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**ENFORCEMENT**

## **2010 FCPA ENFORCEMENT YEAR-END REVIEW**



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**A**s we predicted at the end of 2009 in *Arnold & Porter LLP's FCPA News and Insights*, Foreign Corrupt Practices Act ("FCPA") enforcement in 2010 continued to outpace prior years, setting new records both for the number of prosecutions and enforcement actions filed and for the substantial corporate penalties and individual sentencing resulting from the corporate prosecutions. There appear to be few obstacles in the path of the U.S. Department of Justice ("Justice Department" or "DOJ") and the Securities and Exchange Commission ("SEC" or the "Commission") as they employ new enforcement tactics and novel theories of liability, target individuals and entire business industries, expand the range of ancillary laws used to reach corrupt actors wherever they may be, and continue to extract significant monetary settlements. All signals indicate that the Justice Department and the Commission have been increasing their respective resources to continue to fight foreign corruption on a global scale. Recently enacted legislation, both in the U.S. and abroad, will only serve to enhance the government's efforts.

This article provides our analysis of the principal themes and important developments emerging from FCPA enforcement activity in 2010, with the aim of not

only looking back at the highlights of 2010 but also attempting to foretell what the coming year will bring. Knowledge of potential FCPA pitfalls is a prerequisite to the design, implementation, and oversight of an effective anticorruption compliance program. It is important for directors, officers, employees, business or joint venture partners, compliance officers, heads of internal audit departments, and others conducting business globally to pay close attention to the important lessons coming out of the record number of civil and criminal actions that the Justice Department and the Commission are bringing.

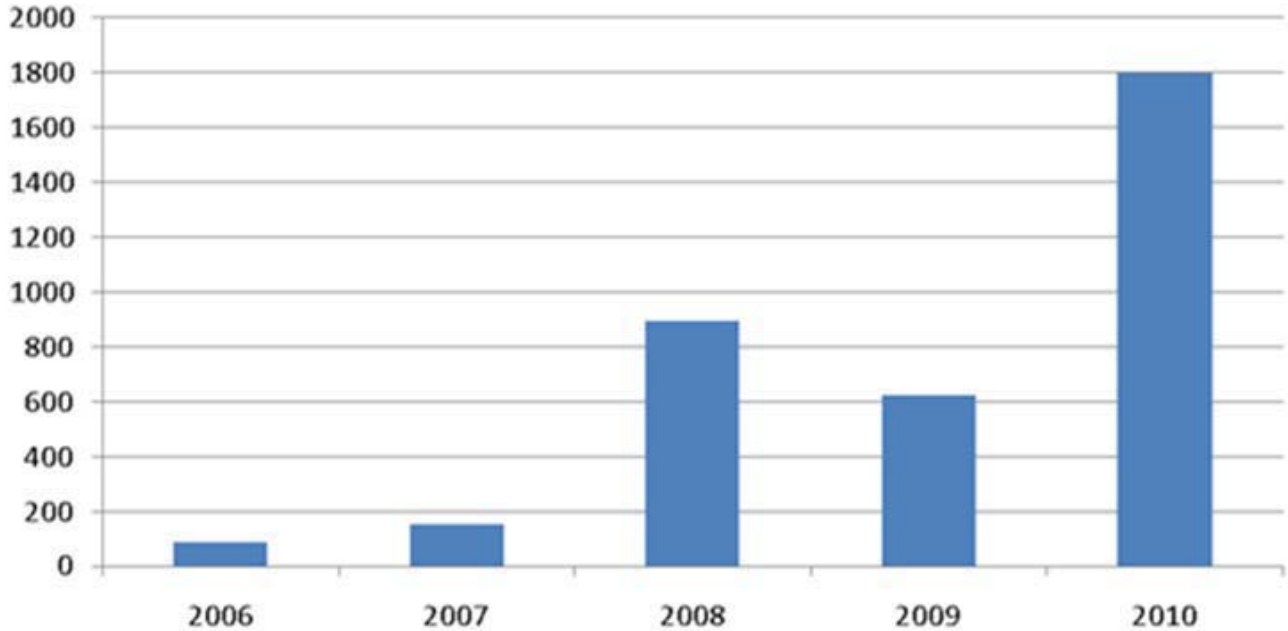
### **KEY THEMES AND IMPORTANT DEVELOPMENTS**

#### **I. Increased Monetary Penalties & Increased Number of Settlements Result in Record-Breaking \$1.8 Billion Year**

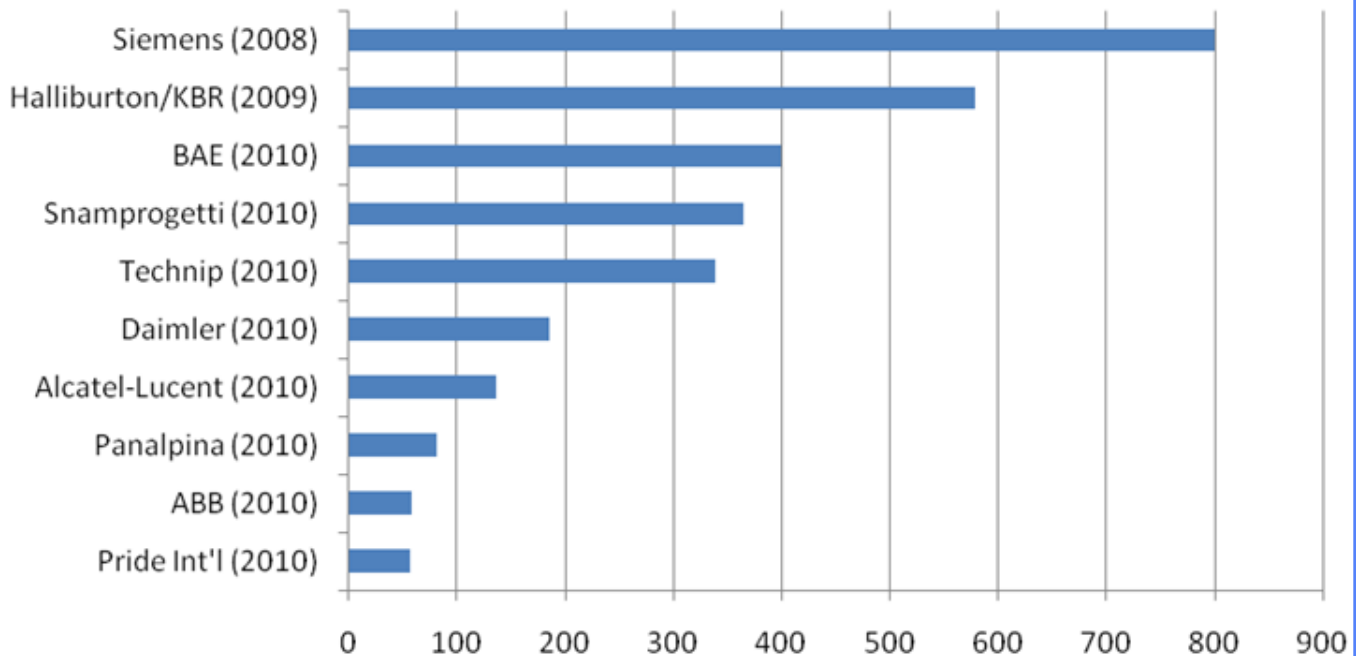
Civil and criminal enforcement under the FCPA in 2010 broke all previous records for criminal fines, civil monetary penalties, and disgorgement. The \$1.8 billion in criminal fines, civil monetary penalties, and disgorgement levied in 2010 is more than the previous two years combined, \$621.9 million in 2009 and \$893.4 million in 2008. The totals for each of 2009 and 2008 were, in turn, greater than the combined FCPA penalties from 1977, when the FCPA was first passed, through 2007.

It appears the primary factor behind 2010's record total is an increase in the average penalty amount, a rather troubling trend. Unlike the previous two years, each of which saw a single enforcement action dwarf the year's remaining penalties (Siemens AG ("Siemens") in 2008 and Halliburton Company ("Halliburton") and its former subsidiary Kellogg Brown & Root, Inc. ("KBR") in 2009), the \$1.8 billion total fines levied in 2010 were spread across a number of defendants. The median penalty in 2010 was approximately \$19 million, compared to medians of approximately \$1.2 mil-

### Total FCPA Penalties (in millions)



### Largest FCPA Penalties (in millions)



lion in 2009 and \$488,000 in 2008.<sup>1</sup> Although the 2008 Siemens and 2009 Halliburton/KBR settlements (\$800 million and \$579 million, respectively) still stand head and shoulders above all others as the highest FCPA monetary settlements, the next eight largest FCPA monetary settlements all come from 2010: BAE Systems plc (“BAE”) (\$400 million), Snamprogetti Netherlands B.V. (“Snamprogetti”) (\$365 million), Technip S.A. (“Technip”) (\$338 million), Daimler AG (“Daimler”) (\$185 million), Alcatel-Lucent S.A. (“Alcatel-Lucent”) (\$137 million), Panalpina World Transport (Holding) Ltd. (“PWT”) (collectively with Panalpina, Inc., “Panalpina”) (\$81.8 million), ABB Ltd. (“ABB”) (\$58.3 million), and Pride International Inc. (“Pride International”) (\$56.1 million).

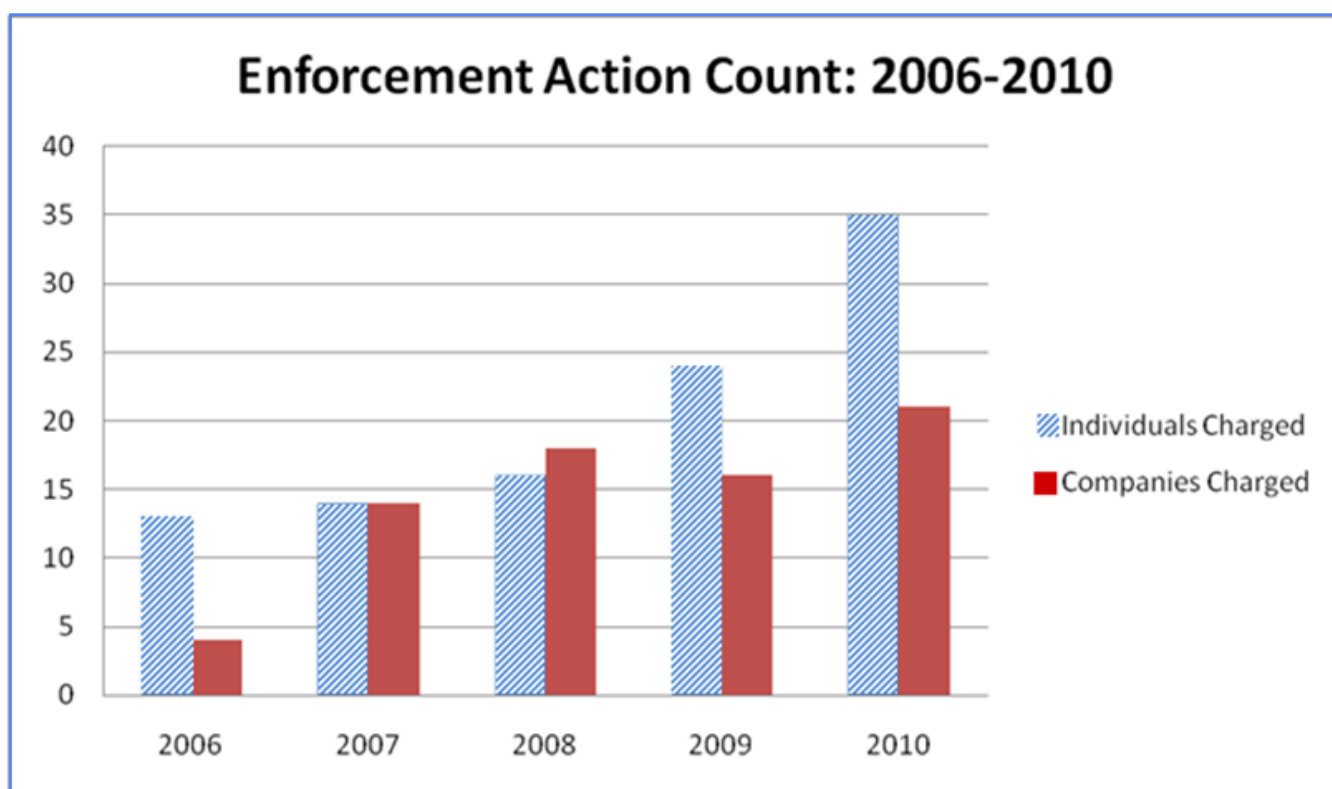
Not only are the median, mean, and total penalty amounts higher in 2010 than in any previous year, so is the number of enforcement actions, lending the statistical measures an increased significance.

There is no indication that this trend will abate in 2011 and beyond. Although the government would have us believe that the number of enforcement actions represents but a tiny fraction of FCPA violators, the greatly increased penalties mark a concerted effort to raise the cost of noncompliance. Public disclosures suggest that the government’s pipeline of cases continues to grow, and one can only conclude that 2011 will likely set its own records.

## II. Continuing Focus on the Prosecution of Individuals

In February 2010, Assistant Attorney General Lanny Breuer, calling “the aggressive prosecution of individuals” a cornerstone of the Justice Department’s FCPA enforcement policy, emphasized that:

The prospect of significant prison sentences for individuals should make clear to every corporate



Between the SEC and the Justice Department, 2010 saw enforcement actions brought against 21 companies and 35 individuals. Each of these is a record number. In comparison, as we discussed in Arnold & Porter’s *FCPA News and Insights* at the time, 2009 saw 40 enforcement actions (16 against companies and 24 against individuals) and 2008 saw 34 (18 against companies and 16 against individuals).

<sup>1</sup> The median, unlike the mean, is immune to large outliers. The mean penalty in 2010 was also significantly higher than in previous years – \$65.1 million, as compared to \$36 million in 2009 and \$49.5 million in 2008.

executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations. As we focus on the prosecution of individuals, we will not shy away from tough prosecutions, and we will not shy away from trials.<sup>2</sup>

<sup>2</sup> Lanny A. Breuer, Assistant Attorney General, Criminal Division, Remarks at the American Bar Association National Institute on White Collar Crime (Feb. 25, 2010), available at <http://www.prnewswire.com/news-releases/remarks-by-lanny-a-breuer-assistant-attorney-general-for-the-criminal-division-at-the-american-bar-association-national-institute-on-white-collar-crime-85375107.html>.

Echoing the same sentiments from his February 2010 speech, Assistant Attorney General Breuer commented in May 2010 that “[c]harging individuals is part of a deliberate enforcement strategy to deter and prevent corrupt corporate conduct before it happens.”<sup>3</sup> Cheryl Scarboro, Chief of the SEC’s FCPA unit, recently warned that the SEC “will vigorously hold accountable those individuals who approve such bribery and who sign false . . . documents to cover up the [FCPA] wrongdoing.”<sup>4</sup>

The 2010 enforcement statistics reflect that the government’s focus on prosecuting individuals has not wavered. In 2010, 35 individuals were named in civil and criminal FCPA actions, including the 22 “SHOT Show” defendants,<sup>5</sup> surpassing 2009’s total of 24 individuals. Assistant Attorney General Breuer has also emphasized that the use of wiretaps was important in the SHOT Show sting operation, and that the Justice Department has added to the ranks of its lawyers who review wiretap applications. Assistant Attorney General Breuer recently warned that the aggressive tactics used in the SHOT Show sting are destined to become commonplace in the Justice Department’s investigations.<sup>6</sup>

Notwithstanding the chest pounding, however, not everyone is convinced that the Justice Department is doing enough to put individuals behind bars for bribery. As part of the Senate’s examination of the Justice Department’s FCPA enforcement program, then Senator Arlen Specter questioned why large fines are levied against corporations in FCPA cases, while few individuals are imprisoned in those same cases.<sup>7</sup> Senator Specter drew particular attention to the fact that no individuals have been charged in the record-setting Siemens enforcement action, even though the Justice Department asserted that members of Siemens’ legal, finance, corporate compliance, and internal audit departments were involved in bribery.<sup>8</sup> Similar enforcement actions

in which no individuals have been charged include Panalpina, BAE, and Daimler, to name but a few. The Justice Department offered no explanation for its failure to prosecute a single individual in these high profile cases where the evidence seems particularly strong other than to note generally that “jurisdictional hurdles, foreign evidence and witnesses, foreign prosecutions, and issues with the relevant statute of limitations” often pose substantial challenges in individual prosecutions.<sup>9</sup> Look for the Justice Department to begin to address this criticism in 2011.

### III. Courts Continue to Impose Lighter Sentences Than Recommended

In 2008, Mark Mendelsohn, then Deputy Chief of the Justice Department’s Fraud Section, noted that the Justice Department’s view on FCPA enforcement is that “to have a credible deterrent effect, people have to go to jail . . . . This is a federal crime. This is not fun and games.”<sup>10</sup> More recently, in May 2010, Assistant Attorney General Breuer promised that the pursuit of tough prison sentences is a key element of the Justice Department’s enforcement strategy.<sup>11</sup>

Thus, 2010 witnessed the longest FCPA prison term ever imposed. *Charles Paul Edward Jumet* was sentenced to serve 87 months in prison for his role in a conspiracy to violate the FCPA.<sup>12</sup> Jumet, a former executive of Ports Engineering Consultants Corporation (“PECC”), allegedly made improper payments to Panamanian government officials and apparently made a false statement to federal agents, the latter earning him additional months behind bars.<sup>13</sup> While Jumet’s sentence is impressive, it likely was driven in large part by

(2009), available at [http://www.arnoldporter.com/resources/documents/CA\\_SiemensPaysRecord\\$800MillionToSettleSystemicAndWidespread\\_032409.pdf](http://www.arnoldporter.com/resources/documents/CA_SiemensPaysRecord$800MillionToSettleSystemicAndWidespread_032409.pdf).

<sup>9</sup> See *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. (Nov. 30, 2010) (statement of Greg Andres, Acting Deputy Assistant Attorney General), available at <http://www.scribd.com/doc/44480586/Andres-Testimony120110>.

<sup>10</sup> Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007, 22 CORPORATE CRIME REPORTER 36(1), Sept. 16, 2008, available at <http://www.corporatecrimereporter.com/mendelsohn091608.htm>.

<sup>11</sup> See Breuer May 2010 Remarks, *supra* note 3 (stating “[a]nd rest assured that we will seek equally tough sentences, including significant jail time if appropriate, to reinforce this message of deterrence”).

<sup>12</sup> See Judgment in a Criminal Case, *United States v. Jumet*, No. 3:09-CR-00397-HEH (E.D. Va. Apr. 22, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/04-22-10jumet-judgment.pdf>. In addition to his prison term, Jumet was ordered to pay a \$15,000 fine and serve three years of supervised release.

<sup>13</sup> See Press Release, Department of Justice, Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government Officials (Apr. 10, 2010), available at <http://www.justice.gov/opa/pr/2010/April/10-crm-442.html>; Criminal Information, *United States v. Jumet*, No. 3:09-CR-00397-HEH (E.D. Va. Nov. 10, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/11-10-09jumet-info.pdf>; Frank Green, *Fluvanna Man Sentenced in Bribery Case Involving Panamanian Officials*, RICHMOND TIMES DISPATCH, Apr. 20, 2010, available at [http://www2.timesdispatch.com/news/2010/apr/20/brib20\\_20100419-221008-ar-157080/](http://www2.timesdispatch.com/news/2010/apr/20/brib20_20100419-221008-ar-157080/) [hereinafter *Jumet Sentencing Article*].

<sup>3</sup> Lanny A. Breuer, Assistant Attorney General, Criminal Division, Remarks at the Compliance Week – 5th Annual Conference for Corporate Financial, Legal, Risk, Audit & Compliance Officers (May 26, 2010), available at <http://www.justice.gov/criminal/pr/speeches-testimony/documents/05-26-10aag-compliance-week-speech.pdf> [hereinafter *Breuer May 2010 Remarks*].

<sup>4</sup> See Press Release, SEC, SEC Charges Former CEO of Innospec for Role in Bribery Scheme (Jan. 24, 2011), available at <http://sec.gov/news/press/2011/2011-21.htm>.

<sup>5</sup> The “SHOT Show” investigation refers to the FBI arrest of 22 individuals in the military and law enforcement industries at the trade show in Las Vegas in January 2010. We reported on this prosecution in detail in the Summer 2010 edition of *FCPA News and Insights*. See Arnold & Porter, *FCPA NEWS AND INSIGHTS* (Summer 2010), available at [http://www.arnoldporter.com/resources/documents/FCPA%20Newsletter%20\(summer\)-090810.pdf](http://www.arnoldporter.com/resources/documents/FCPA%20Newsletter%20(summer)-090810.pdf) [hereinafter *FCPA NEWS AND INSIGHTS* (Summer 2010)].

<sup>6</sup> See Joe Palazzolo, DOJ Strengthening Its Fraud Section, Wiretap Unit, WALL ST. J., Nov. 4, 2010, <http://blogs.wsj.com/corruption-currents/2010/11/04/doj-strengthening-its-fraud-section-wiretap-unit/>.

<sup>7</sup> See *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. (Nov. 30, 2010) (statement of Sen. Specter, Chair).

<sup>8</sup> See *id.*; see also Information, *United States v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367-RJL (D.D.C. Dec. 12, 2008), Dkt. Entry No. 1. For a more detailed discussion of the Siemens case, see Arnold & Porter, *Siemens Pays Record \$800 Million to Settle Systemic and Widespread FCPA Violations*



Jumet's lack of candor rather than the substantive FCPA violation. The court remarked that its "view of the case would be totally different" had Jumet not lied to federal investigators.<sup>14</sup> Notably, by contrast, the same judge later sentenced Jumet's codefendant, *John Warwick*, to 37 months in prison, a 50-month difference.<sup>15</sup>

Notwithstanding the Jumet sentence, it is unclear whether the government actually can secure the tough prison sentences that it has promised or that Senator Specter has demanded. Courts appear to be routinely rejecting the government's recommendation of long prison sentences. The frequent disparity between the views of prosecutors and judges is reflected in the table below, which illustrates the recommended sentences and the actual sentences imposed in several FCPA cases:

DEFENDANT	CASE	RECOMMENDED SENTENCE	SENTENCE IMPOSED
Bobby Jay Elkin	<i>United States v. Elkin</i> , No. 10-CR-00015 (W.D. Va.)	38 months	36 months probation
Nam Nguyen	<i>United States v. Nguyen</i> , No. 08-CR-00522 (E.D. Pa.)	168-210 months	16 months + 24 months supervised release
An Nguyen	<i>United States v. Nguyen</i> , No. 08-CR-00522 (E.D. Pa.)	87-108 months	9 months + 36 months supervised release
Kim Nguyen	<i>United States v. Nguyen</i> , No. 08-CR-00522 (E.D. Pa.)	"significant sentence of incarceration below the advisory guidelines range of 70-87 months"	24 months probation
Joseph Lukas	<i>United States v. Nguyen</i> , No. 08-CR-00522 (E.D. Pa.)	"sentence of incarceration below the advisory guidelines range of 37-46 months"	24 months probation
Gerald and Patricia Green	<i>United States v. Green</i> , No. 08-CR-00059 (C.D. Cal.)	120 months	6 months + 36 months supervised release
Frederic Bourke	<i>United States v. Bourke</i> , No. 08-CR-00518 (S.D.N.Y.)	120 months	12 months and one day + 36 months supervised release

What accounts for this stark disparity? Both the extent of each individual defendant's involvement in the bribery schemes in question and the individual's coop-

eration with the government likely played significant roles. In some cases, courts questioned the government's view of the culpability of the defendant. Whatever the reasons, this much is clear: the Justice Department's views are not being blindly accepted.

For example, prosecutors sought the maximum sentence of 10 years imprisonment for *Frederic Bourke*, who was convicted in July 2009 of conspiracy to violate the FCPA and making false statements to the FBI.<sup>16</sup> Bourke, however, was ultimately sentenced to just a year and a day in prison, to be followed by three years supervised release. He also was fined \$1 million. Tellingly, Judge Shira Scheindlin is reported to have said "[a]fter years of supervising this case, it's still not entirely clear to me whether Mr. Bourke is a victim or a crook or a little of both."<sup>17</sup>

Judge Scheindlin's sentiments were echoed by the court in the case of *Bobby J. Elkin*, a former executive at Dimon Incorporated ("Dimon"), who became involved in an alleged conspiracy to bribe government officials in Kyrgyzstan. The government recommended a 38-month prison sentence, although Elkin could have been sentenced to up to 60 months in prison and fined \$250,000.<sup>18</sup> Instead, on October 21, 2010, he was sentenced to 36 months probation and ordered to pay a \$5,000 fine.<sup>19</sup> The court noted that "Elkin faced a choice of 'either you [make the improper payments] or lose your job.'"<sup>20</sup> On the issue of Elkin's culpability, the court curiously noted that the fact that the CIA's routine bribery of Afghan warlords is not considered illegal "sort of goes to the morality of the situation."<sup>21</sup> These factors, along with Elkin's cooperation with the government, likely influenced the court's decision to depart from the government's recommendation, spare Elkin from prison, and even waive the usual travel restrictions of probation so that Elkin could return to Kyrgyzstan.

The individual prosecutions in the Nexus Technologies Inc. ("Nexus") investigation provide other telling examples. On September 15, 2010, *Nam Nguyen*, *An Nguyen*, *Kim Nguyen*, and *Joseph Lukas* were sentenced for their involvement in a conspiracy to bribe Vietnamese government officials in exchange for technology and equipment contracts.<sup>22</sup> As reflected in the

<sup>16</sup> See David Glovin, *Bourke Convicted of Bribery in Azerbaijan Oil Deal*, BLOOMBERG (July 10, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aseVHkjVRMQ>; David Glovin, *Bourke Gets One Year in Prison in Azerbaijan Bribery Case*, BLOOMBERG (Nov. 11, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aFKqNJY2Vgt8&pos=7> [hereinafter *Bourke Sentencing Article*]; Second Superseding Indictment, *United States v. Bourke*, No. 05-cr-00518 (S.D.N.Y. May 26, 2009), Dkt. Entry No. 203.

<sup>17</sup> See *Bourke Sentencing Article*, *supra* note 16.

<sup>18</sup> See Plea Agreement, *United States v. Elkin*, No. 10-CR-00015 (W.D. Va. Aug. 3, 2010), Dkt. Entry No. 12.

<sup>19</sup> See Judgment in a Criminal Case, *United States v. Elkin*, No. 10-CR-00015 (W.D. Va. Oct. 21, 2010), Dkt. Entry No. 26.

<sup>20</sup> Mike Gangloff, *Judge Gives Tobacco Exec Probation, Fine for Bribery*, ROANOKE TIMES, Oct. 22, 2010, available at <http://www.roanoke.com/news/roanoke/wb/264721>.

<sup>21</sup> *Id.*

<sup>22</sup> See Judgment, *United States v. Nexus Tech., Inc.*, No. 08-0522 (E.D. Pa. Sept. 16, 2010), Dkt. Entry No. 198; see also Press Release, Department of Justice, Former Nexus Technologies Inc. Employees and Partner Sentenced for Roles in Foreign Bribery Scheme Involving Vietnamese Officials (Sept.

<sup>14</sup> See *Jumet Sentencing Article*, *supra* note 13.

<sup>15</sup> See Press Release, Department of Justice, Virginia Resident Sentenced to 37 Months in Prison for Bribing Foreign Government Officials (June 10, 2010), available at <http://www.justice.gov/opa/pr/2010/June/10-crm-750.html>. Warwick received two years of supervised release, one year less than Jumet.

table above, the government recommended substantial prison sentences. In the end, the court imposed a sentence of 16 months for Nam Nguyen, although the government recommended that he be sentenced to 168-210 months imprisonment. The government recommended 87-108 months imprisonment for An Nguyen, but he was sentenced to just nine months. Kim Nguyen and Lukas were both placed on probation.<sup>23</sup>

The sentencing phase of the high-profile case of *Gerald and Patricia Green*, film producers who were convicted of conspiracy to violate and violation of the FCPA with respect to bribes paid to Thai government officials to secure contracts for a film festival in Bangkok, saw both sides filing numerous papers discussing, among other things, FCPA sentencing trends and the application of the federal sentencing guidelines, given the Greens' role in the bribery scheme. In the end, the court rejected the Justice Department's recommendation of a ten-year prison sentence for each defendant and instead sentenced each defendant to six months in prison and three years of supervised release.<sup>24</sup> Here, the health and age of Gerald Green likely played a role in the court's sentencing decision, but the trend towards light prison sentences in FCPA cases may have also affected the court's decision. The government plans to appeal.<sup>25</sup>

Ultimately, the disparity between the government's sentencing recommendations and the actual sentences imposed may reflect judicial ambivalence about the government's view of the underlying conduct. As the government continues its trend of prosecuting individuals, we will have to wait to see if courts continue to impose substantially lighter sentences than those recommended by the government and the reasons for such disparity.

8, 2010), available at <http://www.justice.gov/opa/pr/2010/September/10-crm-1032.html>. For discussion of the Nexus matter, see FCPA NEWS AND INSIGHTS (Summer 2010), *supra* note 5.

<sup>23</sup> See Judgment as to Nam Nguyen, *United States v. Nguyen*, No. 08-522 (E.D. Pa. Sept. 16, 2010), Dkt. Entry No. 208; Government's Sentencing Mem., *United States v. Nguyen*, No. 08-522 (E.D. Pa. Sept. 8, 2010), Dkt. Entry No. 193; Judgment as to An Nguyen, *United States v. Nguyen*, No. 08-522 (E.D. Pa. Sept. 16, 2010), Dkt. Entry No. 200; Judgment as to Kim Nguyen, *United States v. Nguyen*, No. 08-522 (E.D. Pa. Sept. 16, 2010), Dkt. Entry No. 202; Judgment as to Joseph Lukas, *United States v. Lukas*, No. 08-522 (E.D. Pa. Sept. 16, 2010), Dkt. Entry No. 205; Government's Sentencing Mem., *United States v. Nguyen*, No. 08-522 (E.D. Pa. Sept. 8, 2010), Dkt. Entry No. 194; Government's Sentencing Mem., *United States v. Lukas*, No. 08-522 (E.D. Pa. Sept. 8, 2010), Dkt. Entry No. 195.

<sup>24</sup> See Judgment and Probation/Commitment Order at 1, *United States v. Green*, No. 08-CR-00059 (C.D. Cal. Sept. 10, 2010), Dkt. Entry No. 387 (Patricia Green); Judgment and Probation/Commitment Order at 1, *United States v. Green*, No. 08-CR-00059 (C.D. Cal. Sept. 10, 2010), Dkt. Entry No. 388 (Gerald Green); Government's Mem. in Resp. to Defs.' Suppl. Sentencing Information at 1, *United States v. Green*, No. 08-CR-00059 (C.D. Cal. Sept. 11, 2010), Dkt. Entry No. 380.

<sup>25</sup> See Notice of Appeal, *United States v. Green*, No. 08-CR-00059 (C.D. Cal. Oct. 8, 2010), Dkt. Entry No. 389; Notice of Appeal, *United States v. Green*, No. 08-CR-00059 (C.D. Cal. Oct. 8, 2010), Dkt. Entry No. 390.

## IV. The Increasingly Global Nature of Bribery Investigations

Not too long ago, companies facing allegations of corruption merely needed to worry about resolving those allegations with the Justice Department and the Commission. Over the last several years, the trend has been that other countries are increasingly looking to enforce their own anticorruption laws, even in investigations where the Justice Department and the Commission already have instituted enforcement actions. Interest from law enforcement agencies from other countries significantly increases the complexities surrounding when, and to whom, to self-report, how and when to conduct internal investigations, what to do with the results of the internal investigation, and how to structure global settlements with multiple countries with conflicting legal jurisprudence. These and other related strategic decisions plague any major FCPA investigation. Language in recent Justice Department settlements appears to mandate that settling companies cooperate with other countries as a condition of settlement.<sup>26</sup> Increased interest from other countries seeking a piece of the action and the insistence by the Justice Department on cooperation as a condition of settlement have ensured an increase in the number of follow-on actions from other countries, a trend that is likely to continue.

One need look no further than 2010's top settlements to find an example of this trend. In the Panalpina-inspired set of cases, Shell, despite having paid over \$48 million in penalties and disgorgement to the SEC and the Justice Department, agreed to pay another \$10 million to the Nigerian government to settle bribery allegations based largely on the same facts.<sup>27</sup> Panalpina itself is under investigation in Nigeria for bribery after paying \$82 million in civil and criminal penalties to settle bribery allegations in the U.S.<sup>28</sup>

In the Alcatel-Lucent case, following the company's \$137 million settlement with the Justice Department and the Commission,<sup>29</sup> officials in Malaysia and Hondu-

<sup>26</sup> See, e.g., Deferred Prosecution Agreement ¶ 5, *United States v. Alcatel-Lucent*, S.A., No. 10-20907 (S.D. Fla. Dec. 20, 2010) (requiring that Alcatel-Lucent, S.A. "cooperate fully with such other domestic or foreign law enforcement authorities and agencies, as well as Multilateral Development Banks, in any investigation of Alcatel-Lucent" or other related parties) [hereinafter Alcatel-Lucent DPA]; Plea Agreement ¶ 9, *United States v. Panalpina*, No. 10-00765 (S.D. Tex. Nov. 4, 2010) (requiring that Panalpina cooperate with "any other federal, state, local, or foreign law enforcement agency"); Deferred Prosecution Agreement ¶ 6, *United States v. Shell Nigeria Exploration & Prod. Co.*, No. 10-00767 (S.D. Tex. Nov. 4, 2010) (requiring that Shell "cooperate fully with other domestic or foreign law enforcement authorities and agencies . . . in any investigation of SNEPCO" or other related parties).

<sup>27</sup> See Elisha Bala-Gbogbo, *Shell Pays \$10 Million Fine to Nigerian Government*, BLOOMBERG, Dec. 22, 2010, <http://www.bloomberg.com/news/2010-12-22/shell-pays-10-million-fine-to-nigerian-government-update1.html>.

<sup>28</sup> See Joe Palazzolo, 2011: The Year of the FCPA Piggyback?, WALL ST. J., Dec. 29, 2010, <http://blogs.wsj.com/corruption-currents/2010/12/29/2011-the-year-of-the-fcpa-piggyback/?KEYWORDS=2011+the+year+of+the+fcpa+piggyback>.

<sup>29</sup> See Press Release, Department of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay \$92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), available at <http://www.justice.gov/opa/pr/2010/>

ras, two countries mentioned in the U.S. settlement, announced that they were investigating Alcatel-Lucent's conduct in their respective countries. Additionally, in January 2010, Alcatel-Lucent agreed to pay \$10 million to settle a case brought against it by the government of Costa Rica for alleged bribery of Costa Rican officials.<sup>30</sup>

Additionally, both BAE and Innospec, while settling with the Justice Department and the Commission, also settled with the United Kingdom's Serious Fraud Office ("SFO"). After first announcing a joint settlement with the U.K. and U.S. in February 2010, BAE settled with the U.S. for \$400 million in March 2010.<sup>31</sup> After running into questions by a U.K. judge who initially objected to the settlement (more on this later), the SFO eventually reached a deal with BAE where BAE agreed to pay up to £30 million (\$48.3 million) in connection with its allegedly improper recording of payments to a Tanzanian agent in order to obtain a radar system contract in that country.<sup>32</sup>

Innospec was fined £8.5 million (\$12.7 million) by the SFO for conduct involving bribes to Indonesian government officials for the continued use of banned fuel additives,<sup>33</sup> and it also agreed to pay the Justice Department, the Commission, and the Office of Foreign Assets Control ("OFAC") \$27.5 million in fines and disgorgement for the Indonesian bribes, for paying kickbacks to Iraqi government officials under the UN's Oil for Food Program ("OFFP"), and for violating the U.S. embargo against Cuba.<sup>34</sup> The Innospec settlement in particular

December/10-crm-1481.html [hereinafter Alcatel-Lucent Press Release].

<sup>30</sup> *Id.*

<sup>31</sup> See Lindsay Fortado, *BAE Faces Unlimited Fine from U.K. Judge in Tanzania Radar Accounting Case*, BLOOMBERG, Dec. 20, 2010, <http://www.bloomberg.com/news/2010-12-20/bae-systems-faces-unlimited-fine-for-u-k-accounting-charge.html>.

<sup>32</sup> See Sentencing Remarks of Justice Bean, *R v. BAE Sys. plc*, Case No. S2010565 (Crown Ct. Southwark Dec. 21, 2010), available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/r-v-bae-sentencing-remarks.pdf>.

<sup>33</sup> See Matt Williams & Tim Moynihan, *British Chemical Firm Innospec Fined for Indonesia Bribes*, THE INDEPENDENT, Mar. 26, 2010, available at <http://www.independent.co.uk/news/world/asia/british-chemical-firm-innospec-fined-for-indonesia-bribes-1928508.html>.

<sup>34</sup> In a related development, this summer, David Turner, a U.K. citizen and Innospec executive, along with Ousama Naaman, an Innospec agent and dual citizen of Canada and Lebanon, resolved individual civil and criminal matters related to the same conduct. On August 5, 2010, Turner and Naaman settled civil charges with the SEC based on violations of the FCPA. See SEC Files Settled Charges Against David P. Turner and Ousama M. Naaman for Engaging in Bribery, SEC Litigation Release No. 21615 (Aug. 5, 2010), available at <http://www.sec.gov/litigation/litreleases/2010/lr21615.htm> [hereinafter Turner and Naaman Litigation Release]. Turner agreed to disgorge \$40,000 to the SEC. See Consent of Def. David P. Turner ¶ 2, SEC v. Turner, No. 1:10-cv-01309 (D.D.C. May 11, 2010), Dkt. Entry No. 5. He was not required to pay any civil penalty, likely because of what the SEC described as his "extensive and ongoing cooperation in the investigation." See Turner and Naaman Litigation Release. Naaman agreed to disgorge \$810,076 plus prejudgment interest of \$67,030, and pay a civil penalty of \$438,038. See Consent of Def. Ousama M. Naaman ¶¶ 2-3, SEC v. Naaman, No. 1:10-cv-01309 (D.D.C. June 25, 2010), Dkt. Entry No. 3. Naaman also pleaded guilty to criminal charges, including conspiracy to violate the FCPA and violation of the FCPA, for which he faces up to ten years

reflects the difficulty in crafting global settlements across countries with differing jurisprudential approaches to settlements. As part of its efforts to reach a global settlement, Innospec had reached an agreement with the Justice Department and the SFO.<sup>35</sup> The U.S. court approved the agreed-upon settlement, but the U.K. court, which was less familiar with such arrangements, balked. While the U.K. court ultimately approved the SFO portion of the deal, Lord Justice Thomas, who presided over the sentencing, stated that the amount of the penalty was "wholly inadequate" to fit the conduct.<sup>36</sup> Another judge, Geoffrey Rivlin, sharply criticized the agreement on the basis that the SFO's decision to enter into the settlement in the first place was "deeply wrong."<sup>37</sup> While voluntarily disclosing evidence of potential corruption to the Justice Department and the Commission, conducting an internal investigation, and taking remedial actions where appropriate have historically led to reduced penalties in the U.S., the concerns expressed by the Innospec court in the U.K. will likely make it more difficult, or at least less certain, that global settlements can be achieved, certainly where U.K. companies are involved.

The Bonny Island scandal in Nigeria provides another example of multinational enforcement. From 1995 through 2004, joint venture TSKJ allegedly paid over \$180 million in bribes to Nigerian government officials in order to gain a \$6 billion contract to build a facility on Nigeria's Bonny Island. The joint venture consisted of four companies from four different countries—Technip (a French company); Snamprogetti (a Dutch company); American-based KBR (later acquired by Halliburton) and JGC Corporation (a Japanese company). Three of the four companies have announced record-setting settlements with the Justice Department and the SEC, totaling over \$1.28 billion.<sup>38</sup>

Following the U.S. settlements, Nigeria announced in December 2010 that it was issuing its own indictments

in prison. See Press Release, Department of Justice, Innospec Agent Pleads Guilty to Bribing Iraqi Officials and Paying Kickbacks Under the Oil for Food Program (June 25, 2010), available at <http://www.justice.gov/opa/pr/2010/June/10-crm-747.html>.

<sup>35</sup> See *infra* section VII.D "Continuing Oil For Food Program Docket."

<sup>36</sup> Sentencing Remarks of Lord Justice Thomas ¶ 40, *Regina v. Innospec Ltd.* (Crown Ct. Southwark Mar. 26, 2010), available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf>.

<sup>37</sup> See also *Innospec Admits Corruption in U.K. First*, THE TIMES, Mar. 18, 2010, <http://business.timesonline.co.uk/tol/business/law/article7067774.ece> (Judge Geoffrey Rivlin QC, the Honorary Recorder of Westminster, recusing himself and calling the agreement "‘deeply wrong’ given the ‘massive criminality’").

<sup>38</sup> Press Release, Department of Justice, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (July 7, 2010), available at <http://www.justice.gov/opa/pr/2010/July/10-crm-780.html>; Press Release, Department of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (June 28, 2010), available at <http://www.justice.gov/opa/pr/2010/June/10-crm-751.html>; Press Release, Department of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine (Feb. 11, 2009), available at <http://www.justice.gov/opa/pr/2009/February/09-crm-112.html>.



for those it alleged were involved in the bribery scheme, including former Halliburton CEO and former U.S. Vice President, *Dick Cheney*.<sup>39</sup> The Nigerian government agreed to drop the charges against Vice President Cheney after Halliburton agreed to pay \$35 million on behalf of KBR, Halliburton, related companies, Vice President Cheney, and other individuals.<sup>40</sup> In a related settlement, Nigeria received another \$30 million in criminal penalties from Snamprogetti.<sup>41</sup> Technip and JGC are still in talks with Nigerian authorities.<sup>42</sup>

A recent case illustrates that multiple prosecutions will likely survive a challenge in U.S. courts. In *United States v. Jeong*, 624 F.3d 706 (5th Cir. 2010), the defendant, *Gi-Hwan Jeong*, was a South Korean national convicted in 2008 in South Korea for bribing U.S. officials there in order to secure a telecommunications contract for his company.<sup>43</sup> Later that same year, the U.S. government arrested Jeong for the same conduct. After losing a motion to dismiss the U.S. charges and pleading guilty, Jeong appealed his conviction, relying on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Jeong argued that the Convention prohibits a signatory from prosecuting a foreign national whose alleged crimes occurred overseas, and that Article 4.3 of the Convention prohibits multiple prosecutions of the same individual for the same offense. The U.S. court rejected both arguments and Jeong was sentenced to 60 months incarceration and a \$50,000 fine, in addition to the 58-day sentence and fines imposed by the South Korean government.

As an increasing number of countries commit resources to fighting global corruption (and no doubt take an increasing interest in the corresponding high-value penalties and settlements), companies facing enforcement action in the U.S. will need to determine whether to include other countries in settlement negotiations in an effort to achieve a global settlement. While such settlements offer closure, they can be incredibly tricky to negotiate and even trickier to get approved through courts that are not familiar with U.S.-style settlement.

<sup>39</sup> See Elisha Bala-Gbogbo, *Nigeria to Charge Dick Cheney in Pipeline Bribery Case*, BLOOMBERG, Dec. 1, 2010, <http://www.bloomberg.com/news/2010-12-01/nigeria-to-file-charges-against-former-u-s-vice-president-over-bribery.html>; see also Jon Gambrell, *Nigeria Charges Dick Cheney in Halliburton Bribery Case*, MSNBC.COM, Dec. 7, 2010, [http://www.msnbc.msn.com/id/40555171/ns/world\\_news-africa](http://www.msnbc.msn.com/id/40555171/ns/world_news-africa).

<sup>40</sup> See *Halliburton Settles Nigeria Bribery Claims for \$35 Million*, CNN.COM, Dec. 21, 2010, [http://articles.cnn.com/2010-12-21/world/nigeria.halliburton\\_1\\_tskj-nigerian-officials-financial-crimes-commission?\\_s=PM:WORLD](http://articles.cnn.com/2010-12-21/world/nigeria.halliburton_1_tskj-nigerian-officials-financial-crimes-commission?_s=PM:WORLD).

<sup>41</sup> See Samuel Rubinfeld, *Eni Unit Reaches \$32.5 Million Settlement With Nigeria*, WALL ST. J., Dec. 20, 2010, <http://blogs.wsj.com/corruption-currents/2010/12/20/eni-unit-reaches-325-million-settlement-with-nigeria/>.

<sup>42</sup> See Elisha Bala-Gbogbo, *Nigeria in Talks with Technip, Eni, and JGC Over Bribe Case*, BLOOMBERG, Dec. 7, 2010, <http://www.bloomberg.com/news/2010-12-07/nigeria-in-negotiations-with-technip-eni-and-jgc-to-settle-bribery-case.html>; Elisha Bala-Gbogbo, *Shell Pays \$10 Million Fine to Nigerian Government*, BLOOMBERG, Dec. 22, 2010, <http://www.bloomberg.com/news/2010-12-22/shell-pays-10-million-fine-to-nigerian-government-update1-.html?cmpid=msnmoney>.

<sup>43</sup> See *Jeong*, 624 F.3d at 707.

## V. Prosecution of Foreign Government Officials

In 2010, prosecutors increasingly turned to ancillary statutes to reach bribery collaborators who could not otherwise be prosecuted under the FCPA. Two enforcement actions are illustrative.

*Robert Antoine*, the former director of international affairs for state-owned national telecommunications agency Telecommunications D'Haiti ("Haiti Teleco"), was indicted as part of an investigation of corrupt payments to officials of Haiti Teleco. Allegedly, Antoine, who had primary responsibility for the relationships between U.S. telecommunications companies and Haiti Teleco, used his position to accept bribes from three U.S. telecommunications companies. Even though he could not be prosecuted under the FCPA for receiving bribes, the government was nevertheless able to prosecute Antoine, a part-time Florida resident, under the anti-money laundering statutes for accepting bribes through intermediary companies in the U.S. that he controlled.<sup>44</sup> Antoine was sentenced to 48 months in prison and three years of supervised release,<sup>45</sup> ordered to pay \$1,852,209 in restitution, and ordered to forfeit \$1,580,771.<sup>46</sup>

In another prosecution related to the Gerald and Patricia Green film festival bribery case, discussed above, the Justice Department is seeking to hold a Thai official and her daughter, a Thai citizen, accountable for their roles in accepting payments from the Greens.<sup>47</sup> As the recipients of alleged bribes, *Juthamas Siriwan*, the ex-governor of the Tourism Authority of Thailand, and her daughter, *Jittisopa Siriwan*, were charged, not with FCPA violations, but with conspiracy as well as substantive violations of U.S. laws prohibiting the transport of funds outside the U.S. to promote illegal activity, in this case, FCPA violations. If convicted, *Juthamas* and *Jittisopa Siriwan* each face up to 20 years in prison.

Both of these cases evince the government's stated intent to continue to look beyond the four corners of the FCPA when making charging decisions against participants in a bribery scheme, wherever they might be.

## VI. Challenges to the Government's Definition of "Foreign Official"

As the government steps up efforts to prosecute more individuals under the FCPA, individuals are beginning to mount vigorous defenses to the Justice Department's actions—a trend that is expected to continue in 2011. One such defense that has not yet been successful, but continues to be raised, is a challenge to the govern-

<sup>44</sup> See Indictment, *United States v. Esquenazi*, No. 1:09-21010-MCG (S.D. Fla. Dec. 4, 2009), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/esquenazi-indict.pdf> [hereinafter *Esquenazi Indictment*].

<sup>45</sup> See Judgment in a Criminal Case, *United States v. Antoine*, No. 1:09-21010-CR-Martinez-3 (S.D. Fla. June 9, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/06-01-10antoine-judgment.pdf>.

<sup>46</sup> See Press Release, Department of Justice, Former Haitian Government Official Sentenced to Prison for His Role in Money Laundering Conspiracy Related to Foreign Bribery Scheme (June 10, 2010), available at <http://www.justice.gov/opa/pr/2010/June/10-crm-639.html>.

<sup>47</sup> See Indictment, *United States v. Siriwan*, No. 09-CR-00081 (C.D. Cal. Jan. 28, 2009), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/01-28-09siriwan-indictment.pdf>.



ment's definition of "foreign official" under the FCPA. In 2010, *Joel Esquenazi*, the former president of an unnamed Miami-based telecommunications company who was indicted in December 2009 for his role in a scheme to pay bribes to foreign officials of Haiti Teleco,<sup>48</sup> challenged the Justice Department's prosecution on these grounds.<sup>49</sup>

Esquenazi filed a motion to dismiss the indictment against him, arguing that the government's indictment failed to state a criminal offense when it alleged that the recipients of the improper payments were "foreign officials" because they were employees of an entity "owned" by the Republic of Haiti. Esquenazi argued that mere control or ownership of an entity does not make that entity's employees "foreign officials."<sup>50</sup> In the alternative, Esquenazi argued that the indictment should be dismissed on the grounds that "the FCPA's definition of 'foreign official,' which includes employees of any foreign government 'department, agency or instrumentality,' is unconstitutionally vague."<sup>51</sup>

In its response, the Justice Department asserted that Esquenazi was prematurely asking the court to rule on the sufficiency of the government's evidence that Haiti

Teleco was an instrumentality of the Republic of Haiti.<sup>52</sup> However, the Justice Department also stated that Esquenazi's "tortured formulation" of the definition of "government official" found no support and argued that the FCPA's definition was not unconstitutionally vague.<sup>53</sup>

In a short opinion that provided only cursory analysis of the issues, the court agreed with the Justice Department and denied Esquenazi's motion to dismiss.<sup>54</sup> The court found that the government "sufficiently alleged that [the individuals] were foreign officials by alleging that these individuals were directors in the state-owned Haiti Teleco" and that "Haiti Teleco could be an instrumentality of the Haitian government."<sup>55</sup> In addition, the court stated that Esquenazi had not met the standard of showing that the definition of "foreign official" in the FCPA is unconstitutionally vague.<sup>56</sup>

Esquenazi is not the first defendant in an FCPA case to lose a challenge to the Justice Department's interpretation of the definition of a "foreign official." In 2009, defendants in the Nexus investigation similarly moved to dismiss on the grounds that the FCPA's definition of "foreign official" is unconstitutionally vague and that the indictment against them did not allege that the entities in question performed government functions that would make their employees "foreign officials."<sup>57</sup> The judge in the Nexus investigation denied the defendants' motion to dismiss without analyzing this issue.<sup>58</sup> Although the courts cursorily denied these motions to dismiss, the motions are significant as attempts to rein in the Justice Department's expansive interpretation of the FCPA. Enforcement of the FCPA has come under heightened scrutiny, and as the government continues its pursuit of individuals, we expect to see more of these challenges to the interpretation of the FCPA in the coming years.<sup>59</sup>

<sup>48</sup> See Press Release, Department of Justice, Two Florida Executives, One Florida Intermediary and Two Former Haitian Government Officials Indicted for Their Alleged Participation in Foreign Bribery Scheme (Dec. 7, 2009), available at <http://www.justice.gov/opa/pr/2009/December/09-crm-1307.html> [hereinafter Haiti Teleco Press Release].

<sup>49</sup> While Esquenazi is challenging his prosecution, one of his co-defendants and several other individuals associated with this case have already pleaded guilty. On March 12, 2010, Robert Antoine, Esquenazi's co-defendant and a former director of international relations for telecommunications at Haiti Teleco, pleaded guilty to conspiracy to commit money laundering. See Press Release, Department of Justice, Former Haitian Government Official Pleads Guilty to Conspiracy to Commit Money Laundering in Foreign Bribery Scheme (Mar. 12, 2010), available at <http://www.justice.gov/opa/pr/2010/March/10-crm-260.html>. In addition, Antonio Perez, who, at times, was the controller of the unnamed telecommunications company at which Esquenazi worked, Juan Diaz, the president of J.D. Locator, and Jean Fourcand, the president and director of Fourcand Enterprises Inc., were all indicted separately from Esquenazi and have all pleaded guilty to various charges, including FCPA violations and money laundering. See *id.*; see also Press Release, Department of Justice, Florida Businessman Sentenced to 57 Months in Prison for Role in Foreign Bribery Scheme (July 30, 2010), available at <http://www.justice.gov/opa/pr/2010/July/10-crm-883.html>; Press Release, Department of Justice, Florida Businessman Pleads Guilty to Money Laundering in Foreign Bribery Scheme (Feb. 19, 2010), available at <http://www.justice.gov/opa/pr/2010/February/10-crm-167.html>. Carlos Rodriguez, Jean Rene Duperval, and Marguerite Grandison, who were indicted with Esquenazi, are awaiting trial. See Esquenazi Indictment, *supra* note 44.

<sup>50</sup> See Def. Joel Esquenazi's (Corrected & Am.) Mot. to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness, *United States v. Esquenazi*, No. 09-CR-21010 (S.D. Fla. Nov. 10, 2010), Dkt. Entry No. 283 [hereinafter Esquenazi Motion to Dismiss]. Esquenazi's original motion to dismiss was filed on November 2, 2010, then later withdrawn and replaced by his revised motion to dismiss on November 10, 2010. See Def. Joel Esquenazi's Mot. to Dismiss Indictment for Failure to State a Criminal Offense & for Vagueness, *United States v. Esquenazi*, No. 09-CR-21010 (S.D. Fla. Nov. 2, 2010), Dkt. Entry No. 273.

<sup>51</sup> Esquenazi Motion to Dismiss, *supra* note 50 at 2.

<sup>52</sup> See Government's Resp. in Opp'n to Def. Esquenazi's Corrected & Am. Mot. to Dismiss Indictment for Failure to State a Criminal Offense & For Vagueness at 7, *United States v. Esquenazi*, No. 09-CR-21010 (S.D. Fla. Nov. 17, 2010), Dkt. Entry No. 294.

<sup>53</sup> *Id.*

<sup>54</sup> See Order Denying Def. Joel Esquenazi's (Corrected & Am.) Mot. to Dismiss Indictment for Failure to State a Criminal Offense & For Vagueness, *United States v. Esquenazi*, No. 09-CR-21010 (S.D. Fla. Nov. 19, 2010), Dkt. Entry No. 309.

<sup>55</sup> *Id.* at 2-3.

<sup>56</sup> *Id.* at 3.

<sup>57</sup> See Defs.' Mot. to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness, *United States v. Nguyen*, No. 08-CR-00522 (E.D. Pa. Oct. 16, 2009), Dkt. Entry No. 99; Mot. to Dismiss Superseding Indictment for Failure to State a Criminal Offense and for Vagueness, *United States v. Nguyen*, No. 08-CR-00522 (E.D. Pa. Nov. 9, 2009), Dkt. Entry No. 110.

<sup>58</sup> See Order, *United States v. Nguyen*, No. 08-CR-00522 (E.D. Pa. Dec. 30, 2009), Dkt. Entry No. 144.

<sup>59</sup> Indeed, at the time of publication of this article, the first such challenge in 2011 to the government's definition of "foreign official" made headlines when defendants in the case against former employees of Control Components Inc. filed what some say is the most comprehensive challenge yet to the Justice Department's interpretation of "foreign official" under the FCPA. See Defs.' Notice of Mot. and Mot. to Dismiss Counts One through Ten of the Indictment; Mem. of Points and Authorities in Support Thereof, *United States v. Carson*, No. 09-CR-00077 (C.D. Cal. Feb. 21, 2011), Dkt. Entry No. 304.

ENTITY	ALLEGATIONS	JUSTICE DEPARTMENT RESOLUTION	SEC RESOLUTION
Panalpina World Transport (Holding) Ltd.	From 2003 to 2007, allegedly made \$27 million in improper payments to foreign government officials in numerous countries, including Angola, Azerbaijan, Brazil, Kazakhstan, Nigeria, Russia, and Pakistan in order to obtain preferential treatment for its customers during the customs process.	<ul style="list-style-type: none"> <li>■ \$70.56 million fine</li> <li>■ Deferred prosecution agreement</li> <li>■ Guilty plea by subsidiary</li> </ul>	<ul style="list-style-type: none"> <li>■ \$11.33 million in disgorgement and prejudgment interest</li> <li>■ Agreed to an injunction</li> </ul>
Pride International, Inc.	From 2001 to 2006, allegedly made \$2 million in improper payments to foreign government officials in several countries, including India, Mexico, and Venezuela, to, among other things, extend drilling contracts, secure favorable administrative judicial decisions, and avoid paying customs duties and penalties.	<ul style="list-style-type: none"> <li>■ \$32.63 million fine</li> <li>■ Deferred prosecution agreement</li> <li>■ Guilty plea by subsidiary</li> </ul>	<ul style="list-style-type: none"> <li>■ \$23.53 million in disgorgement and prejudgment interest</li> <li>■ Agreed to an injunction</li> </ul>
Royal Dutch Shell plc	From 2002 to 2006, allegedly paid \$2 million to subcontractors knowing that some or all of the money would be used to bribe Nigerian customs officials.	<ul style="list-style-type: none"> <li>■ \$30 million fine to be paid by subsidiary Shell Nigerian Exploration &amp; Production Co.</li> <li>■ Deferred prosecution agreement</li> </ul>	<ul style="list-style-type: none"> <li>■ \$18.15 million in disgorgement and prejudgment interest</li> <li>■ Agreed to a cease and desist order</li> </ul>
Transocean, Inc.	From 2002 to 2007, allegedly paid \$90,000 to Nigerian customs officials in order to avoid various import regulations on its drilling rigs and secure false paperwork and registration for those rigs.	<ul style="list-style-type: none"> <li>■ \$13.44 million fine</li> <li>■ Deferred prosecution agreement</li> </ul>	<ul style="list-style-type: none"> <li>■ \$7.27 million in disgorgement and prejudgment interest</li> <li>■ Agreed to an injunction</li> </ul>
Tidewater Marine International, Inc.	From 2001 to 2007, allegedly paid \$1.6 million in bribes through Panalpina to Nigerian customs officials in order to have officials ignore regulatory requirements related to importing vessels into Nigerian waters and \$160,000 in bribes to tax officials in Azerbaijan to secure favorable tax assessments.	<ul style="list-style-type: none"> <li>■ \$7.35 million fine</li> <li>■ Deferred prosecution agreement</li> </ul>	<ul style="list-style-type: none"> <li>■ \$8.1 million in disgorgement and prejudgment interest</li> <li>■ \$217,000 penalty</li> <li>■ Agreed to an injunction</li> </ul>
Noble Corporation	Allegedly paid a Nigerian customs agent \$74,000, from 2003 to 2007, that was then used to bribe Nigerian customs officials in order to obtain temporary permits and permit extensions for drilling rigs.	<ul style="list-style-type: none"> <li>■ \$2.59 million fine</li> <li>■ Non-prosecution agreement</li> </ul>	<ul style="list-style-type: none"> <li>■ \$5.58 million in disgorgement and prejudgment interest</li> <li>■ Agreed to an injunction</li> </ul>
GlobalSantaFe Corporation (merged with Transocean, Inc. in 2007)	From 2002 to 2007, allegedly made improper payments to Nigerian customs officials through its customs broker in order to obtain documentation that its oil drilling rigs had been removed from Nigerian waters when the rigs had not been removed.	<ul style="list-style-type: none"> <li>■ No action by taken by DOJ</li> </ul>	<ul style="list-style-type: none"> <li>■ \$3.76 million in disgorgement and prejudgment interest</li> <li>■ \$2.1 million penalty</li> <li>■ Agreed to an injunction</li> </ul>

## VII. Industry-Wide Investigations

### A. Panalpina

On November 4, 2010, the Justice Department and the SEC announced settlements with six companies in the oil and gas industry, as well as with PWT, a global freight forwarding and logistics company, and its U.S. subsidiary, Panalpina, Inc.<sup>60</sup> Generally, these settle-

ments arose from allegations of illicit payments to customs officials in Nigeria and other countries. The settling companies are: Shell Nigerian Exploration and Production Company Ltd. ("SNEPCO"), a Nigerian subsidiary of Shell,<sup>61</sup> Tidewater Marine International,

<sup>60</sup> See Press Release, Department of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties (Nov. 4, 2010), available at <http://www.justice.gov/opa/pr/2010/November/10-crm->

1251.html [hereinafter Justice Dep't Oil Services Press Release]; Press Release, SEC, SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (Nov. 4, 2010), available at <http://www.sec.gov/news/press/2010/2010-214.htm> [hereinafter SEC Oil Services Press Release].

<sup>61</sup> See Information ¶ 23, *United States v. Shell Nigerian Exploration & Prod. Co.*, No. 10-CR-00767 (S.D. Tex. Nov. 4, 2010).

Inc. (“TWMi”), a wholly owned subsidiary of Tidewater, Inc. (“Tidewater”),<sup>62</sup> Transocean Inc., a Cayman Islands subsidiary of Transocean Ltd. (collectively “Transocean”),<sup>63</sup> Pride International and its subsidiaries,<sup>64</sup> GlobalSantaFe Corp. (“GSF”),<sup>65</sup> and Noble Corporation (“Noble”).<sup>66</sup> The total amount of criminal fines, civil penalties, and disgorgements resulting from these settlements equaled \$236,565,000.<sup>67</sup> The table above summarizes the entities, allegations, and resolutions.

However, another company in the oil and gas industry that discovered potentially violative payments to customs brokers in Nigeria enjoyed a more favorable outcome. Global Industries, Ltd. (“Global Industries”) was quick to act when it discovered FCPA violations, engaging outside counsel to direct a thorough internal investigation.<sup>68</sup> The company self-reported the issues to the SEC and the Justice Department, fully cooperated with the government, and enhanced its already-existing compliance program. According to Russell Robicheaux, the company’s General Counsel, Chief Administrative Officer, and Chief Compliance Officer, “Global’s identification of the issue and its decision to self report,” as well as its cooperation and “prompt and effective action,” were the “primary factors” considered by the Justice Department and the SEC in forgoing enforcement actions.<sup>69</sup> The level of cooperation provided by Global Industries and its timely remedial efforts appear to have convinced the SEC and the Justice Department to decline to pursue Global Industries civilly or criminally. The government has pointed to the Global Industries settlement as an example of meaningful credit for self-reporting and cooperation.

As for the other settling companies, the Justice Department’s press release noted that it gave “appropriate and meaningful credit” to the companies that voluntarily self-disclosed their conduct and cooperated. While five companies agreed to deferred prosecutions, Noble entered into a non-prosecution agreement due to its “early voluntary disclosure, thorough self-investigation of the underlying conduct, full cooperation with the [Justice Department] and extensive remedial measures

undertaken by the company.”<sup>70</sup> Perhaps a further reward for cooperation is the fact that none of the settling companies was required to retain an external compliance monitor.<sup>71</sup>

Another feature of the Panalpina settlements may portend an increase in enforcement actions by the SEC. While the FCPA’s accounting provisions, enforced by the SEC, apply to issuers, Panalpina is not an issuer. The Panalpina case therefore represents just the second time the Commission has brought an FCPA enforcement action against a non-issuer. The only other such action was the SEC’s 2001 action against KPMG Siddharta & Harsono (“KPMG”).<sup>72</sup> In that case, KPMG, a non-issuer, allegedly made a payment to an Indonesian tax official to obtain a reduction in tax liability for one of its clients that was owned by Baker Hughes Incorporated (“Baker Hughes”). The SEC charged KPMG, as an agent, with aiding and abetting FCPA violations by its principal, Baker Hughes.<sup>73</sup> Similarly, in Panalpina, the SEC contended that Panalpina, the agent of its oil and gas issuer customers aided and abetted its customers’ violations of the FCPA. We likely can expect that the SEC will employ this tactic to reach non-issuers with greater frequency in the future.

The enforcement sweep of the oil and gas industry shows that the SEC and the Justice Department are not content to target single companies; instead, investigations are now structured with a view to using leads learned in one investigation to launch a broader investigation into the affected industry. As Assistant Attorney General Breuer recently explained, a major reason the Justice Department is able to take such an industry-wide approach is because “one way in which corporations obtain credit for their cooperation is by providing [the government] with information about their competitors and their clients.”<sup>74</sup> Now that the government appears to have honed the blueprint for industry-wide investigations, further industry sweeps should come as no surprise.

## B. The Pharmaceutical Industry

The government’s FCPA investigation in the pharmaceutical industry was previewed heavily by the Justice Department in public speeches in 2009. For example, in a November 12, 2009, speech, Assistant Attorney General Breuer promised that the government “will be in-

<sup>62</sup> See Information ¶¶ 45-51, *United States v. Tidewater Marine Int’l, Inc.*, No. 10-CR-00770 (S.D. Tex. Nov. 4, 2010).

<sup>63</sup> See Criminal Information ¶¶ 15-37, *United States v. Transocean, Inc.*, No. 10-CR-00768 (S.D. Tex. Nov. 4, 2010); Justice Dep’t Oil Services Press Release, *supra* note 60.

<sup>64</sup> See Criminal Information ¶¶ 42-45, *United States v. Pride Int’l, Inc.*, No. 10-CR-00766 (S.D. Tex. Nov. 4, 2010).

<sup>65</sup> See SEC Oil Services Press Release, *supra* note 60.

<sup>66</sup> See Compl. ¶¶ 2-3, *SEC v. Noble Corp.*, No. 10-CV-0433 (S.D. Tex. Nov. 4, 2010); Justice Dep’t Oil Services Press Release, *supra* note 60.

<sup>67</sup> See Justice Dep’t Oil Services Press Release, *supra* note 60; SEC Oil Services Press Release, *supra* note 60.

<sup>68</sup> The author, Claudius Sokenu, represented Global Industries in its FCPA investigation.

<sup>69</sup> Global Industries, Ltd., *Navigating FCPA Hazards*, Remarks and Presentation, Annual Boardroom Summit, at 11-12 (Oct. 7-8, 2010), available at [http://www.google.com/url?sa=t&source=web&cd=4&ved=0CC4QFjAD&url=http%3A%2F%2Fwww.boardmember.com%2FWorkArea%2Flinkit.aspx%3FLinkIdIdentifier%3Did%26ItemID%3D5499&rct=j&q=RUSSELL%20J.%20ROBICHEAUX%20fcpa&ei=IgmTawSocGBIAeKxbXYAQ&usg=AFQjCNGS9aPOAvIBNztRNVb2fgXfvrHzOw&sig2=UfhosZyHyhc0CPiclf\\_i7w&cad=rja](http://www.google.com/url?sa=t&source=web&cd=4&ved=0CC4QFjAD&url=http%3A%2F%2Fwww.boardmember.com%2FWorkArea%2Flinkit.aspx%3FLinkIdIdentifier%3Did%26ItemID%3D5499&rct=j&q=RUSSELL%20J.%20ROBICHEAUX%20fcpa&ei=IgmTawSocGBIAeKxbXYAQ&usg=AFQjCNGS9aPOAvIBNztRNVb2fgXfvrHzOw&sig2=UfhosZyHyhc0CPiclf_i7w&cad=rja).

<sup>70</sup> Justice Dep’t Oil Services Press Release, *supra* note 60.

<sup>71</sup> See Press Release, Department of Justice, Assistant Attorney General Lanny A. Breuer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html> [hereinafter Breuer Press Release].

<sup>72</sup> See SEC and Department of Justice File First-Ever Joint Civil Action Against KPMG Siddharta Siddharta & Harsono and Its Partner Sonny Harsono for Authorizing the Payment of a Bribe in Indonesia, SEC Litigation Release No. 17127 (Sept. 12, 2001), available at <http://www.sec.gov/litigation/litreleases/lr17127.htm>. The author, Claudius Sokenu, during his tenure at the Commission, was responsible for leading the action against KPMG and Baker Hughes, the first ever joint investigation in the FCPA arena by the Justice Department and the SEC.

<sup>73</sup> Complaint at ¶ 9, *United States and SEC v. KPMG Siddharta, Siddharta, and Harsono*, H-01-0305 (S.D. Tex. Sept. 11, 2001).

<sup>74</sup> Breuer Press Release, *supra* note 71.



tensely focused on rooting out foreign bribery in [the pharmaceutical] industry.”<sup>75</sup>

The pharmaceutical industry may be particularly vulnerable to FCPA violations because its employees frequently interact with health and medical professionals or other healthcare representatives who may be considered government officials in areas of the world where the healthcare sector is government-owned. As Breuer noted, “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.”<sup>76</sup> It is easy to see how the many opportunities for corrupt payments would attract attention from the Justice Department and the Commission. Reports that a pharmaceutical company is involved in bribery, particularly if that corruption can be tied to public safety, are almost guaranteed to capture headlines. Consequently, in 2010, many companies in the pharmaceutical industry have reported that they have received FCPA inquiries from the Commission and the Justice Department.<sup>77</sup> The government’s investigation into the pharmaceutical industry is ongoing.

### C. The Telecommunications Industry

The telecommunications industry, another business sector that is typically government-owned or government-controlled in many parts of the world, has spawned numerous FCPA settlements over the past few years, including Lucent Technologies, Inc. (“Lucent”) in 2007;<sup>78</sup> UTStarcom, Inc. in 2009; and Latin Node, Inc. (“LatiNode”), also in 2009.<sup>79</sup> Additionally, as we reported in the February 2010 edition of *Arnold & Porter’s FCPA News and Insights*,<sup>80</sup> the Justice Depart-

<sup>75</sup> See, e.g., Lanny A. Breuer, Assistant Attorney General, Prepared Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practice Forum (Nov. 12, 2009), available at <http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-12-09breuer-pharmaspeech.pdf>.

<sup>76</sup> *Id.*

<sup>77</sup> See, e.g., Merck & Co., Inc., Quarterly Report at 26 (Form 10-Q) (June 30, 2010), available at <http://www.sec.gov/Archives/edgar/data/310158/000095012310074336/y83714e10vq.htm>; Johnson & Johnson, Quarterly Report at 32 (Form 10-Q) (July 4, 2010), available at <http://www.sec.gov/Archives/edgar/data/200406/000095012310076076/y84968e10vq.htm>; Eli Lilly and Company, Annual Report at 15 (Form 10-K) (Dec. 31, 2009), available at <http://www.sec.gov/Archives/edgar/data/59478/000095012310014958/c55339ke10vk.htm>; Medtronic, Inc., Annual Report at 36 (Form 10-K) (Apr. 24, 2009), available at [http://www.sec.gov/Archives/edgar/data/64670/000089710109001266/medtronic092639s2\\_10k.htm](http://www.sec.gov/Archives/edgar/data/64670/000089710109001266/medtronic092639s2_10k.htm); Zimmer Holdings, Inc., Annual Report at 14 (Form 10-K) (Dec. 31, 2009), available at <http://www.sec.gov/Archives/edgar/data/1136869/000095012310017177/c55340e10vk.htm>.

<sup>78</sup> See Press Release, Department of Justice, Lucent Technologies Inc. Agrees to Pay \$1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007), available at [http://www.justice.gov/opa/pr/2007/December/07\\_crm\\_1028.html](http://www.justice.gov/opa/pr/2007/December/07_crm_1028.html).

<sup>79</sup> See Press Release, Department of Justice, Latin Node, Inc. Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay \$2 Million Criminal Fine (Apr. 7, 2009), available at <http://www.justice.gov/opa/pr/2009/April/09-crm-318.html>.

<sup>80</sup> For further discussion of FCPA enforcement actions in the telecommunications industry, see *Arnold & Porter’s Febru-*

ment announced in December 2009 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 involving payments to officials at Haiti’s state-owned national telecommunications agency, Haiti Teleco.<sup>81</sup> Other developments in the Haiti Teleco investigation are discussed herein.<sup>82</sup>

In 2010, two other telecommunications companies settled with the Commission and the Justice Department. We reported in the Summer 2010 edition of *Arnold & Porter’s FCPA News and Insights* that Veraz Networks, Inc. (“Veraz”) paid \$300,000 to settle charges with the Commission arising out of payments to government officials in China and Vietnam.<sup>83</sup> The Commission alleged that Veraz hired a consultant in China who gave \$4,500 in gifts to officials at a government-controlled telecommunications company in China. The consultant allegedly also offered to pay \$35,000 in bribes. Similar conduct allegedly occurred in Vietnam. Additionally, the government alleged that a Veraz employee, Alvin Ono, a manager of Asia-Pacific sales for Veraz, destroyed information and data on his computer after the SEC sent his employer a document request for information relating to its investigation. As a result, Ono was indicted on charges of destruction of evidence and obstruction of justice.<sup>84</sup>

The end of 2010 brought another settlement in the telecommunications industry when, on December 27, 2010, France-based telecommunications company Alcatel-Lucent settled with the Justice Department and the SEC, agreeing to pay over \$137 million in combined civil penalties, criminal fines, and disgorgement.<sup>85</sup> Alcatel-Lucent entered into a three-year deferred prosecution agreement while three of Alcatel-Lucent’s subsidiaries agreed to plead guilty to related charges.<sup>86</sup>

The government alleged that Alcatel, S.A. (“Alcatel”), the French company that merged in 2006 with U.S.-based Lucent, used third-party consultants as conduits to bribe foreign government officials in Costa Rica, Honduras, Malaysia, and Taiwan.<sup>87</sup> The government alleged that Alcatel subsidiary executives Edgar

any edition of *FCPA News and Insights*. See *Arnold & Porter LLP, FCPA NEWS AND INSIGHTS* (Feb. 2010), available at [http://www.arnoldporter.com/resources/documents/FCPA\\_newsletter\\_February\\_2010\\_FINAL.pdf](http://www.arnoldporter.com/resources/documents/FCPA_newsletter_February_2010_FINAL.pdf) [hereinafter *FCPA NEWS AND INSIGHTS* (Feb. 2010)].

<sup>81</sup> See *Esquenazi Indictment*, *supra* note 44; see also Haiti Teleco Press Release, *supra* note 48.

<sup>82</sup> See *supra* section V “Prosecution of Foreign Government Officials”.

<sup>83</sup> See *FCPA NEWS AND INSIGHTS* (Summer 2010), *supra* note 5, at 13.

<sup>84</sup> See *Indictment, United States v. Alvin Ono*, No. 10-CR-371 (N.D. Cal. May 4, 2010).

<sup>85</sup> See *Alcatel-Lucent Press Release*, *supra* note 29. The combined settlements put Alcatel-Lucent’s payments among the top ten for all FCPA violations.

<sup>86</sup> The named subsidiaries were Alcatel-Lucent France, S.A., previously known as Alcatel CIT, S.A., Alcatel-Lucent Trade International, A.G., previously known as Alcatel Standard, A.G., and Alcatel Centroamerica, S.A., previously known as Alcatel de Costa Rica, S.A.

<sup>87</sup> See *SEC Files Settled Foreign Corrupt Practices Act Charges Against Alcatel-Lucent, S.A. with Total Disgorgement and Criminal Fines of Over \$137 Million*, SEC Litigation Release No. 21795 (Dec. 27, 2010), available at <http://www.sec.gov/litigation/litreleases/2010/lr21795.htm>; see *Alcatel-Lucent DPA*, *supra* note 26, Attachment A ¶ 29.

Valverde Acosta (a Costa Rican citizen) and Christian Sapsizian (a French citizen) negotiated agreements with consultants to make improper payments to Costa Rican officials in exchange for telecommunications contracts.<sup>88</sup> The government alleged that regional executives knew about and ignored the activity.<sup>89</sup> As a result of the company's decentralized structure, the actions of the employees involved in this conduct went unnoticed and the executives in charge of oversight failed to prevent the bribes. The complaint alleges that Alcatel provided \$14.5 million to third parties; \$7 million of that was provided to government officials in Costa Rica.<sup>90</sup>

Likewise in Honduras, Sapsizian and other employees arranged for payments to a consultant who had no prior experience in the telecommunications industry, in order to pass along bribes to a government official's brother (and, presumably, ultimately the official himself).<sup>91</sup> In Malaysia, Alcatel employees, with the approval of management and executives, made improper payments to Telekom Malaysia employees in exchange for nonpublic information related to tenders.<sup>92</sup> The Alcatel employees also made payments to "consultants" who apparently never did any work for the company. Allegedly, all of the improper payments were either undocumented or improperly recorded as legitimate consulting fees in the books of Alcatel's subsidiaries, then consolidated into the parent company's financial statements.<sup>93</sup> Similar conduct allegedly occurred in nine additional countries, namely Taiwan, Kenya, Nigeria, Ecuador, Bangladesh, Angola, the Ivory Coast, Mali, and Uganda.<sup>94</sup> In total, profits from these activities were estimated at over \$48 million.

The Justice Department charged Alcatel-Lucent with one count of violating the FCPA's internal controls provisions and one count of violating the books and records provisions. The Alcatel-Lucent settlement represents only the second time, after Siemens, that a company has settled to criminal books and records and internal controls violations. Alcatel-Lucent entered into a three-year deferred prosecution agreement, agreed to pay a monetary penalty of \$92 million, and separately agreed to pay over \$45 million in disgorgement to the Commission.<sup>95</sup> The fine, though substantial, was on the lower end of the penalty range contemplated under the Sentencing Guidelines of \$86.6 million to \$173.1 million.<sup>96</sup> Three of Alcatel-Lucent's subsidiaries agreed to plead guilty to charges of conspiring to violate the anti-

bribery, books and records, and internal controls provisions of the FCPA.

Alcatel-Lucent agreed to retain an independent compliance monitor, and to submit yearly reports to the Justice Department.<sup>97</sup> Interestingly, the monitor will be a French national who will make the necessary reports to the French government to relay to the Justice Department. This structure is required because the French blocking statute would prohibit direct reports from the monitor to the U.S. Alcatel-Lucent also agreed to implement extensive corporate compliance enhancements. In particular, the agreement credits Alcatel-Lucent with a voluntary initiative "at substantial financial cost" to cease all use of third-party sales and marketing agents in conducting its business.<sup>98</sup> This "unprecedented" pledge<sup>99</sup> may represent a new standard for commitment by worldwide companies to eradicate what was previously viewed as an inherent risk in global commerce.

In a development relating to 2009's LatiNode case, on December 14, 2010, a federal grand jury in Miami returned a 19-count indictment against *Jorge Granados* and *Manuel Caceres*, the former chief executive officer and the vice president of business development, respectively, of LatiNode.<sup>100</sup> The two men are charged with violating the anti-bribery provisions of the FCPA and international money laundering stemming from corrupt payments they allegedly made to government officials in Honduras.<sup>101</sup> According to the indictment, Granados and Caceres paid over \$500,000 in bribes between September 2006 and June 2007.<sup>102</sup> Many of the payments were allegedly concealed by laundering money through LatiNode's Guatemalan subsidiaries and using accounts in Honduras that were controlled by Honduran government officials.<sup>103</sup>

In April 2009, LatiNode pleaded guilty to violating the FCPA and 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.<sup>104</sup> In return, LatiNode secured an interconnection agreement with Hondutel at a reduced rate per minute. Senior executives at LatiNode approved the payments, and recipients included a senior attorney for Hondutel, the deputy general manager (who later became the general manager), and a member of the evaluation committee responsible for awarding Hondutel interconnection agreements.<sup>105</sup> LatiNode agreed to pay \$2 million in criminal fines over three years.<sup>106</sup>

<sup>88</sup> See Alcatel-Lucent DPA, *supra* note 26. In 2007, Sapsizian and Valverde were individually charged with FCPA violations for this activity. Sapsizian was arrested and in June 2007 pleaded guilty to those violations. In 2008 he was sentenced to 30 months in prison. Valverde remains at large. See generally Alcatel-Lucent Press Release, *supra* note 29.

<sup>89</sup> See Alcatel-Lucent DPA, *supra* note 26, Attachment A ¶¶ 39-53.

<sup>90</sup> See Alcatel-Lucent Press Release, *supra* note 29.

<sup>91</sup> Alcatel-Lucent DPA, *supra* note 26, Attachment A ¶¶ 54-61.

<sup>92</sup> *Id.* ¶¶ 62-69.

<sup>93</sup> See Compl. ¶¶ 1-3, *SEC v. Alcatel-Lucent, S.A.*, No. 1:10-cv-24620 (S.D. Fla. Dec. 27, 2010), available at <http://www.sec.gov/litigation/complaints/2010/comp21795.pdf>.

<sup>94</sup> *Id.* ¶¶ 80-117.

<sup>95</sup> *Id.* In January 2010, Alcatel-Lucent agreed to pay a \$10 million penalty to settle a corruption case brought by the government of Costa Rica for the same activity. See Alcatel-Lucent Press Release, *supra* note 29.

<sup>96</sup> See Alcatel-Lucent DPA, *supra* note 26, ¶ 6.

<sup>97</sup> See Alcatel-Lucent Press Release, *supra* note 29.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See Press Release, Department of Justice, Former Senior Executives of Latin Node Inc. Charged with Bribing Honduran Officials and Money Laundering (Dec. 20, 2010), available at <http://www.justice.gov/opa/pr/2010/December/10-crm-1463.html>.

<sup>101</sup> See Indictment, *United States v. Granados*, No. 1:10-cr-20881 (S.D. Fla. Dec. 21, 2010), Dkt. Entry No. 3.

<sup>102</sup> *Id.* at 10-19.

<sup>103</sup> *Id.* at 22-25.

<sup>104</sup> See Statement of Offense at 7, *United States v. Latin Node, Inc.*, No. 1:09-CR-20239 (S.D. Fla. Apr. 3, 2009), Dkt. Entry No. 5.

<sup>105</sup> Press Release, Department of Justice, Latin Node, Inc. Pleads Guilty to Foreign Corrupt Practices Act Violation and



## D. Continuing Oil For Food Program Docket

The SEC recently noted that it has collected \$204 million as a result of 15 enforcement actions alleging that companies paid kickbacks to the Iraqi government in exchange for contracts in the OFFP.<sup>107</sup> By our own calculation the Justice Department has collected over \$178 million in criminal fines in its OFFP investigation, excluding the Siemens settlement that also included OFFP issues.

The OFFP was intended to provide humanitarian relief to the Iraqi population, which faced severe hardship under international trade sanctions. The OFFP allowed the Iraqi government to purchase humanitarian goods through a U.N. escrow account. The OFFP investigation focused on the practice of paying kickbacks to the Iraqi government in order to secure contracts in the OFFP. The suppliers who paid kickbacks would inflate their contract price by the kickback, thereby diverting funds from the U.N. escrow account. These payments were typically mischaracterized by suppliers on their invoices to conceal the kickbacks. The government's continuing OFFP investigation netted settlements in 2010 with ABB, Innospec, and General Electric Company ("GE"), the latest company to resolve charges in the long-running investigation.

ABB pleaded guilty to allegations that its Jordanian subsidiary provided kickbacks under the OFFP.<sup>108</sup> According to the indictment, ABB Ltd.-Jordan and ABB Near East Trading Ltd. received purchase orders for electrical equipment and services worth over \$5.9 million from Iraqi electricity companies. To obtain the business, the ABB entities allegedly paid over \$300,000 in kickbacks to the Iraqi government.<sup>109</sup> The payments were concealed by inflating contract prices by 10% and labeling them as "consultation fees." ABB's September 29, 2010 settlement with the Justice Department and the SEC, totaling \$58.4 million, included a \$1.9 million criminal fine for ABB Ltd.-Jordan to settle the OFFP allegations. Although the Justice Department and ABB had agreed to a total criminal fine of \$28.1 million, Judge Lynn N. Hughes refused to agree with the Justice Department's assessment that ABB was a recidivist, and reduced the criminal fine to \$17.1 million.<sup>110</sup>

Innospec's Swiss subsidiary, Alcor Chemie Vertriebs GmbH ("Alcor"), was awarded five contracts to sell tetraethyl lead to refineries run by the Iraqi Ministry of Oil under the OFFP. To obtain these contracts, the government charged that Alcor paid or promised to pay at least \$4 million in kickbacks to the former Iraqi government. Alcor allegedly inflated the price of the contracts by approximately 10% to cover the cost of the kickbacks before submitting them to the UN for approval, and then falsely characterized the payments on the company's books and records as "commissions" paid to its agent in Iraq. Innospec also admitted to paying and promising to pay more than \$1.5 million in bribes, in the form of cash and travel, to officials of the Iraqi Ministry of Oil to secure sales of tetraethyl lead in Iraq from 2004 to 2008, as well as to paying \$150,000 in 2006 to officials in the Iraqi Ministry of Oil to ensure that a competing product to tetraethyl lead was not approved for use in Iraqi refineries. Innospec admitted that the illicit payments were recorded as "commissions" on the basis of false invoices, which were incorporated into the company's books and records. Based on the allegations, Innospec pleaded guilty to wire fraud, as well as to FCPA violations. As part of its settlement with the Justice Department, Innospec agreed to pay a \$14.1 million criminal fine and to retain an independent compliance monitor for three years. Innospec settled with the SEC as well, agreeing to disgorge \$11.2 million in profits. Innospec also agreed to pay \$2.2 million to the Office of Foreign Assets Control for violating the U.S. embargo against Cuba. Innospec also settled with the SFO, agreeing to pay a criminal fine of \$12.7 million.

In the GE investigation, the Commission charged violations of the FCPA's internal controls and books and records provisions by four GE subsidiaries. The government alleged that two of GE's subsidiaries, Marquette-Hellige and OEC-Medical Systems (Europa), paid \$2.04 million in kickbacks to the Iraqi Health Ministry.<sup>111</sup> Two other companies, Ionics Italba S.r.L. (a former subsidiary of Ionics, Inc. now known as GE Healthcare Ltd.) and Nycomed Imaging AS (a former Amersham plc subsidiary now known as GE Ionics, Inc.) are alleged to have paid approximately \$1.55 million in kickbacks before GE acquired their parent companies. GE has agreed to pay \$23.4 million to settle charges related to all four subsidiaries. In another example of the virtues of cooperation, GE was not criminally charged, and in reaching this settlement, the SEC "considered remedial acts promptly undertaken by GE and the co-operation the company afforded the Commission staff in its investigation."<sup>112</sup> GE's settlement with the Commission highlights the need for U.S. companies to consider potential FCPA liability when acquiring companies that conduct business in foreign countries.

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## VIII. Successor Liability

On August 6, 2010, Alliance One International, Inc. ("Alliance One"), a product of a 2005 merger of two tobacco companies, Standard Commercial Corporation ("Standard") and Dimon, and its subsidiaries in Switzerland and Kyrgyzstan settled FCPA charges with the SEC and the Justice Department.<sup>113</sup> On the same day, Universal Corporation, Inc. ("Universal") and its Brazil-

Agrees to Pay \$2 Million Criminal Fine (Apr. 7, 2009), available at <http://www.justice.gov/opa/pr/2009/April/09-crm-318.html>.

<sup>106</sup> See Plea Agreement at 7, *United States v. Latin Node, Inc.*, No. 1:09-CR-20239 (S.D. Fla. Apr. 3, 2009), Dkt. Entry No. 4.

<sup>107</sup> See Press Release, SEC, SEC Charges General Electric and Two Subsidiaries with FCPA Violations (July 27, 2010), available at <http://www.sec.gov/news/press/2010/2010-133.htm> [hereinafter GE Press Release].

<sup>108</sup> See Plea Agreement, *United States v. ABB Inc.*, No. H-10-664 (S.D. Tex. Sept. 29, 2010) [hereinafter ABB Plea Agreement], available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/09-29-10abb-inc-plea-agmt.pdf>.

<sup>109</sup> See Deferred Prosecution Agreement, *United States v. ABB Ltd.-Jordan*, No. H-10-665 (S.D. Tex. Sept. 29, 2010) [hereinafter ABB DPA], available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/09-29-10abb-jordan-dpa.pdf>; see also ABB DPA Attachment A-2 [hereinafter ABB Ltd.-Jordan Statement of Facts].

<sup>110</sup> See Transcript of Arraignment/Sentencing at 11, *United States v. ABB Inc.*, No. H-10-664 (S.D. Tex. Sept. 29, 2010).

<sup>111</sup> See GE Press Release, *supra* note 107.

<sup>112</sup> *Id.*

<sup>113</sup> See Compl. ¶ 1, *SEC v. Alliance One Int'l, Inc.*, Civ. A. No. 1:10-CV-01319 (D.D.C. Aug. 6, 2010), Dkt. Entry No. 3 [hereinafter Alliance One Compl.].



ian subsidiary settled related FCPA enforcement actions with the SEC and the Justice Department.

The prosecution of Alliance One and Universal stemmed in part from the companies' efforts to sell tobacco to the Thailand Tobacco Monopoly ("TTM"), a Thai government agency.<sup>114</sup> Alliance One's settlement was based on conduct of its predecessor companies, Dimon and Standard.

According to the charging papers, from 2000 to 2004, Dimon, Standard, and Universal Leaf Tabacos Ltda. ("Universal Brazil") agreed to divide sales, coordinate prices, and pay kickbacks through sales agents to officials of the TTM to secure sales contracts.<sup>115</sup> To further this agreement, Dimon and Standard allegedly paid a total of \$1,238,750 in bribes to Thai officials,<sup>116</sup> while Universal Brazil allegedly paid approximately \$698,000 in bribes.<sup>117</sup>

The SEC, in its complaint, asserted additional illicit payments by Dimon and Standard. Allegedly, Standard provided gifts, travel, and entertainment expenses to foreign government officials in "the Asian Region," including China.<sup>118</sup> Dimon allegedly made illegal payments to Greek and Indonesian tax officials in return for favorable treatment.<sup>119</sup>

In addition to these allegations, from 1996 to 2004, an Alliance One subsidiary in Kyrgyzstan, Alliance One Tobacco Osh LLC ("AOI-Kyrgyzstan"), paid approximately \$3 million in bribes to various Kyrgyzstan government officials.<sup>120</sup> AOI-Kyrgyzstan paid another \$283,762 in bribes to local provincial government officials for the right to buy tobacco from local growers and another \$82,850 to the Kyrgyzstan Tax Police to avoid penalties and investigations.

To resolve these allegations, Alliance One entered into a three-year non-prosecution agreement under which it agreed to cooperate with the government's investigation, and to retain an independent compliance monitor for three years to oversee the implementation of an FCPA compliance program and to make periodic reports to the Justice Department. To settle civil charges with the SEC, Alliance One agreed to disgorge approximately \$10 million in profits.<sup>121</sup>

Alliance One's Swiss subsidiary, Alliance One International AG, agreed to pay \$5.25 million in criminal fines and plead guilty to conspiring to violate the FCPA as well as to violations of the anti-bribery and books

and records provisions of the FCPA.<sup>122</sup> AOI-Kyrgyzstan pleaded guilty to conspiring to violate the FCPA and to violations of the anti-bribery and books and records provisions of the FCPA and will pay a criminal fine of \$4.2 million.<sup>123</sup>

For its part, Universal entered into a three-year non-prosecution agreement with the Justice Department, under which it agreed to retain an independent compliance monitor for three years.<sup>124</sup> Additionally, Universal Brazil pleaded guilty and agreed to pay \$4.4 million in criminal fines for conspiracy to violate the FCPA and violating the anti-bribery provisions of the FCPA.<sup>125</sup> In the SEC action, Universal agreed to pay \$4.58 million to settle claims regarding alleged improper payments in Thailand, Mozambique, and Malawi.<sup>126</sup>

As with the GE case discussed above, the prosecution of Alliance One serves as a reminder that companies can be held liable for the conduct of their predecessors. Accordingly, careful FCPA due diligence prior to business combinations and joint ventures is essential in avoiding successor liability.

## IX. Government Highlights Benefits of Cooperation

Cooperation played a prominent role in many enforcement settlements in 2010. For example, Panalpina, RAE Systems, Inc. ("RAE"), Alcatel-Lucent, ABB, and BAE all received substantial credit for cooperating with government investigations. It had been suggested that the government ought to be more transparent in telling companies exactly what they get for coming forward, self-reporting, and cooperating with ensuing investigations. It appears that the government is paying attention and responding to this criticism. The ABB case is instructive.

On September 29, 2010, ABB, the Swiss electrical engineering corporation, and several of its subsidiaries, including U.S.-based ABB Inc. and Jordan-based ABB Ltd.-Jordan, settled FCPA violations stemming from

<sup>114</sup> See Information, *United States v. Alliance One Int'l AG*, No. 4:10-cr-00017 (W.D. Va. Aug. 6, 2010), Dkt. Entry No. 3 [hereinafter AOIAG Information]; Information, *United States v. Universal Leaf Tabacos Ltda.*, No. 3:10-cr-225 (E.D. Va. Aug. 6, 2010), Dkt. Entry No. 1 [hereinafter Universal Brazil Information].

<sup>115</sup> See generally AOIAG Information, *supra* note 114; Universal Brazil Information, *supra* note 114.

<sup>116</sup> See AOIAG Information ¶¶ 14-15, *supra* note 114.

<sup>117</sup> See Universal Brazil Information ¶ 25, *supra* note 114.

<sup>118</sup> See Alliance One Compl., *supra* note 113, ¶ 4.

<sup>119</sup> *Id.* ¶ 5.

<sup>120</sup> See Information, *United States v. Alliance One Tobacco Osh, LLC*, No. 4:10-cr-00016 (W.D. Va. Aug. 6, 2010), Dkt. Entry No. 3.

<sup>121</sup> See SEC Files Anti-Bribery Charges Against Two Global Tobacco Companies, SEC Litigation Release No. 21618 (Aug. 6, 2010), available at <http://www.sec.gov/litigation/litreleases/2010/lr21618.htm>; Final Judgment at 11, *SEC v. Alliance One Int'l, Inc.*, Civ. A. No. 1:10-CV-01318 (D.D.C. Aug. 27, 2010), Dkt. Entry No. 4.

<sup>122</sup> See Plea Agreement, *United States v. Alliance One Int'l AG*, No. 4:10-cr-00017 (W.D. Va. Aug. 6, 2010), Dkt. Entry No. 7; Press Release, Department of Justice, Alliance One International Inc. and Universal Corporation Resolve Related FCPA Matters Involving Bribes Paid to Foreign Government Officials (Aug. 6, 2010), available at <http://www.justice.gov/opa/pr/2010/August/10-crm-903.html> [hereinafter Tobacco Companies Press Release].

<sup>123</sup> See Plea Agreement, *United States v. Alliance One Tobacco Osh, LLC*, No. 4:10-cr-00016 (W.D. Va. Aug. 6, 2010), Dkt. Entry No. 7.

<sup>124</sup> See Tobacco Companies Press Release, *supra* note 122.

<sup>125</sup> See Plea Agreement at 9, *United States v. Universal Leaf Tabacos Ltda.*, No. 3:10-cr-225 (E.D. Va. Aug. 6, 2010), Dkt. Entry No. 3. It is notable that the case against Universal arose from an employee's report to the company's internal compliance hotline. Universal subsequently conducted an internal investigation and self-reported to the Justice Department, earning the company credit in the sentencing recommendation. In the wake of the Dodd-Frank Act's whistleblower provisions, under which a whistleblower who provides original information is entitled to 10-30% of the imposed penalty, such a scenario may soon become exceedingly rare. See The Restoring American Financial Stability Act of 2010, S. Rep. 111-176, at 110, 111th Cong. § 922 (2d Sess. 2010).

<sup>126</sup> See Compl. ¶¶ 42-47, *SEC v. Universal Corp.*, Civ. A. No. 1:10-CV-01318 (D.D.C. Aug. 6, 2010), Dkt. Entry No. 1.

payments in Jordan and Mexico.<sup>127</sup> The Jordan investigation involved ABB Ltd.-Jordan and the OFFP, discussed above.<sup>128</sup> The other conduct related to alleged corrupt payments in exchange for contracts by an ABB Inc. subsidiary, ABB Network Management (“ABB Network”), operating out of Sugar Land, Texas, to Mexican officials at Comision Federal de Electricidad (“CFE”), a state-owned electric utility.<sup>129</sup> Much of the same conduct involved in the individual prosecutions and FCPA allegations arising out of the Mexico investigation is relevant to the current corporate settlements.<sup>130</sup> In November 2009, John Joseph O’Shea, a former General Manager of ABB Network, was charged with bribing and conspiring to bribe Mexican government officials to secure tens of millions of dollars in contracts with the CFE.<sup>131</sup> Fernando Maya Basurto, a Mexican citizen who acted as a middleman in the scheme, pleaded guilty.

These OFFP and CFE allegations were uncovered by an internal investigation initiated and self-reported to the government by ABB.<sup>132</sup> In April 2005, ABB voluntarily disclosed to the Justice Department and the SEC evidence of suspicious payments relating to the CFE.<sup>133</sup> ABB had already taken extensive internal measures to address its findings, including dismissing O’Shea.<sup>134</sup> The government noted that ABB’s “extraordinary cooperation” led to the indictment of O’Shea and the guilty plea by Basurto.<sup>135</sup>

As a result, ABB entered into a three-year deferred prosecution agreement while ABB Inc. pleaded guilty to a criminal information charging it with one count of violating the anti-bribery provisions of the FCPA and one count of conspiracy to violate the FCPA. The SEC also filed a civil complaint against ABB alleging violations of the anti-bribery, books and records, and internal control provisions arising from the same conduct.<sup>136</sup> The settlements included criminal fines for

ABB, Inc. of \$28.5 million, later reduced to \$17.5 million, and for ABB Ltd.-Jordan of \$1.9 million.<sup>137</sup> ABB also agreed to pay \$22.8 million in disgorgement and prejudgment interest and \$16.5 million in civil penalty.<sup>138</sup> ABB additionally agreed to adopt an internal compliance program that the Justice Department indicated “may become a benchmark for the industry.”<sup>139</sup>

ABB’s comprehensive investigation and prompt disclosure led to significant leniency for the company. The deferred prosecution agreement specifically identified these efforts as relevant considerations in reaching a settlement with ABB, citing ABB’s “voluntary and timely disclosure,” “thorough internal investigation,” “regularly reported” findings, “substantial remedial measures,” and continued cooperation in both the SEC and Justice Department investigations.<sup>140</sup> Importantly, ABB was not required to retain an independent compliance monitor, another welcome return on its cooperation with the enforcement authorities.<sup>141</sup>

The ABB investigation also resulted in enforcement actions against other individuals. In September 2010, Enrique Faustino Aguilar Noriega and his wife Angela Maria Gomez Aguilar, both Mexican citizens, were indicted for their involvement in the Mexican scheme.<sup>142</sup> The indictments allege that the couple used their company, Grupo Internacional de Asesores S.A. (“Grupo”), as an intermediary company to facilitate corrupt payments between an unnamed company in California and CFE’s chief of operations, Nestor Moreno.<sup>143</sup> Noriega was charged with conspiracy to violate the FCPA, FCPA violations, money laundering conspiracy, and money laundering. Aguilar was charged with money laundering conspiracy and money laundering, but not violations of the FCPA. Reflecting again the government’s aggressive prosecution stance, Aguilar was arrested when she traveled to the U.S. on business. Noriega remains out of the country and out of reach, creating speculation that Aguilar’s detention is a strong arm tactic to reach her fugitive spouse.

Other cases from 2010, in addition to the ABB settlement, demonstrate that companies received credit for cooperation. In the Panalpina settlements, for example, discussed in greater detail above, the Justice Department noted that it gave “appropriate and meaningful credit” to the settling companies. Of those seven settling companies, five received deferred prosecution agreements, and one entered into a non-prosecution agreement. Assistant Attorney General Breuer in a speech on May 26, 2010, promised that “in every case of self-disclosure, full cooperation, and remediation, the Department is committed to giving meaningful credit

<sup>127</sup> See Press Release, Department of Justice, ABB Ltd. and Two Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Will Pay \$19 Million in Criminal Penalties (Sept. 29, 2010), available at <http://www.justice.gov/opa/pr/2010/September/10-crm-1096.html> [hereinafter ABB Press Release]; SEC Charges ABB for Bribery Schemes in Mexico and Iraq – ABB to Pay \$39 Million in Disgorgement and Civil Penalties, SEC Litigation Release No. 21673 (Sept. 29, 2010), available at <http://www.sec.gov/litigation/litreleases/2010/lr21673.htm> [hereinafter ABB SEC Litigation Release]; see ABB DPA, *supra* note 109, Attachment A-1 [hereinafter ABB Inc. Statement of Facts]; ABB Ltd.-Jordan Statement of Facts, *supra* note 109.

<sup>128</sup> See *supra* section VII.D “Continuing Oil for Food Program Docket” and notes 107-112.

<sup>129</sup> See ABB Inc. Statement of Facts, *supra* note 127.

<sup>130</sup> For more on the two individual prosecutions arising out of the Mexico investigation, see Arnold & Porter’s February 2010 edition of *FCPA News and Insights*. See *FCPA NEWS AND INSIGHTS* (Feb. 2010), *supra* note 80, at 18.

<sup>131</sup> *Id.* The conduct involving O’Shea centered around at least two contracts worth \$44 million and \$37 million in revenue. As of this writing, O’Shea’s trial date had not been set, and Basurto had not yet been sentenced.

<sup>132</sup> See ABB DPA, *supra* note 109, at 4-5.

<sup>133</sup> See ABB Press Release, *supra* note 127.

<sup>134</sup> 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>.

<sup>135</sup> See ABB Plea Agreement, *supra* note 108, at 13.

<sup>136</sup> See Compl., SEC v. ABB Ltd., No. 1:10-cv-01648 (D.D.C. Sept. 29, 2010), available at <http://www.sec.gov/litigation/complaints/2010/comp-pr2010-175.pdf>.

<sup>137</sup> See ABB DPA, *supra* note 109, at 4-5.

<sup>138</sup> See ABB SEC Litigation Release, *supra* note 127.

<sup>139</sup> See ABB Press Release, *supra* note 127.

<sup>140</sup> See ABB DPA, *supra* note 109, at 4-5.

<sup>141</sup> See ABB Press Release, *supra* note 127.

<sup>142</sup> See Press Release, Department of Justice, Two Intermediaries Indicted for Their Alleged Participation in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico (Sept. 15, 2010), available at <http://www.justice.gov/opa/pr/2010/September/10-crm-1034.html>.

<sup>143</sup> See David Luhnow, *U.S. Probe Leads to Utility Chief*, WALL ST. J., Aug. 24, 2010, available at <http://online.wsj.com/article/SB10001424052748703589804575445654118709426.html>; Indictment, *United States v. Noriega*, No. CR10-1031 (C.D. Cal. Sept. 15, 2010).



where it's deserved to obtain a fair and just resolution."<sup>144</sup> Now that the government has heeded the calls for transparency and meaningful cooperation credit, we can look for this trend to continue.

## X. Joint Venture Partners Create FCPA Risks

RAE, a California gas and chemical detection company, on December 10, 2010, entered into a non-prosecution agreement in which it will pay \$1.7 million in criminal penalties.<sup>145</sup> RAE also reached a settlement with the SEC, consenting to a permanent injunction against further FCPA violations, and agreeing to pay over \$1.2 million in disgorgement and prejudgment interest.<sup>146</sup> This case illustrates that the government will hold companies accountable for the FCPA violations of their joint venture partners.

The investigation concerned conduct from 2004-2008 by two China-based joint ventures involving RAE—RAE-KLH (Beijing) Co., Ltd. ("RAE-KLH") and RAE Cola Mine Safety Instruments (Fushun) Co., Ltd. ("RAE-COLA").<sup>147</sup> According to the charging papers, direct sales representatives from RAE-KLH and RAE-COLA made \$400,000 in payments to Chinese officials, resulting in contracts worth \$3 million and profits of over \$1 million.<sup>148</sup> The government alleged that money for expenses related to kickbacks was improperly obtained as "cash advances," then falsely recorded as "business fees" and "travel and entertainment expenses," resulting in violations of the anti-bribery, books and records, and internal controls provisions of the FCPA.<sup>149</sup>

The RAE investigation is notable for several reasons. First, while the conduct at issue involved solely Chinese employees, Chinese officials, and payments made in China on behalf of Chinese companies, the government noted that "[c]ompanies that fail to respond to red flags can be held liable for the acts of their [foreign] joint-venture partners."<sup>150</sup> Here, RAE failed to conduct FCPA due diligence on one of the two joint venture partners, RAE-COLA, even though warning signs were apparent, such as the existence of government customers and the

high-risk location in China. RAE, however, conducted FCPA due diligence on RAE-KLH prior to forming the joint venture.<sup>151</sup> The due diligence revealed evidence of bribery and kickback schemes. Internal documents demonstrated that RAE executives both recognized the improper conduct and made a calculated decision to minimize control efforts over the bribery and kickback schemes in order to obtain and maintain the business. The government charged that senior management made no comprehensive effort to effectively implement the company's control policies. For example, while RAE ordered an internal audit of the Chinese companies for FCPA violations, the auditor never provided any findings or recommendations. Although RAE did undertake some steps in the right direction, including providing FCPA training to its Chinese employees, these steps were not enough to prevent either the illegal activity or the eventual enforcement action.

The RAE settlement demonstrates that the government will seek to hold companies liable for FCPA violations by their joint venture partners, especially where adequate due diligence and oversight are lacking. Other enforcement actions in 2010, such as GE and Alliance One, show that the government took the same view regarding FCPA liability arising from acquisitions. The message from the government is clear that business combinations continue to warrant adequate due diligence and continue to receive government scrutiny.

## XI. Increase in Derivative Actions

In 2009 there was a rise in derivative shareholder suits triggered by settled FCPA enforcement actions.<sup>152</sup> In 2010 the trend continued in what a Reuters Legal analysis called a "sharp rise" in derivative actions.<sup>153</sup> Based on a review of court filings, Reuters Legal reported 24 derivative actions filed from January to November 2010, compared with 37 in the previous four years combined.<sup>154</sup>

Generally, derivative actions involve allegations that officers and directors breached their fiduciary duty or wasted corporate assets, or, in one recent case, that executives allowed illegal activity to occur by "conducting [the company's] business in countries with higher than normal risk of corruption, such as Kazakhstan and Nigeria, without implementing internal controls in compliance with the FCPA."<sup>155</sup> Thus far, these cases have had little success in court because the standard of proof to survive a motion to dismiss often stops the actions well before any real risk of recovery materializes.<sup>156</sup>

<sup>144</sup> Lanny A. Breuer, Assistant Attorney General, Criminal Division, Prepared Remarks to Compliance Week 2010 – 5th Annual Conference for Corporate Financial, Legal, Risk, Audit & Compliance Officers (May 27, 2010), available at <http://ethisphere.com/lanny-breuer-assistant-attorney-general-doj/>

<sup>145</sup> See Press Release, Department of Justice, RAE Systems Agrees to Pay \$1.7 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (Dec. 10, 2010), available at <http://www.justice.gov/opa/pr/2010/December/10-crm-1428.html>.

<sup>146</sup> *Id.*; SEC Files Settled FCPA Case Against RAE Systems, Inc., SEC Litigation Release No. 21770 (Dec. 10, 2010), available at <http://www.sec.gov/litigation/litreleases/2010/lr21770.htm> [hereinafter RAE SEC Litigation Release].

<sup>147</sup> See RAE SEC Litigation Release, *supra* note 146.

<sup>148</sup> See Compl. ¶¶ 1-4, SEC v. RAE Sys. Inc., No. 1:10-cv-02093 (D.D.C. Dec. 10, 2010), available at <http://www.sec.gov/litigation/complaints/2010/comp21770.pdf>; see also Letter from U.S. Department of Justice to Carlos F. Ortiz and Roy K. McDonald (Dec. 10, 2010), App. A, available at <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/12-10-10rae-systems.pdf> [hereinafter RAE Non-Prosecution Agreement].

<sup>149</sup> RAE SEC Litigation Release, *supra* note 146.

<sup>150</sup> *Id.*; Marcy Gordon, RAE Systems Paying Almost \$3M in China Settlements, ASSOCIATED PRESS, Dec. 10, 2010, available at <http://www.federalnewsradio.com/index.php?nid=37&sid=2196430>.

<sup>151</sup> See RAE Non-Prosecution Agreement, *supra* note 148, at App. A ¶ 7.

<sup>152</sup> See FCPA NEWS AND INSIGHTS (Feb. 2010), *supra* note 80, at 10-12.

<sup>153</sup> See Brian Grow, *Bribery Investigations Spark Shareholder Suits*, REUTERS, Nov. 1, 2010, <http://www.reuters.com/article/idUSTRE6A04CO20101101> [hereinafter Reuters Analysis].

<sup>154</sup> *Id.*

<sup>155</sup> Verified Shareholders Derivative Pet., *Kassamali v. Parker*, No. 2010-34655 (Tex. Dist. Ct. June 10, 2010), available at <http://www.courthousenews.com/2010/06/07/ParkerBribes.pdf> (shareholders suing oil service company Parker Drilling Co. based on an FCPA investigation of bribes in the two countries).

<sup>156</sup> See, e.g., *Midwestern Teamsters Pension Trust Fund v. Baker Hughes, Inc.*, No. H-08-1809, 2010 WL 3359560 (S.D. Tex. May 26, 2010) (adopting prior recommendation on Mo-



Corporate compliance programs provide a further defense, establishing that the board took reasonable precautions to avoid FCPA violations.<sup>157</sup>

So why, in the face of such few victories and mounting legal hurdles, have FCPA-inspired derivative actions thrived? The answer is likely twofold. First, business realities can outweigh defendants' courthouse victories; in other words, many cases settle for their nuisance value. Reuters Legal reports that of the 37 shareholder suits from 2006 through 2009, 26 were settled.<sup>158</sup> Second, the significant cost of conducting FCPA investigations and, as we discussed above, the ever increasing civil and criminal penalties companies pay to settle civil and criminal enforcement actions appear to have gotten the attention of the plaintiffs' bar. With these two factors, we expect this trend to continue.

## **XII. Justice Department Issues Three Opinion Releases in 2010**

The FCPA Opinion Releases issued in 2010 provide guidance regarding the scope of due diligence and anti-corruption controls that companies subject to the FCPA should consider when establishing business relationships with third parties that may have ties to foreign governments.

### **A. Opinion Release 10-01: Hiring a Foreign Official at the Direction of the U.S. Government**

On April 19, 2010, the Justice Department issued FCPA Opinion Release 10-01.<sup>159</sup> This request was submitted by an unnamed U.S. company ("Requestor 10-01")<sup>160</sup> that had contracted with a U.S. government agency to design and construct a facility in a foreign country. Under the contract, and at the direction of the U.S. government, Requestor 10-01 was obligated to hire and compensate local individuals to work at the facility. The contract required Requestor 10-01 to hire a designated local individual as facility director. Critically, the individual was also serving as a paid officer of an agency of the foreign country and therefore was a "foreign official" under the FCPA. Concerned that hiring a foreign official to serve as director of its facility could be viewed as a violation of the FCPA, Requestor 10-01 sought guidance from the Justice Department prior to hiring the individual.

The Justice Department opined that it did not intend to take any enforcement action with respect to the pro-

posed hiring. Two considerations informed the Justice Department's opinion. First, Requestor 10-01 was contractually obligated to hire the individual at the direction of the U.S. government. Second, Requestor 10-01 ensured that the individual would not be in a position to influence any act or decision affecting Requestor 10-01 in connection with this project or future projects.

Opinion Release 10-01 makes clear that a payment made directly to, or for the benefit of, a foreign official may be permissible in certain circumstances. A key lesson here is that when making such a payment, even if the payment is made pursuant to a valid contract, the ability of a company or individual to demonstrate that the payment is not intended to corruptly influence the official is critical to avoiding FCPA liability. To that end, and essential to the Justice Department's opinion in this request, was Requestor 10-01's documentation of the relationship with the foreign official and assurance that the foreign official's government responsibilities would be kept separate from his private responsibilities.

### **B. Opinion Release 10-02: The Risks of Charitable Giving under the FCPA**

On July 16, 2010, the Justice Department issued FCPA Opinion Release 10-02.<sup>161</sup> This request was submitted by a U.S. company ("Requestor 10-02") that was running a nonprofit microfinance institution ("MFI") in an unnamed country in Eurasia. Requestor 10-02 was in the process of converting its foreign operations from nonprofit institutions to commercial enterprises. In order to complete the conversion of its Eurasian operation, Requestor 10-02 had to apply for and obtain a commercial banking license from the Eurasian government. The Eurasian government would not issue the license, however, unless Requestor 10-02 made a charitable contribution of approximately \$1.4 million to one of six local MFIs recommended by the Eurasian government. Before making the requested donation, Requestor 10-02 sought guidance from the Justice Department to ensure that the proposed grant would not violate the FCPA.

The Justice Department opined that it would not take enforcement action with respect to the proposed transaction, stating that, although Requestor 10-02 intended to make the grant expressly for the purpose of obtaining or retaining business (i.e., converting from a nonprofit to a for-profit banking institution), the due diligence it performed and the proposed controls on the grant funds would make it unlikely that the payment will result in the corrupt giving of anything of value to foreign officials.<sup>162</sup> The Justice Department described in detail Requestor 10-02's extensive three-phase due diligence inquiry to vet the potential grant recipients and select the proposed grantee. The due diligence included: screening of the candidates based upon a review of publicly available information; ruling out candidates for conflict of interest concerns; and examining candidates for ties to government officials through board members. The Justice Department opined that Requestor 10-02's due diligence inquiry and proposal to implement stringent controls over the grantee's use of the funds—i.e., staggered payments, periodic monitor-

tion to Dismiss because plaintiffs could not establish that conduct of directors of Baker Hughes was a conscious disregard of their duties); see also *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).

<sup>157</sup> See *In re The Dow Chemical Co. Derivative Litig.*, No. 4349-CC, 2010 WL 66769 (Del. Ch. Ct. Jan. 11, 2010) (Dow's compliance program was evidence that the board had met its fiduciary duty to prevent overseas bribery).

<sup>158</sup> See Reuters Analysis, *supra* note 153.

<sup>159</sup> See Justice Department, FCPA Review: Opinion Procedure Release No. 10-01 (Apr. 19, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1001.pdf>.

<sup>160</sup> Under the FCPA, a company or individual subject to the statute may request an opinion from the Attorney General ("FCPA Opinion") as to whether a particular course of action is in line with the Justice Department's current enforcement policy. See 15 U.S.C. §§ 78dd-1(e), 78dd-2(f); 28 C.F.R. § 80.1.

<sup>161</sup> See Justice Department, FCPA Review: Opinion Procedure Release No. 10-02 (July 16, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1002.pdf>.

<sup>162</sup> *Id.* at 2.

ing and auditing, designating grant funds for infrastructure building, prohibiting grant funds to be used as compensation to board members or the parent organization, and adoption of an anti-corruption policy—would ensure with reasonable certainty that the grant money would not be transferred to officials of the Eurasian country.<sup>163</sup>

Opinion Release 10-02 reflects what the Justice Department is likely to find to be appropriate due diligence and anti-corruption safeguards in connection with a contemplated donation to an entity selected by a government agency.

### **C. Opinion Release 10-03: When a Consultant May Be Considered a Foreign Official**

On September 1, 2010, the Justice Department issued Opinion Release 10-03.<sup>164</sup> The request was submitted by a U.S.-based limited partnership (“Requestor 10-03”) engaged in the development of natural resource trading and infrastructure. Requestor 10-03 was interested in retaining a consultant to enter discussions with an agency of a foreign government regarding a proposed business initiative. Notably, the consultant currently represented the foreign government in various marketing matters and lobbying efforts in the U.S.<sup>165</sup> Furthermore, the consultant had in the past represented certain agencies of the foreign government that would play some role in the discussions regarding Requestor 10-03’s proposed initiative.

Recognizing the potential conflict of interest between the consultant’s representation of Requestor 10-03 and the consultant’s work with the foreign government, as well as the inherent FCPA risks in retaining a consultant who would also act on behalf of the same foreign government before which the consultant would appear on behalf of other clients, Requestor 10-03 proposed to implement safeguards including, among other things: prohibiting the consultant from lobbying for the foreign government during the consultancy; creating an ethical screen for employees working on behalf of Requestor 10-03 and employees working on behalf of the government; requiring that neither the owner nor the consulting company have any decision-making authority on behalf of the foreign government; securing a local law opinion that it would be permissible for the consulting company to represent simultaneously the foreign government and Requestor 10-03.

<sup>163</sup> *Id.* at 5.

<sup>164</sup> See Justice Department, FCPA Review: Opinion Procedure Release No. 10-03 (Sept. 1, 2010), at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1003.pdf> [hereinafter FCPA Opinion Release No. 10-03].

<sup>165</sup> According to the Release, the consultant is a registered agent of a foreign government pursuant to the Foreign Agents Registration Act, 22 U.S.C. § 611 *et seq.* (“FARA”). See *id.*

The Justice Department opined that it did not intend to take enforcement action with respect to the proposed consultancy. Without opining on whether the consultant was a foreign official under the FCPA, the Justice Department opined that the law “does not *per se* prohibit business relationships with, or payments to, foreign officials.”<sup>166</sup> Rather, in determining whether a consultancy violates the FCPA, the Justice Department looks to whether the arrangement exhibits any indicia of corrupt intent, whether the arrangement is transparent to the foreign government and the public, whether the arrangement conforms to local law, and whether there are appropriate safeguards in place to prevent a foreign official from improperly using his or her official position to direct business to or otherwise assist the consultant’s client.

While any company that retains a consultant with a prior or existing relationship with a foreign government should be aware of the inherent FCPA risks, Opinion Release 10-03 reflects the Justice Department’s willingness to countenance such arrangements to the extent that a company can demonstrate the existence of safeguards sufficient to ensure the consultant is not acting “on behalf of” a foreign government.

## **CONCLUSION**

Multinational companies must take heed of the record number of FCPA enforcement actions in 2010, as well as the record-breaking \$1.8 billion in criminal fines, civil monetary penalties, and disgorgement assessed in 2010. Now is the time for companies to ensure that their anticorruption compliance programs are comprehensive and effective, and that adequate procedures are in place to avoid or mitigate potential FCPA violations. The government’s interest in pursuing FCPA enforcement actions shows no sign of abating in 2011 and beyond.

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<sup>166</sup> FCPA Opinion Release No. 10-03, *supra* note 164, at 4.