco Gray (UK) Ltd. was charged under the 1998 provision expanding jurisdiction to foreign companies that engage in conduct in the United States in furtherance of a bribe. Both companies pleaded guilty to substantive violations of the FCPA's anti-bribery and books and records provisions, and each agreed to pay a criminal fine of US$5.25 million.[144] On the civil side, the SEC alleged that ABB Limited, the parent company, had violated the FCPA's anti-bribery and books and records provisions. ABB Limited agreed to pay US$5.9 million in disgorgement and prejudgment interest, and a civil penalty of US$10.5 million, which was satisfied by the criminal fines paid by ABB Limited's subsidiaries to settle the criminal case. As part of the settlement, ABB Limited was required to retain an independent consultant to review its FCPA compliance policies and procedures, even though ABB Limited had sold off the Vetco Gray entities.

The lessons from the ABB Limited investigation include the following: *First*, it is critically important to conduct rigorous due diligence and monitor the activities of foreign agents, consultants, representatives, distributors, suppliers, and joint venture parties. *Second*, FCPA violations uncovered during due diligence do not necessarily spell the end of the transaction, assuming the parties to the transaction can work together to resolve the government's investigation prior to closing the acquisition. *Third*, on a related point, where the transaction is going to go forward despite the FCPA issues and the facts warrant it, the parties should consider getting an opinion letter from the Justice Department stating that the acquiring company will not be charged with additional undiscovered pre-acquisition conduct.[145] In so doing, the acquirers can gain some assurance about their potential liability for past FCPA violations.[146]

6. Paradigm B.V.

While conducting due diligence before its initial public offering in January 2007, Paradigm B.V. (Paradigm), an oil and gas services provider, discovered that it had made payments to foreign officials in violation of the FCPA.[147] Between 2000 and 2007, Paradigm bribed officials in China,

141 *SEC v. ABB Ltd*, No. 1:04-CV-1141 (RBW) (D.D.C. filed Jul. 6, 2004); Litigation Release No. 18775, US Sec. and Exch. Comm'n, SEC Sues ABB Ltd. in Foreign Bribery Case (Jul. 6, 2004); *United States v. ABB Vetco Gray, Inc.*, No. CR-H-04-279 (S.D. Tex. Jun. 22, 2004). *See also* Opinion Release No. 04-02, Foreign Corrupt Practices Act Review (Jul. 12, 2004), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2004/0402.html.

142 *See generally id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 Unfortunately, employees of Vetco Gray Ltd. and other Vetco Gray affiliates continued to make payments to foreign officials in violation of the FCPA. In February 2007, three Vetco Gray subsidiaries pleaded guilty to FCPA charges and paid a combined US$26 million in fines—a then record in the FCPA realm. The Justice Department made it clear that then Vetco Gray Ltd.'s status as a repeat offender was a major reason for the scale of this fine. *See* Justice Department Release No. 07-075, "Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines," *available at* http://www.usdoj.gov/opa/pr/2007/February/07_crm_075.html.

147 Press Release No. 07-751, US Dep't of Justice, "Paradigm B.V. Agrees to Pay $1 Million Penalty to Resolve Foreign Bribery Issues in Multiple Countries," (Sept. 24, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/September/07_crm_751.html.

Indonesia, Kazakhstan, Mexico, and Nigeria in order to receive contracts from those governments.[148] While the exact total of payments was not stated in the complaint, Paradigm is estimated to have paid about US$22,500 in Kazakhstan, US$100-200 per Chinese official, several hundred thousand dollars to Mexican officials, and between US$100,000 and US$200,000 to Nigerian government agents.[149] These payments, which were funneled through third-party consulting agencies, were inappropriately accounted for as entertainment and travel expenses.[150]

On September 24, 2007, because Paradigm voluntarily disclosed its conduct and took extensive steps to prevent similar occurrences from happening again, the Justice Department agreed to an 18-month deferred prosecution agreement, rather than the more common three-year term.[151] Additionally, Paradigm was required to pay a US$1 million fine and retain an independent compliance monitor.[152]

7. Statoil ASA

Statoil ASA (Statoil) is a government-owned Norwegian company with ADRs traded on the New York Stock Exchange. Statoil ASA, on October 1, 2007, merged with Norsk Hydro ASA's (Hydro) oil and gas division to form StatoilHydro ASA (StatoilHydro).[153] On the same day it announced its acquisition of Hydro, StatoilHydro publicly disclosed that it had initiated an investigation into payments made by Hydro's operations in Libya for possible violation of Norwegian and US anti-corruption laws.[154]

In June 1999, after its acquisition of another Norwegian oil company, Saga Petroleum ASA (Saga), Hydro inherited consultancy contracts involving Libyan oil fields.[155] The corruption allegations concerned payments agreed to by Saga under a January 1999 contract to acquire Libyan oil exploration acreage.[156] After the merger, Hydro paid the consultancy fees under the agreement totaling US$6.85 million in 2000 and 2001.[157] As a result of the October 2007 merger, Hydro's petroleum business in Libya was transferred to StatoilHydro.

StatoilHydro's Annual Report indicates that the company learned about the improper payments only five days before the merger.[158] StatoilHydro immediately hired a US law firm to investigate the payments and notified Norway's National Authority for Investigation and Prosecution of Economic and Environmental Crime as well as the SEC.[159] StatoilHydro's chairman resigned during the first week of the merger.[160] The investigation appears to be ongoing as no resolution has been announced by the Justice Department or the SEC.

B. Liability for post-acquisition conduct of a newly acquired company

1. Baker Hughes, Inc.

Among other allegedly violative conduct, in 1998, Baker Hughes, Inc. (Baker Hughes) authorized payments to one of its agents in India, but allegedly did not conduct sufficient due diligence to ensure that the payments would not be directed to government officials.[161] In August 1998, Baker Hughes acquired Western Atlas Corporation (Western Atlas), which provided services relating to offshore oil drilling.[162] Western Atlas subsequently was scheduled

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 *See* "Norway's StatoilHydro Begins Operations, Announces Probe of Questionable Libya Contracts," *Int'l Herald Trib.* (Oct. 1, 2007). *See also* "FCPA Due Diligence in the Context of Mergers and Acquisitions," David S. Krakoff, James T. Parkinson, and Kristy L. Balsanek, *Bloomberg Law Reports*, Vol. 12, No. 19 (Sept. 29, 2008).

154 *See id.*; *see also* StatoilHydro ASA, Form 20-F (2007 Annual Report) (Apr. 9, 2008), at 5.3.

155 *See* "Norway's StatoilHydro Begins Operations, Announces Probe of Questionable Libya Contracts," *Int'l Herald Trib.* (Oct. 1, 2007).

156 *See id.*

157 *See id.*

158 *See* StatoilHydro, Form 20-F, at 5.3.

159 *See* "Nina Berglund, Bribery Investigation Mars 'StatoilHydro' Debut," *Aftenposten* (Oct. 1, 2007), *available at* http://www.aftenposten.no/english/business/article2023532.ece.

160 *See* "Wojciech Moskwa, StatoilHydro CEO Sees Fast Recovery from Bribe Row," *Reuters UK* (Oct. 6, 2007), *available at* http://uk.reuters.com/article/oilRpt/idUKMOS65608320071006.

161 *In the Matter of Baker Hughes, Inc.*, Exchange Act Release No. 44784 (Sept. 12, 2001), *available at* http://www.sec.gov/litigation/admin/34-44784.htm.

162 *Id.*

to perform work in India, but needed to receive a special license from the Indian Coastal Commission (ICC).[163] Less than a month after it was acquired by Baker Hughes, in September 1998, and in order to facilitate the issuance of the license from the ICC, the General Manager of Western Atlas authorized a US$15,000 illicit payment.[164] Shortly after the illicit payment was made, Western Atlas received approval from the ICC.[165] Baker Hughes settled with the SEC and the Justice Department, on September 12, 2001, by agreeing to cease and desist from future violations of the FCPA.[166]

2. Syncor International Corporation

In the course of conducting pre-merger due diligence, evidence was uncovered suggesting that employees of Syncor International Corp. (Syncor), a radiopharmaceutical company based in California, had violated the FCPA by making illicit payments to government employees in Taiwan, Mexico, Belgium, Luxembourg, and France.[167] Between 1997 and 2002, Syncor's Taiwanese subsidiary made improper payments (commissions totaling US$344,000) to physicians at state-owned hospitals to influence their decision to buy Syncor products and services. These payments were authorized by Syncor's board chairman located in California. The SEC alleged that additional payments, totaling US$600,000, were made through Syncor's foreign subsidiaries in Mexico, Belgium, Luxembourg, and France. These payments were made with the knowledge and approval of Syncor's founder and chairman. Furthermore, these payments were improperly recorded as "commissions."

Syncor self-reported to the Justice Department and the SEC, and settled the resulting charges. Syncor Taiwan Inc. (Syncor Taiwan), a Taiwanese corporation and wholly owned subsidiary of Syncor, pleaded guilty to substantive violations of the FCPA's anti-bribery and books and records provisions, and was sentenced to three years of supervised probation and ordered to pay a US$2 million fine.[168] On the SEC front, Syncor agreed to pay US$500,000 in civil penalties (which at the time was the largest penalty ever obtained by the SEC in an FCPA case) and to cease and desist from future violations of the FCPA.[169] Additionally, Syncor was required to retain an independent consultant to review and make recommendations concerning the company's FCPA compliance and procedures.[170]

Several points can be gleaned from the wrongdoing at Syncor. *First*, Syncor agreed, on November 22, 2002, to extend the date prior to which either party could unilaterally terminate the planned merger from December 31, 2002 to January 15, 2003.[171] *Second*, the terms of the merger shifted dramatically in favor of the acquirer: whereas the original merger terms called for Syncor shareholders to receive 0.52 of a share of the acquirer's common stock for each outstanding share of Syncor stock, the amended merger terms reduced the exchange ratio to 0.47.[172] *Third*, the acquisition was delayed until the investigation was concluded and agreements were struck with the government. *Fourth*, the Syncor enforcement action was the first time the Justice Department charged a foreign company under the 1998 amendments to the FCPA for acts—*i.e.*, the chairman's approval—in the United States. *Fifth*, parent company liability was established through the foreign subsidiary's books and records. *Sixth*, employees of a state-owned entity are instrumentalities of the government. *Seventh*, due diligence efforts were crucial to this favorable outcome. As the acquirer's then-Chairman and Chief Executive Officer put it:

> As a result of our further extensive domestic and international due diligence, which included investigations conducted by outside legal and forensic accounting teams, and the separate investigation conducted by

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.*

167 Litigation Release No. 17887, US Sec. and Exch. Comm'n, SEC Obtains $500,000 Penalty Against Syncor International Corporation for Violating the Anti-Bribery Provisions of the Foreign Corrupt Practices Act (Dec. 10, 2002), *available at* http://www.sec.gov/litigation/litreleases/lr17887.htm.

168 *Id.*

169 *Id.*

170 *Id.*

171 *See* http://www.secinfo.com/drDX9.31Cm.htm.

172 *See* http://www.secinfo.com/drDX9.31db.htm.

> the Syncor Special Committee, the issues have been identified and dealt with decisively. We believe that these actions, in conjunction with the agreements reached with the Department of Justice and SEC, bring these issues to closure and give us the confidence that shareholders will be protected as we move forward to complete the acquisition.[173]

And, *eighth*, using the Justice Department's review process, the acquirer was able to obtain reassurance that it will not be charged with additional undisclosed pre-acquisition conduct of Syncor and its subsidiaries.

III. FCPA DUE DILIGENCE TO AVOID SUCCESSOR LIABILITY

In light of the steep penalties that now routinely accompany the discovery of an FCPA violation, it is essential for companies to take proactive measures to ensure that they do not inherit liability for the past sins of a target company and to ensure that they do not incur FCPA violations in their future operations. In addition to the financial concerns associated with acquiring a company that will likely face serious criminal charges, there are reputational concerns to worry about, not to mention debarment, suspension from participating in certain government contracts, and other collateral consequences. Well-designed pre-acquisition due diligence and comprehensive FCPA compliance programs can significantly reduce the likelihood that FCPA issues will arise.

The Titan/Lockheed case, as discussed above, demonstrates that by conducting careful pre-acquisition due diligence that is specifically designed to identify suspicious payments to foreign officials, acquiring companies can uncover potential FCPA problems before the transaction is complete. In Lockheed's case, this discovery spared it from exposure to a US$13 million criminal fine and US$15.5 million in disgorgement—the sums that Titan ultimately paid to settle the government's charges.

In conducting FCPA due diligence, particular attention should be paid to the following warning signs: (i) business activity in countries with widespread official corruption; (ii) payments of excessive or unusually high compensation; (iii) a request for increased compensation during a sales campaign; (iv) requests that payments be made to third countries or third parties; (v) requests for payments in cash or bearer instrument; (vi) payments to parties lacking facilities or qualified staff; (vii) use of shell companies; (viii) lack of experience or "track record" with product field or industry; (ix) prior allegations related to business integrity; (x) the reputation of representatives or consultants engaged by the target; (xi) absence of written agreements; (xii) close relationships to government officials (close relative or financial/ownership interest); (xiii) the recommendation of a representative and/or consultant by a government official or customer; (xiv) violations of local law or policy (*e.g.*, prohibitions on commissions, currency or tax law violations); (xv) misrepresentations or inconsistencies in the application or the due diligence process; and (xvi) refusal to certify compliance with the FCPA.[174]

These general principles are, however, only the beginning. Given the wide variety of potential sources of FCPA liability, it is essential that the acquiring company conduct pre-acquisition due diligence that is carefully tailored to the particular risk factors posed by the acquisition and take other steps, including obtaining written representations and warranties concerning FCPA compliance and structuring the transaction to minimize potential successor liability. A January 15, 2008, Opinion Release by the Justice Department broadly confirms that US authorities view these and other measures as appropriate elements of an FCPA due diligence inquiry.[175]

While the level of pre-closing due diligence possible will depend on the type of transaction and the facts and circumstances of each deal, it is recommended that as much due diligence as is permissible should be conducted. As indicated above, the level of possible pre-closing due diligence will depend on the nature, facts, and circumstances of each transaction. For example, in

173 *Id.*

174 *See generally* Margaret M. Myers & Bethany K. Hipp, *FCPA Considerations in Mergers and Acquisitions, in the Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risks Fall 2007*, at 241-271 (PLI Corporate Law and Practice, Course Handbook Series No. B-1619, 2007); Dale Chakarian Turza, *Foreign Corrupt Practices Act Implications for Mergers, Acquisitions, Joint Ventures and Other Business Combinations*, (PLI Corporate Law and Practice, Course Handbook Series No. B-1619, 2007).

175 *See* Opinion Release No. 08-01, US Dep't of Justice, Foreign Corrupt Practices Act Review (Jan. 15, 2008), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0801.pdf.

the case of a hostile takeover, virtually no due diligence will be possible other than searching and reviewing publicly available information about the target company. In an auction, relatively little may be possible prior to the signing of the stock purchase or merger agreement. Indeed, even friendly acquisitions may not provide access to significantly more information than would be available in hostile takeovers or auctions.

As many of the following issues as possible should be addressed before the deal closes in order to provide the acquirer with as much background information about the target company: (i) in what countries does the target company do business? Once identified, these countries should be cross-referenced against the Transparency International Index;[176] (ii) how does the target company conduct business in each of those foreign countries? Obviously, it is important both from a legal and economic standpoint for the acquirer to understand exactly what it is buying;[177] (iii) does the target company engage agents, consultants, distributors, or third-party intermediaries to assist in its business?; (iv) in what countries has the target company ceased conducting business and under what circumstances?; (v) are there any employees of the target company that hold foreign government positions or serve on any boards of directors of foreign government-owned entities?; (vi) does the target company have FCPA, money-laundering, or anti-kickback policies and compliance or other applicable due diligence procedures, including training programs for its employees, agents, consultants, distributors, or third-party intermediaries?; (vii) will the proceeds from the sale be used to pay or reimburse bribes promised or made by the target company? If so, the acquirer may be inadvertently facilitating the payment of a bribe; (viii) does the target company have written procedures relating to the conduct of a due diligence review of foreign agents, consultants, distributors, or third-party intermediaries?;(ix) does the target company maintain due diligence and/or contract or engagement files for agents, consultants, distributors, or third-party intermediaries?; (x) does the target company maintain due diligence files for all persons who have acted as agents, consultants, distributors, or third-party intermediaries prior to the last five years, but who received payments (or to whom the company owed payments) within the past five years?; (xi) does the target company conduct periodic reviews and certifications of its foreign agents, consultants, distributors, or third-party intermediaries?; (xii) does the target company maintain commission, retainer, and expense reimbursement information for all persons who have acted as agents, consultants, distributors, or third-party intermediaries, regardless of whether or not the target company executed a formal agreement with such persons?; and (xiii) does the target company have any written internal audit policies and procedures relating to the foregoing items?

In addition to the foregoing, the following issues should be considered and addressed if possible before the deal closes so as to avoid acquiring a target company with pre-existing FCPA or similar problems: (i) has the target company ever been the subject of any bribery, money-laundering, or anti-kickback investigation by any government authority in the United States or abroad?;(ii) if the target company has bribed foreign government officials in the past, did the misconduct involve personnel that are important to the target company's current business?; (iii) will continuing bribes be required to retain a concession/license/tax break/contract that may be material or important to the target company's business?; (iv) if past bribes have been paid, and the target company is a US exporter or government contractor, does it risk losing its export licenses or government business?; (v) what impact, if any, did past bribes have on the target company's books and records, accounting, and/or disclosures that would need to be addressed if the transaction closes?; (vi) does the target company maintain records, including hotline logs, relating to any allegations of impropriety implicating bribery, money-laundering, or anti-kickback laws?; (vii) has the target company ever conducted, with or without the assistance of outside counsel, any internal investigations involving allegations of impropriety involving bribery, money-laundering, or anti-kickback laws in the United States or abroad?; and (viii) does the target company maintain records showing responses to questions raised by internal and

176 *See generally* Myers & Hipp, *supra* note 174, at 241-272; Turza, *supra* note 174.

177 *Id.*

external auditors relating to impropriety involving bribery, money-laundering, or anti-kickback laws?[178]

Similarly, the following are additional areas of inquiry an acquirer must explore and have a plan to address before the acquisition is completed: (i) does the target company provide anything of value, including hospitality, entertainment, gifts, or trinkets to foreign government officials, officials of political parties, employees of state-owned entities, or candidates for political office (Foreign Officials)?;[179] (ii) does the target company sponsor travel for Foreign Officials, and, if so, under what circumstances is such travel provided and what expenses are paid?; (iii) does the target company engage Foreign Officials to provide services or products?; (iv) what are the target company's charitable, social, or political contributions in the foreign countries in which it operates?; (v) what are the written procedures relating to the approval of requests for charitable, social, or political contributions in the foreign countries in which the target company operates?; (vi) does the target company maintain due diligence files relating to the approval of requests for charitable, social or political contributions in the foreign countries in which it operates?; (vii) has the target company received from any foreign government entity or judicial authority any grants, tax benefits, rulings, or orders related to the target company's business?; (viii) is a senior management-level employee assigned responsibility for the target company's compliance program?; and (ix) does the target company conduct periodic internal compliance audits relating to potential FCPA anti-bribery and books and records violations?

The answers to these and other questions should guide an acquirer's decision about whether to go forward with the deal. What is perhaps most important in reaching a determination about whether to go forward with any business combination, from an FCPA compliance standpoint, is whether ethical behavior is emphasized at the very top of the target company. Accordingly, questions and requests for information that are directed toward ascertaining the tone at the top must be asked and answered prior to closing. Another very important non-FCPA reason for engaging in this exercise is that it is likely to be very instructive in determining the actual worth of the target company and the right price to pay for the deal. In circumstances where only limited due diligence will be permitted prior to closing, an acquirer should consider whether to obtain a written agreement containing certain terms, representations and warranties. Indeed, it may well be prudent to obtain these and other representations and warranties no matter how much access an acquirer is provided pre-closing. For example, Lockheed's ability to walk away from the Titan acquisition was due to sound due diligence and proper protective language inserted into the transaction documents. The converse of the aborted Lockheed-Titan acquisition is the Tyco acquisition discussed above.

178 *Id.*

179 *Id.*

IV. CONCLUSION

Taken together, Opinion Release Nos. 08-01 and 08-02 and the cases discussed above stemming from pre-acquisition due diligence all support the conclusion that companies contemplating mergers, acquisitions, and other business combinations must be keenly aware of the FCPA problems faced by their target companies before closing the transaction, regardless of how the transaction is to be structured.

Given the then record US$26 million criminal fine imposed against three wholly owned subsidiaries of Vetco Gray International companies, Vetco Gray Controls Inc., Vetco Gray Controls Ltd., and Vetco Gray (UK) Ltd.,[180] the combined civil and criminal record fine of US$44 million against Baker Hughes, Inc.,[181] and the record number of FCPA cases that are being filed by the Justice Department and the SEC, companies considering mergers, acquisitions, or any other type of business combinations, including joint

180 Press Release No. 07-075, US Dep't of Justice, "Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines," Feb. 26, 2007.

181 *SEC* v. *Baker Hughes, Inc.*, No. H-07-1408 (S. D. Tex. filed Apr. 26, 2007); *see also* Litigation Release No. 20094, US Sec. and Exch. Comm'n, SEC Charges Baker Hughes with Foreign Bribery and with Violating 2001 Commission Cease-and-Desist Order (Apr. 26, 2007); Press Release No.07-296, US Dep't of Justice, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay $11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case (Apr. 26, 2007).

ventures, must conduct extensive FCPA due diligence prior to closing to determine what, if any, FCPA exposure is outstanding. The checklist of questions discussed above is a good starting point in helping companies begin to assess their potential FCPA risks when considering a business combination. ♦

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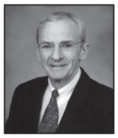

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