ARNOLD & PORTER LLP

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FCPA News and Insights

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

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Our Foreign Corrupt Practices Act and Anti-Corruption Practice

Arnold & Porter LLP regularly works with our clients to ensure compliance with the FCPA, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted in 1998 by the Organisation for Economic Co-operation and Development, and other US, UK, and EC anti-corruption compliance requirements. Our team provides the full spectrum of FCPA and anti-corruption related services, from counseling clients on FCPA compliance programs to reduce the risk of FCPA exposure to representing US and foreign companies and individuals before the two US enforcement agencies, the Justice Department and the SEC as well as other US, UK, and EC enforcement authorities when allegations of violations arise. We have experience advising on the impact that FCPA and other US, UK, and EC anti-corruption laws have on companies doing business in all regions of the world, including Asia, Latin America, the Middle East, Africa, and Europe. Our team includes lawyers who have government experience at the Justice Department and SEC, including a former Senior Counsel at the SEC, whose group had responsibility for the SEC's FCPA program. Where anti-corruption issues arise outside US or EC law, we also have experience working with lawyers who are admitted in the pertinent country and are knowledgeable on foreign laws.

FCPA News and Insights is published periodically by the white collar defense, corporate and securities, and government contracts practices of Arnold & Porter LLP. For further information on anything discussed in FCPA News and Insights, please contact:

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Another Record Year Brings to an End a Decade That Saw the Explosion of FCPA Prosecution

It would not be an overstatement to say that 2009 brought to a close a decade that witnessed the dramatic escalation of Foreign Corrupt Practices Act (FCPA) civil and criminal enforcement. The year saw a continuation of the government's aggressive prosecution of foreign bribery, as well as the inauguration of a President who believes that "the struggle against corruption is one of the great struggles of our time."[1] The 16 criminal prosecutions and civil enforcement actions brought against corporations in 2009 were comparable to the 18 in the prior year, while the number of criminal prosecutions and civil enforcement actions against individuals rose from 16 in 2008 to 24 in 2009. These numbers support the observation that the FCPA remains an area of intense focus for the United States Department of Justice (the Justice Department) and the United States Securities and Exchange Commission (the SEC or the Commission). There is no reason to believe that 2010 is going to be any different—a rather sobering thought.

Awareness of potential FCPA traps is the first step towards being able to prevent or at least deter FCPA violations. Recurring enforcement themes, as well as some new ones, are discernible from the enforcement actions brought in 2009. In this issue of *FCPA News and Insights*, we discuss these themes, and then provide a report on some of the actions of the year. We also explore the FCPA in the context of doing business in China, a market of increasing importance to many entities with FCPA exposure.

Although there are many ways to analyze the cases that were brought in 2009, what follows is our focus on those themes that we believe to be the most important and most likely to shape the way the Justice Department and the Commission prosecute FCPA violations in 2010 and beyond.

Government Promises of More Prosecutions and Enforcement Actions

In public speeches, key FCPA enforcement officials made clear in 2009 that the increased anti-corruption efforts of the past decade will continue into the next. Robert Khuzami, Director of the Commission's Division of Enforcement, speaking to the New York City Bar Association on the occasion of his first 100 days in office, announced the creation of new specialized units at the agency, including an FCPA unit.[2] The mission of the FCPA unit, Khuzami said, will be to "focus on new and proactive approaches to identifying violations of the Foreign Corrupt Practice Act."[3] Khuzami noted that the Commission's goals regarding FCPA enforcement include "being more proactive in investigations, working more closely with [its] foreign counterparts, and taking a more global approach to these violations."[4] Additionally, Khuzami stated that the SEC has added to the ranks of its Trial Unit, viewing it as "imperative that we convey to all defendants in SEC actions that we are prepared to go to trial and we will win."[5]

Not to be outdone, officials from the Justice Department also let it be known that international corruption would not be tolerated. On November 7, 2009, Attorney General Eric Holder spoke in Doha, Qatar, at the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity.[6] In his speech, Holder laid out "three critical steps" in the fight against corruption. These included ratification and full implementation of the UN Convention Against Corruption, ensuring that "corrupt officials do not retain the illicit proceeds of their corruption," and ending "official impunity with regard to corruption."[7]

In a speech more focused on the FCPA, delivered on November 17, 2009 at the American Conference Institute's 22nd National Forum on the Foreign Corrupt Practices Act, Assistant

Attorney General Lanny Breuer stressed that bribery to obtain foreign contracts "*is not business as usual. It is illegal. And it will not be tolerated*."[8] Furthermore, Breuer stated that "prosecution of individuals is a cornerstone of our enforcement strategy" and is thus a practice that will continue.[9] Breuer also sought to dispel the belief that the Justice Department's prosecutions are primarily the result of voluntary disclosures, saying that most cases are "the result of pro-active investigations, whistleblower tips, newspaper stories, referrals from our law enforcement counterparts in foreign countries, and our Embassy personnel abroad."[10] In another speech this year, Breuer noted that "the [Justice] Department currently is pursuing more than 120 FCPA investigations."[11]

The takeaway from these public statements is that the US government is not content with its recent FCPA enforcement successes, which it can be fairly said surpass those of any other country. Neither the Commission nor the Justice Department is satisfied merely to have sent a message. Instead, the aim of both agencies is to continue aggressively pursuing companies and individuals engaged in overseas corruption and to ensure that stiff penalties are meted out. These statements, coupled with the pace of actual cases being brought, illustrate that the stakes are high, and that it is critically important for companies to assess their FCPA exposure continually and to institute strong compliance programs that are monitored and well-enforced.

Aggressive Prosecution as Evidenced by Targeting Individuals, Harsh Sentences, and Industry-Wide Scrutiny

The government's tough talk is backed by the number of FCPA cases filed in 2009. The year saw a record number of prosecutions of individuals, with 24 indicted and four tried and convicted. Control Components, Inc. (CCI) provides the clearest example of the Justice Department's focus on individuals. CCI has seen eight of its most senior executives charged, "including the former CEO and the former finance and global sales heads, two of whom have already pleaded guilty and are cooperating."[12]

Also included in the tally of prosecutions of individuals are the high profile trials of Frederic Bourke and movie producers Gerald and Patricia Green. Although Bourke ultimately was sentenced to only one year in jail, the notable fact is that he was convicted "even though he did not personally pay the bribes and even though he, in fact, lost his multi-million dollar investment in this business venture."[13] Moreover, Bourke claimed that he did not know about the bribery. The government successfully prosecuted Bourke under a theory of willful blindness, or conscious avoidance, conferring knowledge of the bribes on Bourke because he either knew about or was aware of a high probability of the existence of improper payments and consciously and intentionally avoided the knowledge. The key lesson to learn from this case is that lack of actual knowledge of bribes is not sufficient to avoid liability if the government can demonstrate that the defendant was aware of a high probability of the existence of bribes but refrained from further inquiry.

The Greens, on the other hand, were accused of directly paying bribes to a Thai government official, covering up the bribes by classifying them as sales commissions, and using dummy businesses to conceal the rewards they reaped from the illegal payments. Accordingly, the Greens may not escape with a sentence as light as Bourke's. In fact, the government is seeking a life sentence for the 76-year-old Gerald Green.[14] The Greens' case is significant because of the severity of the sentence sought by the government—we are not aware of any other FCPA matter where the Justice Department has sought a life sentence. More broadly, because the Greens' practices do not seem particularly unusual in the Hollywood film industry, the couple's prosecution may be a harbinger of actions to come, and it should put members of the film industry on alert to monitor their actions with foreign officials.

While it is still an open question whether Hollywood is the next FCPA hotspot, the government has made known its intention to crack down on the pharmaceutical industry. In a November 12, 2009 speech to the 10th Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum, Assistant Attorney General Lanny Breuer noted that "it is entirely possible, under certain circumstances and in certain countries, that nearly every aspect of the approval, manufacture, import, export, pricing, sale, and marketing of a drug product in a foreign country will involve a 'foreign official' within the meaning of the FCPA."[15] With so many opportunities for corrupt payments, then, Breuer promised that the government "will be intensely focused on rooting out foreign bribery in [the pharmaceutical] industry."[16]

In addition to Bourke and the Greens, a fourth high-profile individual was tried and convicted in 2009 for FCPA-related offenses. Former US Representative William Jefferson was charged with violating the FCPA by arranging bribes to Nigerian officials to win contracts for his family's companies, soliciting and accepting bribes, wire fraud, money laundering, and obstruction of justice.[17] Jefferson was acquitted of the substantive FCPA charge, but found guilty of "conspiracy to solicit bribes, deprive citizens of honest services by wire fraud and violate the [FCPA]."[18] Jefferson was eventually sentenced to 13 years in prison, well short of the 27 to 33 years recommended by the government.[19] Although the Jefferson case ended up being more about domestic corruption than international bribery, Jefferson's arrest, trial, conviction, and stiff sentence nevertheless illustrate that even elected officials, as their jobs put them in contact with foreign government officials, can be ensnared by the FCPA.

Novel Theories of Liability

It is no secret that the Justice Department and the Commission intend to aggressively target individuals. Last year, the Commission debuted a new weapon in its enforcement arsenal—"control person" liability under Section 20(a) of the Securities Exchange Act of 1934 (Exchange Act). Broadly, Section 20(a) of the Exchange Act provides that every person who "directly or indirectly, controls any person" who is liable under the Exchange Act shall also be jointly and severally liable to the same extent as the controlled person.[20] Control person liability is not a new concept under the federal securities laws and has been used in corporate fraud cases to hold executives accountable.[21] However, the use of the control person theory of liability is a novel concept in the FCPA arena, and has potentially alarming ramifications for corporate executives who have oversight for worldwide operations and financial reporting and controls.

On July 31, 2009, the Commission settled allegations of FCPA violations with Nature's Sunshine Products, Inc. (NSP) and two of its senior executives for improper payments made by NSP's Brazilian subsidiary, Nature's Sunshine Produtos Naturais Ltda. (NSP-Brazil) in 2000 and 2001.[22] According to the Commission's complaint, NSP is a Utah "manufacturer of nutritional and personal care products which markets its products worldwide through a system of independent multi-level marketing distributors."[23] The two executives charged are the company's chief executive officer and former chief operating officer, Douglas Faggioli, and its Chief Financial Officer, Craig Huff.[24]

The complaint alleges further that the Brazilian government reclassified certain of NSP's vitamins and supplements as medicines and required that they be registered as such, but that NSP was unable to do so because the products did not meet the registration requirements of medicines.[25] To avoid the new regulatory requirement, NSP-Brazil paid over US$1 million in bribes to Brazilian customs brokers, who in turn made illicit payments to Brazilian customs officials to allow unregistered products to be imported and sold in Brazil.[26] NSP-Brazil allegedly falsified its books, records, and accounts to hide the nature of the improper payments by recording these illicit payments as "importation advances."[27] According

to the complaint, two former NSP controllers (based in Utah) visited the Brazilian subsidiary near the end of 2000, and were told by an operations manager that unregistered products were being imported and illegally sold, and that it was becoming increasingly difficult and costly to find customs brokers willing to facilitate the illegal importation. The complaint further alleges that one of the controllers, a corporate officer, raised these issues with an unnamed senior manager at NSP who is no longer with the company.[28] Also, the operations manager in Brazil is alleged to have reported that he informed his general manager about these issues and was told that NSP was aware of the problems. In 2001, a newly hired NSP-Brazil controller realized that 80 cash payments had no documentation. NSP, however, accounted for the payments in its 2001 financial statements as legitimate importation expenses, and, in 2002, NSP-Brazil purchased fictitious documentation to support the payments.

Moreover, the complaint alleges that Faggioli, Chief Operating Officer at the time of the payments, had "supervisory responsibilities for the senior management and policies regarding the worldwide manufacture, inventory, and distribution of NSP products, including the export and sale of those products" and that his direct reports included the President of NSP International and others who were responsible for NSP worldwide operations, as well as making and keeping books and records and maintaining internal controls to monitor NSP product registration. As for Huff, the Chief Financial Officer at the time, the complaint alleges that he had supervisory responsibilities for senior management and policies regarding making and keeping books and records, and ensuring that internal controls were in place to monitor product registration. He, too, had direct reports who had responsibility for these tasks. Both Faggioli and Huff allegedly failed to adequately supervise NSP personnel regarding the maintenance of accurate books and records and sufficient internal controls.[29]

Without admitting or denying the Commission's allegations, Faggioli and Huff each agreed to pay a US$25,000 penalty,[30] while NSP agreed to pay a US$600,000 penalty. All three are enjoined from any future violations. Although it seems unlikely that a criminal action would be brought on these facts, the Justice Department has not stated whether it intends to file criminal charges against Faggioli and Huff. Typically, when both agencies file charges, they tend to be coordinated. With respect to NSP, it is unlikely that the Justice Department will commence criminal charges after the SEC's matter has been announced and settled.

The NSP enforcement action is the first time that the SEC has used control person liability to target individuals for FCPA violations, a potentially game -changing move that has dire consequences for corporate executives. The Exchange Act provides: "Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action."[31] Because the statute itself does not define what it means to "control any person," the SEC provided clarification: "control . . . means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."[32]

With respect to private securities actions, in a circuit split, the courts have interpreted control person liability both extremely narrowly and extremely broadly, creating uncertainty as to the scope of the threat of potential liability. When determining whether a control person should be held liable, a few courts apply a "culpable participation" test,[33] while the majority of circuits have adopted various forms of a "potential control" standard.[34] Under the culpable participation test, plaintiffs must demonstrate that

the defendant exercised control over the primary violator and that the defendant culpably participated in the violation.[35] Courts that apply this test believe that control person liability requires more than a mere potential to control and that the controlling person is required to have the same scienter as the primary violator.[36] The courts on the other side of the split apply varying "potential control" standards, none of which require a proof of scienter on the part of the controlling person.[37] Instead, plaintiffs must show that the control person actually exercised control over the person or company in general and possessed the power to control the specific action upon which the primary violation is predicated.[38] Thus, the "potential control" test poses a significant threat of liability for many individuals, even those who had no direct involvement in, nor any knowledge of, the underlying primary FCPA violation.

In the SEC's action against NSP, the complaint alleges a "failure to supervise," but not the direct wrongdoing on the part of the individual defendants that is typically alleged in FCPA enforcement actions. Faggioli and Huff were implicated because of their positions as control persons, not because of any direct action they took. It is too early to tell if this case is an anomaly or part of a new trend; but it stands as a warning that even executives without direct involvement in the underlying potentially violative conduct may face FCPA liability. As a result, corporate executives must be cognizant of potential FCPA violations and vigilant in ensuring FCPA compliance through a robust and comprehensive compliance program.

In 2009, the Commission also debuted a potential new theory of liability under the FCPA when it brought an enforcement action for failure to inform company managers of bribes. On December 11, 2009, the Commission charged Bobby Benton, a former Vice President of Western Hemisphere Operations at Pride International, Inc. (Pride), with FCPA violations arising from his alleged involvement in schemes to pay bribes to foreign officials in Mexico and Venezuela between 2003 and 2005.[39] Benton's alleged involvement in the schemes at issue here is in some respects not unusual. The government alleges that Benton authorized and had knowledge of bribes of Mexican customs officials in return for favorable treatment regarding customs deficiencies.[40]

In another scheme, however, Benton neither made a bribe nor had contemporaneous knowledge of another Pride employee's bribery of foreign officials. Rather, Benton is alleged only to have redacted references to the bribery in an action plan responding to an internal audit report.[41] Further, Benton also is alleged to have given false certifications denying any knowledge of bribery and to have allowed the false records to be created and maintained at Pride. The Commission alleges that absent Benton's false certifications, Pride's managers would have discovered the bribery schemes.[42] It remains to be seen how the government's theories of liability for redacting a document and failing to inform company managers of bribes will play out in this case, but it is more evidence of the government's aggressive stance with respect to individuals who violate the FCPA.

The Continuing Importance of Due Diligence in Business Combinations

In the First Quarter 2009 edition of *FCPA News and Insights*, we discussed the importance of conducting pre-acquisition due diligence in the context of business combinations.[43] A case this year further illustrates the economic downside of failing to conduct FCPA due diligence before the acquisition is complete and, just as importantly, to ensure that the acquired company's post-acquisition conduct does not run afoul of the FCPA.

Latin Node, Inc. (LatinNode) was a privately held Florida corporation that provided telecommunication services to countries around the world, including Honduras and Yemen. eLandia International, Inc. (eLandia) acquired LatinNode in June 2007. Shortly after it completed

the acquisition, eLandia discovered that LatinNode had made improper payments in Honduras and Yemen. eLandia and LatinNode disclosed the improper payments to the Justice Department. On April 7, 2009, LatinNode pleaded guilty to violating the FCPA.[44]

LatinNode admitted that, between March 2004 and June 2007, it paid or caused to be paid approximately US$1.1 million to third parties, with the knowledge that those funds would be used to bribe officials of the Honduran state-owned telecommunications company, Hondutel.[45] In return, LatinNode secured an interconnection agreement with Hondutel at a reduced rate per minute.[46] Senior executives at LatinNode approved the payments, and recipients included "a member of the evaluation committee responsible for awarding Hondutel interconnection agreements, the deputy general manager (who later became the general manager) of Hondutel and a senior attorney for Hondutel."[47]

LatinNode also admitted that between July 2005 and April 2006 it made 17 payments to a third-party consultant, totaling US$1.15 million, with the intention that those funds would be paid to government officials in Yemen.[48] In exchange, as in Honduras, LatinNode received favorable interconnection rates.[49]

As part of its plea agreement, LatinNode agreed to pay US$2 million in criminal fines over a three-year period.[50] According to the Justice Department's press release, several factors weighed in favor of the company: "eLandia's counsel voluntarily disclosed the unlawful conduct to the [Justice] Department promptly upon discovering it; conducted an internal FCPA investigation; shared the factual results of that investigation with the [Justice] Department; cooperated fully with the [Justice] Department in its ongoing investigation; and took appropriate remedial action, including terminating senior LatinNode management with involvement in or knowledge of the violations."[51] The plea agreement praised eLandia's efforts as "timely, thorough, and exemplary."[52] The Justice Department noted that eLandia's cooperation helped greatly to resolve the criminal investigation.[53]

In the end, eLandia paid a heavy price for its newly acquired subsidiary's pre-acquisition illicit payments. In its September 2008 Form 10-Q/A, eLandia reported that the US$26.8 million purchase price exceeded the true value of LatinNode's assets by US$20.6 million, "mostly due to the cost of the FCPA investigation, the resulting fines and penalties to which it may be subject, the termination of LatinNode's senior management, and the resultant loss of business."[54]

The LatinNode and eLandia settlement highlights the importance of pre-acquisition due diligence in business combinations. For undisclosed reasons, eLandia only uncovered evidence of LatinNode's FCPA violations *after* its acquisition of LatinNode closed, at which point successor liability had attached. Ideally for eLandia, the evidence of improper payments would have come to light prior to the acquisition, thus saving eLandia from drastically overpaying for the company. For an in-depth analysis of the due diligence expected by the Justice Department in business combinations, readers can consult the publications section of the Arnold & Porter website.[55]

More Aggressive Anti-Corruption Efforts Overseas

Following the United States' lead, other nations demonstrated an increased willingness in 2009 to prosecute foreign bribery. The standouts to this point have been Germany and the United Kingdom. The former played a decisive role in the investigation and prosecution of Siemens AG, which culminated in December 2008 with over US$1.6 billion in fines. In December 2009, German authorities imposed a combined €150.6 million (over US$220 million) in fines on two subsidiaries of MAN Group, Germany's second largest truck, bus, and diesel-engine manufacturer, for overseas bribery.[56]

After a slow start, which saw it criticized for not taking foreign bribery seriously, the UK's anti-corruption efforts finally came to life. On September 25, 2009, the UK's Serious Fraud Office (SFO), tasked with, among other things, investigating and prosecuting corruption in the United Kingdom and internationally, announced the sentencing of Mabey & Johnson Ltd. in relation to bribery of foreign officials.[57] Mabey & Johnson, an English supplier of steel bridging, pleaded guilty in July 2009 to attempting to influence decision-makers regarding public contracts in Jamaica and Ghana between 1993 and 2001.[58] The company also admitted to breaching United Nations rules for the Iraq Oil-for-Food program in 2001 and 2002.[59] Mabey & Johnson's conviction is the first ever in England for overseas corruption.[60] The fines and reparations totaled approximately £6.6 million or over US$10.5 million.[61] The company must also submit its internal compliance program to an SFO-approved independent monitor.[62]

Following on the heels of the Mabey & Johnson conviction, the SFO announced in December 2009 that it had charged Robert John Dougall, the former Vice President of Market Development of orthopedic device maker DePuy International Limited, a subsidiary of Johnson & Johnson, with conspiring to bribe Greek healthcare system officials in order to induce the purchase of orthopedic products between February 2002 and December 2005.[63] It appears that the DePuy investigation is a byproduct of the US government's own industry-wide investigation into the medical devices sector.[64]

The SFO announced that the matter against Robert John Dougall was referred to it by the Justice Department in March 2008.[65] This development appears to be a harbinger of future cooperation between the two governments. The SFO has also made clear that if a case is within its jurisdiction, it expects to be notified of any potential violation at the same time a report is made to the Justice Department.[66] Conversely, a British company disclosing to the SFO should expect that the Justice Department will learn of the violation upon that reporting because the SFO expects companies to permit a public and transparent remedy. Thus, there is little chance that a company can report to one authority while avoiding detection by the other, which affects the calculus in the decision of whether to self-report.

In our August 2009 advisory, we reported on the guidance issued by the SFO detailing the procedures it would follow in its approach to investigating overseas corruption.[67] We also identified five critical questions left unanswered by the guidance.[68] In response, Richard Alderman, Director of the SFO, issued a letter addressing our questions.[69] In our December 2009 advisory, we discussed the fact that the SFO's guidance, along with Director Alderman's letter, emphasizes that companies with UK connections must make certain their compliance programs are in line with the new enforcement regime in that country.[70]

For the foreseeable future, the United States is likely to remain the nation where international bribery is pursued and punished most often and most severely. But as more countries, particularly the member countries of the Organisation of Economic Co-operation and Development (OECD), begin to enforce their foreign bribery laws, a higher percentage of investigations and enforcement actions will result in multi-jurisdictional settlements, thus raising the cost of noncompliance.

An End to Grease Payments

The FCPA's anti-bribery provisions contain an exception for certain payments to government officials, known as "facilitation payments." Section 30A(b) of the Exchange Act allows the so-called "grease payments" "the purpose of which [are] to expedite or secure the performance of a routine governmental action by the foreign official, political party, or party official."[71] The exception recognizes the fact that

such payments are ingrained in some cultures, and are a part of daily life in many parts of the world. Facilitation payments merely make it possible to get that to which one is entitled.

However, from a practical standpoint, the distinction between lawful and unlawful bribery payments creates a gray zone for companies trying to comply with anti-bribery provisions in a global marketplace, and escalates the risk of FCPA violations. First, grease payments are illegal in most countries, with likely only five countries permitting them—the United States, Canada, New Zealand, Australia, and South Korea. Companies that operate globally often must have varying standards on facilitation payments, depending on which countries' rules are in play.[72] Second, the grease payment exception sends a mixed message to employees. On one hand, employees must be told that bribery is wrong; at the same time, the grease payment exception may lead those employees to believe that a "little" bribery is acceptable. Third, companies are by no means completely shielded from FCPA violations when their employees make facilitation payments. Those payments must be accounted for properly or the company might face books and records and internal controls violations.

Recently, the OECD announced its position that a bribe is a bribe and has called for a ban on facilitation payments. The OECD issued its "Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions" on November 26, 2009.[73] There, the OECD labeled grease payments "corrosive" in effect and encouraged companies to prohibit or discourage their use.[74] The OECD called on all countries to educate their public officials with the aim of persuading them to stop demanding and accepting grease payments.

The OECD's recent stance may signal that the time is right for the demise of the facilitation payment exception for all practical purposes. US Secretary of State Hillary Clinton issued a video message stating that the United States fully supports the OECD's anti-corruption agenda.[75] The bias against facilitation payments may lead to stricter scrutiny on the part of US enforcers. The United States has long been a leader in FCPA enforcement, and it seems unlikely that the Justice Department and the Commission will be content to lag behind when the global consensus is that the bribery exception for facilitation payments should be a thing of the past.

Companies are cautioned to carefully analyze their policies and procedures regarding facilitation payments. If facilitation payments are allowed at all, strict controls over them are essential in today's enforcement climate.

FCPA-Based Civil Actions Gaining Ground

Notwithstanding that there is no private right of action under the FCPA, more private litigants, aided by the ever-creative plaintiffs' bar, turned to private securities fraud and derivative suits in 2009. While these suits face serious legal hurdles,[76] some past civil lawsuits have resulted in sizeable settlements.[77] And although some courts have issued decisions validating private action FCPA cases,[78] other courts have dismissed them.[79] The latest shareholders to try their hands at FCPA-related actions are those of Siemens AG, Panalpina World Transport (Holding) Ltd., Halliburton Company, and BG Group plc, with each company on the receiving end of FCPA-related derivative suits.

In the most recent case, a shareholder of Siemens AG, Christine Johnson, filed suit against the company on behalf of purchasers of Siemens' shares between November 8, 2007 and April 30, 2008.[80] Broadly, the complaint alleges that, during the class period, Siemens represented that it had "cleaned up [its] corporate wide scandal and that it would meet its publicly announced revenue and

earnings expectations."[81] But, the complaint continues, Siemens' ability to meet expectations was dependent on its bribery activities.[82] The plaintiff argues that, because of Siemens' misconduct, "shareholders have suffered, and will continue to suffer, billions of dollars in damages."[83]

As the complaint notes, and as we have previously discussed,[84] in December 2008, Siemens pleaded guilty to charges of circumventing or failing to maintain adequate internal controls and failing to comply with the books and records provisions of the FCPA.[85] Under its settlement with the Justice Department and the Commission, Siemens agreed to pay a fine and disgorgement of profits in the total amount of US$800 million and to submit to monitoring to insure compliance with anti-bribery laws.[86] Additionally, Siemens paid a fine of approximately US$854 million to the Office of the Prosecutor General in Munich, Germany.[87] According to the complaint, Siemens' materially false and misleading statements and failure to disclose information regarding its legal difficulties resulted in an artificially inflated share price.[88] The plaintiff alleges that Siemens' shareholders were damaged by their reliance on the "integrity of the market price of Siemens' securities and market information related to Siemens."[89]

In July 2009, an investment fund that owns approximately 5% of Panalpina World Transport (Holding) Ltd., the holding company for the Panalpina Group (Panalpina), sought to recover damages related to Panalpina's alleged FCPA violations in Nigeria.[90] Panalpina, based in Switzerland, is a provider of intercontinental air and ocean freight forwarding and logistics services and supply chain management solutions.[91] The plaintiffs allege that Panalpina and the defendant directors and officers misrepresented and omitted material facts regarding Panalpina's oil and gas business by concealing that operations in Nigeria depended on bribes to customs agents in Nigeria, violating the FCPA and other laws.[92] According to the complaint, because of such misrepresentations, plaintiffs purchased shares at artificially inflated prices and have suffered substantial damages.[93]

On April 8, 2009, Celeste Grynberg, wife of oil and natural gas tycoon Jack Grynberg, filed a derivative action in the District of Massachusetts on behalf of shareholders of BG Group plc.[94] The suit alleges that directors, officers, and attorneys of BG Group illegally bribed top government officials in Kazakhstan, in violation of the FCPA.[95] The complaint further alleges that in committing these violations, the defendant directors violated their duties of loyalty, honesty, and care to BG Group.[96] This suit follows Jack Grynberg's unsuccessful 2008 suit under the Racketeer Influenced and Corrupt Organizations Act (RICO) against BG Group, BP plc, and StatoilHydro ASA, arising from the same allegations.[97]

According to Ms. Grynberg's complaint, US$90 million in illegal kickbacks were paid to officials in Kazakhstan to secure oil drilling rights in the Caspian Sea, as well as US$40 million in "production sharing fees" given as a bribe.[98] The complaint, based on claimed breaches of fiduciary duties by directors, officers, and attorneys of the BG Group, alleges that not only were bribes paid, but also that the directors failed to implement or comply with reasonable procedures and controls and neglected to monitor overseas transactions of the company.[99] According to Ms. Grynberg, the FCPA not only barred the alleged payments to government officials, but also compelled the company and its shareholders to take action to disassociate themselves from the illegal acts of the company's directors, officers, and attorneys.[100] The complaint asks the court to compel BG Group to create an internal monitoring system to stave off corruption. In addition, the complaint asks the court to force the individual defendants to return bonuses and other pay received during the time they allegedly neglected their monitoring duties. Describing the company and the shareholders as victims of the US$90 million in illegal bribe payments, the complaint states that inaction might expose the company to future liability resulting from the ongoing Justice Department criminal investigation of the same events.[101]

On May 14, 2009, the Policemen and Firemen Retirement System of the City of Detroit filed a derivative action in Texas state court on behalf of the shareholders of Halliburton Company and its former subsidiary KBR, Inc. (KBR).[102] The complaint alleges a laundry list of criminal misdeeds, including "bribery, gang rape, human trafficking, illegal operations in Iran, mishandling of toxic materials, and systematic overbilling."[103] The complaint also alleges that instead of having internal controls to detect and deter such conduct, the companies retaliated against whistleblowers.[104] The complaint alleges further that these illegal activities resulted in substantial losses to the companies.[105]

The FCPA-based allegations stem from the extensive bribery of Nigerian government officials that resulted in civil and criminal actions by the Commission and the Justice Department. In February 2009, KBR agreed to pay a criminal fine of US$402 million after pleading guilty to a five-count information charging the company with violating the FCPA's anti-bribery, books and records, and internal controls provisions.[106] Both Halliburton and KBR agreed to settle a related SEC enforcement action by paying US$177 million in disgorgement and prejudgment interest.[107] Thus, the theory goes, Halliburton's non-compliance with the FCPA cost shareholders US$579 million (not including the costs of the internal investigation and the resulting independent compliance monitor), the second largest FCPA penalty in history. The complaint asserts that this allegedly illegal conduct occurred only because of Halliburton's directors' intentional wrongdoing and reckless disregard of their fiduciary duties.[108] The plaintiffs demand that the defendant directors indemnify the companies for the damages caused by their breaches of fiduciary duty, as well as "all damages allowed by the State of Texas."[109]

As the Justice Department and the Commission continue to aggressively investigate and prosecute FCPA violations, companies facing enforcement actions will also have to answer to their shareholders as FCPA-related derivative actions become more common.

The Possibility of Self-Monitoring

Another noteworthy trend in FCPA enforcement that emerged during 2009 was a gentle retreat from the automatic imposition of external compliance monitors and what appears, at least under the right facts, to be a movement towards self-monitoring provisions in settlement agreements. In recent years, it has been routine for the Justice Department and the Commission to require corporations settling FCPA matters to engage an external corporate compliance consultant to monitor and report on the implementation of new compliance policies within the company. As Assistant Attorney General Lanny Breuer recently noted, these external corporate monitors can be costly and disruptive to businesses, but the government has routinely insisted on their use in order to ensure the proper implementation of effective compliance measures and to deter and detect future violations.[110] In 2009, however, the government allowed two companies to enter into settlement agreements that permitted self-monitoring.

On July 30, 2009, Helmerich & Payne Inc. (H&P), an Oklahoma-headquartered provider of oil drilling rigs, equipment, and personnel, entered into an agreement to resolve alleged improper payments by H&P to government officials in Argentina and Venezuela.[111] H&P subsidiaries, employees, and agents allegedly bribed Argentine and Venezuelan customs officials in order to engage in trade without being subject to the customary government restrictions and to evade higher duties and taxes on goods.[112]

H&P self-discovered these allegedly improper payments, conducted an internal investigation, and voluntarily disclosed its findings to the government. Because of this self-disclosure and what Breuer

described as H&P's "forward leaning, pro-active, highly cooperative approach" to the Justice Department's investigation, H&P received the benefit of being allowed to self-monitor.[113] The case was resolved through a non-prosecution agreement with a term of two years, a penalty of US$1 million, disgorgement of over US$300,000 in illicit profits, and compliance self-reporting by the company for a period of two years in lieu of an independent external compliance monitor.

Similarly, on December 31, 2009, UTStarcom, Inc., a California-based telecommunications company, agreed to settle FCPA charges brought by the Justice Department and the Commission for allegedly authorizing improper payments to foreign government officials in Asia.[114] A Chinese subsidiary of UTStarcom allegedly paid nearly US$7 million for hundreds of overseas trips by employees of Chinese government-controlled telecommunications companies that were customers of UTStarcom. While these trips were purportedly to provide customer training, the government alleges the trips were actually sightseeing excursions. In addition, UTStarcom allegedly provided lavish gifts and all-expenses-paid executive training programs in the United States for existing and potential foreign government customers in China and Thailand. Further, UTStarcom allegedly made payments to sham consultants in China and Mongolia while knowing that they would pay bribes to foreign government officials.[115]

Despite the otherwise unremarkable circumstances of the alleged UTStarcom FCPA violations, the government did not require UTStarcom to retain an external compliance monitor as part of its settlement. In addition to paying a US$1.5 million civil penalty and a US$1.5 million criminal fine, UTStarcom agreed to the entry of a permanent injunction against FCPA violations and to provide the Commission with annual FCPA compliance reports and certifications for four years.[116] The Justice Department indicated that its agreement with UTStarcom was due to the company's "voluntary disclosure, thorough self-investigation of the underlying conduct, the cooperation provided by the company to the Department, and the remedial efforts undertaken by the company."[117]

While the government is unlikely to abandon its insistence on external compliance monitors as an enforcement and deterrence tool in most cases, the H&P and UTStarcom settlements demonstrate that the government may be willing to allow self-monitoring in certain cases where companies have adequately demonstrated their cooperation.

Increasing Use of Forfeiture Actions

Consistent with the government's continued focus on the FCPA, 2009 also marked a sharp increase in the Justice Department's efforts to recoup the proceeds of illegal activity. The government sought forfeiture in at least 10 cases in 2009. In his November 2009 address at an FCPA conference, Assistant Attorney General Lanny Breuer made clear that the Justice Department will focus on asset forfeiture and recovery in its FCPA enforcement actions.[118] Breuer noted that he had directed all of the Justice Department's attorneys to speak with their supervisors and determine whether forfeiture is appropriate in every case. Breuer also emphasized that the Justice Department would utilize the expertise of its Fraud Section and Asset Forfeiture and Money Laundering Section to recover the proceeds of foreign corruption offenses.[119]

One notable example of the government's increased willingness to seek forfeiture of the proceeds of FCPA violations is the Justice Department's January 8, 2009 action against accounts in Singapore worth nearly US$3 million that are alleged to be the proceeds of a scheme to bribe public officials in Bangladesh and their family members in connection with various public works projects.[120] This forfeiture action related primarily to alleged bribes paid to Arafat "Koko" Rahman, the son of the former prime

minister of Bangladesh, in connection with projects awarded to Siemens Aktiengellschaft (Siemens AG) and China Harbor Engineering Company by the government of Bangladesh. As part of its overall resolution of FCPA violations in 2008, Siemens AG and three of its subsidiaries pleaded guilty to causing corrupt payments to be made through purported business consultants to various Bangladeshi officials in exchange for favorable treatment during the bidding process on a mobile telephone project.[121]

As Acting Assistant Attorney General Matthew Friedrich noted at the time, the January 8, 2009 forfeiture action "shows the lengths to which US law enforcement will go to recover the proceeds of foreign corruption."[122] This new trend demonstrates that it is not only companies and individuals violating the FCPA that need to worry about personal liability; the Justice Department also will look to those who receive illicit payments.

Prosecution of Foreign Nationals and Officials

In keeping with the year's increased number of individual prosecutions, more foreign nationals also found themselves the target of FCPA investigations. No fewer than seven non-US citizens were indicted for FCPA-related offenses in 2009, up from three in 2008. The list even includes two foreign government officials, Robert Antoine and Jean Rene Duperval, both former directors of Haiti's state-owned telecommunications company. Because foreign officials cannot be prosecuted under the FCPA for receiving bribes, Antoine and Duperval were charged with conspiracy to commit money laundering (and 12 counts of actual money laundering in the case of Duperval). Duperval and Antoine were arrested in Haiti and extradited to the United States.[123]

The rest of the list consists of Fernando Basurto, a Mexican citizen who facilitated improper payments made by an ABB, Ltd. subsidiary; Wojciech Chodan and Jeffrey Tesler, UK citizens who allegedly assisted Kellogg Brown & Root in bribing Nigerian government officials; and Han Yong Kim and Flavio Ricotti, Korean and Italian nationals, respectively, who were executives of CCI. Foreign nationals are within the reach of the FCPA when they are agents of an "issuer" or a "domestic concern,"[124] which includes employees (like Kim and Ricotti) and third-party consultants (like Basurto).

But while the statute may be clear in its applicability to foreign nationals, there is still the matter of arrest and, potentially, extradition. In some cases, a cooperative foreign police force has made the arrest (for example, Tesler and Duperval). At other times, as in the case of Basurto, an arrest is made when the individual is on US soil. If the arrest is made in a foreign country, the US must convince a foreign court to agree to extradition. Depending on the nation, this process can be simple (Duperval), protracted (Tesler), or even ultimately unsuccessful (Victor Kozeny, about whom more below). Nevertheless, there is every reason to believe that foreign nationals, including foreign government officials, will continue to be a target of FCPA investigations in the coming year.

Important Case Developments from 2009

Several noteworthy cases and developments from 2009 represent a treasure trove of messages that prosecutors and regulators around the globe are sending to corporations and practitioners alike. In addition to those we highlighted in our First Quarter 2009 edition of *FCPA News and Insights,*[125] below is a summary of important cases and developments from 2009.

SEC Charges Former Pride International Executive

On December 11, 2009, the Commission charged Bobby Benton, the former Vice President of Western Hemisphere Operations for Pride International, Inc., with FCPA violations related to bribery of Mexican and Venezuelan government officials.[126] Pride International, based in Houston, Texas, is one of the world's largest offshore drilling companies.[127] Benton was charged with violations of the anti-bribery, internal controls, and books and records provisions of the FCPA, as well as a violation of Exchange Act Rule 13b2-2 regarding false representations to accountants.[128]

According to the complaint, from roughly 2003 to 2005 an unnamed employee of Pride International (the manager of the Venezuelan branch of a French subsidiary) authorized approximately US$384,000 in payments to third-party companies, with the understanding that the funds would be forwarded to an official of Venezuela's state-owned oil company in return for extensions of three drilling contracts.[129] For his part, Benton allegedly "redacted references to the Venezuelan payments in an action plan responding to an internal audit report" in an effort to conceal the payments from Pride International's internal and external auditors.[130]

Further, the complaint alleges that in late 2004 Benton himself authorized the payment of US$10,000 to a third party, with the understanding that all or a portion of the money would be paid to a Mexican customs official in return for favorable treatment regarding customs deficiencies.[131]

Also in late 2004, Benton allegedly learned that a customs agent engaged by Pride International's Mexican subsidiaries had paid US$15,000 to a Mexican customs official so that the export of a rig would not be delayed.[132]

Finally, in March 2005 and May 2006, Benton allegedly signed false certifications in connection with the company's 2004 and 2005 annual reports.[133] In each certification, Benton represented that he was not aware of any bribes or other violations of the FCPA when, according to the complaint, he was well aware of the bribes in Mexico and Venezuela.[134]

In a year where the government has concentrated on bringing individuals to task for their conduct, two of the charges against Benton illustrate the beginnings of a trend that perhaps ought to cause corporate executives some concern. First, the Commission charged Benton with covering up another employee's potentially violative conduct by redacting references to the Venezuelan payments in a "cleaned up" action plan addressing internal control weaknesses and directing that all "other draft versions should be deleted." Benton's email transmitting the "cleaned up" version also confirmed that his "revised" action plan was the version submitted to Pride's internal and external auditors. Second, the Commission charged Benton with failing to inform Pride's management, legal department, and internal auditors of his knowledge of another employee's potentially improper payments and allowing false records relating to the payments to remain on the books and records. Third, Benton is charged with signing false certifications in connection with Pride's 2004 and 2005 annual reports. Allegedly, Benton represented that he knew of no bribes paid to government officials to obtain or retain business, when

in fact he was aware of the Venezuelan and Mexico payments and, on one occasion, had authorized an illicit payment in Mexico. According to the Commission, "but for" Benton's false statements, Pride's management and internal and external auditors would have discovered the bribery schemes and the corresponding false books and records.

Given the current environment of aggressive prosecution of individuals and that Benton was responsible for "ensuring that Pride conducted its Western Hemisphere operations in compliance with the FCPA, that adequate controls were in place to prevent illegal payments, and that the company's books and records were accurate," it is not a surprise that the Commission charged Benton.[135] What is more pertinent here is what this case portends for the future for corporate executives with responsibility for operations in far-flung places.

Five Indicted for Scheme to Bribe Haitian Telecom Officials

On December 7, 2009, the Justice Department announced that it had indicted two Florida businessmen, a Florida-based agent, and two former Haitian government officials for their roles in a foreign bribery scheme.[136] The Justice Department alleged that, from November 2001 to March 2005, the defendants conspired to pay more than US$800,000 to shell companies, which would then use the funds to bribe officials of Haiti's state-owned national telecommunications company, Telecommunications D'Haiti (Haiti Teleco).[137] The five individuals charged in the indictment are (1) Joel Esquenazi, the former president of an unnamed Miami-based telecommunications company, charged with one count of conspiracy to violate the FCPA and to commit wire fraud, seven counts of FCPA violations, one count of conspiracy to commit money laundering, and 12 counts of money laundering; (2) Carlos Rodriguez, the former executive vice president of the same unnamed Miami telecommunications company, who faces the same charges as Esquenazi; (3) Robert Antoine, a former director of international relations for telecommunications at Haiti Teleco, charged with one count of conspiracy to commit money laundering; (4) Jean Rene Duperval, also a former director of international relations for telecommunications at Haiti Teleco, charged with one count of conspiracy to commit money laundering and 12 counts of money laundering; and (5) Marguerite Grandison, Duperval's sister and the former president of Telecom Consulting Services Corp., who faces the same charges as Esquenazi and Rodriguez.[138]

Following their indictment, all five individuals made initial appearances before the court in Miami.[139] According to the indictment, the telecommunications company entered into a series of contracts with Haiti Teleco under which the company's customers could place telephone calls to Haiti.[140] The alleged corrupt payments were authorized by Esquenazi and Rodriguez and were allegedly paid to officials at Haiti Teleco.[141] The government maintains that these bribes were paid to obtain business advantages from Haitian officials, including preferred telecommunications rates, a reduction in the number of minutes for which payment was owed, and credits toward money owed.[142] The defendants allegedly used several shell companies to receive and forward payments in order to conceal the payments' improper nature and purpose.[143] Additionally, the government accuses the defendants of creating false records stating that the bribes were for "consulting services."[144]

The current indictments are related to the investigations of Antonio Perez and Juan Diaz, who entered guilty pleas in April and May 2009. Diaz was the president of J.D. Locator Services, one of the shell intermediary companies used by the current defendants.[145] Diaz served as an intermediary, using shell corporations to transfer more than US$1 million from the Miami telecommunications companies to Haitian officials.[146] Perez was the former controller of the same telecommunications company as

Esquenazi and Rodriguez.[147] Perez recorded the payments to the shell corporations, with bank accounts opened and controlled by Diaz, as "consulting services."[148] According to court documents, the actions of Diaz and Perez violated the FCPA and money laundering laws.[149] Each faces a maximum penalty of five years in prison and a fine equal to the greater of US$250,000 or twice the gross gain.[150] Diaz's sentencing is scheduled for March 31, 2010. Antonio Perez's sentencing scheduled for October 6, 2009 did not go forward.

It is interesting to note that the government charged Diaz and Perez with money laundering. As the government alleged, Diaz and Perez "knowingly conduct[ed] a financial transaction affecting interstate and foreign commerce, which in fact involved the proceeds of specified unlawful activity, that is, a felony violation of the [FCPA] . . . knowing that the property involved in the financial transaction represented the proceeds of some form of unlawful activity, and that the financial transaction was designed . . . to conceal and disguise the nature, the location, the source, the ownership, and the control of the proceeds of said specified unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i)."[151]

Of special interest in this case is the fact that Antoine and Duperval, who were foreign government officials at the time of the alleged wrongdoing, cannot be charged under the FCPA as it does not apply to *recipients* of improper payments. They can, however, be charged with money laundering because they were part-time residents of Florida and allegedly committed their offenses while in Florida. The Justice Department's decision to prosecute Antoine and Duperval provides a warning to other bribe recipients that the US government is committed to its anti-corruption stance, whether through use of the FCPA or otherwise.

OECD Adopts Working Group Recommendations

On November 26, 2009, the 38 member states of the OECD agreed to implement new anti-bribery measures recommended by the OECD's Working Group on Bribery in International Business Transactions (Working Group).[152] According to OECD Secretary-General Angel Gurría, the "new Recommendation strengthens the legal framework for fighting bribery and corruption and ensures Parties to the Convention do more than enact laws to implement the Convention. They must put words into action."[153]

The Working Group's Recommendation for Further Combating Bribery of Foreign Public Officials called for member nations to (1) "[e]nsure companies cannot avoid sanctions by using agents and intermediaries to bribe for them"; (2) "[p]eriodically review policies and approach on small facilitation payments"; (3) "[i]mprove co-operation between countries on foreign bribery investigations and the seizure, confiscation and recovery of the proceeds of transnational bribery"; (4) "[p]rovide effective channels for reporting foreign bribery to law enforcement authorities and for protecting whistleblowers from retaliation"; and (5) "[work] more closely with the private sector to adopt more stringent internal controls, ethics and compliance programmes and measures to prevent and detect bribery."[154]

Beginning in early 2010, the Working Group will monitor member countries' progress in implementing the Recommendation's measures.[155] With the United States already at the forefront of the fight against international bribery, it remains to be seen whether the OECD measures will have a noticeable impact on FCPA enforcement. Nevertheless, the OECD's action is a clear sign that more countries are beginning to take the problem of corruption of government officials seriously.

Former General Manager of ABB Subsidiary Charged with FCPA Violations

On November 23, 2009, the Justice Department announced that a former General Manager for a Texas-based subsidiary of ASEA Brown Boveri, Ltd. (ABB), the Swiss electrical engineering company, had been arrested on charges of violating the FCPA.[156] John Joseph O'Shea was charged with one count of conspiracy to violate the FCPA, 12 counts of violating the FCPA, four counts of international money laundering, and one count of falsifying records in a federal investigation.[157] The Justice Department's announcement did not reveal the name of the Texas-based subsidiary, or identify ABB by name, but ABB later confirmed that O'Shea is a former employee who was terminated in the fall of 2004 and that it "continue[d] to cooperate with US authorities."[158] The charges stem from allegations that O'Shea conspired to and did bribe Mexican government officials to secure contracts with the Comisión Federal de Electridad (CFE), a Mexican state-owned utility company.[159] The arrest coincides with the guilty plea of Fernando Maya Basurto, a Mexican citizen who acted as a middleman in the scheme.[160]

According to the indictment, in 1997 CFE awarded the Texas business unit of ABB a contract that would generate over US$44 million in revenue.[161] In return, O'Shea and Basurto agreed to pay 10% of those revenues back to officials at CFE.[162] Then in 2003, CFE awarded the Texas business unit of ABB a contract worth over US$37 million,[163] in return for which O'Shea and Basurto made approximately US$1 million in corrupt payments to CFE officials.[164] The bribes were hidden with the use of Basurto's Mexican company as an intermediary, along with false invoices submitted to the Texas business unit of ABB by officials at CFE.[165] The money laundering counts allege that O'Shea "knowingly transported, transmitted, and transferred, and willfully caused others to transport, transmit, and transfer" monetary instruments and funds from the United States to bank accounts in Germany and Mexico with the intention that the transactions would "promote the carrying on of a specified unlawful activity, that is, a felony violation of the [FCPA]."[166]

Interestingly, ABB did not purchase the Texas business unit at issue in the O'Shea matter until 1999, two years after the alleged conspiracy had been entered into.[167] This fact alone would not shelter ABB from prosecution here, since successor liability in FCPA cases is well established. Moreover, many of the allegedly illegal acts took place after 1999, which also would serve as a basis for liability for ABB. ABB's case was surely helped to some degree by discovering and disclosing the bribes, firing O'Shea in 2004, and cooperating with officials during the investigation.[168] O'Shea's arrest, however, is yet another example of the increased prosecution of individuals involved in FCPA violations.

Guilty Plea Stemming from Bribery in Panama

Two indictments, one resulting in a guilty plea, have been handed down concerning illicit payments in Panama. On November 13, 2009, the Justice Department announced that Charles Paul Edward Jumet, a former vice president and president of Ports Engineering Consultants Corporation (PECC), had pleaded guilty to a two-count information charging him with conspiring to violate the FCPA and with making a false statement.[169] On December 15, 2009, John W. Warwick, another former president of PECC, was indicted on one count of conspiring to violate the FCPA.[170] Jumet admitted (and with respect to Warwick, the government alleges) that, from at least 1997 through July 2003, the two men and others conspired to make corrupt payments to officials of the government of Panama in order to obtain a maritime contract for PECC.[171] According to court documents, in December 1997, PECC was awarded a no-bid 20-year contract to service the lighthouses and buoys along Panama's waterways.[172] In return, the conspirators, according to the government's allegations in the information, authorized

corrupt payments to Panamanian government officials, namely the former administrator and deputy administrator of Panama's National Maritime Ports Authority and a former high-ranking elected executive official.[173] The payments, totaling more than US$200,000, were made primarily through "dividends" to PECC's shareholders, which were shell companies owned by the Panamanian officials.[174] Jumet's false statement charge resulted from his claim to a government agent that one such "dividend" was a donation to the official's re-election campaign.[175]

The investigation in this case was initiated by the US Department of Homeland Security, Immigration and Customs Enforcement, and was subsequently joined by the Federal Bureau of Investigation (FBI).[176] Sentencing for Jumet is scheduled for March 26, 2010, when he will face up to five years in prison and a US$250,000 fine for each count.[177]

Notably, the decision to charge Jumet with conspiracy to violate the FCPA, as opposed to a substantive count, allowed the government to include criminal behavior whose statute of limitations period would have otherwise run. This is because "[c]onspiracy is a continuing offense" and the statute of limitations does not begin to run until "the date of the last overt act."[178] Thus, the definition of conspiracy effectively lengthens the statute of limitations for FCPA violations, at least as to acts in furtherance of the conspiracy.

Congressman Jefferson Sentenced for Corruption

On August 5, 2009, the jury in former US Representative William Jefferson's corruption trial voted to convict him of 11 of the 16 charges against him, but not for violating the FCPA.[179] On November 13, 2009, Jefferson was sentenced to 13 years in prison, well short of the 27 to 33 years recommended by the government.[180] The judge also ruled that Jefferson must repay the more than US$470,000 and 30 million shares of stock obtained from his illegal acts.[181] Jefferson was charged with violating the FCPA by arranging bribes to Nigerian officials to win contracts for his family's companies, soliciting and accepting bribes, wire fraud, money laundering, and obstruction of justice.[182]

Jefferson made headlines in 2006 when the FBI found US$90,000 in the freezer at the then-Representative's Washington, DC home.[183] The government contended that the money was part of US$100,000 destined for the coffers of a Nigerian government official in exchange for giving business to Jefferson's family members.[184] The prosecution's key evidence on the FCPA charge was a recorded conversation between Jefferson and a wire-wearing Virginia businesswoman, Lori Mody, an investor in Jefferson's deals turned whistleblower.[185] On the tapes, Jefferson is caught saying that the Nigerian Vice President had agreed to pave the way for Representative Jefferson's telecommunications venture in return for a share of the profits.[186] Jefferson insisted that the statement was made solely to allay Mody's concerns about whether the deal would go through.[187]

Despite the notoriety surrounding the FCPA charge, the jury acquitted Jefferson on that count.[188] Jefferson was, however, convicted of "conspiracy to solicit bribes, deprive citizens of honest services by wire fraud and violate the [FCPA]."[189] But the law required that the jury find guilt on only two of those three elements, and the verdict did not specify which elements the jury agreed on.[190] Thus, it is unclear whether the jury decided that Jefferson conspired to violate the FCPA. In the final analysis, the Jefferson case was more about domestic corruption than foreign. Nevertheless, the Jefferson conviction, along with the indictment and conviction of Frederic Bourke and Gerald and Patricia Green, illustrates the government's willingness to take these cases to trial.

Willbros Consultant Pleads Guilty to Violating the FCPA

On November 12, 2009, the Justice Department announced that Paul G. Novak, a former consultant for Willbros International, Inc., pleaded guilty to one count of conspiracy to violate the FCPA and one substantive count of violating the FCPA.[191] Willbros International is a subsidiary of Houston-based Willbros Group, Inc.[192] Novak admitted taking part in a conspiracy to pay more than US$6 million in bribes to Nigerian government officials and officials from a Nigerian political party.[193] In exchange, the officials were to assist Willbros Group in obtaining the Eastern Gas Gathering System (EGGS) Project, a natural gas pipeline system, which was valued at approximately US$387 million.[194]

The bribes were made through the use of intermediary consulting companies represented by Novak.[195] The consulting companies would invoice Willbros West Africa, Inc., another subsidiary of Willbros Group, for supposed consulting services.[196] Once the money was received, Novak would use it to make corrupt payments to the Nigerian officials.[197]

Although Novak's sentencing will not take place until July 2010, Assistant Attorney General Lanny Breuer, in a speech shortly after Novak's guilty plea, remarked that a Willbros consultant had "agreed to a seven year, three month sentence, subject to a reduction for cooperation."[198] In addition to Novak, two other Willbros Group executives, Jim Bob Brown and Jason Steph, have pleaded guilty to FCPA charges stemming from bribery related to the EGGS Project.[199] Meanwhile, James K. Tillery, a Willbros executive indicted alongside Novak, remains at large.[200]

Novak's guilty plea serves as a reminder that Nigeria continues to be a hotbed of corruption that has resulted in several FCPA cases.[201] Notably, Nigeria was also the country where Halliburton and KBR allegedly paid bribes that led to the US$579 million in combined criminal and civil penalties. Also of note, though, is a statement by Assistant Attorney General Lanny Breuer, who announced the settlement for the Justice Department. Breuer insisted that the "use of intermediaries to pay bribes will not escape prosecution under the FCPA" and that the Department "will continue to hold accountable all the players in an FCPA scheme—from the companies and their executives who hatch the scheme, to the consultant they retain to carry it out."[202] While this policy is not a new stance on the part of the Justice Department, such a strong formulation should illustrate that there is no "getting around" the FCPA.

Frederic Bourke Sentenced to One Year in Prison in Long-Running, High Profile FCPA Trial

On July 10, 2009, a jury in the Southern District of New York returned a guilty verdict in the month-long trial of Frederic Bourke, a wealthy US entrepreneur and former member of the Ford family.[203] Although prosecutors had sought the maximum penalty of 10 years, on November 11, 2009, Bourke was sentenced to one year and one day in prison and a US$1 million fine.[204] Bourke was charged with conspiracy to violate the FCPA and the Travel Act, conspiracy to violate money laundering laws, and making false statements to the FBI.[205] The jury voted to acquit on the money laundering allegations.[206]

The jury found that Bourke either knew or consciously avoided knowledge of evidence that his business partner in Azerbaijan, Victor Kozeny, had paid millions of dollars in bribes to senior Azeri government officials, including then-President Heidar Aliyev, in connection with a 1998 oil deal.[207] The bribes were paid in order to ensure that a venture formed by Kozeny would be allowed to purchase

Azerbaijan's state oil company, Socar.[208] In addition, the Azeri government officials were to have a secret two-thirds interest in the venture in return for their cooperation.[209] The government did not allege that Bourke himself made any improper payments.[210] The key evidence against Bourke was the testimony of Kozeny's former aide, Thomas Farrell, and former lawyer, Hans Bodmer,[211] each testifying that he had told Bourke about the bribes.[212] Bodmer testified that he explicitly told Bourke about the details of the scheme in March 1998 during a visit to Baku, Azerbaijan's capital, but suspected that Bourke already knew.[213] Regardless of Bourke's knowledge at that time, the improper payments continued for approximately a year afterwards.[214] Kozeny himself is currently residing in the Bahamas, having waged a (thus far) successful fight against extradition to the United States on charges that he conspired to, and did, violate the FCPA.[215]

Perhaps the most important lesson from the Bourke trial is that *actual knowledge* of improper payments is not required for an FCPA conviction. At trial, Bourke insisted that he knew nothing about Kozeny's bribes. The prosecution, however, introduced evidence that he did know. Judge Shira Scheindlin instructed the jury that it could convict whether Bourke actually knew about the bribes or consciously disregarded a high probability that bribes would be or were paid.[216] In other words, the "head in the sand" defense is no longer valid, if it ever was. An executive in a position to know something is amiss cannot shield himself from liability by choosing not to investigate further. This scenario must be distinguished, however, from an executive who, through negligence or incompetence, fails to acquire actual knowledge of FCPA violations.[217] In the latter case, criminal liability will likely not attach. The lesson is that once one knows that there *may* be violations of the FCPA, the best course of action is to investigate that possibility to a conclusion.

Initially, it seemed that Bourke would face even more liability than the charges he was eventually tried for. Bourke was originally charged with substantive violations of the FCPA, in addition to the conspiracy count on which he was eventually found guilty.[218] The conduct alleged in four of those counts occurred no later than early July 1998, and conduct alleged in the fifth took place in September 1998.[219] The statute of limitations for Bourke's alleged crimes is established by 18 U.S.C. § 3282(a), which requires that an indictment be found "within five years after such offense shall have been committed." Thus, the limitations period expired in early July 2003 for the first four charges and September 2003 for the fifth. On July 21, 2003, after the first limitations period had run, the government applied for, and subsequently received, an order tolling the statute of limitations while it waited on evidence it had requested from the Netherlands and Switzerland.[220] The indictment was eventually returned in May 2005.[221] In October 2006, Bourke moved to dismiss most of the charges against him, arguing that the statute of limitations cannot be suspended after it has already expired.[222] The district court, and later the Second Circuit, agreed. In the resulting superseding indictment, the government pared down the charges to conspiracy to violate the FCPA and the Travel Act, conspiracy to violate money laundering laws, and making false statements to the FBI.[223]

Another notable angle to the Bourke prosecution is that Bourke was apparently an early whistleblower against Kozeny. Bourke's lawyers laid out this narrative in 2005 in a memo supporting a motion to reassign all the Kozeny-related cases to one judge.[224] According to Bourke, once he became suspicious that Kozeny was making improper payments, he began compiling evidence "to persuade law enforcement to investigate and prosecute Kozeny."[225] Bourke allegedly paid a visit, "at considerable personal risk," to Azeri President Aliyev to confront him with the collected evidence.[226] Bourke would eventually testify, in the role of fraud victim, before a New York state grand jury that indicted Kozeny on 15 counts of grand larceny and two counts of possession of stolen property.[227] Although Bourke's

actions clearly did not prevent the government from aggressively prosecuting him, they may have influenced Judge Scheindlin in her decision not to impose the maximum sentence.

Bourke's conviction and sentencing may be the finale to the prosecution of Kozeny's associates and investors. To this point, the government has won every round except the battle to bring the man at the center of the corruption to justice. The extradition decision is on appeal. For his part, Kozeny, who admits paying bribes in Azerbaijan and who has been convicted in his native Czech Republic on unrelated charges, has other plans—to clear his name of all wrongdoing and run for the European Parliament by 2014.[228]

AGCO Corporation Pleads Guilty in Yet Another Oil-For-Food Prosecution

On September 30, 2009, AGCO Corporation, a manufacturer and supplier of agricultural equipment based in Duluth, Georgia, agreed to pay more than US$18.3 million to settle FCPA charges brought by the SEC, the Justice Department, and Danish authorities related to its business dealings in Iraq.[229] The SEC charged AGCO with violations of the FCPA's books and records and internal controls provisions.[230]

The SEC's complaint alleged that, between 2000 and 2003, AGCO subsidiaries paid approximately US$5.9 million in illegal kickbacks to Iraqi officials in connection with the company's participation in the United Nations Oil-for-Food Program.[231] According to the complaint, AGCO's UK subsidiary, AGCO Ltd., marketed and negotiated the sale of equipment to Iraq through two other AGCO subsidiaries in France and Denmark.[232] These subsidiaries then made improper payments, in the form of "after sales service fees," via a third-party agent based in Jordan.[233] To conceal the scheme, AGCO's employees created a fictional account in its books and records called "Ministry Accrual," set up to appear as if it was being used for paying the agent's commissions.[234] The complaint alleges that the dummy account was created by AGCO Ltd.'s marketing staff with almost no oversight from the finance department.[235] Indeed, according to the SEC, no one even questioned the existence of the account.[236] As with other Oil-for-Food cases, AGCO increased its bids to the United Nations by 10% in order to cover the cost of the improper payments.[237]

Under the settlement agreement, AGCO neither admitted nor denied the charges against it, but agreed to pay US$13.9 million in disgorged profits plus US$2 million in prejudgment interest and a civil penalty of US$2.4 million.[238] AGCO will also pay a US$1.6 million penalty under a deferred prosecution agreement with the Justice Department.[239] Finally, AGCO agreed to enter into a criminal disposition in which the Danish State Prosecutor for Serious Economic Crime will confiscate over US$600,000.[240] The Denmark penalty marks another example of parallel prosecutions for international corruption. As more countries toughen their stances on overseas bribery, such instances of multiple prosecutions are likely to rise.

Husband and Wife Producers Convicted of Bribes Related to Thai Film Festival

On September 11, 2009, husband and wife film producers Gerald and Patricia Green were convicted of conspiring to violate the FCPA and money laundering laws, of nine counts of violating the FCPA, and of seven counts of money laundering.[241] Additionally, Patricia Green was found guilty of two counts of falsely subscribing to a US income tax return, knowing that the false and overstated figure included the improper payments.[242]

The Greens had been charged in a March 11, 2009 superseding indictment with paying over US$1.8 million to a Thai government official in return for US$14 million in contracts.[243] The indictment alleged

that the Greens, through several of their businesses, allegedly made corrupt payments to a governor of the Tourism Authority of Thailand, a government agency, often using the official's friend and daughter as intermediaries.[244] In return, the Greens received lucrative contracts related to staging the Bangkok International Film Festival.[245]

Gerald Green also faced an obstruction of justice count, which alleged that he, believing the bribe payments to be under investigation by the FBI, altered and falsified budgets to make the payments look like legitimate film production expenses.[246] The jury could not reach a verdict on this count.[247]

The maximum penalty for each of the conspiracy and FCPA charges is five years, while the money laundering charges each carry up to a 20-year term.[248] Patricia Green's false subscription conviction carries a maximum penalty of three years in prison and a fine of not more than US$100,000.[249] In addition to prison terms, the Greens face forfeiture of any assets derived from proceeds traceable to their alleged offenses.[250] Sentencing is scheduled for March 11, 2010.[251]

After Bourke and Jefferson, the Greens' conviction marks the third FCPA trial of individuals this year to end in a guilty verdict. There have been no acquittals. In addition to demonstrating how difficult it is for a defendant to prevail in an FCPA trial, the prosecution of the Greens may be the first in a line of Hollywood-related cases. Other economic sectors, such as the pharmaceutical and oil and gas industries, have been targeted in the past, and if the Greens' practices are any indication, the film industry suffers from more than its share of international graft.

California Businessman Pleads Guilty to Bribing UK Officials

On September 3, 2009, Leo Winston Smith, former Director of Sales and Marketing for Pacific Consolidated Industries, LP (PCI), pleaded guilty to violations of the FCPA stemming from bribes paid to an official in the UK Ministry of Defense.[252] This followed the May 2008 guilty plea of Martin Eric Self, part owner and former President of PCI, who was sentenced to two years' probation for essentially the same conduct.[253]

According to the facts stipulated to in the Plea Agreement, Smith and Self caused approximately US$70,000 in bribes to be paid to a UK official in return for government contracts.[254] The bribes were funneled through a sham marketing agreement executed between Self and a relative of the official.[255] Smith was also charged with obstructing and impeding the due administration of tax laws by under-reporting his income and failing to file a tax return for his company, Design Smith, Inc.[256]

Smith's sentencing had been scheduled for December 18, 2009, but the court granted Smith's motion for a continuance. Smith's sentencing is now scheduled for March 22, 2010.[257] The government is asking that the court impose a US$200 special assessment, a fine of US$75,000, and a sentence of 37 months imprisonment followed by a three-year term of supervised release.[258]

SEC Settles with Former Faro Executive

On August 28, 2009, the Commission settled with former Faro Technologies, Inc. executive Oscar Meza regarding violations of the FCPA's anti-bribery, books and records, and internal controls provisions, as well as aiding and abetting his former employer's violations of the FCPA.[259] Faro settled with both the Commission and the Justice Department in June 2008 over its own violations. With respect to its settlement with the Justice Department, Faro paid a US$1.1 million criminal penalty and accepted

the appointment of a compliance monitor for a two-year term.[260] In settling with the Commission, Faro agreed to pay US$1.85 million in disgorgement and prejudgment interest.[261]

For his part, Meza allegedly authorized a former employee of Faro's Chinese subsidiary, Faro Shanghai, Ltd, to make improper payments to employees of Chinese state-owned companies in order to obtain contracts.[262] According to the indictment, as a result of Meza's actions, Faro Shanghai paid a total of US$444,492 in bribes from 2004 through 2006, resulting in approximately US$4.5 million in sales and approximately US$1.4 million in net profits.[263] Additionally, to cover up the improper payments, Meza ordered the accounting staff to alter the books and records and authorized the use of third-party distributors.[264]

Without admitting or denying the charges against him, Meza agreed to a final judgment under which he is permanently enjoined from further violations of the FCPA and will pay a US$30,000 civil penalty and US$26,707 in disgorgement and prejudgment interest.[265]

Justice Department's Opinion Release 09-01 Clarifies Reach of FCPA

On August 3, 2009, the Justice Department issued FCPA Opinion Release 09-01. The request was submitted by an unnamed US company (Requestor) that designs and manufactures a certain type of medical device. Requestor is one of only a small number of global companies to design and manufacture the type of medical device at issue. Requestor's competitors already operate and sell their products to the government of a certain foreign country, but Requestor is not well known to that country's government because its sales in that country to date have been mainly in the private sector.

In March 2009, a senior official of a government agency (Senior Official) in the unspecified foreign country told Requestor about his government's plan to establish a program to provide the medical device to patients in need and what the Senior Official believed Requestor should do in order to participate successfully in the program. The government, the Senior Official said, intended to purchase the medical devices and then subsidize the cost when it resold them to patients, but would only purchase (and thus endorse) those medical devices which it had technically evaluated with favorable results.

Because the government was not familiar with Requestor's medical device, the Senior Official asked the company to provide sample medical devices to government health centers for evaluation. Requestor represented to the Justice Department that it had no reason to believe that the Senior Official would personally benefit from the donation of the medical devices. Together, the company and the government decided on a sample size of 100 units distributed among 10 health centers, with Requestor selecting the participating centers. The approximate value of the medical devices and related items and services to be provided by Requestor was US$19,000 per medical device, for a total of US$1.9 million.

It was proposed that the 100 patient recipients would be selected from a list of candidates (provided by the participating medical centers) by a working group of healthcare professionals. Requestor's country manager, who received FCPA training in January 2008 and March 2009, would be a part of that working group. Close family members of the government agency's officers or employees, working group members, and employees of the participating medical centers would be ineligible for the trial unless (a) the government-employed relatives of the recipient held low-level positions and could not influence patient selection or the testing process; (b) the requisite economic criteria were clearly met;

and (c) the recipient was a more suitable candidate than those not selected for participation. As a further safeguard, Requestor's country manager would review the selection of any immediate family members of any other government officials (*e.g.*, those unaffiliated with the medical device project of the government agency) to ensure that the criteria were properly and fairly applied.

Evaluation of the donated medical devices would be based on standard and objective criteria. If the evaluation yielded favorable results, then Requestor's medical device would be eligible for the government's program, along with the medical devices of Requestor's other competitors, which had already been declared eligible. None of the company's medical devices would be promoted by the government over other qualified medical devices.

Based on these representations, the Justice Department opined that it had no intention of taking any enforcement action, reasoning that the proposed action fell outside the scope of the FCPA because the donated products would be provided to the foreign government, as opposed to individual government officials, for ultimate use by patient recipients selected in accordance with specific guidelines. The Justice Department's opinion appears to be consistent with the strictures of the FCPA because the prohibited conduct covers the giving of something of value to foreign government officials, as opposed to the foreign government itself.[266]

The most immediate comparison to Opinion Release 09-01 is Opinion Release 81-02, in which Iowa Beef Packers, Inc. wished to promote sales by furnishing samples of its packaged beef products to officials of the Soviet Ministry of Foreign Trade.[267] As in Opinion Release 09-01, the Justice Department declined to take any enforcement action, although without providing a rationale. In Opinion Release 81-02, the individual sample packages were valued at no more than US$250, for a total of less than US$2,000—a far cry from the US$1.9 million worth of high-tech medical equipment at issue in Opinion Release 09-01.

In Opinion Release 09-01, the Justice Department was careful to note that the transaction fell "outside the scope of the FCPA." In other words, the donation could be made without implicating the FCPA at all. Opinion Release 81-02, on the other hand, can be read as falling within the FCPA's promotional expenses affirmative defense. That is, the transaction would have been a violation but for the defense provided by the statute. Under the FCPA, it is an affirmative defense that "the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof."[268]

What, one might ask, distinguishes Opinion Release 09-01 from Opinion Release 81-02? Opinion Release 09-01 can be factually distinguished from Opinion Release 81-02 in that, in the latter, Iowa Beef Packers provided its samples to *officials* of the Soviet Ministry of Foreign Trade in order to influence their purchasing decision. But because the sample packages were of a reasonable value and directly related to the promotion of products, the affirmative defense was deemed applicable. The same defense was implicated, but not explicitly mentioned, in Opinion Releases 82-01 and 83-03 (both involving Missouri's payment of travel expenses to promote its agricultural products to foreign officials), and Opinion Releases 83-02 and 85-01 (in which US companies paid travel expenses for the visit of foreign officials to the companies' US facilities). More recently, in Opinion Release 08-03, the Justice Department explicitly cited the promotional expenses defense as the reason for declining

any enforcement action against TRACE International, which proposed to pay the travel expenses of journalists at Chinese state-owned media outlets so the journalists could cover TRACE's press conference. Unlike Opinion Releases 81-02, 82-01, 83-02, 83-03, 85-01, and 08-03, Requestor in Opinion Release 09-01 did not need to resort to the promotional expenses defense, even though it was promoting its goods, because its donation was not "incurred by or on behalf of a foreign official, party, party official, or candidate."[269] Instead, the primary beneficiary of the donation was the government, rather than an individual government official or officials.

Companies that wish to provide sample products or pay for promotional expenses for foreign governments and/or foreign government officials in their individual capacity will be well served to familiarize themselves with these opinion releases and other relevant pronouncements by the Justice Department and the Commission to avoid inadvertently running afoul of the FCPA's anti-bribery provisions. Opinion Release 09-01 appears to suggest that, where possible, it is better to provide products and other things of value to the foreign government itself rather than to individual foreign government officials. Of course, whatever the structure, anything provided to a foreign government or individual foreign government officials must be clearly, accurately, and transparently recorded on the company's books and records.

Control Components Settles; Two Officers Plead Guilty While Six Others Get Trial Dates

On July 31, 2009, CCI, a California-based valve company, pleaded guilty to violations of the FCPA and the Travel Act.[270] This followed the January and February 2009 guilty pleas of two of the company's former executives, Mario Covino, the former worldwide sales director, and Richard Morlok, the former finance director, who are scheduled to be sentenced in February 2011.[271] Additionally, in April 2009, six former CCI executives were charged with violations of the same statutes and are scheduled for trial on November 2, 2010.[272]

CCI admitted that from 2003 through 2007, it made approximately 236 corrupt payments in 36 countries, totaling approximately US$6.85 million, resulting in net profits of approximately US$46.5 million from sales related to those corrupt payments.[273] The payments were made to officers and employees of CCI's state- and privately-owned customers around the world, including those in China, South Korea, Malaysia, and the United Arab Emirates, with the aim of obtaining or retaining business.[274]

Pursuant to the plea agreement, CCI will pay a criminal fine of US$18.2 million; create, implement, and maintain a comprehensive anti-bribery compliance program; and retain an independent compliance monitor for three years to review the design and implementation of its compliance program and make periodic reports to CCI and the Justice Department. In addition, CCI agreed to a three-year term of organizational probation. Moreover, CCI agreed to continue to cooperate with the Justice Department in its ongoing investigation.[275]

Morlok and Covino both pleaded guilty to conspiring to violate the anti-bribery provisions of the FCPA and agreed to cooperate with the government in its further investigation of the company.[276] Morlok and Covino were scheduled to be sentenced January 25, 2010, but their sentencing dates have been reset to February 14, 2011.[277]

The six former executives charged in April 2009 with conspiring to violate the anti-bribery provisions of the FCPA[278] include the company's former chief executive officer, the former director of sales for

China and Taiwan, the former director of worldwide sales, the former vice president of worldwide customer service, the former vice president and head of sales for Europe, Africa, and the Middle East, and the former president of the company's Korean office.[279]

The current indictment charges that the six defendants, over a ten year period, conspired to, and did, pay approximately US$4.9 million in bribes to officials of foreign state-owned companies, in violation of the FCPA.[280] They are also alleged to have paid US$1.95 million in bribes to officers and employees of both foreign and domestic privately held companies, in violation of the Travel Act.[281] All told, between 2003 and 2007, the company allegedly made approximately 236 corrupt payments in over 30 countries, including China, South Korea, Malaysia, and the United Arab Emirates.[282] Additionally, one of the defendants is charged with destruction of records, which carries a maximum prison term of 20 years.[283]

On May 18, 2009, the court granted in part the defendants' joint motion for a bill of particulars.[284] The court held that the government had to provide within 20 days the following information for each of the 236 alleged bribes: (i) the date of the payment; (ii) the amount of the payment; and (iii) the name and business affiliation of the recipient, or if the recipient is an intermediary, the business affiliation of the person who was intended to benefit from the payment.[285] With a total of eight employees indicted, CCI is one of the premier examples of the government's increasing interest in prosecuting individual employees for FCPA violations.

Canadian National Wanted on FCPA Charges Arrested in Germany

In keeping with the recent trend of FCPA enforcement actions against individuals, a Canadian national indicted in the United States for FCPA violations was arrested on July 30, 2009 in Germany.[286] The Justice Department immediately announced it would seek extradition to the United States. The individual, Ousama Naaman, was originally indicted on August 7, 2008, for one count of conspiracy to commit wire fraud and to violate the FCPA and two counts of violating the FCPA.[287]

According to the indictment, from 2001 to 2003, Naaman, acting on behalf of an unnamed US chemical company, paid 10% kickbacks to Iraqi government officials in exchange for contracts under the Oil-for-Food Program.[288] The US company, like other companies involved in the Oil-for-Food FCPA cases, inflated its contract price to cover the cost of the kickbacks.[289] Additionally, the indictment alleges that in 2006 Naaman paid US$150,000 in bribes, on behalf of the same US company, to officials in the Iraqi Ministry of Oil so that they would keep a competing product out of the Iraqi market.[290] If convicted on all the charges, Naaman faces up to 15 years in prison.[291]

Helmerich & Payne Settles Charges of Foreign Bribery in South America

On July 30, 2009, Helmerich & Payne, Inc., an Oklahoma-based provider of oil drilling equipment and personnel, agreed to pay US$1 million to settle FCPA charges brought by the Justice Department as part of a two-year non-prosecution agreement.[292] On the same day, Helmerich & Payne settled with the SEC on related allegations, agreeing to pay over US$375,000 in disgorgement and prejudgment interest.[293] The charges concerned improper payments purportedly made by Helmerich & Payne to customs officials in Argentina and Venezuela.[294] According to the Justice Department's announcement, the bribes were meant to allow Helmerich & Payne to "import and export goods that were not within regulations, to import goods that could not lawfully be imported, and to evade higher duties and taxes on the [imported] goods."[295] Helmerich & Payne made most of the improper payments indirectly

through customs brokers.[296] After making the payments, the brokers would then bill Helmerich & Payne for phony expenses such as "additional assessments" or "urgent processing."[297] In addition to the US$1 million criminal penalty, Helmerich & Payne also agreed to implement rigorous internal controls and cooperate fully with the Justice Department's ongoing investigation.[298] Because of Helmerich & Payne's voluntary disclosure, "thorough self-investigation," and "extensive remedial efforts," the government agreed not to prosecute provided the company continues its efforts for two years.[299]

The Helmerich & Payne settlement illustrates two recurring themes of FCPA enforcement and compliance. The first is that channeling improper payments through third-party agents does not immunize a company from liability. The second is that the government will likely reward voluntary disclosure and full cooperation with a lighter penalty, although it is difficult to know the extent of such reward.

Avery Dennison Settles Charges of Bribes in China, Indonesia, and Pakistan

On July 28, 2009, office products giant Avery Dennison Corporation settled two FCPA enforcement proceedings with the SEC.[300] Both proceedings stemmed from improper payments (and promises of improper payments) made to foreign officials by Avery Dennison's Chinese subsidiary and other acquired entities.[301] In a civil enforcement action, Avery Dennison agreed to pay a civil penalty of US$200,000.[302] In the related administrative proceeding, the company was ordered to cease and desist its violations and to disgorge US$273,313 and US$45,457 in prejudgment interest.[303]

According to the complaint, between 2002 and 2005 Avery Dennison's Chinese subsidiary spent US$30,000 on providing government officials with kickbacks, sightseeing trips, and other gifts.[304] In the largest of these payments, an Avery Dennison sales manager, to secure a sale to a state-owned end user, allegedly agreed to pay a US$25,000 "commission" through a distributor to a project manager at the end user.[305] That payment resulted in US$466,162 in sales, on which Avery turned a profit of US$273,213.[306]

Additionally, after Avery Dennison acquired a company in June 2007, the acquired company continued its pre-acquisition practice of making illegal petty cash payments to officials in Indonesia, Pakistan, and China with the aim of influencing these officials to help Avery Dennison entities to obtain or retain business.[307] Together, these improper payments amounted to US$51,000.[308] According to the complaint, "Avery Dennison failed to accurately record these payments and gifts in the company's books and records, and failed to implement or maintain a system of internal accounting controls sufficient to detect and prevent such illegal payments or promises of illegal payments."[309] In August 2009, the Justice Department informed Avery Dennison that it had declined to take action against the company.[310]

Although this is certainly neither the first nor the last case involving FCPA violations by a company's far-flung subsidiaries, it serves as a reminder of how even an attenuated connection can result in liability for the parent company. In Avery Dennison's case, the Chinese subsidiary is "owned by Avery Dennison Hong Kong BV, which is in turn wholly owned by Avery Dennison Group Denmark ApS, which is in turn wholly owned by Avery Dennison Corporation."[311] This far-reaching risk of liability reinforces the point that FCPA compliance programs must be instituted throughout an organization if they are to be truly effective.

Siemens Penalized by World Bank and United Nations

As we discussed in a prior publication,[312] Siemens AG settled FCPA-related charges with the Justice Department and the Commission in December 2008 for a combined US$800 million. On July 2, 2009, the World Bank Group announced a settlement with Siemens that will require Siemens to pay US$100 million over the next 15 years in support of anti-corruption campaigns around the world.[313] Additionally, the settlement prescribes up to a four-year debarment for Siemens' Russian subsidiary, as well as a two-year shut-out on World Bank contracts for Siemens AG and all of its affiliates.[314] The settlement follows a World Bank investigation into corrupt practices during a World Bank-financed transportation project in Moscow. The Russian subsidiary allegedly paid about US$3 million in bribes from 2005 through 2006 in relation to the Moscow Urban Transport Project.[315]

The World Bank penalty follows a lighter sentence imposed by the United Nations Secretariat Procurement Division in March 2009, which stemmed from Siemens' December 2008 guilty plea to FCPA violations.[316] The United Nations Secretariat Procurement Division suspended Siemens from its vendor database for a period of only six months.[317]

These penalties imposed by World Bank and the United Nations illustrate the collateral consequences of FCPA violations. Indeed, the United States' FCPA statute is simply one tool in the fight against international corruption. Like Siemens, a company may also face charges in its home country, or the home country of its subsidiary, or before an international body. Additionally, an investigation by one authority may encourage parallel prosecution by authorities with overlapping jurisdiction. Thus, the moral is that the consequences of international bribery can be much farther reaching than prosecution under the FCPA.

Nexus Technologies Employee Pleads Guilty

Per our First Quarter 2009 issue of *FCPA News and Insights*,[318] in September 2008 Nexus Technologies Inc., 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 charged with conspiracy to bribe Vietnamese government officials in exchange for contracts to supply equipment and technology to government agencies.[319]

In a new development, on June 29, 2009, Lukas pleaded guilty to the charges, admitting that from 1999 to 2005, he and other Nexus employees conspired to, and did, pay bribes to Vietnamese government officials.[320] Lukas, who was responsible for negotiating contracts with US suppliers, now faces up to 10 years in prison. His sentencing is scheduled for April 6, 2010.[321] There is no word yet whether the other defendants plan to follow Lukas's lead and plead guilty. Lukas's plea and the indictments of the other Nexus employees are yet another example of the government's increasing willingness to prosecute individuals, and not simply the business entities they represent.

Aerospace and Defense Systems Giant Settles with SEC over Actions of Subsidiary's President

On May 29, 2009, the Commission settled with Thomas Wurzel, the former president of ACL Technologies, Inc., a former subsidiary of United Industrial Corporation (UIC), providers of aerospace and defense systems.[322] While not admitting the allegations against him, Wurzel agreed to a final judgment that ordered him to pay a US$35,000 civil penalty and permanently enjoined him from violating Sections

30A and 13(b)(5) of the Exchange Act and Rule 13b2-1 promulgated thereunder.[323] On the same day, UIC agreed to cease and desist its violations of Sections 30A and 13(b)(2)(A)(B) of the Exchange Act, and to pay US$337,679.42 in disgorgement and prejudgment interest.[324]

The penalties result from the Commission's allegations that Wurzel authorized improper payments to an Egypt-based agent, knowing (or consciously disregarding the high probability) that the agent would use at least some of that money to bribe Egyptian Air Force officials in order to persuade the officials to award business related to a Cairo military aircraft depot to UIC.[325] Wurzel allegedly booked the payments to the Egypt-based agent as payments for labor subcontracting work, equipment and materials, and marketing services.[326] Wurzel later instructed his subordinates to create false invoices.[327] UIC, through its subsidiary ACL, won the contract, which resulted in gross revenues of US$5.3 million and net profits of US$267,000.[328] The settlements of Wurzel and UIC provide further illustrations of the government's focus on pursuing culpable individuals as well as the reach of parent company liability.

FCPA False Alarm or Faux Pas?

On May 8, 2009, Sun Microsystems filed a Form 10-Q with the SEC in which it acknowledged that it had "identified potential violations of the FCPA, the resolution of which could possibly have a material effect" on its business.[329] The announcement came less than a month after Oracle Corp. had agreed to buy Sun for US$7.4 billion.[330] In its 10-Q, Sun went on to state that it had (a) initiated an internal investigation with the help of outside counsel; and (b) made a voluntary disclosure to the Justice Department, the SEC, and certain foreign government agencies regarding its own investigation.[331] Without any further public disclosure, Sun, on June 8, 2009, filed a Definitive Merger Proxy with the SEC, representing that it had "complied with the FCPA and other applicable anti-corruption laws."[332] Although the reasons for the seemingly inconsistent disclosures remain unknown, Sun's speedy disclosure continues a trend that has appeared in major deals over the last few years, which is that companies in the middle of pre-acquisition due diligence often, under the threat of successor liability, disclose their due diligence findings to the Justice Department and the SEC in an effort to resolve, before closing, any pre-acquisition FCPA-related issues.

Another possibility, however, is that Sun's disclosures raise issues similar to those arising from the Titan Corporation's representations in connection with its proposed acquisition by Lockheed Martin Corporation. Titan's actions led the Commission to issue a Report of Investigation, pursuant to Section 21(a) of the Exchange Act. There, Titan affirmatively represented in the September 2003 Merger Agreement that "neither [the] Company nor any of its Subsidiaries, nor any director, officer, agent or employee of the Company or any of its Subsidiaries, has . . . taken any action which would cause the Company or any of its Subsidiaries to be in violation of the Foreign Corrupt Practices Act."[333] Titan referred to this FCPA representation in its proxy statement, to which was appended the complete Merger Agreement.[334] Subsequently, in March 2005, Titan settled with the Commission over FCPA violations in Benin.[335] While the Commission did not charge Titan with disclosure violations, the Report of Investigation stressed that the disclosure of merger agreement representations can lead to liability if such disclosure is false or misleading, even if the underlying contract was not prepared as a disclosure document.[336]

Rocket Scientist Sentenced to 51 Months in Prison for Offering to Bribe Chinese Officials

On April 7, 2009, Shu Quan-Sheng was sentenced to 51 months in prison, to be followed by two years of supervised release, after pleading guilty in November 2008 to violating the Arms Export Control Act and the anti-bribery provisions of the FCPA.[337] Quan-Sheng, a physicist and naturalized US citizen, illegally exported technical data and defense services to China and offered and paid bribes to Chinese government officials.[338]

As we discussed in a prior edition of *FCPA News and Insights*, Quan-Sheng, acting for his company AMAC International, based in Newport News, Virginia, with offices in Beijing, and for a French company he represented, offered money to members of China's 101st Research Institute in order to secure a contract for the development of a liquid hydrogen tank system.[339] On three occasions in 2006, Quan-Sheng offered officials bribes in the form of "percentage points," totaling US$189,300.[340] In January 2007, the French company won the contract for the US$4 million project. Prior to sentencing, Quan-Sheng forfeited US$386,740 to the federal government.[341] The sentencing order did not impose any further fines or restitution.[342]

New Report on OECD Anti-Bribery Convention Paints Gloomy but Hopeful Picture

On June 23, 2009, Transparency International, an international non-governmental organization based in Berlin, Germany, which describes itself as "the global civil society organisation leading the fight against corruption," released its *Progress Report 2009: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.*[343] The OECD adopted the Convention in 1997, and it now numbers 38 countries as signatories. The Convention requires all parties to make it an offense to "intentionally offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."[344] Despite the promise that such an international commitment to fight corruption represents, Transparency International's fifth annual Progress Report suggests the outlook appears grim.

The takeaway from the 2009 Progress Report is that enforcement of the Convention has been "extremely uneven." In the report, Transparency International grouped countries into three categories: "Active Enforcement," "Moderate Enforcement," and "Little or No Enforcement."[345] Only four countries—Germany, Norway, Sweden, and the United States—fall into the first category, whereas 21 countries (approximately 55%) fall into the third group. Even worse, the 2009 Progress Report found that there are already signs of backsliding, "with some government efforts to curtail the ability of investigative magistrates to bring cases, shorten statutes of limitations, and extend immunities from prosecution."[346] The risk of further regression is especially great in the current economic climate where "competition for decreasing numbers of orders has intensified greatly."[347] Transparency International's conclusion is that the cause of this bleak state of affairs, and the greatest threat to future progress in this area, is a lack of political will at the highest government levels.

The 2009 Progress Report makes a number of recommendations, addressed to both party countries and the OECD itself. First, the OECD's Ministerial Council should exercise more regular oversight to make sure that the Convention is meeting its objectives. Second, the Secretary General should

meet with the Justice Ministers of under-performing parties to work out steps for improvement, with the failure to implement such steps resulting in suspension of membership in the Convention. Third, party governments should assign foreign corruption cases to specialized staffs with adequate resources. Fourth, the Ministerial Council should reaffirm that enforcement should not be influenced by claims of national economic security. Fifth, the Ministerial Council should encourage China, India, and Russia to accede to the Convention. Sixth, the OECD Working Group on Bribery should move on to the next phase of its monitoring program, with top priority given to country visits to ensure that identified deficiencies are corrected. Seventh, the Working Group should meet annually with prosecutors to gather input on the best means of overcoming obstacles to enforcement. Eighth, the Working Group on Bribery should begin to address unresolved issues and loopholes in the Convention (and in parties' implementing legislation), "including bribe payments to political parties, lack of corporate criminal liability, inadequate statutes of limitations, and private-to-private corruption."[348]

Based on its analysis of corruption cases from around the world, Transparency International noted several emerging trends in the fight against corruption. First, there is an expanding range of how and to whom bribes are paid, including political parties, family members, charities run by government decision-makers or their relatives, and private sector companies performing services under a government contract. Second, evidence can be discovered through a wide array of sources, including pre-takeover audits, anti-money laundering due diligence, and bank audits. Third, Transparency International observed that because of the complexity of these cases and the efforts taken by companies and officials to cover up evidence, enforcement authorities require adequate resources and long statutes of limitation to accomplish their enforcement objectives. Fourth, bribery often fits into larger anti-competitive activities (price-fixing and market-sharing cartels, for example), which suggests a need for anti-corruption and antitrust agencies to cooperate. Fifth, international cooperation is often a sticking point, with numerous cases illustrating that failure to provide mutual legal assistance can impede international investigations.[349]

Transparency International concludes its 2009 Progress Report with summaries on enforcement efforts in each party country. Notably, the United States received a very positive review, with "no significant obstacles or inadequacies in [its] legal framework."[350] Nevertheless, the 2009 Progress Report includes four recommendations on ways in which the United States could improve. First, the United States should clarify the nature of the benefit for voluntary disclosures. Second, the United States should continue its efforts to prosecute offenders based outside the United States and to improve collaboration with other countries. Third, attorney-client privilege should be protected to encourage resolution of potential violations. Fourth, the United States should be more transparent with respect to closed cases and pending investigations.[351] As discussed in our year-end review section above, it appears the Justice Department and the Commission are taking these suggestions onboard and attempting to address them.

Complying with the FCPA and Doing Business in China: A Perilous Balancing Act

Western enthusiasm over the prospects of a China open for business is not a new phenomenon. For example, this breathless paean is from the end of the 19th century: "If to the Empire of China, with its vast population, its vast territory, its limitless resources, the electric spark of American enterprise could be communicated, the trade that would spring into existence would surpass all the records of history."[352] Today, over 100 years later, American entrepreneurs are still fervid about the potential of Chinese revenue streams. Given China's progressively loosening state controls over the country's economy, Western money has, not surprisingly, poured into the country. According to China's Ministry of Commerce, the country was the recipient of US$111.17 billion in foreign direct investment (FDI) in 2008, up 27.65% from 2007.[353] This increase in foreign investment in China stands in stark contrast to a 21% decline in global FDI.[354] Although the current worldwide economic downturn has depressed the absolute numbers, China is, and will certainly continue to be, a top recipient of foreign currency.

Alongside this rosy portrait of a burgeoning mega-economy, American companies, foreign businesses listed on American exchanges or operating in America, and others subject to the widening scope of the FCPA have reason for concern. Whether because increased investment in China has produced more FCPA violations or because US authorities have stepped up FCPA enforcement generally, and most likely due to both, doing business in China comes with increased scrutiny. Not without reason: from an FCPA standpoint, operating in China is fraught with peril. A number of political and cultural factors combine to create higher costs for companies concerned with compliance. Furthermore, there are very early signs that China itself may be taking anti-corruption enforcement seriously.

I. The Dangers of Guanxi

For foreign companies doing business in China, *guanxi* may pose more of a risk than demands for cash-filled suitcases. *Guanxi* is a highly nuanced concept, but in its broadest formulation refers to "interpersonal linkages with the implication of continued exchange of favors."[355] The repayment of one favor "is typically unequal; thus allowing the relationship to continue, because there will always be a gift or favor to reciprocate."[356] Because *guanxi* is "ubiquitous and plays a fundamental role in daily life" in China, no company, foreign or domestic, can succeed without extensive *guanxi* networks.[357]

This is not to say that every *guanxi* interaction amounts to a violation of the FCPA or of its international counterparts or other anti-corruption laws. However, the practice increases the opportunities for and probabilities of such an infraction. As one treatise on the subject puts it, *guanxi* is a "critical facilitator" of corruption.[358] It is dangerous, and perhaps impossible, for a company, when dealing with foreign government officials, to accurately delineate the precise boundary between acceptable business interactions and illegal corruption. The problem with *guanxi* is that in its most common manifestation it straddles that hazy boundary. Furthermore, due to the intentionally unbalanced nature of the exchanges, an initial "grease" payment, acceptable under the FCPA, could bloom into outright bribery.[359]

Guanxi is especially problematic given that so many foreign companies operate in China through Chinese subsidiaries and distributors, or in joint ventures with Chinese companies.[360] In most Sino-foreign joint ventures, the Chinese partner is the party responsible for dealing with local government officials to obtain the approvals necessary to function.[361] Because foreign companies have historically been "barred from engaging directly in import/export transactions and from distributing products that they do not

manufacture within China . . . , sales in China (including sales to government agencies) often require a complex web of local agents and independent middlemen."[362] Nevertheless, the FCPA obligates entities within its reach to extend a certain level of control over their foreign subsidiaries and affiliates. Thus, an American company or a foreign issuer listed in the United States is bound by the FCPA to impose compliance with the FCPA on Chinese employees, agents, distributors, or joint venture partners, to whom the exchange of gifts and favors (with government officials or otherwise) is a natural part of life. Regardless of the moral or philosophical underpinnings of such a system, the law makes these burdens just another cost of doing business in China. Thus, when a Chinese employee requests permission to "do business the Chinese way,"[363] the company's answer most likely must be no to avoid potential violations of the FCPA.

Another problem with *guanxi* is that any amounts paid to or spent on government officials, even acceptable ones, must be accurately reflected in a company's books and records. The nature of the *guanxi* relationship, however, is very much "off the books."[364] Under the FCPA, it is illegal to record *guanxi* maintenance expenses as "commission"[365] or "referral fees."[366] If a company believes its expenditures are on the legal side of the gift-bribe continuum, then there should be no hesitation about booking those expenditures accurately. Indeed, entries reflecting commissions and referral fees paid in China may raise red flags to US authorities, even when they are accurate descriptions of a transaction.

For the most part, FCPA investigations have centered on large-scale bribes, above and beyond the level of *guanxi*.[367] In at least one case, though, *guanxi*-type expenses have made their way into a criminal information. In 2006, the Justice Department brought an action against Schnitzer Steel Industries, Inc. (SSI) International Far East, a wholly-owned subsidiary of SSI, for violations of the anti-bribery and books and records provisions of the FCPA.[368] SSI was based in South Korea, but also sold scrap metal to customers in China.[369] Among its alleged numerous corrupt payments to public and private customers in both Korea and China, between 1999 and 2004, the company spent approximately US$138,000 on gifts and entertainment.[370] The expenditures "included, among other things, jewelry, gift certificates, perfume, and the use of SSI Korea's golf club membership and condominium time-share."[371] Of these payments, at least US$4,000 worth were paid directly to managers of government instrumentalities.[372] Spread out over a five-year period, US$4,000 in gifts may seem like a trivial amount. Nevertheless, these expenses, indicative of a *guanxi* relationship, made their way into the government's case against the company. SSI ended up paying a US$7.5 million criminal fine, while its parent company was left with a US$7.7 million civil penalty from the SEC.[373] While the payments resulting from *guanxi* maintenance may have played a small role in the government's decision to prosecute SSI, the greater risk is that such behavior paves the way for future large-scale corruption.

II. The Pervasiveness of Foreign Officials

The clearest FCPA difficulty in China, and in communist countries generally, is that the state's pervasive presence means that nearly anyone can be a "foreign official" for purposes of the FCPA. The FCPA's definition of "foreign official" encompasses any "officer or employee of a foreign government or any department, agency, or instrumentality thereof, . . . and any person acting in an official capacity for or on behalf of any such . . . instrumentality."[374] The US government has made clear that "government instrumentalities" include state-owned commercial enterprises.[375] From steel mills to newspapers, many businesses in China are owned or controlled by the state. Indeed, some "entire sectors of the Chinese economy remain almost entirely state-owned or controlled (such as hospitals and medical institutions, and transportation companies)."[376] To make matters more confusing, in many cases the

state's role is less clear. Companies are often joint ventures with the government or have publicly traded shares, meaning that it can be difficult to determine whether the entity is a government instrumentality for purposes of the FCPA.[377] Nevertheless, when it comes to such state-owned organizations, every employee is potentially a foreign official for FCPA purposes. Even more disconcerting, it is at least conceivable that, under the FCPA's broad definition, every member of the Communist Party of China (CPC), numbering over 70 million people, is a foreign official. [378]

That this heightened government presence creates more opportunities for improper payments is borne out by the case law. In the majority of FCPA investigations, the recipients of bribes were not government officials of the American variety. Rather, the Chinese officials in these investigations were typically employees and executives of state-owned enterprises. For example, in the Diagnostics Products Corporation, AGA Medical Corporation, and Siemens AG cases, many of the payments were to employees at state-run hospitals. Likewise, many of those treated by Lucent Technologies, Inc., to generous overseas trips worked for state-owned telecommunications companies. The US government's increased enforcement of the FCPA means that making such payments in China is especially risky. This is true even though the recipients of the improper payments may not be considered government officials under Chinese law. The Justice Department has indicated that it does not consider foreign legal opinions on this issue to be dispositive, instead relying on its own analysis of the facts.[379]

III. Chinese Anti-Corruption Efforts

Despite the preconceived notions of many foreign companies operating in China, the country does have actual anti-bribery laws.[380] Historically, however, enforcement has been selective and sporadic.[381] But in what is likely to be a mixed blessing to Western companies in China, the country appears serious about stepping up enforcement of its anti-corruption laws. The CPC began the year with a vow to increase corruption investigations.[382] The Chinese government has followed up this promise with concrete action. In June 2009, China launched a confidential whistleblower hotline and accompanying website for citizens to report or inquire about corruption by government officials.[383] The hotline received over 11,000 calls in its first week.[384] Although China's current efforts are directed at policing its own officials and not foreign companies, the latter still have reason to be concerned. First, because foreign businesses are likely behind much of the corruption,[385] investigations of government officials may ensnare the payers along with the payees. Second, even if the Chinese authorities do not concern themselves with prosecuting foreign operators, the results of its enforcement activity may be used by the US government in its FCPA enforcement actions.

On the plus side, if China really does crack down on corruption inside its borders, this will allay the concerns of companies subject to the FCPA that the American law creates an uneven playing field. Currently, many US companies point to other countries' lax anti-corruption enforcement, as if to argue "They can bribe, why can't we?"[386] If China commits to stamping out bribery, this perceived competitive disadvantage will likely be removed or at least reduced over time. On the other hand, another source of enforcement means another body of laws to comply with and another risk of punishment for noncompliance. The possibility that China could revoke a company's license to do business in the country may do more to ensure FCPA compliance in China than the US government could ever do.

IV. Requisites for Compliance

In China, as in any other country, the most effective preventative measure is also the most basic—that is, a compliance and ethics program. Just having a program, however, is not sufficient. It must be promoted and enforced consistently throughout the organization.[387] Two essential elements to any such program are (1) clear and written guidelines that are easily available to all personnel, and (2) in-person training of all personnel.[388] But in China, more so than in most countries, the guidelines and training must go beyond a simple explanation of the FCPA. For a native Chinese employee, following this foreign statute requires putting aside a culture in which exchanging gifts and favors is the norm. Chinese employees may think, and perhaps correctly, that the only way to help their organization is to "do business the Chinese way." With cultural sensitivity, trainers must explain that, regardless of the Chinese custom, the US government has imposed the FCPA on the company (and by extension its foreign employees) and that infractions, even well-intentioned ones, can result in serious consequences. Employees must know that although FCPA rules are foreign and may seem counterproductive, they are simply a fact of life.

Next, companies must recognize that they cannot turn a blind eye to FCPA violations by their contractual partners, including agents, distributors, and other members of a joint venture. While a company may not be able to issue guidelines and perform training exercises for third parties, it can protect itself by insisting on an FCPA compliance clause in the contract governing the relationship. A company subject to the FCPA should insist on a clause in which the contracting party represents that it has abided, and will continue to abide, by a covenant against bribing foreign government officials, wherever they might be. Further, if possible, the company should reserve the right to inspect the third parties' books to ensure compliance.

The best designed compliance program also will include a contingency plan to ensure that any FCPA issues that arise are addressed in an appropriate manner. Employees must know how to report possible infractions and there must be internal procedures to guide the resulting internal investigation, if any. In some cases, this will require the assistance of outside counsel and forensic accounting experts.

V. Case Studies

A. Faro Technologies

A recent case illustrating many of the FCPA pitfalls in China is that of Faro Technologies, Inc. The corrupt payments, the cover-up efforts, and the punishments imposed are all representative of Chinese FCPA issues generally, as are the environmental causes that led to the infractions. It will be useful, then, to take a closer look at the events and their consequences.

In June 2008, the Florida-based software development and manufacturing company resolved FCPA charges with the Justice Department and the SEC.[389] The company paid a US$1.1 million criminal penalty as part of a non-prosecution agreement that also entailed appointment of a compliance monitor.[390] Faro also paid US$1.85 million in disgorgement and prejudgment interest to the SEC.[391] The government's charges would later provide additional allegations in a private securities fraud class action suit, which Faro eventually settled for US$6.875 million.[392]

Between 2004 and 2006, Faro allegedly paid approximately US$445,000 in bribes to employees at various state-owned companies in order to obtain sales contracts.[393] These alleged bribes resulted

in US$4.5 million in sales and US$1.4 million in net profits.[394] Faro operated in China via its wholly owned subsidiary, Faro Shanghai, which was established in 2003 to replace a Chinese distributor.[395] A former employee of that distributor became the Country Sales Manager at Faro Shanghai and, eventually, became the source of the company's legal difficulties.[396]

Faro's misdeeds allegedly went beyond the anti-bribery violations. To conceal the improper payments that the Country Sales Manager made on the company's behalf, the Sales Director for the Asia-Pacific region ordered Faro Shanghai's staff to alter the company's books so as to delete the names of the bribes' recipients and classify the payments as referral fees.[397] Beginning in 2005, Faro used a shell company as an intermediary to funnel the bribes, with payments to the intermediary made under a phony services contract.[398] This behavior led to Faro pleading guilty to violations of the books and records provisions of the FCPA.[399]

The Faro case study is, in many ways, indicative of the challenges the FCPA presents to the companies and individuals within its scope. First is the source of the improper payments—a wholly owned Chinese subsidiary (as opposed to a representative or branch office). The same situation is found in the cases of Lucent and Diagnostics Products.[400] But, as with AGA Medical Corporation, a Chinese distributor (or in Faro's case, a distributor turned employee) played an important role.[401] Soon after accepting the offer from Faro, the eventual Country Sales Manager inquired whether he would have the freedom to "do business the Chinese way."[402] Instead of explaining that Faro, as an American company, was bound by law not to do business that way, a top executive acceded to the request.[403]

Also illustrative of FCPA issues in China is the class of recipients of Faro's bribe money. The corrupt payments were not made to government officials as that term is commonly used, but rather to employees of state-owned and state-controlled enterprises.[404] The same was true in the Diagnostics Products, Lucent, AGA, Paradigm, and Schnitzer cases.[405] Furthermore, Faro's Country Sales Manager for China spoke in terms of maintaining good relationships with the government officials, implying that a *guanxi* relationship was at the root of the corrupt behavior.[406]

According to the SEC's findings, "Faro lacked a system of internal accounting controls sufficient to provide reasonable assurances that the transactions were executed in accordance with management's authorization."[407] In fact, during the entire three-year period under review, "Faro provided no training or education to any of its employees, agents, or subsidiaries regarding the requirements of the FCPA."[408] Additionally, Faro "failed to establish a program to monitor its employees, agents, and subsidiaries for compliance with the FCPA."[409]

Finally, the Faro case illustrates that when it comes to instituting internal controls, better late than never. In negotiating the settlement, the SEC considered the cooperation and remedial actions taken by Faro.[410] The company agreed to retain an SEC-approved independent consultant for two years "to review and evaluate Faro's internal controls, record-keeping, and financial reporting policies and procedures as they relate to its compliance with the anti-bribery, books and records, and internal accounting controls of the FCPA."[411] Additionally, Faro agreed to require the independent consultant to issue a report within 120 days "summarizing the review and recommending policies and procedures reasonably designed to ensure compliance with the federal securities laws as they related to the FCPA," and to adopt such recommendations.[412] Finally, Faro agreed to have the independent consultant conduct a year-long investigation of the company's FCPA compliance plan, with the aim of certifying that the program was appropriately designed and properly implemented.[413]

As estimated by Faro in its latest Form 10-K, the company spent US$3.8 million in 2006, US$3.1 million in 2007, and US$0.3 million in 2008 on its internal investigation.[414] That US$7.2 million total is in addition to the US$2.95 million in fines, penalties, and interest paid to the Justice Department and the SEC in 2008 under the settlement agreements,[415] the US$6.875 million securities fraud class action settlement,[416] and the as yet undetermined cost of the independent consultant. Compliance with the FCPA is undoubtedly costly, and may result in lost business opportunities. But, as Faro illustrates, the consequences of noncompliance are likely to be even larger.

B. Lucent Technologies

A second case study, with FCPA violations on a grander scale than Faro, is the experience of Lucent Technologies. While the extent and form of Lucent's improper payments may be unique, the officials and environmental factors involved are indicative of the complexities of doing business in China.

From 2002 to 2003, Lucent allegedly spent over US$10 million in travel, lodging, entertainment, and related expenses for approximately 1,000 employees of Chinese state-owned entities (SOE) that were either existing or prospective customers.[417] The traveling SOE employees, who qualify as foreign officials under the FCPA,[418] were identified as "decision makers" with respect to the awarding of new business for which Lucent was bidding or planned to bid.[419] Ostensibly, the purpose of the approximately 315 trips was for the SOE employees to inspect Lucent's factories and to train in using Lucent's equipment.[420] In reality, however, the SOE employees visited tourist destinations throughout the United States, such as Hawaii, Las Vegas, the Grand Canyon, Niagara Falls, Disney World, Universal Studios, and New York City, where the Chinese officials spent little or no time visiting Lucent's facilities.[421] In fact, some of these trips were to cities where Lucent did not even have factories.[422]

As in Faro, Lucent's troubles stemmed not from third-party agents, but rather from its wholly owned Chinese subsidiary, Lucent China. The trips were approved by executives in China and arranged by Lucent China employees based in New Jersey.[423] The trips were generally categorized as either "pre-sale" or "post-sale," depending upon whether Lucent was seeking new business from the SOE (pre-sale visit) or performing obligations under an existing contract (post-sale visit).[424] Concerning pre-sale trips, Lucent allegedly provided about 330 SOE employees of various levels with all-expense paid visits to the United States and elsewhere to participate in conferences or seminars held or attended by Lucent employees; visit Lucent facilities; and engage in sightseeing, entertainment, and leisure activities.[425] Lucent spent more than US$1 million on at least 55 pre-sale trips.[426] In one such pre-sale trip, in April 2001, Lucent supposedly paid for six officers and engineers of an existing SOE customer to visit the United States for two weeks in order to negotiate a memorandum of understanding.[427] In its books and records, the April 2001 pre-sale trip, which cost more than US$73,000, was described as a "gold[en] opportunity for Lucent to introduce [its] network operation center to [the SOE]" and was improperly recorded as "Transportation International."[428] During the trip, the SOE employees spent five days visiting Lucent facilities and nine days sightseeing in places such as Hawaii and the Grand Canyon.[429] Other similar trips were improperly recorded as "Services Rendered-Other Services."[430]

Post-sale trips were typically required by provisions in the contracts between Lucent and its SOE customers.[431] These contracts typically obligated Lucent to provide its SOE customers with expense-paid trips to the United States and other countries for "factory inspections" or "training" purposes.[432] Pursuant to these contracts, Lucent allegedly spent more than US$9 million on approximately 260

post-sale trips for more than 850 individuals.[433] Certain of these post-sale "factory inspection" trips occurred in countries where Lucent had no existing factories and consisted of entertainment and leisure activities.[434] Similarly, the "training" visits involved no legitimate training.[435] For example, in June 2001, Lucent paid for six SOE employees to go sightseeing in Niagara Falls, Las Vegas, and elsewhere as part of a "factory expense" amounting to more than US$46,854.[436] This trip was recorded on Lucent's books and records as a "Lodging" expense.[437]

The non-prosecution agreement with the Justice Department, but not the Commission's complaint, included allegations that Lucent paid or offered to pay for educational opportunities for relatives or associates of Chinese government officials, some of whom were in a position to influence China's use of Lucent-compatible technologies.[438] These educational opportunities included: (i) payment of over US$71,000 to cover tuition and living expenses of an employee of a Chinese government ministry who was obtaining a master's degree in international management from the Thunderbird School of Management Training in Beijing, China; (ii) payment of US$21,687 for a deputy general manager of an SOE to obtain an MBA at Wuhan University in China; and (iii) providing a paid internship to the daughter of a Chinese government official, who was described in an email as "Lucent's key contact in China."[439]

The government charged that Lucent, in authorizing payments for these trips, violated the books and records and internal controls provisions of the FCPA in that it lacked the proper internal controls to detect and prevent trips intended for sightseeing, entertainment, and leisure, rather than business purposes, and improperly recorded many of these trips on its books and records.[440] Internal controls were so non-existent that even though the SOE employees were identified by name, organization, and title in Customer Visit Request Forms prepared by the company, Lucent China had no mechanism for assessing whether any of the trips violated the FCPA.[441] Indeed, Lucent employees allegedly made little or no inquiry into whether the SOE employees were government officials or whether the Lucent-funded entertainment and leisure activities constituted "things of value" under the FCPA.[442]

As with Faro, the government charged that these violations occurred because Lucent failed to properly train its employees to comprehend and appreciate the nature and status of its Chinese customers under the FCPA.[443] This level of improper training and knowledge allegedly permeated Lucent's ranks. Indeed, the Chairman and President of Lucent China and other Lucent China executives authorized and funded these trips without appropriate oversight.[444] The status of Chinese SOE employees as "foreign officials" under the FCPA is likely to be counterintuitive to both Chinese and American employees. Thus, a lack of training on this point greatly increases the probability of a resulting FCPA violation. When doing business in China, it is not sufficient simply to disseminate information about the requirements of the FCPA. Rather, companies must be certain that employees who deal with Chinese officials (with "officials" defined broadly) are trained to truly understand the broad scope of the FCPA.

Fortunately for Lucent, its punishment did not match the scale of its wrongdoing. In settling the Commission's books and records injunctive action, Lucent, without admitting or denying the allegations in the complaint, consented to the entry of a final judgment permanently enjoining it from future violations of the securities laws and imposing a civil penalty of US$1.5 million.[445] In its non-prosecution agreement with the Justice Department, Lucent admitted to all of the alleged conduct and agreed to pay a US$1 million penalty to the US Treasury.[446] The non-prosecution agreement further required Lucent to adopt new, or modify existing, internal controls, policies

and procedures so as to ensure that it can make and keep fair and accurate books, records, and accounts.[447] Additionally, Lucent agreed to implement a rigorous anti-corruption compliance code, standards, and procedures designed to detect and deter violations of the FCPA and other applicable anti-corruption laws.[448]

While Lucent's corrupt payments may have exceeded the amount most companies would be willing or able to pay, the circumstances leading to the payments were typical—specifically, a lack of understanding of the FCPA on the part of Chinese and American employees and a failure by the company to remedy that lack of understanding. Implementing an effective FCPA compliance program anywhere is difficult, but even more so in China. Thus, companies wishing to do business in China without running afoul of the FCPA must try harder.

Endnotes

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12 Breuer, *supra* note 8, at 2.

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16 *Id.*

17 Indictment, *United States v. Jefferson*, No. 1:07-CR-00209, Dkt. Entry No. 1 (E.D. Va. June 4, 2007).

18 *Id.*

19 Jonathan Tilove & Bruce Alpert, *Jefferson Gets 13 Years in Jail*, New Orleans Times-Picayune (Nov. 14, 2009).

20 Securities Exchange Act of 1934 § 20(a), 48 Stat. 881, 899 (codified as amended at 15 U.S.C. § 78t(a) (2000)).

21 *See, e.g.*, Compl., *SEC v. Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 02-cv-05776 (S.D.N.Y. July 24, 2002) (charging Adelphia's CFO, CAO, and three executive vice presidents with control person liability in connection with

Adelphia's filing of fraudulent documents with the SEC); Compl. ¶¶ 652-57, *In re Adelphia Commc'ns Corp. Secs. & Derivative Litig.*, No. 03-MDL-1529, 2003 WL 23306195 (S.D.N.Y. Dec. 22, 2003) (filing suit against numerous Adelphia officers and directors for violations of Section 20(a) of the Exchange Act based on the facts alleged in the SEC complaint "by virtue of [the defendants'] high-level positions, and active participation in and/or awareness of [Adelphia's] day-to-day operations . . .").

22 SEC Litigation Release No. 21162, "SEC Charges Nature's Sunshine Products, Inc. with Making Illegal Foreign Payments" (July 31, 2009), http://www.sec.gov/litigation/litreleases/2009/lr21162.htm [hereinafter NSP Release].

23 Compl. ¶ 2, *SEC v. Nature's Sunshine Prods., Inc.*, No. 2:09-CV-0672, Dkt. Entry No. 2 (D. Utah July 31, 2009).

24 *Id.* ¶¶ 14, 15.

25 *Id.* ¶¶ 18-20.

26 *Id.* ¶¶ 22-23

27 *Id.*

28 *Id.* ¶ 36.

29 *Id.* ¶¶ 43-48.

30 NSP Release, *supra* note 22.

31 15 U.S.C. § 78t(a).

32 17 C.F.R. § 230.405 (2005). This definition was issued for the purpose of administrative proceedings.

33 *See Boguslavsky v. Kaplan*, 159 F.3d 715, 720 (2d Cir. 1998); *Carpenter v. Harris, Upham & Co.*, 594 F.2d 388, 394 (4th Cir. 1979); *Rochez Bros., Inc. v. Rhoades*, 527 F.2d 880, 885 (3d Cir. 1975).

34 *See, e.g., Brody v. Stone & Webster, Inc.*, 424 F.3d 24, 26 n.2 (1st Cir. 2005); *Peltz v. Polyphase Corp.*, 36 F. App'x 316, 321 (9th Cir. 2002); *Brown v. Enstar Group, Inc.*, 84 F.3d 393, 396-97 (11th Cir. 1996); *Donohoe v. Consol. Operating & Prod. Corp.*, 982 F.2d 1130, 1138 n.7 (7th Cir. 1992); *Metge v. Baehler,* 762 F.2d 621, 630-31 (8th Cir. 1985); *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Dynegy, Inc.*, 339 F. Supp. 2d 804, 828 (S.D. Tex. 2004) (citing *Dennis v. General Imaging, Inc.*, 918 F.2d 496, 509-10 (5th Cir. 1990)).

35 *See Boguslavsky,* 159 F.3d at 720.

36 *Rochez Bros.*, 527 F.2d at 885.

37 *See*, *e.g., Brody*, 424 F.3d at 26 n.2; *Peltz*, 36 F. App'x at 321; *Brown*, 84 F.3d at 396-97; *Donohoe*, 982 F.2d at 1138 n.7; *Metge*, 762 F.2d at 630-31; *Pirelli Armstrong Tire Corp.*, 339 F. Supp. 2d at 828.

38 *See Metge*, 762 F.2d at 630-31.

39 SEC Litigation Release No. 21335, "SEC Charges Former Officer of Pride International with Violating the Foreign Corrupt Practices Act" (Dec. 14, 2009), http://www.sec.gov/litigation/litreleases/2009/lr21335.htm.

40 Compl. ¶ 3, *SEC v. Benton*, No. 4:09-CV-03963 (S.D. Tex. Dec. 11, 2009) [hereinafter Benton Compl.].

41 *Id.* ¶ 20.

42 *Id.* ¶¶ 4-5.

43 *FCPA News and Insights* (Arnold & Porter LLP), First Quarter 2009, http://www.arnoldporter.com/public_document.cfm?id=14228&key=21I0.

44 Information at 2, *United States v. Latin Node, Inc.*, No. 1:09-CR-20239, Dkt. Entry No. 1 (S.D. Fla. Mar. 23, 2009) [hereinafter LatinNode Information].

45 Statement of Offense at 7, *United States v. Latin Node, Inc.*, No. 1:09-CR-20239, Dkt. Entry No. 5 (S.D. Fla. Apr. 3, 2009) [hereinafter LatinNode Statement of Offense].

46 *Id.*

47 Justice Department Press Release No. 09-318, "Latin Node Inc., Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay $2 Million Criminal Fine" (Apr. 7, 2009), http://www.justice.gov/opa/pr/2009/April/09-crm-318.html [hereinafter LatinNode Press Release].

48 LatinNode Statement of Offense, *supra* note 45, at 9.

49 *Id.*

50 Plea Agreement at 7, *United States v. Latin Node, Inc.,* No. 1:09-CR-20239, Dkt. Entry No. 4 (S.D. Fla. Apr. 3, 2009) [hereinafter LatinNode Plea Agreement].

51 LatinNode Press Release, *supra* note 47.

52 LatinNode Plea Agreement, *supra* note 50, at 8.

53 LatinNode Press Release, *supra* note 47.

54 eLandia International, Inc., Quarterly Report (Form 10-Q/A), at 11-12 (Sept. 5, 2008).

55 *See* Claudius O. Sokenu, "DOJ Again Clarifies FCPA Due Diligence Expected in Business Combinations," *Securities Regulation & Law Report,* vol. 40, no. 34 (August 25, 2008), http://www.arnoldporter.com/public_document.cfm?id=14048&key=14I0.

56 MAN, Investigations Against MAN Group Companies Brought to an End with Administrative Orders Imposing Fines (Dec. 10, 2009), http://www.man-mn.com/en/media/Press_releases/show_press.jsp?id=206827.

57 UK Serious Fraud Office Press Release, "Mabey & Johnson Ltd. Sentencing" (Sept. 25, 2009), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey--johnson-ltd-sentencing-.aspx.

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

63 SFO, "Former Vice President of DePuy International Ltd Charged with Corruption" (Dec. 1, 2009), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/former-vice-president-of-depuy-international-ltd-charged-with-corruption.aspx [hereinafter DePuy SFO Release].

64 In February 2007, Johnson & Johnson announced that it had voluntarily disclosed to the Commission and to the Justice Department that it believed some of its foreign subsidiaries had made improper payments "in connection with the sale of medical devices in two small-market countries." *See* Johnson & Johnson Statement on Voluntary Disclosure, Current Report Filing (Form 8-K) (February 12, 2007). A few months later, in September 2007, DePuy Orthopaedics, Inc., another Johnson and Johnson subsidiary, and four other medical device manufacturers agreed to pay US$311 million to settle charges that they paid kickbacks to induce US doctors to buy their products. *See* Justice Department Press Release, "Five Companies in Hip and Knee Replacement Industry Avoid Prosecution by Agreeing to Compliance Rules and Monitoring" (Sept. 27, 2007), http://www.justice.gov/usao/nj/press/files/pdffiles/hips0927.rel.pdf. In this US settlement, DePuy Orthopaedics, Inc. agreed to pay US$84.7 million and be monitored by an external attorney. *Id.* Since this settlement of anti-kickback violations, the four other companies, along with two additional ones, have disclosed FCPA investigations. Our partner Claudius Sokenu represents certain individuals in connection with the government's investigation of the medical device industry.

65 DePuy SFO Release, *supra* note 63.

66 SFO, Approach of the Serious Fraud Office to Dealing with Overseas Corruption (July 21, 2009), http://www.sfo.gov.uk/media/28313.

67 *See* Arnold & Porter's advisory, *The UK Gets Serious About Overseas Corruption: The Bribery Bill and SFO Guidance*, http://www.arnoldporter.com/public_document.cfm?id=14626&key=2G2.

68 *Id.* at 5.

69 *See* Arnold & Porter's advisory, *The SFO Provides Updated Guidance on Its Approach to Enforcing Allegations of Overseas Corruption*, http://www.arnoldporter.com/public_document.cfm?id=14976&key=14G0.

70 *Id.*

71 15 U.S.C. 78dd-2(d)(b).

72 TRACE, Anti-Bribery Compliance Solutions; *Trace Facilitations Payments in Benchmarking Survey* (Oct. 2009), https://www.traceinternational.org/documents/FacilitationPaymentsSurveyResults.pdf.

73 The full report can be found at http://www.oecd.org/dataoecd/11/40/44176910.pdf.

74 *Id.* at 4.

75 US Department of State Press Release, "Secretary Clinton Marks International Anti-Corruption Day with Video Address to OECD Conference" (Dec. 9, 2009), http://www.state.gov/r/pa/prs/ps/2009/dec/133342.htm.

76 *See Glazer Capital Mgmt. v. Magistri*, 549 F.3d 736, 748-49 (9th Cir. 2008) (requiring that plaintiffs plead facts giving rise to a strong inference of scienter for false statements regarding FCPA compliance); Magistrate's Memorandum and Recommendation on Motion to Dismiss, *Sheet Metal Workers' Nat'l Pension Fund v. Deaton*, No. 4:07-CV-01517, Dkt. Entry No. 57 (S.D. Tex. Apr. 14, 2008) (requiring plaintiffs to make a demand on the board to file suit).

77 *See* Lead Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement, *In re Faro Techs., Inc.* Sec. Litig. No. 6:05-CV-1810, Dkt. Entry No. 171 (M.D. Fla. Sept. 26, 2008) (US $6.875 million).

78 *See In re Syncor Int'l Corp. Sec. Litig.*, No. 05-55748, 2007 WL 1729968 (9th Cir. June 12, 2007) (reversing in part the district court's dismissal because the plaintiffs had pleaded facts that demonstrated certain of Syncor's directors were aware that the company's overseas sales were due to bribery).

79 *See Harper Woods Employees' Ret. Sys. v. Olver*, 589 F.3d 1292 (D.C. Cir. 2009) (affirming the dismissal of a shareholder derivative suit against executives of BAE Systems PLC for allegedly paying bribes and kickbacks to Prince Bandar Bin Sultan of Saudi Arabia by applying British law and finding that the pension fund had no standing to act as a plaintiff); *In re The Dow Chemical Co. Deriv. Litig.*, No. 4349-CC, 2010 WL 66769 (Del. Ch. Jan. 11, 2010) (citing Dow's compliance program as evidence that the board had met its fiduciary duty to prevent overseas bribery and dismissing a suit against the company's directors for allegedly failing to prevent overseas bribery because the plaintiffs failed to allege that the board knew of, or had reason to suspect, bribery).

80 Compl. ¶ 1, *Johnson v. Siemens AG*, No. 01:09-CV-5310, Dkt. Entry No. 1 (E.D.N.Y. Dec. 4, 2009) [hereinafter Siemens Shareholder Compl.].

81 *Id.* ¶ 2.

82 *Id.*

83 *Id.* ¶¶ 2-3.

84 Arnold & Porter LLP, *Siemens Pays Record $800 Million to Settle Systemic and Widespread FCPA Violations* (2008), *available at* http://www.arnoldporter.com/public_document.cfm?id=14213&key=18D1.

85 Siemens Shareholder Compl., *supra* note 80, at 26-27.

86 *Id.* at 27.

87 *Id.*

88 *Id.* at 30.

89 *Id.* at 30-31.

90 *Deccan Value Advisors Fund, L.P. v. Panalpina World Transp. (Holding) Ltd.*, No. 5:2009-CV-0080, Dkt. Entry No. 2 (S.D. Tex. July 23, 2009).

91 *Id.* at 1.

92 *Id.* at 2.

93 *Id.* at 3.

94 Compl., *Grynberg v. BG Group, P.L.C.*, No. 1:2009-CV-10543, Dkt. Entry No. 1 (D. Mass. Apr. 8, 2009) [hereinafter Grynberg Compl.].

95 *Id.*

96 *Id.*

97 *See Grynberg v. BP P.L.C.*, 596 F. Supp. 2d 74, 80 (D.D.C. 2009) (granting remaining defendant's motion to dismiss).

98 Grynberg Compl., *supra* note 94, ¶¶ 25-26.

99 *Id.* ¶¶ 68-72.

100 *Id.* ¶ 25.

101 *Id.*

102 *See* Compl., *Policemen & Firemen Retirement Sys. v. Cornelison*, No. 2009-29987 (Tex. Dist. Ct. May 14, 2009) [hereinafter Halliburton Compl.].

103 *Id.* ¶ 3.

104 *Id.*

105 *Id.* ¶ 35.

106 SEC Litigation Release No. 20897, "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), http://www.sec.gov/litigation/litreleases/2009/lr20897.htm.

107 *Id.*

108 Halliburton Compl., *supra* note 102, ¶ 148.

109 *Id.* ¶¶ 149-51.

110 Breuer, *supra* note 8, at 4.

111 Justice Department Press Release, "Helmerich & Payne Agrees to Pay $1 Million Penalty to Resolve Allegations of Foreign Bribery in South America" (July 30, 2009), http://www.justice.gov/opa/pr/2009/July/09-crm-741.html.

112 *Id.*

113 Breuer, *supra* note 8, at 5.

114 SEC Litigation Release No. 21357, "SEC Charges California Telecom Company with Bribery and Other FCPA Violations" (Dec. 31, 2009), http://www.sec.gov/litigation/litreleases/2009/lr21357.htm.

115 *Id.*

116 *Id.*

117 Justice Department Press Release No. 09-1390, "UTStarcom Inc. Agrees to Pay $1.5 Million Penalty for Acts of Foreign Bribery in China" (Dec. 31, 2009), http://www.justice.gov/opa/pr/2009/December/09-crm-1390.html.

118 Breuer, *supra* note 8, at 2.

119 *Id.*

120 Justice Department Press Release, "Department of Justice Seeks to Recover Approximately $3 Million in Illegal Proceeds from Foreign Bribe Payments" (Jan. 9, 2009), http://www.justice.gov/opa/pr/2009/January/09-crm-020.html.

121 Justice Department Press Release, "Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fees" (Dec. 15, 2008), http://www.justice.gov/usao/dc/Press_Releases/2008%20Archives/December/08-1105.pdf.

122 Justice Department Press Release, "Department of Justice Seeks to Recover Approximately $3 Million in Illegal Proceeds from Foreign Bribe Payments" (Jan. 9, 2009), http://www.justice.gov/opa/pr/2009/January/09-crm-020.html.

123 Justice Department Press Release, "Two Florida Executives, One Florida Intermediary and Two Former Haitian Government Officials Indicted for Their Alleged Participation in Foreign Bribery Scheme" (Dec. 7, 2009), http://www.justice.gov/opa/pr/2009/December/09-crm-1307.html [hereinafter Teleco DOJ Release]; *see also* Jacqueline Charles & Jay Weaver, *Former Haitian official appears in Miami federal court*, MIAMI HERALD, Dec. 14, 2009, http://www.miamiherald.com/2009/12/14/1382065/former-haitian-official-appears.html.

124 *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

125 *FCPA News and Insights* (Arnold & Porter LLP), First Quarter 2009, http://www.arnoldporter.com/public_document.cfm?id=14228&key=21l0.

126 SEC Litigation Release No. 21335, "SEC Charges Former Officer of Pride International with Violating the Foreign Corrupt Practices Act" (Dec. 14, 2009), http://www.sec.gov/litigation/litreleases/2009/lr21335.htm.

127 Benton Compl. ¶¶ 1, 3.

128 *Id.* ¶¶ 7-10.

129 *Id.* ¶ 1.

130 *Id.*

131 *Id.* ¶¶ 1-2.

132 *Id.* ¶ 2.

133 *Id.* ¶ 7.

134 *Id.*

135 *Id.* ¶ 3.

136 Teleco DOJ Release, *supra* note 123.

137 *United States v. Esquenazi, et al.*, No. 09-21010, ¶ 10 (Dec. 4, 2009) (hereinafter Haiti Indictment).

138 *Id.* ¶¶ 2-4.

139 Order on Initial Appearance as to Joel Esquenazi, *United States v. Esquenazi, et al.*, No. 09-CR-21010, Dkt. Entry No. 53 (S.D. Fla. Jan. 11, 2010); Order on Initial Appearance as to Robert Antoine, *United States v. Esquenazi, et al.*, No. 09-CR-21010, Dkt. Entry No. 26 (S.D. Fla. Dec. 14, 2009); Order on Initial Appearance as to Marguerite Grandison, *United States v. Esquenazi, et al.*, No. 09-CR-21010, Dkt. Entry No. 16 (S.D. Fla. Dec. 7, 2009); Order on Initial Appearance as to Jean Rene Duperval, *United States v. Esquenazi, et al.*, No. 09-CR-21010, Dkt. Entry No. 14 (S.D. Fla. Dec. 7, 2009); Order on Initial Appearance as to Carlos Rodriguez, *United States v. Esquenazi, et al.*, No. 09-CR-21010, Dkt. Entry No. 11 (S.D. Fla. Dec. 11, 2009).

140 Haiti Indictment, *supra* note 137, ¶ 3.

141 *Id.* ¶ 5.

142 *Id.* ¶ 6.

143 *Id.* ¶ 8.

144 *Id.* ¶ 9.

145 *Id.* ¶ 10.

146 Information at 6-7, *United States v. Diaz*, No. 1:09-CR-20346, Dkt. Entry No. 1 (S.D. Fla. Apr. 22, 2009) [hereinafter Diaz Information].

147 Haiti Indictment, *supra* note 137, ¶ 9.

148 Information at 5-6, *United States v. Perez*, No. 1:09-CR-20347, Dkt. Entry No. 1 (S.D. Fla. Apr. 22, 2009) [hereinafter Perez Information].

149 *See* Diaz Information, *supra* note 146; Perez Information, *supra* note 148.

150 Justice Department Press Release No. 09-476, "Two Florida Businessmen Plead Guilty to Participating in a Conspiracy to Bribe Foreign Government Officials and Money Laundering" (May 15, 2009), http://www.justice.gov/opa/pr/2009/May/09-crm-476.html.

151 Diaz Information, *supra* note 146, at 5; Perez Information, *supra* note 148, at 4.

152 *OECD, Governments Agree to Step up Fight Against Bribery* (Dec. 9, 2009), http://www.oecd.org/document/35/0,3343,en_2649_34487_44232739_1_1_1_1,00.html.

153 *Id.*

154 *Id.* The full report can be found at http://www.oecd.org/dataoecd/11/40/44176910.pdf.

155 *Id.*

156 Justice Department Press Release No. 09-1265, "Former General Manager of Texas Business Arrested for Role in Alleged Scheme to Bribe Officials at Mexican State-Owned Electrical Utility" (Nov. 23, 2009), http://www.justice.gov/opa/pr/2009/November/09-crm-1265.html [hereinafter O'Shea Press Release].

157 Indictment, *United States v. O'Shea*, No. 4:09-CR-00629, Dkt. Entry No. 1 (S.D. Tex. Nov. 16, 2009) [hereinafter O'Shea Indictment].

158 *See* Nathan Vardi, *ABB Entangled in Corruption Case*, Forbes.com (Nov. 23, 2009), http://www.forbes.com/2009/11/23/

abb-cfe-bribery-business-mexico-indictment.html.

159 O'Shea Press Release, *supra* note 156.

160 Plea Agreement, *United States v. Basurto*, No. 4:09-CR-00325, Dkt. Entry No. 43 (S.D. Tex. Nov. 23, 2009).

161 O'Shea Indictment, *supra* note 157, at 5.

162 *Id.* at 10.

163 *Id.* at 5.

164 *Id.* at 10-11.

165 *Id.* at 11.

166 *Id.* at 26-27.

167 Vardi, *supra* note 158.

168 *Id.*

169 Justice Department Press Release No. 09-1229, "Virginia Resident Pleads Guilty to Bribing Panamanian Officials for Maritime Contract" (Nov. 13, 2009), http://www.justice.gov/opa/pr/2009/November/09-crm-1229.html [hereinafter Jumet Press Release].

170 Justice Department Press Release No. 09-1348, "Virginia Resident Charged with Conspiring to Bribe Former Panamanian Government Officials for Maritime Contract" (Dec. 16, 2009), http://www.justice.gov/opa/pr/2009/December/09-ag-1348.html.

171 Information at 5, *United States v. Jumet*, No. 3:09-cr-00397, Dkt. Entry No. 2 (E.D. Va. Nov. 10, 2009) [hereinafter Jumet Information]; Information at 4, *United States v. Warwick*, No. 3:09-cr-00449, Dkt. Entry No. 1 (E.D. Va. Dec. 15, 2009).

172 Statement of Facts at 4, *United States v. Jumet*, No. 3:09-cr-00397, Dkt. Entry No. 7 (E.D. Va. Nov. 13, 2009).

173 Jumet Information, *supra* note 171.

174 *Id.*

175 *Id.* at 8-9.

176 *Id.* at 3.

177 Jumet Press Release, *supra* note 169.

178 United States Attorneys' Manual, Statute of Limitations for Conspiracy, Criminal Resource Manual 652 (2008).

179 Bruce Alpert, "Jefferson Legal Saga Far From Being Over," *New Orleans Times-Picayune*, Aug. 8, 2009, at 1.

180 Jonathan Tilove & Bruce Alpert, "Jefferson Gets 13 Years in Jail," *New Orleans Times-Picayune* (Nov. 14, 2009).

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182 Indictment, *United States v. Jefferson,* No. 1:07-CR-00209, Dkt. Entry No. 1 (E.D. Va. June 4, 2007) [hereinafter Jefferson Indictment].

183 Philip Shenon, "FBI Contends Lawmaker Hid Bribe in Freezer," *The New York Times*, May 22, 2006, at A1.

184 Jefferson Indictment, *supra* note 182, at 33-34.

185 Bruce Alpert, "Jefferson Tape Cites Nigerian Leader's Role," *New Orleans Times-Picayune* (July 7, 2009), at 1.

186 *Id.*

187 *Id.*

188 Jonathan Tilove, "Guilty on 11 Counts: Jefferson Faces Lengthy Sentence, Possible Restitution," *New Orleans Times-Picayune*, Aug. 6, 2009, at 1.

189 *Id.*

190 *Id.*

191 Justice Department Press Release No. 09-1220, "Former Willbros International Consultant Pleads Guilty to $6 Million Foreign Bribery Scheme" (Nov. 12, 2009), http://www.justice.gov/opa/pr/2009/November/09-crm-1220.html [hereinafter Novak Press Release].

192 *Id.*

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.*

197 *Id.*

198 Breuer, *supra* note 8, at 2.

199 Novak Press Release, *supra* note 191. On January 28, 2010, Brown was sentenced to a year and a day in prison and fined US$17,500. Steph was sentenced to a prison term of 15 months and fined US$2,000. Justice Department Press Release, "Former Willbros International Executives Sentenced to Prison for Their Roles in $6 Million Foreign Bribery Scheme" (Jan. 28, 2010), http://washingtondc.fbi.gov/dojpressrel/pressrel10/wfo012810a.htm.

200 *Id.* Additionally, both Willbros Group and Willbros International entered into a deferred prosecution agreement with the Justice Department, under which they will pay a US$22 million criminal penalty. *Id.*

201 *See* Justice Department Press Release, "Two UK Citizens Charged by United States with Bribing Nigerian Government Officials to Obtain Lucrative Contracts as Part of KBR Joint Venture Scheme" (Mar. 5, 2009), http://www.justice.gov/criminal/pr/press_releases/2009/03/03-05-09tesler-charged.pdf; Justice Department Press Release, "Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fee" (Feb. 11, 2009), http://www.justice.gov/criminal/pr/press_releases/2009/02/02-11-09kellogg-guilty.pdf; Justice Department Press Release, "Aibel Group Ltd. Pleads Guilty to Foreign Bribery and Agrees to Pay $4.2 Million in Criminal Fines" (Nov. 21, 2008), http://www.justice.gov/opa/pr/2008/November/08-crm-1041.html; Justice Department Press Release, "Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines" (Feb. 6, 2007), http://www.justice.gov/opa/pr/2007/February/07_crm_075.html; *Deccan Value Advisors Fund, L.P. v. Panalpina World Transp. (Holding) Ltd.*, No. 5:2009-CV_0080, Dkt. Entry No. 2 (S.D. Tex. July 23, 2009); Compl., *United States v. Siemens Aktiengesellschaft*, No. 1:08-CV-02167, Dkt. Entry No. 1 (D.D.C. Dec. 12, 2008).

202 Breuer, *supra* note 8, at 2.

203 David Glovin, "Bourke Convicted of Bribery in Azerbaijan Oil Deal," *Bloomberg* (July 10, 2009), http://www.bloomberg.com/apps/news?pid=20601205&sid=aseVHkj_VRMQ.

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205 *See* Second Superseding Indictment, *United States v. Bourke*, No. 05-cr-00518, Dkt. Entry No. 203 (S.D.N.Y. May 26, 2009) [hereinafter Bourke Indictment].

206 Glovin, *supra* note 203.

207 *See United States v. Kozeny,* No. 05-CR-518, 2009 WL 1514369, at *2 (S.D.N.Y. May 29, 2009) (holding that conscious avoidance of knowledge is sufficient for conviction).

208 Bourke Indictment, *supra* note 205, at 10.

209 *Id.*

210 *See id.*

211 Although Farrell pleaded guilty in 2003 and Bodmer in 2004, neither has been sentenced.

212 Glovin, *supra* note 204.

213 Adam Klasfeld, "Fed Witness Tells Tangled Tale of Bribery in Azerbaijan," *Courthouse News Service*, June 16, 2009, http://www.courthousenews.com/2009/06/16/Fed_Witness_Tells_Tangled_Tale_of_Bribery_in_Azerbaijan_.htm.

214 Bourke Indictment, *supra* note 205, at 25-30.

215 Glovin, *supra* note 203.

216 *Kozeny*, 2009 WL 1514369, at *2 (noting that "the defendant must be shown to have decided not to learn the key fact, not merely *to have failed to learn it through negligence*" (emphasis in original) (quoting *United States v. Nektalov*, 461 F.3d 309, 315 (2d Cir.2006))).

217 *Id.*

218 *See United States v. Kozeny*, 541 F.3d 166, 168 (2d Cir. 2008).

219 *Id.*

220 *Id.* at 169.

221 *Id.* at 170.

222 *Id.*

223 *See* Bourke Indictment, *supra* note 205.

224 Memorandum of Law of Defendant Frederic A. Bourke, Jr. in Support of Motion for Reassignment of Related Pending Actions, *United States v. Kozeny*, No. 05-cr-00518, Dkt. Entry No. 24 (S.D.N.Y. Nov. 15, 2005).

225 *Id.* at 7.

226 *Id.* at 8.

227 *Id.* at 9.

228 David Glovin, "Pirate in Exile," *Bloomberg* (Nov. 2008), http://www.bloomberg.com/news/marketsmag/mm_1108_story3.html.

229 SEC Litigation Release No. 21229, "SEC Files Settled Books and Records and Internal Controls Charges Against AGCO Corporation For Improper Payments to Iraq Under the U.N. Oil-For-Food Program—AGCO Agrees to Pay Over $18.3 Million in Disgorgement, Interest, and Penalties" (Sept. 30, 2009), http://www.sec.gov/litigation/litreleases/2009/lr21229.htm [hereinafter AGCO Release].

230 Compl. ¶¶ 13-14, *SEC v. AGCO Corp.*, No. 1:09-CV-01865, Dkt. Entry No. 1 (D.D.C. Sept. 30, 2009).

231 *Id.* ¶ 1.

232 *Id.* ¶ 6.

233 *Id.*

234 *Id.* ¶ 8.

235 *Id.*

236 *Id.* ¶ 8-9.

237 *Id.* ¶ 9-10.

238 AGCO Release, *supra* note 229.

239 *Id.*

240 *Id.*

241 Justice Department Press Release No. 09-952, "Film Executive and Spouse Found Guilty of Paying Bribes to a Senior Thai Tourism Official to Obtain Lucrative Contracts" (Sept. 14, 2009), http://www.justice.gov/criminal/pr/press_releases/2009/09/09-14-09green-guily.pdf [hereinafter Green Press Release].

242 *Id.*

243 *See* Second Superseding Indictment, *United States v. Green*, No. 2:08-CR-00059, Dkt. Entry No. 159 (C.D. Cal. Mar. 11, 2009) [hereinafter Green Indictment].

244 *Id.*

245 *Id.*

246 *Id.*

247 Green Press Release, *supra* note 241.

248 *Id.*

249 *Id.*

250 Green Indictment, *supra* note 243.

251 Green Press Release, *supra* note 241.

252 Justice Department Press Release No. 09-928, "Former Pacific Consolidated Industries LP Executive Pleads Guilty in Connection with Bribes Paid to U.K. Ministry of Defense Official" (Sept. 3, 2009), http://www.justice.gov/opa/pr/2009/September/09-crm-928.html.

253 *Id.*

254 Plea Agreement at 5, *United States v. Smith*, No. 8:07-CR-00069, Dkt. Entry No. 89 (C.D. Cal. Sept. 3, 2009) [hereinafter Smith Plea Agreement].

255 *Id.*

256 *Id.*

257 *United States v. Smith*, No. 8:07-CR-00069, Dkt. Entry No. 103 (C.D. Cal. Dec. 14, 2009).

258 Government's Response to the Presentence Report for Defendant Leo Winston Smith at 16, *United States v. Smith*, No. 8:07-CR-00069, Dkt. Entry No. 95 (C.D. Cal. Dec. 2, 2009).

259 SEC Litigation Release No. 21190, "SEC Sues Former Sales Executive for Foreign Bribery" (Aug. 28, 2009), http://www.sec.gov/litigation/litreleases/2009/lr21190.htm [hereinafter Meza Release].

260 Justice Department Press Release No. 08-505, "Faro Technologies Inc. Agrees to Pay $1.1 Million Penalty and Enter Non-Prosecution Agreement for FCPA Violations" (June 5, 2008), http://www.justice.gov/opa/pr/2008/June/08-crm-505.html.

261 *Id.*

262 Compl. ¶ 4, *SEC v. Meza*, No. 1:09-CV-01648, Dkt. Entry No. 1 (D.D.C. Aug. 28, 2009).

263 *Id.* ¶ 1.

264 *Id.* ¶¶ 5-6.

265 Meza Release, *supra* note 259.

266 *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (prohibiting payments to "any foreign *official*" (emphasis added)). Indeed, it is for this very reason, at least in part, that the Oil-for-Food Program cases were charged as books and records and internal controls violations rather than anti-bribery violations, since the alleged "commissions" were, in the main, paid directly to the government of Iraq rather than individual Iraqi government officials. *See, e.g., United States v. AGCO Ltd.*, No. 09-CR-00249 (D.D.C. 2009) (charged with a books and records violation and conspiracy to commit wire fraud for payments made to the government of Iraq); *United States v. Novo Nordisk* A/S, No. 09-CR-00126 (D.D.C. 2009) (same); *United States v. Volvo Constr. Equip., AB*, No. 08-CR-00069 (D.D.C. 2008) (charged with books and records and internal controls violations for improper payments made to Iraqi government ministries); *United States v. Ingersoll-Rand Italiana S.p.A.*, No. 07-CR-00294 (D.D.C. 2007) (charged with conspiracy to commit wire fraud and conspiracy to violate the FCPA's books and records provisions for payments to Iraqi government).

267 Justice Department, FCPA Opinion Procedure Release 1981-02 (Dec. 11, 1981), http://www.justice.gov/criminal/fraud/fcpa/review/1981/r8102.html.

268 15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c).

269 *Id.*

270 Justice Department Press Release No. 09-754, "Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $18.2 Million Criminal Fine" (July 31, 2009), http://www.justice.gov/opa/pr/2009/July/09-crm-754.html.

271 *Id.*

272 Joint Stipulation, *United States v. Carson,* No. 8:09-CR-00077, Dkt. Entry No. 130 (C.D. Cal. Nov. 24, 2009).

273 Information at 4, *United States v. Control Components, Inc.*, No. 8:09-cr-00162, Dkt. Entry No. 1 (C.D. Cal. July 22, 2009).

274 *Id.*

275 Plea Agreement, *United States v. Control Components, Inc.*, No. 8:09-cr-00162, Dkt. Entry No. 7 (C.D. Cal. July 24,

2009).

276 Justice Department Press Release No. 09-322, "Six Former Executives of California Valve Company Charged in $46 Million Foreign Bribery Conspiracy" (Apr. 8, 2009) [hereinafter Control Press Release].

277 Order Regarding Continuance of Sentencing Date, *United States v. Morlok*, No. 8:09-CR-00005, Dkt. Entry No. 20 (C.D. Cal. July 2, 2009); Order Regarding Continuance of Sentencing Date, *United States v. Covino*, No. 8:08-CR-00336, Dkt. Entry No. 19 (C.D. Cal. July 2, 2009); Order to Continue Sentencing, *United States v. Morlok*, No. 8:09-CR-00005, Dkt. Entry No. 22 (C.D. Cal. Dec. 4, 2009); Order to Continue Sentencing, *United States v. Covino*, No. 8:08-CR-00336, Dkt. Entry No. 26 (C.D. Cal. Nov. 23, 2009).

278 Control Press Release, *supra* note 276.

279 Indictment at 2-6, *United States v. Carson*, No. 8:09-CR-00077, Dkt. Entry No. 1 (C.D. Cal. Apr. 8, 2009).

280 *Id.* at 7.

281 *Id.*

282 *Id.*

283 *Id.* at 35-36.

284 Minutes of Motion Hearing, *United States v. Carson*, No. 8:09-CR-00077, Dkt. Entry No. 75 (C.D. Cal. May 18, 2009).

285 *Id.*

286 Justice Department Press Release No. 09-757, "Canadian National Charged with Foreign Bribery and Paying Kickbacks Under the Oil for Food Program" (July 31, 2009), http://www.justice.gov/criminal/pr/press_releases/2009/07/07-31-09_naaman-indict.pdf [hereinafter Naaman Press Release].

287 *See United States v. Naaman*, No. 1:08-cr-00246, Dkt. Entry No. 3 (D.D.C. Aug. 7, 2008).

288 *Id.* at 8-15.

289 *Id.* at 5, 7.

290 *Id.* at 16-17.

291 Naaman Press Release, *supra* note 286.

292 Justice Department Press Release No. 09-741, "Helmerich & Payne Agrees to Pay $1 Million Penalty to Resolve Allegations of Foreign Bribery in South America" (July 30, 2009), http://www.justice.gov/opa/pr/2009/July/09-crm-741.html [hereinafter Helmerich & Payne Press Release].

293 *Id.*

294 *Id.*

295 *Id.*

296 Administrative Order, *In re Helmerich & Payne, Inc.*, Securities Exchange Act Release No. 60400 (July 30, 2009).

297 *Id.*

298 Helmerich & Payne Press Release, *supra* note 292.

299 *Id.*

300 SEC Litigation Release No. 21156, "SEC Files Settled Charges Against Avery Dennison Corporation for Violating the Books and Records and Internal Controls Provisions of the Foreign Corrupt Practices Act" (July 28, 2009), http://www.sec.gov/litigation/litreleases/2009/lr21156.htm.

301 *Id.*

302 *See SEC v. Avery Dennison Corp.*, No. CV09-5493, Dkt. Entry No. 1 (C.D. Cal. July 28, 2009) [hereinafter Avery Compl.].

303 Administrative Order, *In re Avery Dennison Corp.*, Securities Exchange Act Release No. 60393 (July 28, 2009).

304 Avery Compl., *supra* note 302, ¶ 1.

305 *Id.* ¶ 5.

306 *Id.*

307 *Id.* ¶¶ 1-2.

308 *Id.* ¶ 1.

309 *Id.* ¶ 2.

310 Avery Dennison Corp., Quarterly Report (Form 10-Q), at 17 (Aug. 12, 2009).

311 Avery Compl., *supra* note 302, at 3.

312 *See* Arnold & Porter's advisory, "Siemens Pays Record $800 Million to Settle Systemic and Widespread FCPA Violations," http://www.arnoldporter.com/public_document.cfm?id=14213&key=18D1.

313 World Bank Press Release, "Siemens to Pay $100m to Fight Corruption as Part of World Bank Group Settlement" (July 2, 2009), http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22234573~pagePK:34370~piPK:34424~theSitePK:4607,00.html.

314 *Id.*

315 *Siemens Loses World Bank Business for Two Years,* Reuters (July 2, 2009), http://www.reuters.com/article/governmentFilingsNews/idUSL29877020090702.

316 Siemens Press Release, "Legal Proceedings—First Six Months of Fiscal 2009" (July 30, 2009), http://w1.siemens.com/press/pool/de/events/2009-q3/2009-q3-legal-proceedings-e.pdf.

317 *Id.*

318 *FCPA News and Insights* (Arnold & Porter LLP), First Quarter 2009, http://www.arnoldporter.com/public_document.cfm?id=14228&key=21I0.

319 *See* Justice Department Press Release No. 09-635, "Former Executive of Philadelphia Company Pleads Guilty to Paying Bribes to Vietnamese Officials" (June 29, 2009), http://www.justice.gov/opa/pr/2009/June/09-crm-635.html.

320 Plea Agreement, *United States v. Nguyen*, No. 2:08-CR-00522, Dkt. Entry No. 79 (E.D. Penn. July 9, 2009).

321 Notice of Hearing, *United States v. Nguyen*, No. 2:08-CR-00522, Dkt. Entry No. 70 (E.D. Penn. June 29, 2009).

322 SEC Litigation Release No. 21063, "SEC Sues Former President of United Industrial Corporation Subsidiary for Authorizing the Payment of Foreign Bribes" (May 29, 2009), http://www.sec.gov/litigation/litreleases/2009/lr21063.htm [hereinafter Wurzel Release].

323 *Id.*

324 *Id.*

325 Compl., *SEC v. Wurzel*, No. 09-CV-01005, Dkt. Entry No. 1 (D.D.C. May 29, 2009).

326 *Id.* ¶¶ 7-11.

327 *Id.* ¶ 12.

328 *Id.* ¶ 11.

329 Sun Microsystems, Inc., Quarterly Report (Form 10-Q), at 40 (May 8, 2009) [hereinafter Sun 10-Q].

330 Steve Lohr, "In Sun, Oracle Sees a Software Gem," *The New York Times* (Apr. 20, 2009), at B8.

331 Sun 10-Q, *supra* note 329, at 40.

332 Sun Microsystems, Inc., Definitive Proxy Statement (Schedule 14A), at A-30 (June 8, 2009).

333 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, Securities Exchange Act Release No. 51283 (Mar. 1, 2005).

334 *Id.*

335 *Id.*

336 *Id.*

337 Judgment in a Criminal Case, *United States v. Quan-Sheng*, No. 2:08-CR-00194, Dkt. Entry No. 41 (E.D. Va. Apr. 9, 2009) [hereinafter Quan-Sheng Sentencing Order].

338 Justice Department Press Release No. 09-317, "Virginia Physicist Sentenced to 51 Months in Prison for Illegally Exporting Space Launch Data to China and Offering Bribes to Chinese Officials" (Apr. 7, 2009), http://www.justice.gov/opa/pr/2009/April/09-nsd-317.html.

339 Information, *United States v. Quan-Sheng*, No. 2:08-CR-00194, Dkt. Entry No. 17 (E.D. Va. Nov. 12, 2008).

340 *Id.* at 4.

341 *Id.* at 5.

342 Shu Sentencing Order, *supra* note 337.

343 Fritz Heimann & Gillian Dell, Transparency International, *Progress Report 2009: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (2009), http://www.transparency.org/content/download/44447/712572/.

344 *Id.* at 6.

345 The categories are defined as follows: Active Enforcement consists of (a) "Countries with a share of world exports over two per cent (the 11 largest exporters) that have at least ten major cases on a cumulative basis, of which at least three were initiated in the last three years, and at least three were concluded with substantial sanctions," and (b) "Countries with a share of world exports less than two percent that have brought at least three major cases including at least one concluded with substantial sanctions and have at least one case pending that was initiated in the last three years." The Moderate Enforcement group consists of "Countries that do not qualify for Active Enforcement but have at least one major case as well as active investigations." Finally, the Little or No Enforcement class is made up of "Countries that do not qualify for the previous two categories. This includes countries that have only brought minor cases, countries that only have investigations and countries that have neither."

346 *Id.* at 6.

347 *Id.*

348 *Id.* at 9.

349 *Id.* at 15.

350 *Id.* at 53-55.

351 *Id.* at 55.

352 Charles Denby, Jr., "America's Opportunity in Asia," *North America Review*, Vol. 0166, Issue 494, p. 36 (Jan. 1898).

353 Ding Qingfen, "China Still Top Destination for FDI," *ChinaDaily.com* (June 9, 2009), http://www.chinadaily.com.cn/bizchina/2009-06/09/content_8262095.htm.

354 *Id.*

355 Yadong Luo, *Guanxi and Business* 2 (2d ed., World Scientific Publishing Co. 2007).

356 Nicole Y. Hines, *Cultural Due Diligence: The Lost Diligence That Must Be Found by U.S. Corporations Conducting M&A Deals in China to Prevent Foreign Corrupt Practices Act Violations,* 9 Duq. Bus. L.J. 19, 56 (Spring 2007).

357 Luo, *supra* note 355, at 1-2.

358 *Id.* at 227.

359 Hines, *supra* note 356, at 59-60.

360 *Id.* at 59.

361 Patrick M. Norton, *The Foreign Corrupt Practices Act: A Minefield for U.S. Companies in China*, 11/1/04 China L. P. 15 (2004).

362 *Id.*

363 *See* Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934, *In re Faro Technologies, Inc.*, Admin. Proceeding File No. 3-13059 (June 5, 2008) [hereinafter Faro SEC Order].

364 *See* Abdulla K. Al-Qahtani, *Managerial Accounting Journal: Financial Regulation* Vol. 20, No. 3 (Gerald Vinten ed., Emerald 2005).

365 *See, e.g.*, Justice Department Press Release No. 05-282, "DPC (Tianjin) Ltd. Charged With Violating the Foreign Corrupt Practices Act" (May 20, 2005), http://www.justice.gov/criminal/fraud/press/2005/dpcfcpa.pdf.

366 *See, e.g.*, Faro SEC Order, *supra* note 363.

367 *See, e.g.*, Justice Department Press Release No. 07-1028, "Lucent Technologies Inc. Agrees to Pay $1 Million Fine to Resolve FCPA Allegations" (Dec. 21, 2007), http://www.justice.gov/opa/pr/2007/December/07_crm_1028.html (Lucent provided Chinese government officials with trips to the U.S. that typically lasted two weeks and cost US$25,000 to US$55,000 each).

368 Information, *United States v. SSI Int'l Far East, Ltd.*, No. CR 06-398 (D. Or. Oct. 16, 2006).

369 *Id.* at 3.

370 *Id.* at 12-13.

371 *Id.* at 13.

372 *Id.*

373 Justice Department Press Release No. 06-707, "Schnitzer Steel Industries Inc.'s Subsidiary Pleads Guilty to Foreign Bribes and Agrees to Pay a $7.5 Million Criminal Fine" (Oct. 16, 2006), http://www.justice.gov/criminal/pr/press_releases/2006/10/2006_4809_10-16-06schnitzerfraud.pdf.

374 15 U.S.C. §§ 78dd-l(f)(2)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

375 *See, e.g.*, Information at 3, *United States v. AGA Medical Corp.*, No. 08-CR-00172-1 (D. Minn. June 3, 2008).

376 Norton, *supra* note 361.

377 *Id.*

378 Xinhuanet.com, *Hu Jintao Calls on Party Members to Intensify Anti-Corruption Efforts* (June 30, 2006), http://news.xinhuanet.com/english/2006-06/30/content_4770288.htm.

379 *See* Opinion Release 94-01 (May 13, 1994), http://www.usdoj.gov/criminal/fraud/fcpa/opinion/1994/9401.html (stating that although the requesting company's foreign attorney had advised that under the foreign country's law the general director of a state-owned enterprise is not a government official, such opinion was not dispositive and the Department considered the individual a "foreign official" under the FCPA).

380 *See* Norton, *supra* note 361.

381 *Id.*

382 ChinaDaily.com, *CPC to Tighten Crackdown on Corruption* (Jan. 17, 2008), http://www.chinadaily.com.cn/china/2008-01/17/content_6399769.htm.

383 Wang Huazhong, "Whistleblowers Heat Up New Hotline" *ChinaDaily.com* (June 30, 2009), http://www.chinadaily.com.cn/china/2009-06/30/content_8335092.htm.

384 *Id.*

385 According to one Chinese consultant group, of the 500,000 bribery investigations in the past ten years, 64% involved foreign companies. Liu Jie, *Slipping Stature*, ChinaDaily.com (Dec. 10, 2007), http://www.chinadaily.com.cn/bw/2007-12/10/content_6308161.htm.

386 *See* Norton, *supra* note 361.

387 *See* U.S.S.G. § 8B2.1(a)(1) (2005).

388 *See Id.*; Norton, *supra* note 361.

389 Justice Department Press Release No. 08-505, "Faro Technologies Inc. Agrees to Pay $1.1 Million Penalty and Enter Non-Prosecution Agreement for FCPA Violations" (June 5, 2008), http://www.justice.gov/opa/pr/2008/June/08-crm-505.html [hereinafter Faro Press Release].

390 *Id.*

391 *Id.*

392 Lead Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement, *In re Faro Technologies, Inc. Securities Litigation*, No. 6:05-CV-1810, Dkt. Entry 171 at 1 (M.D. Fla. Sept. 26, 2008).

393 Faro SEC Order, *supra* note 363, at 2.

394 *Id.*

395 *Id.*

396 *Id.* at 2-3.

397 *Id.* at 4.

398 *Id.*

399 Faro Press Release, *supra* note 389.

400 *See* Complaint, *SEC v. Lucent Tech., Inc.*, No. 1:07-CV-02301, Dkt. Entry No. 1 (D.D.C. Dec. 21, 2007) (Lucent's wholly owned subsidiary in China spent over US$10 million from 2000-2003 for approximately 1,000 Chinese officials to take approximately 315 trips to the U.S. and elsewhere); Justice Department Press Release No. 05-282, "DPC (Tianjin) Ltd. Charged with Violating the Foreign Corrupt Practices Act" (May 20, 2005), http://www.justice.gov/criminal/fraud/press/2005/dpcfcpa.pdf (the Chinese subsidiary of U.S.-based Diagnostic Products Corporation paid approximately US$1.6 million in bribes in the form of "commissions" to physicians and lab personnel employed by state-owned hospitals in China).

401 Information, *United States v. AGA Medical Corp.*, No. 08-CR-00172-1, Dkt. Entry No. 1 (D. Minn. June 3, 2008) (between 1997 and 2005, AGA channeled over US$460,000 through a Chinese distributor to doctors at government-owned hospitals in return for the doctors directing the hospitals to purchase AGA's products).

402 Faro SEC Order, *supra* note 363, at 2.

403 *Id.* at 3. To be fair, however, certain Faro managers instructed the Sales Director and Country Sales Manager not to make such payments. That the payments were still made, though, illustrates a lack of internal controls and supervision.

404 *Id.*

405 *United States v. AGA Medical Corp.*, No. 08-CR-00172-1 (D. Minn. June 3, 2008) (payments made to doctors at state-owned hospitals in China); *SEC v. Lucent Tech., Inc.*, No. 1:07-CV-02301 (D.D.C. Dec. 21, 2007) (trips provided to approximately 1,000 Chinese government officials, most executives at state-owned or state-controlled companies); Justice Department Press Release No. 07-751, "Paradigm B.V. Agrees to Pay $1 Million Penalty to Resolve Foreign Bribery Issues in Multiple Countries" (Sept. 24, 2007), http://www.justice.gov/criminal/pr/press_releases/2007/09/09-24-07paradigm-agree.pdf (paid employees of Chinese national oil companies or state-owned entities to influence their employers to purchase Paradigm's products); *United States v. SSI Int'l Far East, Ltd.*, No. CR 06-398 (D. Or. Oct. 16, 2006) (over US$200,000 in corrupt payments to managers of government-owned customers in China); *United States. v. DPC (Tianjin) Co. Ltd.*, No. CR 05-482 (C.D. Cal. May 20, 2005) (paid approximately US$1.6 million in bribes to physicians and lab personnel employed by state-owned hospitals in China).

406 Faro SEC Order, *supra* note 363, at 3.

407 *Id.* at 5.

408 *Id.*

409 *Id.*

410 *Id.*

411 *Id.*

412 *Id.* at 5-6. As to recommendations that Faro considered unduly burdensome, it had the right to propose an alternative policy. If the parties could not reach a compromise, the independent consultant's recommendation remained intact.

413 *Id.*

414 Faro Technologies, Inc., Annual Report (Form 10-K), at 24 (Feb. 27, 2009).

415 *Id.*

416 Lead Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement, *In re Faro Techs., Inc. Secs. Litig.*, No. 6:05-CV-1810, Dkt. Entry 171 at 1 (M.D. Fla. Sept. 26, 2008).

417 Compl., *SEC v. Lucent Tech. Inc.*, No. 1:07-CV-02301, Dkt. Entry No. 1 (D.D.C. Dec. 21, 2007) [hereinafter Lucent Compl.]; SEC Litigation Release No. 20414, "SEC Files Settled Action Against Lucent Technologies Inc. in Connection

with Payments of Chinese Officials' Travel and Entertainment Expenses; Company Agrees to Pay $1.5 Million Civil Penalty" (Dec. 21, 2007), http://www.sec.gov/litigation/litreleases/2007/lr20414.htm [hereinafter Lucent Litigation Release]; Justice Department Press Release 07-1028, "Lucent Technologies Inc. Agrees to Pay $1 Million Fine to Resolve FCPA Allegations" (Dec. 21, 2007), http://www.justice.gov/opa/pr/2007/December/07_crm_1028.html [hereinafter Lucent Press Release].

418 15 U.S.C. § 78dd-1(f)(1)(A).

419 Lucent Compl., *supra* note 417, ¶ 2.

420 *Id.* ¶ 1.

421 *Id.*

422 *Id.* ¶ 9.

423 *Id.* ¶ 5.

424 *Id.* ¶ 4.

425 *Id.* ¶ 6.

426 *Id.*

427 *Id.* ¶ 7.

428 *Id.* ¶¶ 7-8.

429 *Id.* ¶ 7.

430 *Id.*

431 *Id.* ¶ 8.

432 *Id.*

433 *Id.*

434 *Id.* ¶¶ 8-9.

435 *Id.* ¶¶ 12-13.

436 *Id.* ¶¶ 9-10.

437 *Id.* ¶ 10.

438 *See* Letter from Mark F. Mendelsohn, Deputy Chief, Fraud Section Criminal Division, Dep't of Justice (Nov. 14, 2007) (setting forth the Lucent Technologies Inc. Non-Prosecution Agreement), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/lucent.pdf.

439 *Id.*

440 Lucent Compl., *supra* note 417, ¶ 13-14.

441 *Id.* ¶ 5.

442 *Id.* ¶¶ 5-6.

443 *Id.* ¶ 2.

444 *Id.*

445 Lucent Litigation Release, *supra* note 417.

446 Lucent Press Release, *supra* note 417.

447 *Id.*

448 *Id.*