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

CLAUDIUS O. SOKENU

In this article, the author explores recent enforcement themes under the Foreign Corrupt Practices Act.

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

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"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. Although there are many ways to analyze the cases that were brought in 2009, what follows is a focus on those themes that are 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 anticorruption 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 U.S. 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, "in-

cluding 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—no other FCPA actions have 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 U.S. 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 $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 Of-

ficer 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 $25,000 penalty,[30] while NSP agreed to pay a $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

It is vitally important to conduct preacquisition due diligence in the context of business combinations. A case this year 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 postacquisition 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. The company, eLandia Interna-

tional, 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. LatinNode and eLandia disclosed the improper payments to the Justice Department. On April 7, 2009, LatinNode pleaded guilty to violating the FCPA.[43]

LatinNode admitted that, between March 2004 and June 2007, it paid or caused to be paid approximately $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.[44] In return, LatinNode secured an interconnection agreement with Hondutel at a reduced rate per minute.[45] 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."[46]

LatinNode also admitted that between July 2005 and April 2006 it made 17 payments to a third party consultant, totaling $1.15 million, with the intention that those funds would be paid to government officials in Yemen.[47] In exchange, as in Honduras, LatinNode received favorable interconnection rates.[48]

As part of its plea agreement, LatinNode agreed to pay $2 million in criminal fines over a three year period.[49] 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.[50]

The plea agreement praised eLandia's efforts as "timely, thorough, and exemplary."[51] The Justice Department noted that eLandia's cooperation helped greatly to resolve the criminal investigation.[52]

In the end, eLandia paid a heavy price for its newly acquired subsidiary's preacquisition illicit payments. In its September 2008 Form 10-Q/A, eLandia reported that the $26.8 million purchase price exceeded the true value of LatinNode's assets by $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."[53]

The LatinNode and eLandia settlement highlights the importance of preacquisition 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.[54]

MORE AGGRESSIVE ANTICORRUPTION 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 $1.6 billion in fines. In December 2009, German authorities imposed a combined €150.6 million (over $220 million) in fines on two subsidiaries of MAN Group, Germany's second largest truck, bus, and diesel engine manufacturer, for overseas bribery.[55]

After a slow start, which saw it criticized for not taking foreign bribery seriously, the UK's anticorruption 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.[56] 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.[57] The company also admitted to breach-

ing United Nations rules for the Iraq Oil-for-Food program in 2001 and 2002.[58] Mabey & Johnson's conviction is the first ever in England for overseas corruption.[59] The fines and reparations totaled approximately £6.6 million or over $10.5 million.[60] The company must also submit its internal compliance program to an SFO-approved independent monitor.[61]

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.[62] It appears that the DePuy investigation is a byproduct of the U.S. government's own industry-wide investigation into the medical devices sector.[63]

The SFO announced that the matter against Robert John Dougall was referred to it by the Justice Department in March 2008.[64] 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.[65] 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.

The SFO issued guidance detailing the procedures it would follow in its approach to investigating overseas corruption. In addition, Richard Alderman, Director of the SFO, wrote a letter addressing specific enforcement issues that were unanswered by the guidance. This guidance, along with 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.

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 multijurisdictional settlements, thus raising the cost of noncompliance.

AN END TO GREASE PAYMENTS

The FCPA's antibribery 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."[66] 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 antibribery 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.[67] 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.[68] There, the OECD labeled grease payments "corrosive" in ef-

fect and encouraged companies to prohibit or discourage their use.[69] 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. U.S. Secretary of State Hillary Clinton issued a video message stating that the United States fully supports the OECD's anticorruption agenda.[70] The bias against facilitation payments may lead to stricter scrutiny on the part of U.S. 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,[71] some past civil lawsuits have resulted in sizeable settlements.[72] And although some courts have issued decisions validating private action FCPA cases,[73] other courts have dismissed them.[74] 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.[75] 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."[76] But, the com-

plaint continues, Siemens' ability to meet expectations was dependent on its bribery activities.[77] The plaintiff argues that, because of Siemens' misconduct, "shareholders have suffered, and will continue to suffer, billions of dollars in damages."[78]

As the complaint notes, 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.[79] 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 $800 million and to submit to monitoring to insure compliance with antibribery laws.[80] Additionally, Siemens paid a fine of approximately $854 million to the Office of the Prosecutor General in Munich, Germany.[81] 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.[82] 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."[83]

In July 2009, an investment fund that owns approximately five percent 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.[84] Panalpina, based in Switzerland, is a provider of intercontinental air and ocean freight forwarding and logistics services and supply chain management solutions.[85] 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.[86] According to the complaint, because of such misrepresentations, plaintiffs purchased shares at artificially inflated prices and have suffered substantial damages.[87]

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.[88] The suit alleges that directors, officers, and attorneys of BG Group illegally bribed top government officials in Kazakhstan, in violation of the FCPA.[89] The complaint further al-

leges that in committing these violations, the defendant directors violated their duties of loyalty, honesty, and care to BG Group.[90] 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.[91]

According to Ms. Grynberg's complaint, $90 million in illegal kickbacks were paid to officials in Kazakhstan to secure oil drilling rights in the Caspian Sea, as well as $40 million in "production sharing fees" given as a bribe.[92] 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.[93] 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.[94] 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 $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.[95]

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").[96] 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."[97] The complaint also alleges that instead of having internal controls to detect and deter such conduct, the companies retaliated against whistleblowers.[98] The complaint alleges further that these illegal activities resulted in substantial losses to the companies.[99]

The FCPA based allegations stem from the extensive bribery of Nige-

rian 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 $402 million after pleading guilty to a five count information charging the company with violating the FCPA's antibribery, books and records, and internal controls provisions.[100] Both Halliburton and KBR agreed to settle a related SEC enforcement action by paying $177 million in disgorgement and prejudgment interest.[101] Thus, the theory goes, Halliburton's noncompliance with the FCPA cost shareholders $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.[102] 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."[103]

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.[104] 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.[105] 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.[106]

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.[107] The case was resolved through a nonprosecution agreement with a term of two years, a penalty of $1 million, disgorgement of over $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.[108] A Chinese subsidiary of UTStarcom allegedly paid nearly $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.[109]

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 $1.5 million civil penalty and a $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.[110] 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."[111]

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.[112] 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.[113]

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 $3 million and alleged to be the proceeds of a scheme to bribe public of-

ficials in Bangladesh and their family members in connection with various public works projects.[114] 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 by the government of Bangladesh to Siemens Aktiengellschaft ("Siemens AG") and China Harbor Engineering Company. 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.[115]

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."[116] 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-U.S. 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.[117]

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,"[118] 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 U.S. soil. If the arrest is made in a foreign country, the United States 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.

NOTES

[1] Senator Barack Obama, Address to the University of Nairobi, (Aug. 28, 2006), http://nairobi.usembassy.gov/root/pdfs/obama-speech.pdf.

[2] Robert Khuzami, Speech by SEC Staff: Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), http://www.sec.gov/news/speech/2009/spch080509rk.htm.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Justice News, Remarks of Attorney General Eric Holder at the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity (Nov. 7, 2009), http://www.justice.gov/ag/speeches/2009/ag-speech-091107.html.

[7] *Id.*

[8] Lanny A. Breuer, Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act, at 2 (Nov. 17, 2009), http://www.justice.gov/criminal/pr/speeches/2009/11/11-17-09aagbreuer-remarks-fcpa.pdf.

[9] *Id.*

[10] *Id.* at 3.

[11] Lanny A. Breuer, Prepared Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practice Forum, at 2 (Nov. 12, 2009), http://www.justice.gov/criminal/pr/speeches/2009/11/11-12-09breuer-pharmaspeech.pdf.
[12] Breuer, *supra* note 8 at 2.
[13] *Id.* at 3.
[14] Government's Response and Objections to Pre-Sentence Report as to Defendant Gerald Green, *United States v. Green*, No. 2:08-CR-00059, Dkt. Entry No. 315 (C.D. Cal. Dec. 14, 2009). Sentencing is scheduled for April 29, 2010.
[15] Breuer, *supra* note 11 at 2.
[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. Note that all references to dollars in this article are to US currency unless otherwise indicated.
[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; *Donoho*e, 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] 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].
[44] 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].
[45] *Id.*
[46] 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].
[47] LatinNode Statement of Offense, *supra* note 44 at 9.
[48] *Id.*
[49] 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].
[50] LatinNode Press Release, *supra* note 46.
[51] LatinNode Plea Agreement, *supra* note 49 at 8.
[52] LatinNode Press Release, *supra* note 46.
[53] eLandia International, Inc., Quarterly Report (Form 10-Q/A), at 11-12 (Sept. 5, 2008).
[54] For an in depth analysis of the due diligence expected by the Justice Department in business combinations, *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).
[55] 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.
[56] 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.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] 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].
[63] 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 $311 million to settle charges that they paid kickbacks to induce U.S. 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 U.S. settlement, DePuy Orthopaedics, Inc. agreed to pay $84.7 million and be monitored by an external attorney. *Id.* Since this settlement of antikickback violations, the four other companies, along with two additional ones, have disclosed FCPA investigations. The author represents certain individuals in connection with the government's investigation of the medical device industry.

[64] DePuy SFO Release, *supra* note 62.

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

[66] 15 U.S.C. 78dd-2(d)(b).

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

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

[69] *Id.* at 4.

[70] U.S. 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.

[71] *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).

[72] *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).
[73] *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).
[74] *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).
[75] 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.].
[76] *Id.* ¶ 2.
[77] *Id.*
[78] *Id.* ¶¶ 2-3.
[79] Siemens Shareholder Compl., *supra* note 75 at 26-27.
[80] *Id.* at 27.
[81] *Id.*
[82] *Id.* at 30.
[83] *Id.* at 30-31.
[84] *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).
[85] *Id.* at 1.
[86] *Id.* at 2.
[87] *Id.* at 3.
[88] 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.].
[89] *Id.*
[90] *Id.*

[91] *See Grynberg v. BP P.L.C.*, 596 F. Supp. 2d 74, 80 (D.D.C. 2009) (granting remaining defendant's motion to dismiss).
[92] Grynberg Compl., *supra* note 88 ¶¶ 25-26.
[93] *Id.* ¶¶ 68-72.
[94] *Id.* ¶ 25.
[95] *Id.*
[96] *See Compl., Policemen & Firemen Retirement Sys. v. Cornelison*, No. 2009-29987 (Tex. Dist. Ct. May 14, 2009) [hereinafter Halliburton Compl.].
[97] *Id.* ¶ 3.
[98] *Id.*
[99] *Id.* ¶ 35.
[100] 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.
[101] *Id.*
[102] Halliburton Compl., *supra* note 96 ¶ 148.
[103] *Id.* ¶¶ 149-51.
[104] Breuer, *supra* note 8 at 4.
[105] 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.
[106] *Id.*
[107] Breuer, *supra* note 8 at 5.
[108] 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.
[109] *Id.*
[110] *Id.*
[111] 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.
[112] Breuer, *supra* note 8 at 2.
[113] *Id.*

[114] 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.

[115] 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.

[116] 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.

[117] 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.

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