ARNOLD & PORTER LLP

Summer 2011

FCPA & Global Anti-Corruption Insights

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

TABLE OF CONTENTS

Our Foreign Corrupt Practices Act and Global Anti-Corruption Practice

For further information on anything discussed in FCPA & Global Anti-Corruption Insights, please contact:

Claudius O. Sokenu

Editor-in-Chief
Partner
New York
+1 212.715.1787
Claudius.Sokenu@aporter.com

Our team includes members of the firm's White Collar Criminal Defense, Securities Enforcement and Litigation, Corporate and Securities, and Government Contracts Practices

Marcus A. Asner
Partner
New York
+1 212.715.1789
Marcus.Asner@aporter.com

John P. Barker
Partner
Washington, DC
+1 202.942.5328
John.Barker@aporter.com

John B. Bellinger III
Partner
Washington, DC
+1 202.942.6599
John.Bellinger@aporter.com

Mark D. Colley
Partner
Washington, DC
+1 202.942.5720
Mark.Colley@aporter.com

James W. Cooper
Partner
Washington, DC
+1 202.942.6603
James.W.Cooper@aporter.com

Dmitri Evseev
Partner
London
+44 (0)20 7786 6114
Dmitri.Evseev@aporter.com

John A. Freedman
Partner
Washington, DC
+1 202.942.5316
John.Freedman@aporter.com

Drew A. Harker
Partner
Washington, DC
+1 202.942.5022
Drew.Harker@aporter.com

Kathleen J. Harris
Partner
London
+44(0)20 7786 6100
Kathleen.Harris@aporter.com

Richard L. Jacobson
Counsel
Washington, DC
+1 202.942.6975
Richard.Jacobson@aporter.com

Keith M. Korenchuk
Partner
Washington, DC
+1 202.942.5817
Keith.Korenchuk@aporter.com

John N. Nassikas III
Partner
Washington, DC
+1 202.942.6820
John.Nassikas@aporter.com

Evelina Norwinski
Partner
Washington, DC
+1 202.942.6474
Evelina.Norwinski@aporter.com

Kirk Ogrosky
Partner
Washington, DC
+1 202.942.5330
Kirk.Ogrosky@aporter.com

Philippe A. Oudinot
Senior Attorney
Washington, DC
+1 202.942.5736
Philippe.Oudinot@aporter.com

Lisa A. Price
Counsel
Washington, DC
+1 202.942.6240
Lisa.Price@aporter.com

Christopher S. Rhee
Partner
Washington, DC
+1 202.942.5524
Christopher.Rhee@aporter.com

Mara V.J. Senn
Partner
Washington, DC
+1 202.942.6448
Mara.Senn@aporter.com

Jeffrey H. Smith
Partner
Washington, DC
+1 202.942.5115
Jeffrey.Smith@aporter.com

Craig A. Stewart
Partner
New York
+1 212.715.1142
Craig.Stewart@aporter.com

Michael D. Trager
Partner
Washington, DC
+1 202.942.6976
Michael.Trager@aporter.com

Baruch Weiss
Partner
Washington, DC
+1 202.942.6819
Baruch.Weiss@aporter.com

Charles R. Wenner
Counsel
Washington, DC
+1 202.942.6974
Charles.Wenner@aporter.com

Samuel M. Witten
Counsel
Washington, DC
+1 202.942.6115
Samuel.Witten@aporter.com

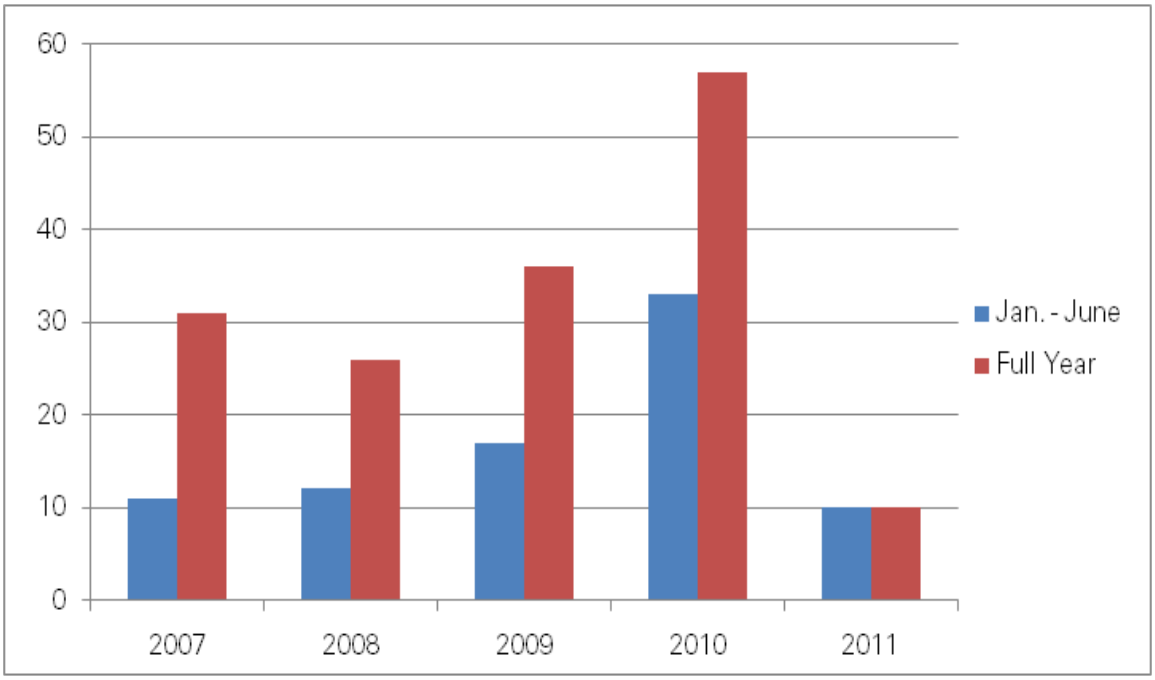
EXECUTIVE SUMMARY

As we discussed in our year-end advisory, 2010 was another record-setting year in civil and criminal enforcement under the Foreign Corrupt Practices Act (FCPA).[1] Given the enforcement activity in the first six months of the year, 2011 is shaping up to be an equally compelling and perhaps record-setting year. In prior updates, we noted that the Securities and Exchange Commission (SEC or Commission) and the Department of Justice (Justice Department or DOJ) have continued their transformation of what, prior to 2001, was largely a dormant statute into an enforcement blockbuster, with each passing year seeing substantial monetary sanctions, novel and aggressive prosecution tactics, and heightened levels of enforcement directed at corporations, entire industries, and categories of defendants arguably far beyond what the FCPA contemplates.

Evidence of a continuing aggressive enforcement program is apparent in the first six months of 2011. For example, two corporations paid total fines and penalties large enough to earn spots in the top ten largest FCPA settlements of all time, the SEC entered into its first deferred prosecution agreement (DPA), and the SEC and the Justice Department have continued to pursue industry-wide investigations, with one company in last year's widely publicized pharmaceutical industry sweep settling FCPA charges.

As Table 1 below illustrates, in the first half of 2011, the SEC and the Justice Department charged nine companies and one individual in civil and criminal FCPA enforcement actions. The number of cases brought against corporations is similar to the six companies charged at the same point in 2010. While the single action against an individual falls far short of the twenty-seven individuals charged by the same time last year, that total included twenty-two individual defendants arising from a single investigation, the Shooting, Hunting, Outdoor Trade Show and Conference sting operation (hence the name SHOT Show).

Table 1: Number of Enforcement Actions

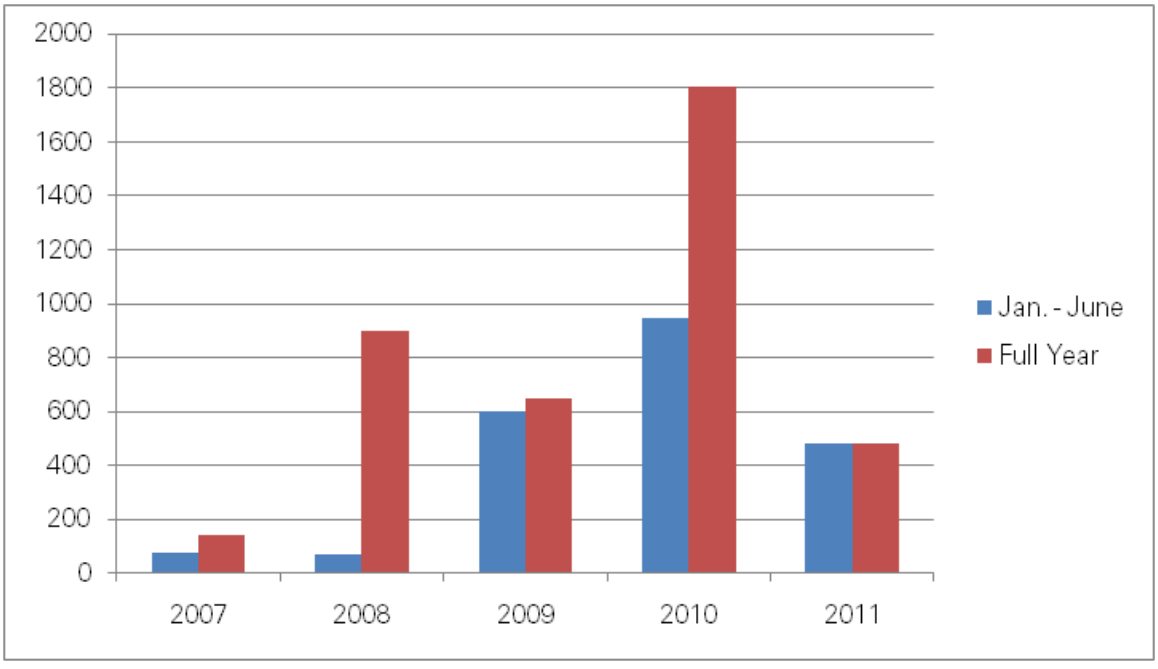


As Table 2 shows, in terms of monetary sanctions, the first six months of 2011 have witnessed a decrease in civil monetary penalties and criminal fines compared to last year's mid-point. By this stage of 2010, US$949 million in penalties and fines had been imposed, including several penalties over US$100 million, such as US$338 million for *Technip S.A.* (Technip) and US$365 million for *Snamprogetti Netherlands B.V.* (Snamprogetti). By comparison, this year has seen "only" US$482 million in penalties and fines imposed so far. Despite the lower total, 2011 has seen two new additions to the list of the ten largest FCPA penalties, *JGC Corporation* (JGC) paid US$218.8 million (sixth all-time) and *Johnson & Johnson* paid US$70 million (tenth all-time).

In that same stratosphere is also the largest ever forfeiture order entered against an individual in an FCPA case. On March 11, 2011, *Jeffrey Tesler,* a former United Kingdom solicitor and consultant for Kellogg Brown & Root LLC (KBR), pleaded guilty to FCPA violations in connection with allegations of bribery of Nigerian government officials. Tesler agreed to forfeit a record-setting US$148,964,568. The Johnson & Johnson, JGC, and Tesler settlements are discussed in greater detail below.

FCPA civil and criminal enforcement in 2010 broke all previous records for criminal fines, civil monetary penalties, and disgorgement. The US$1.8 billion in criminal fines, civil monetary penalties, disgorgement, and prejudgment interest levied in 2010 was more than the previous two years combined, US$645 million in 2009 and US$901 million in 2008. Given that 2010 set all-time records for total monetary fines and penalties, it may not be a surprise that the 2011 settlements to date are lagging. Nevertheless, when one looks at the historic numbers, it is clear that FCPA enforcement continues to be a high priority for the SEC and the Justice Department. Indeed, SEC and DOJ staff have publicly affirmed their commitment to enforcing the FCPA. Assistant Attorney General Lanny A. Breuer summed it up when he said, "[w]e are in a new era of FCPA enforcement; and we are here to stay."[2]

Table 2: FCPA Penalties Assessed (in millions)



Most significantly, 2011 is proving to be the year of the trial, as *Lindsey Manufacturing, Inc.* (Lindsey Manufacturing) became the first corporation convicted of FCPA violations at trial and several individuals either have been convicted or are scheduled to go to trial in the coming months. The importance of these trials is at least twofold. First, the increasing number of individual prosecutions shows that the Justice Department continues to dedicate substantial resources to its aggressive enforcement agenda. Second, trials provide an opportunity for judicial guidance on the many areas of the FCPA where there is a dearth of caselaw. Notably, thus far this year, the Justice Department has won a number of critical battles concerning the scope of the FCPA, including two separate cases endorsing the government's expansive view of what it means to be a "foreign official" under the FCPA.

These developments, along with the increasingly global nature of FCPA investigations, the implementation of the United Kingdom's Bribery Act of 2010 (Bribery Act), and the number of record-setting cases that the government continues to file, all reinforce the wisdom that multinational corporations are well-advised to heed the important lessons learned from global anti-corruption enforcement actions. This update provides our analysis of the principal themes and important developments emerging from FCPA enforcement activity in the first half of 2011.

KEY ENFORCEMENT AND INVESTIGATIVE DEVELOPMENTS

The Year of the Trial

The resources the government has brought to bear in prosecuting FCPA cases over the last five years are beginning to yield results. The Justice Department has scored six guilty verdicts so far in 2011, including the first FCPA conviction of a corporation. The government will have additional opportunities for success as a number of other cases are set for trial later this year and the next. As the discussion below reflects, 2011 is reminiscent of 2009, which saw *Frederic Bourke*, *Gerald and Patricia Green*, and *William Jefferson* tried and convicted in trials involving, at least in part, the FCPA.

United States v. Aguilar

On May 10, 2011, after only a day of deliberations, a jury in federal court in Los Angeles, California in *United States v. Aguilar* convicted Lindsey Manufacturing, its chief executive officer, *Keith Lindsey*, its chief financial officer, *Steven K. Lee*, and *Angela Aguilar*, the wife of Lindsey Manufacturing's Mexican sales agent, *Enrique Faustino Aguilar Noriega* (collectively, the *Aguilar* defendants) for their roles in bribing employees of Comisión Federal de Electricidad (CFE), the state-owned electric utility in Mexico. In reaction to the *Aguilar* guilty verdicts, Assistant Attorney General Lanny A. Breuer remarked that the Justice Department is "fiercely committed to bringing to justice all the players in these bribery schemes — the executives who conceive of the criminal plans, the people they use to pay the bribes, and the companies that knowingly allow these schemes to flourish."[3] Breuer said further that Lindsey Manufacturing would not be the last company to be tried and convicted under the FCPA.[4]

In addition to the guilty verdict against Lindsey Manufacturing being a historic "first," the *Aguilar* trial is also important because of the court's ruling on a key element of the FCPA and because it showcases the tough tactics the government is willing to use to fight corruption. Of particular note (and discussed in further detail below), the court denied the *Aguilar* defendants' motion to dismiss on the grounds that the CFE employees were not "foreign officials" under the FCPA. This decision validates the government's long-held view that the universe of potential bribe recipients under the FCPA includes

employees of state-owned enterprises. The court's decision on who qualifies as a "foreign official" has significant ramifications for companies doing business in countries where the state owns key sectors of the economy. The decision is also noteworthy in the sense that the convictions were based largely on circumstantial evidence like the size of the commission from Lindsey Manufacturing relative to commissions paid to agents in the past and Noriega's penchant for corruption. This should be a warning to companies and their compliance officers and counsels that direct proof of bribery is not required and that, therefore, it is important to pay attention to indicia of bribery or so-called red flags.

The prosecution of Aguilar also shows that the Justice Department will go to great lengths to bring a corrupt actor to justice. Aguilar's prosecution for money laundering was seen largely as an effort to pressure her fugitive husband, Noriega, to come to the United States to face charges of conspiracy to violate the FCPA, substantive FCPA violations, money-laundering conspiracy, and money laundering. Aguilar, a citizen of Mexico, was arrested when she traveled to the United States on a business trip. Aguilar spent nine months in prison but struck a deal soon after her conviction, which saw her sentenced to time served in exchange for giving up her rights to appeal her conviction. Her husband, at least for now, remains at large.

On June 25, 2011, the *Aguilar* defendants (excluding Aguilar) filed a supplemental brief in support of their motion to dismiss the indictment claiming prosecutorial misconduct. Judge Matz, in a hearing on June 27, 2011, appeared concerned over several aspects of the case, especially when the prosecution reported that it had located grand jury testimony that it did not provide to the defense despite a court order to do so. A briefing schedule has been set to examine certain of the prosecution's tactics.[5]

SHOT Show Trial

The first of four SHOT Show trials, featuring *Pankesh Patel, John Benson Wier III*, *Andrew Bigelow*, and *Lee Allen Tolleson*, got underway on May 16, 2011 in the United States District Court for the District of Columbia before Judge Richard J. Leon.[6] On July 7, 2011, Judge Leon declared a mistrial when the jury deadlocked, handing the Justice Department a setback in its aggressive enforcement agenda.[7]

As we discussed in our Summer 2010 edition of *FCPA News and Insights*, the SHOT Show investigation was a massive sting operation that led to the arrest, on January 19, 2010, of twenty-two executives and employees in the military and law enforcement products industry, sending shockwaves through the FCPA bar.[8] Twenty-one of the defendants were arrested while attending the SHOT Show, an industry trade show in Las Vegas. In its investigation, the Justice Department employed wiretaps, undercover FBI agents posing as foreign government officials, and an informant, *Richard Bistrong*, who acted as an intermediary between the government and the defendants, demonstrating a game-changing shift in how FCPA cases will be prosecuted. Bistrong pleaded guilty last year.

Prior to the first trial, three other SHOT Show defendants pleaded guilty earlier this year. Specifically, on March 1, 2011, March 29, 2011, and April 28, 2011, respectively, *Daniel Alvirez*, *Jonathan Spiller*, and *Haim Geri* pleaded guilty to conspiracy to violate the FCPA. Each faces up to five years in prison. Spiller testified for the government at the first trial, which ultimately may help him secure a lenient sentence if federal prosecutors are satisfied with his cooperation and testimony.[9] Interestingly, Alvirez was charged with two conspiracies, one at the center of the SHOT Show investigation and a separate allegation concerning Alvirez's involvement in sales of military supplies to the Republic of Georgia.[10]

The allegedly violative conduct in Georgia was not identified when the SHOT Show investigation was first announced, leading to speculation that more FCPA charges may be forthcoming in the military and arms industry.

Importantly, and in what is believed to be another historic first, on June 6, 2011, Judge Leon ruled in favor of Patel when the court dismissed one of the counts against Patel because the government failed to establish the territorial jurisdiction necessary under 15 U.S.C. § 78dd-3 (the 1998 amendment to the FCPA), to show that Patel had acted "while in the territory of the United States" when he sent a package containing a purchase agreement in furtherance of the alleged corrupt payment from the United Kingdom to the United States. This ruling is likely to have significant repercussions for the government's FCPA program, given the number of cases (like Siemens) that are predicated on very minimal or no contacts with the United States. For example, will the many cases (such as the TSKJ and Siemens cases) that are based on wiring money through a U.S. correspondent bank continue to be prosecutable under the 15 U.S.C. § 78dd-3 territorial jurisdictional prong. Indeed, will any act outside the United States, however offensive, be capable of meeting the 15 U.S.C. § 78dd-3 territorial jurisdictional requirement of conduct "while in the territory of the United States."

Although prosecutors told Judge Leon that they planned to retry the case, the failure to secure a conviction in the massive sting operation raises uncertainty about the fate of the SHOT Show defendants and the tactics employed by the government. The three other trial groups are set for trial on September 22, 2011, December 12, 2011, and May 12, 2012.

Other Trials

Control Components, Inc. Defendants

In *United States v. Carson*, five individuals associated with *Control Components, Inc.* (CCI), including *Stuart Carson*, his wife *Hong (Rose) Carson*, *Paul Cosgrove*, *David Edmonds*, and *Han Yong Kim* (the *Carson* defendants), are scheduled for trial in June 2012. CCI, a California-based valve company, pleaded guilty on July 31, 2009 to violations of the FCPA and the Federal Travel Act of 1961 (Travel Act).[11] As part of the plea, CCI admitted that from 2003 through 2007 it made corrupt payments in thirty-six countries, totaling US$6.85 million, with the aim of securing lucrative contracts that resulted in net profits of US$46.5 million.[12] The bribes allegedly paid by CCI also form the basis of the actions against the *Carson* defendants. On April 28, 2011, *Flavio Ricotti*, a former vice president of sales at CCI, who was extradited from Germany to the United States last year, pleaded guilty to one count of conspiracy to make corrupt payments to foreign government officials in violation of the FCPA.[13] He is the third CCI executive to plead guilty to violations of the FCPA, following earlier pleas from *Mario Covino*, former worldwide sales director (January 2009), and *Richard Morlok*, former finance director (February 2009).[14] At sentencing, Ricotti, Morlok, and Covino each face up to five years in prison. All three are believed to be cooperating with the government's investigation. As in *Aguilar*, pre-trial motion practice in the *Carson* case resulted in another court ruling sustaining the government's expansive interpretation of who qualifies as a "foreign official" (discussed in more detail below).

John Joseph O'Shea

John Joseph O'Shea, a former manager of *ABB Network Management*, a subsidiary of *ABB, Inc.*, faces trial in Texas on October 25, 2011. O'Shea is accused of authorizing bribes of US$1.9 million to CFE employees in exchange for contracts worth US$81 million. O'Shea allegedly hired

Fernando Maya Basurto, a Mexican citizen, who acted as a middleman in the scheme and who has pleaded guilty to conspiracy to violate the FCPA, commit money laundering, and falsify records in a federal investigation. Basurto is expected to testify in O'Shea's trial. Defendant's "foreign official" motion is pending. The *O'Shea* case, like *Aguilar*, involves payments to CFE employees, so the *O'Shea* court may look to the *Aguilar* court in ruling on O'Shea's motion to dismiss.

Haiti Teleco Defendants

Two of the remaining defendants charged in connection with bribery of government officials at Telecommunications D'Haiti (Haiti Teleco), *Joel Esquenazi* and *Carlos Rodriguez*, began trial July 18, 2011 in federal court in Miami, Florida. On August 4, 2011, the jury convicted Esquenazi and Rodriguez on all counts.

Additionally, on July 13, 2011, a superseding indictment was filed charging another Florida telecommunications company and an additional five individuals in the Haiti Teleco bribery scheme, including Cinergy Telecommunications, Inc. (Cinergy), *Washington Vasconez Cruz*, *Amadeus Richers*, *Patrick Joseph*, *Jean Rene Duperval*, and *Marguerite Grandison*.[15] Grandison and Duperval were charged in a previous indictment, but the others were recently added. Joseph was an official at Haiti Teleco, while Cruz and Richers were senior executives at Cinergy.

These trials have the potential to add to a growing body of judicial interpretations on the FCPA, thereby addressing one of the major criticisms of the government's enforcement of the FCPA, which is that the law is what the SEC and the Justice Department say that it is.

Defendants Lose Challenge to Foreign Official Definition

On April 20, 2011 and May 18, 2011, the Central District of California in two separate cases, *United States v. Aguilar* and *United States v. Carson*, ruled for the government on the question of who qualifies as a "foreign official" under the FCPA.

In each case, the defendants were charged with violating the anti-bribery provisions of the FCPA by making improper payments to, among others, employees of a government-owned commercial enterprise.[16] In *Aguilar*, the entity in question was the CFE, a utility wholly owned by the Mexican government.[17] The *Carson* defendants are charged with paying nearly US$5 million in bribes to employees of state-owned companies in China, South Korea, Malaysia, and the United Arab Emirates, as well as to employees of private companies.[18]

The FCPA defines a "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof . . . or any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality . . . ."[19] Both sets of defendants contend that the charges should be dismissed because, as the court framed the *Aguilar* defendants' contention, "under no circumstances can [an employee or officer of a state-owned commercial enterprise] be a foreign official, because under no circumstances can a state-owned corporation be a department, agency, or instrumentality of a foreign government."[20]

The *Aguilar* defendants focused on the definition of "instrumentality," reasoning that this part of the definition of foreign official was the most likely fit for state-owned corporations.[21] The *Aguilar* defendants

argued that looking to the ordinary meaning of the term, an instrumentality of the government "is an entity the government uses to accomplish its functions of setting forth and administering public policy or public affairs or exercising political authority."[22] While noting that government branches, ministries, and commissions would be included in the definition of instrumentalities, the *Aguilar* defendants contended that corporations would not.[23] The *Aguilar* defendants further argued that state-owned corporations cannot be included in the definition of instrumentality because state-owned entities have characteristics different from agencies and departments, the other elements of the foreign official definition.

In *Aguilar*, the government countered that state-owned corporations share various qualities with both agencies and departments, and that the term "instrumentality" would be robbed of independent meaning if an instrumentality must share all the same characteristics with both a department and an agency.[24]

The *Aguilar* court ruled for the government, holding that the "structure, purpose and object" of the FCPA are consistent with a definition of instrumentality that includes at least some state-owned corporations.[25] The *Aguilar* court found the legislative history of the FCPA inconclusive, rejecting the *Aguilar* defendants' arguments that the FCPA's legislative history confirmed their interpretation. The *Aguilar* court noted that while the legislative history does not show that Congress intended to include all state-owned corporations within the FCPA, it also does not demonstrate that Congress intended to exclude all state-owned corporations from the FCPA.[26]

The *Aguilar* court provided a non-exhaustive list of factors to consider in determining whether an entity is an instrumentality under the FCPA, including whether:

1. the entity provides a service to the citizens — indeed, in many cases to all the inhabitants — of the jurisdiction;
2. the key officers and directors of the entity are, or are appointed by, government officials;
3. the entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such as entrance fees to a national park;
4. the entity is vested with and exercises exclusive or controlling power to administer its designated functions; and
5. the entity is widely perceived and understood to be performing official (i.e., governmental) functions.[27]

Applying these factors, the *Aguilar* court observed that the CFE was created by statute as a decentralized public entity, that its governing board is composed of governmental officials, and that the CFE describes itself as a government agency. The court further noted that the CFE, as a supplier of electricity, performs a quintessential government function and that the Mexican Constitution recognizes the supply of electric power as an exclusive function of the government.[28] Thus, the *Aguilar* court held that a state-owned entity such as CFE may be an instrumentality under the FCPA.[29] The *Aguilar* court denied the defendants' motion to dismiss. After a five-week trial, the jury ultimately convicted each of the *Aguilar* defendants on all counts after just one day of deliberation.[30]

The *Carson* decision, which was handed down less than a month after the *Aguilar* decision, echoes the ruling by the *Aguilar* court. The defendants in *Carson* made virtually identical arguments to those made in *Aguilar*, and the *Carson* court reached the same conclusion.[31] The court in *Carson* held that

state-owned entities could be instrumentalities under the FCPA, but that the determination is a question of fact.[32] The *Carson* court identified a number of other factors beyond those identified by the *Aguilar* court that should be considered in determining whether a business entity constitutes an instrumentality under the FCPA, including:

1. the foreign state's characterization of the entity and its employees;
2. the foreign state's degree of control over the entity;
3. the purpose of the entity's activities; and
4. the circumstances surrounding the entity's creation.[33]

While it did not apply these enumerated factors to the alleged facts before it, the *Carson* court noted that the factors are not exclusive and none is dispositive.[34] For example, a mere monetary investment by the government in a business entity may not qualify the entity as an instrumentality.[35] However, the *Carson* court noted that a monetary investment combined with additional factors that indicate the entity is being used to carry out governmental objectives may be sufficient.[36] Combined, the *Aguilar* and *Carson* decisions provide the nine factors that must be considered when deciding who qualifies as a foreign government official under the FCPA.

The defendants in *Aguilar* and *Carson* were not the first to challenge the government's interpretation of the term "foreign official." In November 2010, the court in *United States v. Esquenazi* denied the defendants' motion to dismiss the indictment, which was based on the same reasoning as the motions in *Aguilar* and *Carson*. In its short written ruling, the *Esquenazi* court held that the statute's plain language, as well as the plain meaning of the term "instrumentality," made it clear that the state-owned corporation in question, Haiti Teleco, could be an instrumentality of the Haitian government.[37] Similarly, the court in *United States v. Nguyen* denied the defendant's motion, which was based on the same arguments made by the plaintiffs in the *Aguilar* and *Carson* cases, but without a written decision.[38]

Update on Industry-Wide Investigations

Pharmaceutical and Medical Device Industries

Johnson & Johnson/DePuy

On April 8, 2011, Johnson & Johnson entered into a US$77.9 million global settlement with the SEC, the Justice Department, and the UK's Serious Fraud Office (SFO). The SEC and the Justice Department announced that Johnson & Johnson would pay US$70 million total to settle criminal and civil charges under the FCPA.[39] Pursuant to a DPA with the Justice Department, Johnson & Johnson admitted that its subsidiaries in Greece, Poland, and Romania bribed healthcare providers employed by the governments of those countries and provided kickbacks to the former Iraqi government in order to secure contracts under the United Nations Oil for Food Programme (OFFP).[40]

Allegedly, in 2006, Johnson & Johnson's internal auditors learned from a whistleblower that Greek surgeons at public hospitals were being bribed to purchase the company's surgical implants — a scheme that had originated with *DePuy, Inc.* (DePuy) before DePuy was acquired by Johnson & Johnson in 1998.[41]

In Poland, Johnson & Johnson's subsidiary *Johnson & Johnson Poland Sp. z.o.o.* (J&J Poland) allegedly bribed public healthcare professionals using sham civil contracts that called for payments to doctors in return for their services, which neither party ever intended for the doctors to actually provide.[42] J&J Poland also allegedly funded public healthcare workers' travel expenses to encourage them to grant hospital tenders to J&J Poland or to purchase Johnson & Johnson products.[43]

A Romanian subsidiary, *Johnson & Johnson d.o.o.* (J&J Romania), bribed publicly employed doctors and pharmacists to prescribe the products it was promoting. Finally, two Johnson & Johnson subsidiaries, *Cilag AG International* and *Janssen Pharmaceutica N.V.*, submitted contracts with inflated prices to the United Nations in order to fund kickbacks to the Iraqi Ministry of Health in the OFFP.[44]

Johnson & Johnson entered into a three-year DPA with the Justice Department in which it agreed to pay a criminal fine of US$21.4 million, a twenty-five percent discount from sentencing guidelines minimum. [45] The Justice Department noted that Johnson & Johnson's fine was reduced in light of the company's cooperation in the ongoing investigation of other companies and individuals in the pharmaceutical and medical device industry. Additionally, the Justice Department recognized that Johnson & Johnson had conducted an extensive internal investigation and voluntarily disclosed its potentially violative conduct.[46] Instead of imposing a compliance monitor, which tends to be standard where the alleged violation is widespread, Johnson & Johnson is required to report its remediation and enhanced compliance efforts to the government every six months. The Justice Department emphasized that the Johnson & Johnson settlement highlights the Justice Department's two goals of holding corporations accountable for bribing foreign officials while also giving meaningful credit to companies that self-report and cooperate with the Justice Department.[47] Additionally, the Johnson & Johnson DPA provided that an information charging conspiracy and substantive FCPA violations would be filed against DePuy.[48] With respect to the SEC settlement, Johnson & Johnson agreed to pay more than US$48.6 million, which included US$38.2 million in disgorgement and US$10.4 million in prejudgment interest.[49] Johnson & Johnson was also enjoined from future FCPA violations and ordered to implement various improvements to its FCPA compliance program.

Johnson & Johnson's internal investigation revealed that the illicit payments in Greece involved a British subsidiary of DePuy, *DePuy International Limited* (DePuy International). Consequently, in October 2007, the Justice Department notified the SFO of the allegations concerning DePuy International.[50] Given that the Justice Department had already prosecuted DePuy's conduct, the SFO determined that prosecution in the United Kingdom was barred by principles of double jeopardy. Rather than prosecuting the company, the SFO sought a civil recovery order under the Proceeds of Crime Act of 2002. Considering the sanctions already imposed on DePuy in the United States, and the fact that Greece had already frozen US$8.4 million in assets, the SFO determined that the appropriate amount to recover was £4.8 million (US$7.9 million).[51]

The SFO's action highlights the increasing cooperation among enforcement authorities around the world and also shows that the SFO is willing to view enforcement from a global perspective, both in its decision not to prosecute DePuy based on principles of double jeopardy, as well as the decision to seek a civil recovery order in light of previous penalties paid in the United States and Greece.

In the wake of settlements reached with the Commission and the Justice Department, Johnson & Johnson's shareholders filed a derivative suit on May 2, 2011 against eleven of its directors.[52] The shareholders allege breach of fiduciary duty, mismanagement, abuse of control, corporate waste,

unjust enrichment, and violation of the federal securities laws. The derivative lawsuit alleged that Johnson & Johnson did not disclose the details surrounding the company's widespread bribery of doctors in Europe and kickbacks to Iraq.[53] Additionally, the derivative action asserted that Johnson & Johnson's FCPA settlement is the tenth-largest settlement of its type and the second-largest FCPA settlement involving a U.S. corporation to bolster the contention that Johnson & Johnson has suffered and likely will suffer additional damages as it remediates these compliance violations.[54] The derivative suit is a reminder that the costs of FCPA violations come in many forms, including collateral litigation by other constituencies even after the government's interests are resolved.

Philips Discloses Possible Corruption Violations

In its 2010 annual report filed on February 18, 2011 with the SEC, *Royal Philips Electronics* (Philips) reported that it is conducting an internal review of certain activities related to the sale of medical equipment in Poland for potential violations of the FCPA. Philips reported the internal review to the SEC and the Justice Department and is cooperating with both agencies.[55] The internal review was started following the indictment of three former officials of its Polish unit, Philips Polska Sp. z.o.o., for alleged bribery of Polish hospital directors to influence purchasing decisions.[56] This review stands as a reminder of the risk that companies face as they do business with employees of state-owned entities, who arguably qualify as "foreign officials" under the FCPA. The SEC and the Justice Department continue to broadly investigate possible FCPA violations in the medical device and pharmaceutical industries.

High Tech Industry

Like a lot of other industries with a global footprint, technology companies with international operations face substantial FCPA risks. Their business typically requires extensive interaction with government officials regarding such matters as regulatory licenses and approvals, and contracting directly with government agencies, government-sponsored entities, and enterprises engaging in government-related functions. Furthermore, many technology companies extensively rely on consultants, agents, suppliers, and distributors in conducting business around the world. Moreover, many U.S.-based high tech companies call Silicon Valley home, putting them in close proximity to the SEC's San Francisco-based FCPA unit. As Tracy L. Davis, assistant regional director for the SEC's San Francisco Regional Office, stated, "[t]he fact that we have a significant presence of companies in Silicon Valley who do business internationally, specifically in Asia, makes us well-suited for addressing these kinds of issues. That's one of the reasons why San Francisco is a particularly good location for an FCPA unit."[57] With dedicated SEC resources to focus on high tech companies, and as the following developments show, FCPA enforcement activity in the high tech industry appears to be underway.

IBM

On March 18, 2011, *IBM* settled SEC allegations that it violated the books and records and internal controls provisions of the FCPA.[58] Allegedly, an IBM subsidiary, *IBM Korea Inc.*, together with a joint venture in which IBM owned a majority interest, *LG IBM PC Co., Ltd.*, bribed South Korean government officials between 1998 and 2003.[59] Furthermore, the SEC alleged that between 2004 and 2009, IBM subsidiaries *IBM (China) Investment Company Limited* and *IBM Global Services (China) Co., Ltd.* violated the FCPA by bribing Chinese government officials. Despite IBM's anti-bribery policy

and FCPA compliance procedures, violative payments were made in the form of direct payments to government officials, gifts, or covered travel and entertainment expenses. These payments were recorded on IBM's books and records as valid business expenses.[60] Without admitting or denying the Commission's allegations, IBM entered into a permanent injunction prohibiting it from future violations of the books and records and internal controls provisions of the FCPA. In addition, IBM agreed to pay US$10 million in civil penalties, disgorgement, and pre-judgment interest.[61] To date, the Justice Department has not brought a separate enforcement action against IBM.

Comverse Technology, Inc.

On April 7, 2011, the SEC and the Justice Department announced settlements against *Comverse Technology, Inc.* (CTI), a global provider of software and software systems for communication and billing services.[62] The settlements arose from allegations of improper payments totaling US$536,000 made by CTI's Israeli subsidiary, *Comverse Ltd.* (Comverse), to employees of telecommunications provider Hellenic Telecommunications Organization S.A. (OTE), which is more than one-third owned by the Greek government. Staying on the foreign official point, it appears the DOJ and SEC were suggesting that the Greek government controlled Hellenic and, therefore, employees of Hellenic are foreign officials under the FCPA. The Commission and the Justice Department alleged that Comverse made improper payments using a Cyprus-based agent in order to win business contracts worth approximately US$10 million in revenues, resulting in approximately US$1.2 million in profits.[63]

Furthermore, CTI allegedly failed to maintain internal accounting controls that would have ensured transactions were properly recorded. For example, CTI had no process for conducting due diligence of sales agents or for the independent review of agent contracts.[64] And although CTI did have a policy prohibiting improper payments to government-affiliated third parties, it did not widely circulate the policy or provide its employees with training.[65]

Without admitting or denying the Commission's allegations, CTI agreed to be enjoined from further violations of the books and records and internal controls provisions of the FCPA and to pay US$1.6 million in disgorgement and prejudgment interest. With respect to the Justice Department, CTI entered into a non-prosecution agreement (NPA) and agreed to pay US$1.2 million in criminal fines. The Justice Department indicated that the settlement was based on several mitigating factors, including CTI's thorough self-investigation, voluntary disclosure of the underlying conduct, and full cooperation with the government during the investigation.[66] The Justice Department also noted that CTI had undertaken significant remedial efforts, overhauled its compliance culture, instituted mandatory anti-corruption training programs that focused on the use of third-party agents, and employed enhanced accounting controls for payments associated with third parties.[67]

This case illustrates the dangers of failing to provide effective anti-corruption training for employees and neglecting to diligently review agents and other third parties, which can give rise to liability under the FCPA.[68] Companies should ensure that they have established appropriate risk-based review of their business partners. Moreover, it is imperative to educate employees on the need to comply with anti-corruption policies as well as the consequences of not doing so, including possible individual prosecution.

Veraz II

On March 31, 2011, California-based *Dialogic Inc.* (Dialogic) announced that the SEC was conducting an investigation into allegations of potential violations of the FCPA by its predecessor company, *Veraz Networks Inc.* (Veraz).[69] Allegedly, the wrongdoing occurred prior to the merger of Dialogic Corporation and Veraz to form Dialogic, which was completed in October 2010.

The Commission previously, on June 29, 2010, had charged Veraz with violating the books and records and internal controls provisions of the FCPA. Allegedly, Veraz hired a consultant in China who spent US$40,000 in gifts and other improper payments to officials at a government-controlled telecommunications company in China, and a Veraz employee made similar payments to officals at a government-controlled telecommunications company in Vietnam. Veraz violated the books and records and internal controls provisions of the FCPA by failing to keep books, records, and accounts that accurately and fairly recorded the improper payments and failing to devise and maintain a system of effective internal controls to prevent such payments. To settle these allegations, Veraz agreed to pay US$300,000 in civil penalties and consented to the entry of a final judgment permanently enjoining it from future FCPA violations.[70] Although it may be too soon to know what the SEC is investigating and whether any potential violations will be revealed, the SEC's second investigation of Dialogic reinforces the importance of pre-acquisition due diligence.

Oil and Gas Industry

As we discussed in our 2010 year-end review, on November 4, 2010, the SEC and the Justice Department announced settlements with five companies in the oil and gas industry, as well as with *Panalpina World Transport (Holding) Ltd.* (PWT), a global freight forwarding and logistics company, and its U.S. subsidiary, *Panalpina, Inc.*[71] Generally, those settlements arose from allegations of illicit payments to customs officials in Nigeria and other countries.

Tidewater, Inc.

On March 3, 2011, *Tidewater, Inc.* (Tidewater), an oil services company ensnared in the U.S. Panalpina bribery probe, announced that it had agreed to pay US$6.3 million to settle a related investigation brought by Nigeria's Economic & Financial Crimes Commission.[72] Under the settlement agreement, the Nigerian government agreed not to bring criminal or civil charges against any Tidewater entity or personnel.[73] The Nigerian settlement follows Tidewater's earlier settlement with U.S. authorities, in which the company agreed to pay US$15.6 million in civil and criminal penalties. It is becoming increasingly common for companies to face enforcement actions in multiple jurisdictions arising out of the same potentially violative conduct.

Hercules Offshore, Inc.

Hercules Offshore, Inc. (HERO), a global provider of offshore contract drilling, liftboat, and inland barge services,[74] announced in its Form 10-Q on April 29, 2011, that it had received a subpoena from the SEC indicating that certain of HERO's activities were under review. HERO also indicated that the Justice Department was also reviewing its activities for potential FCPA violations.[75] HERO did not specifically disclose what geographic regions were under investigation, although the disclosure's reference to potential violations being in certain international jurisdictions where the company conducts operations suggests that the government's inquiry spans more than one country. HERO is conducting an internal investigation and intends to cooperate with the SEC and the Justice Department.

Financial Services Industry

The financial services industry has recently drawn the attention of the government as the SEC and the Justice Department turn their focus to sovereign wealth funds (SWFs). SWFs are investment funds owned and operated by governments. The massive influx of capital from SWFs into Wall Street's biggest banks and private-equity funds has led to a recent increase in scrutiny from enforcement authorities.[76] Earlier this year, the SEC sent letters to as many as ten banks and private-equity firms asking about the firms' dealings with SWFs and requesting that the recipients retain documents.[77] In June 2011, press reports suggested that the SEC was examining whether a major Wall Street firm violated the FCPA's anti-bribery provisions in its dealings with the SWF Libyan Investment Authority.[78]

Together, the SEC letters and this reported review may signal the beginning of a broader, industry-wide investigation into the financial services sector. If this industry-wide investigation unfolds, we expect it to encompass other financial institutions and other FCPA issues beyond those related to SWFs. To mitigate FCPA exposure, financial institutions need to ensure that they have robust anti-corruption compliance programs. When conducting business with an SWF, it is imperative to conduct appropriate due diligence on, among other things, the SWF, its organizational structure, key personnel, management arrangement, compensation structure, and the closeness of the SWF's relationship to its government.

Successor Liability: Companies Continue to Face Liability for Inadequate Pre-Acquisition Due Diligence

The Commission and the Justice Department expect companies that engage in joint ventures, mergers, or other business combinations to conduct thorough due diligence to uncover, report, and resolve any lurking FCPA issues. One of the areas that the Chamber of Commerce targeted in its efforts to rewrite the FCPA (or at least parts of it) is the issue of successor liability. The Chamber of Commerce argues that holding a company criminally responsible for the acts of its predecessors is unfair and casts a chill on business combinations. As discussed above, the Chamber of Commerce's call for reform includes eliminating successor liability when the violative conduct wholly predated the business combination, making clear precisely what level of due diligence is required to avoid liability, and providing a safe harbor period after closing the business combination in order to allow the acquiring company to conduct due diligence and disclose any issues to the government. In the meantime, as the following cases illustrate, companies must conduct adequate due diligence to ensure that any existing FCPA issues are addressed.

Ball Corporation

On March 28, 2011, *Ball Corporation* (Ball), a manufacturer of metal packaging for beverages, foods, and household products, resolved an SEC enforcement action in which the SEC alleged that Ball's Argentine subsidiary, *Formametal, S.A.* (Formametal), paid bribes totaling over US$100,000 to employees of the Argentine government to ensure the importation of prohibited used machinery and the exportation of raw materials at reduced tariffs.[79] Three months after Ball acquired Formametal, a financial analyst from Ball made a routine visit to Formametal to gather information about its operations. During the visit, the financial analyst learned of questionable customs fees, mischaracterization of assets on customs declarations, and the destruction of documents. The financial analyst reported his findings to the director of accounting of Ball's Metal, Food and Household Packaging Products Division, who shared it with other senior executives. Ball accountants also learned of a bribe by the former president and owner of Formametal to import machinery for use in its manufacturing process. Although some

remedial action was taken in the aftermath of the report, Formametal's senior officers continued to authorize unlawful payments to Argentine government officials for over a year.

Despite these findings, Ball neglected to take sufficient steps to ensure that the conduct did not continue at Formametal.[80] The SEC noted that Ball's weak internal controls, which included the failure to secure appropriate documentation for imports, made it difficult to detect that Formametal was repeatedly paying bribes.[81] Those inadequate controls also prevented Ball from bringing about remediation after Ball executives became aware of compliance problems at Formametal.[82] For example, the SEC noted that the employees responsible for dealing with customs officials remained at Formametal, even when due diligence suggested that Formametal employees might have authorized questionable payments.[83]

Ball was charged with violating the FCPA's books and records and internal controls provisions. As a result, Ball agreed to a cease and desist order prohibiting future FCPA books and records violations and agreed to pay a US$300,000 civil penalty. In determining the penalty, the SEC considered that Ball undertook remedial acts, voluntarily disclosed the matters, and cooperated fully with the Commission's investigation.[84] While the Ball case shows the benefits of cooperation and voluntary disclosure, the case also reflects the need not only to proceed cautiously when acquiring other businesses, but also to respond quickly and decisively when potential problems are revealed.

Kraft Foods

On February 28, 2011, *Kraft Foods, Inc.* (Kraft) disclosed in its 2010 annual report that it had received a subpoena from the SEC on February 1, 2011 in connection with an FCPA investigation.[85] Kraft acquired UK-based *Cadbury* in a US$19 billion deal in February 2010. In its disclosure, Kraft reported that while its preliminary due diligence had found Cadbury's overall state of compliance to be sound, in certain jurisdictions, including India, there appeared to be facts and circumstances warranting further investigation.[86] According to Kraft, the SEC's subpoena demanded information relating to a Cadbury facility in India and primarily requested information regarding dealings with Indian governmental agencies and officials to obtain approvals related to the operations of the India plant.[87] Kraft has stated that it is cooperating with the U.S. government.[88]

Latin Node Inc.

The *Latin Node Inc.* (LatiNode) enforcement action is often cited to highlight the importance of pre-acquisition due diligence. LatiNode was acquired by Florida-based *eLandia International, Inc.* (eLandia) in 2007. Soon after the acquisition, eLandia discovered potential FCPA violations at LatiNode. 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 US$1.1 million to third parties, with the knowledge that those monies would be used to bribe officials of the Honduran state-owned telecommunications company, Hondutel.[89] 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.[90] LatiNode agreed to pay US$2 million in criminal fines over three years.[91] As a result of the monetary penalties imposed on LatiNode and the loss of business, eLandia estimated that it lost US$20.6 million on the LatiNode acquisition.[92]

The fallout from the case continues as four former senior executives of LatiNode have pleaded guilty to conspiring to pay bribes to Honduran officials. On May 19, 2011, *Jorge Granados*, LatiNode's former chief executive officer, pleaded guilty to conspiring to bribe government officials in Honduras in violation of the FCPA.[93] Granados admitted to authorizing the payment of bribes to senior officials of Hondutel and to a minister of the Honduran government who later joined Hondutel's board of directors.[94] Granados faces a maximum of five years in prison and a fine of US$250,000, or twice the value gained or lost through the scheme.[95] Granados is the fourth former LatiNode executive to plead guilty. He joins *Manuel Salvoch*, the chief financial officer, *Juan Pablo Vasquez*, the chief commercial officer, and *Manuel Caceres*, the vice president for business development. These prosecutions are additional examples of the Justice Department's aggressive pursuit and vigorous prosecution of individuals supposedly responsible for FCPA violations.

Rounding Out the Enforcement Docket

Maxwell Technologies Settles China Bribery Charges

On January 31, 2011, *Maxwell Technologies, Inc.* (Maxwell), a manufacturer of energy-storage and power-delivery products, agreed to pay US$14.3 million to settle FCPA charges brought by the SEC and the Justice Department.[96] According to court documents, Maxwell's wholly owned Swiss subsidiary, *Maxwell Technologies S.A.* (Maxwell-Swiss), employed a Chinese sales agent to pay US$2.8 million in bribes to officials at several Chinese state-owned entities to secure and retain lucrative sales contracts.[97] Maxwell-Swiss's payments to the sales agent included payments characterized as "extra amount" or "special arrangement" fees.[98] Allegedly, the bribes were paid with the knowledge and approval of senior corporate officers in Switzerland and the U.S., some of whom had knowledge of the scheme as early as 2002. An email from one U.S.-based executive noted that "this is a well know[n] issue" and "no more emails please."[99] To conceal the scheme, the payments were improperly recorded as sales commission expenses in Maxwell's reported financials.[100]

The SEC charged Maxwell with violations of the anti-bribery, books and records, and internal controls provisions of the FCPA. Without admitting or denying the SEC's allegations, Maxwell consented to the entry of a final judgment that permanently enjoins the company from future violations. Further, Maxwell agreed to pay US$5.6 million in disgorged profits and US$696,314 in prejudgment interest.[101] Maxwell also entered into a three-year DPA with the Justice Department and agreed to pay a criminal fine of US$8 million.[102] Under the terms of the agreement, Maxwell agreed to enhance its compliance and internal controls program to prevent future FCPA violations, to report periodically on the company's compliance efforts, and to fully cooperate with the Justice Department's ongoing investigation.[103]

Tyson Foods Settles Charges of Bribing Mexican Government Inspectors

On February 10, 2011, *Tyson Foods, Inc.* (Tyson) agreed to pay US$5.2 million to settle FCPA charges brought by the SEC and the Justice Department.[104] Allegedly, Tyson's wholly owned subsidiary, *Tyson de Mexico* (Tyson-Mexico), paid US$100,311 to two veterinarians employed by the Mexican federal government.[105] The payments were intended to influence the decisions of the veterinarians who were responsible for certifying Tyson's products for export under a federal inspection program.

The payments were initially made indirectly by including the veterinarians' wives on Tyson-Mexico's payroll, even though they were not providing any services to Tyson-Mexico. In 2004, Tyson learned about the payments to the wives and stopped them, but replaced these payments with direct payments to one of the veterinarians. The payments were recorded as legitimate expenses and were included in Tyson's reported financials for 2004, 2005, and 2006.[106]

Tyson entered into a two-year DPA with the Justice Department and agreed to pay a US$4 million criminal fine to resolve the charges.[107] Under the terms of the agreement, Tyson agreed to enhance its compliance program and internal controls to prevent future violations and to fully cooperate in any government investigation.[108] The SEC charged Tyson with violations of the anti-bribery, books and records, and internal controls provisions of the FCPA. Without admitting or denying the allegations in the SEC's complaint, Tyson consented to the entry of a final judgment that permanently enjoins it from future FCPA violations. Further, Tyson agreed to pay more than US$1.2 million in disgorged profits and prejudgment interest.[109]

Rockwell Limits Civil Penalty Exposure through Cooperation

On May 3, 2011, *Rockwell Automation, Inc.* (Rockwell), a global manufacturer of industrial automation products and services, entered into a cease-and-desist order (Order) with the SEC.[110] Allegedly, one of Rockwell's former subsidiaries, *Rockwell Automation Power Systems (Shanghai) Ltd.* (RAPS-China), violated the books and records and internal controls provisions of the FCPA.

RAPS-China employees allegedly used consultants to pay approximately US$615,000 to state-owned engineering firms, with the intention of influencing state-owned mining companies to purchase RAPS-China products. Further, RAPS-China allegedly paid approximately US$450,000 to fund leisure travel for employees of state-owned companies. Without admitting or denying the findings contained in the Order, Rockwell agreed to cease and desist from committing further FCPA violations and to pay US$1.8 million in disgorged profits, US$590,091 in prejudgment interest, and a US$400,000 civil penalty.[111]

Rockwell's Order illustrates the government's effort to be increasingly transparent about how companies are rewarded for their cooperation. The SEC expressly noted that it did not impose a civil penalty in excess of US$400,000 due to Rockwell's willingness to cooperate during the investigation.[112]

Global Anti-Corruption Enforcement and Investigation Update

Several enforcement actions show that anti-corruption enforcement is becoming increasingly global. This trend is likely to continue, particularly with the continuing global effort to combat corruption. In addition to the SFO's cooperation with the Justice Department in the Johnson & Johnson/DePuy International settlement discussed above, the following actions reflect the continuing trend of global coordination of corruption enforcement.

Mabey & Johnson Executives Sentenced

On February 23, 2011, three former executives of *Mabey & Johnson Ltd.* (Mabey & Johnson) were sentenced in the United Kingdom for making illicit payments to the Iraqi government in connection

with the OFFP.[113] In May 2001, Mabey & Johnson entered into a €4.2 million (US$5.9 million) contract under the OFFP to supply the Iraqi government with thirteen steel modular bridges.[114] To secure the contracts, Mabey & Johnson executives agreed to pay kickbacks to the Iraqi regime amounting to ten percent of the contract price and to record the payments as "commissions" paid to local representatives.

Richard Forsyth, the former managing director of Mabey & Johnson, and *David Mabey*, a former sales director, were tried and convicted. Forsyth was sentenced to twenty-one months in prison, disqualified from acting as a company director for five years, and ordered to pay £75,000 (US$122,722) in prosecution costs.[115] The sentencing judge indicated that Forsyth was the most culpable company official because of his position as managing director.[116] Mabey was sentenced to eight months in prison, disqualified from acting as a company director for two years, and ordered to pay £125,000 (US$204,537) in prosecution costs.[117] *Richard Gledhill*, a former sales manager who pleaded guilty before trial and testified for the prosecution, was given a suspended eight-month sentence.[118] Alderman noted that, like the Justice Department's policy on prosecuting individuals, the Mabey & Johnson case illustrates the SFO's determination to go after senior executives who break the law.[119]

Medical Instrument Supplier Mark Rodney Jessop Sentenced

On April 13, 2011, the SFO announced that surgical instruments supplier *Mark Rodney Jessop* had been sentenced to twenty-four weeks in prison for making illegal payments to the Iraqi government between 1996 and 2003 in connection with the OFFP. Jessop's case marks the seventh conviction garnered by the SFO in OFFP cases.[120] As alleged, between 1996 and 2003, Jessop entered into 54 contracts with the Iraqi government that in total were valued at US$12.3 million. Jessop admitted to accepting contracts and supplying medical goods pursuant to a kickback scheme. Allegedly, Jessop made payments to Dr. Janan Matloob and Dr. Ishan Ibrahim, both of whom had contacts with the Iraqi government, to facilitate the kickbacks. In addition to the twenty-four-week jail sentence, Jessop was ordered to pay £150,000 (US$245,455) to the Development Fund for Iraq and to pay prosecution costs of £25,000 (US$40,907).

Innospec Names U.S.-U.K. External Compliance Monitor

In March 2010, *Innospec Inc.* (Innospec) settled corruption charges with the SEC, the Justice Department, the SFO, and the Office of Foreign Assets Control (OFAC) for allegedly bribing Iraqi government officials under the OFFP program and for paying bribes to government officials in Indonesia.[121]

On January 24, 2011, *Paul W. Jennings*, who held various positions at Innospec, including chief financial officer and chief executive officer, settled with the SEC, agreeing to pay a civil monetary penalty of US$100,000 and to disgorge US$116,092 plus prejudgment interest of US$12,945. The SEC alleged that Jennings had extensive knowledge of bribery at Innospec, citing multiple documents discussing the payments, including an email on which Jennings was copied that stated "[w]e are sharing most of our profits with Iraqi officials. Otherwise, our business will stop and we will lose the market. We have to change our strategy and do more compensation to get the rewards."[122]

In total, Innospec agreed to pay US$40.2 million in fines to resolve allegations by the SEC, the Justice Department, the OFAC, and the SFO.[123] As part of the settlement, Innospec committed to retain a compliance monitor jointly approved by United States and United Kingdom authorities.[124] On May 11, 2011, the law firm of Hughes Hubbard & Reed announced that partner Kevin Abikoff, chair of the firm's anti-corruption and internal investigations practice, had been appointed by Innospec as the company's external compliance monitor.[125] This appointment of the first-ever jointly approved compliance monitor underscores the continuing trend toward cooperation among enforcement authorities around the world. The SEC, the Justice Department, and the SFO are increasingly pursuing joint investigations, sharing information, and referring cases. This development extends their cooperation beyond investigative activity to cooperative monitoring.

Further Fallout from Bonny Island

The Bonny Island scandal in Nigeria provides yet another example of multinational anti-corruption enforcement. From 1995 through 2004, *TSKJ*, a joint venture named for its four member companies, allegedly paid over US$180 million in bribes to Nigerian government officials in order to gain a US$6 billion contract to build a facility on Nigeria's Bonny Island. TSKJ 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 (a Japanese company). Prior to April 2011, all but JGC announced record-setting settlements with the SEC and the Justice Department. In 2009, KBR agreed to pay US$579 million; in 2010, Snamprogetti agreed to pay US$365 million and Technip agreed to pay US$338 million.[126] The Bonny Island saga continued to unfold this year with several related enforcement actions.

On April 6, 2011, JGC, the first Japanese company prosecuted under the FCPA, settled with the SEC and the Justice Department by agreeing to pay US$218.8 million and entering into a two-year deferred prosecution agreement.[127] In its press release, the Justice Department noted that JGC had authorized the hiring of a Japanese company and Jeffrey Tesler, a United Kingdom solicitor and a former consultant for KBR, to facilitate bribes to Nigerian government officials. Parenthetically, the JGC settlement also shows the government's policy of, where possible, going after companies from countries with a poor track record of anti-corruption enforcement. With this latest settlement, US$1.5 billion in criminal fines and civil penalties have been imposed on the Bonny Island bribery participants by U.S. authorities alone. That makes the TSKJ case the second largest in history behind the Siemens settlement.

In large part, the TSKJ prosecutions were grounded on the assumption that the transfer of money in furtherance of the illicit payments through the use of correspondent accounts at American banks to clear U.S. dollar transactions was enough to confer jurisdiction under 15 U.S. C. § 78dd-3. In light of the court's ruling for Patel in the SHOT Show case, it is unclear whether this is a sufficient basis for jurisdiction. Companies may well begin to push back on the government's overly aggressive position on territorial jurisdiction under 15 U.S. C. § 78dd-3. (*See also* the Tenaris settlement for an aggressive claim of territorial jurisdiction.)

On February 16, 2011, KBR's wholly owned subsidiary, *M.W. Kellogg Limited* (M.W. Kellogg), agreed to pay £7 million (US$11.4 million) to settle civil corruption charges with the SFO.[128] The SFO noted that the settlement represented the profit that M.W. Kellogg realized from KBR's wrongful conduct

and that M.W. Kellogg itself played no active role in the Bonny Island plot. For its part, M.W. Kellogg self-reported concerns to the SFO and fully cooperated with the investigation.[129] Citing M.W. Kellogg's self-reporting and cooperation, the SFO opted not to prosecute, and instead recovered the proceeds of the corrupt conduct through a civil recovery order.[130] The M.W. Kellogg settlement again shows the benefits of self-reporting and cooperation. It also shows the SFO's willingness to credit cooperation and to take into account actions taken in other jurisdictions.

Finally, with respect to prosecution of individuals, on March 11, 2011, Tesler pleaded guilty to FCPA violations and agreed to forfeit a record-setting US$148,964,568.[131] Tesler admitted to helping TSKJ pay bribes to Nigerian government officials. At his plea hearing, Judge Keith P. Ellison commented that Tesler seemed an unlikely defendant and asked Tesler, "[w]as it just that everyone else was doing this?" Tesler reportedly responded, "I think that's a fair comment."[132] Tesler's sentencing is scheduled for September 8, 2011; he faces up to ten years in prison. Tesler's co-defendant, Wojciech Chodan, also awaits sentencing and faces up to five years in prison. On December 6, 2010, Chodan pleaded guilty and agreed to forfeit US$726,885, which likely was his compensation.[133]

THE SEC ENTERS INTO ITS FIRST DEFERRED PROSECUTION AGREEMENT

On January 13, 2010, the SEC announced its Enforcement Cooperation Initiative (Cooperation Initiative), in which it outlined a number of tools to foster and encourage cooperation by individuals and companies that are the subject of SEC enforcement actions. The tools include proffer agreements, cooperation agreements, DPAs, NPAs, and a streamlined process for criminal immunity requests.[134]

The Cooperation Initiative extends the range of possible options available to the Commission as it decides what actions to take to redress potentially violative conduct. On one end of the spectrum, the SEC could decline to take action. On the other end, the SEC could institute an enforcement action with the possibility of monetary penalties, including disgorgement and prejudgment interest. In between these options, the SEC could enter into an NPA or a DPA, or it could, although it rarely does, issue an investigative report pursuant to Section 21(a) of the Securities and Exchange Act of 1934 as it did with the October 23, 2001 Seaboard Report.[135]

The Cooperation Initiative makes it clear that cooperation is a key consideration as the Commission makes its enforcement decisions. However, it is not the sole determinative factor. Instead, incorporating principles from the Seaboard Report, the Enforcement Division in its Enforcement Manual identified four criteria that the enforcement staff will consider in determining whether, how much, and in what manner the enforcement staff will credit a company's cooperation: (1) self-policing prior to the company's discovery of the misconduct; (2) self-reporting of the conduct once it is discovered and conducting a review of the circumstances; (3) effective remediation of the misconduct; and (4) cooperation with law enforcement authorities following the discovery of the misconduct.[136]

It is important for companies navigating potential SEC enforcement actions to understand the factors that influence the Commission staff as they make decisions about how matters are resolved. A helpful starting point is the Seaboard Report. By way of background, on October 23, 2001, the Commission issued a cease and desist order against *Gisela de Leon-Meredith*, the former controller of *Chestnut Hill Farms* (CHF), a subsidiary of *Seaboard Corp.* (Seaboard). Allegedly, Meredith caused Seaboard's

books and records to be inaccurate and its periodic reports to be misstated.[137] Along with the cease and desist order against Meredith, also issued on October 23, 2001, the Commission issued a Section 21(a) investigative report in which it outlined the factors it would consider in assessing a corporation's cooperation. Those considerations include (1) the nature of the conduct; (2) how the conduct arose; (3) the seniority of the employees engaged in the misconduct; (4) the length of time the conduct lasted; (5) what harm the misconduct caused; (6) how the misconduct was discovered; (7) how the company responded to the misconduct; (8) whether the company cooperated with the SEC; (9) whether there were assurances that the conduct would not occur again; and (10) what structural changes the company undertook after the discovery of misconduct.[138]

The SEC can also conclude an ongoing investigation by declining to take an enforcement action without any public statement, and without any explanation of the basis for the decision.[139] On October 29, 2009, *Zale Corp.* (Zale) disclosed that the SEC was conducting an investigation regarding its accounting practices.[140] Eighteen months later, on April 14, 2011, the Commission filed a complaint against a former Zale executive, *Rebecca Lynn Higgins*, alleging that she circumvented internal controls regarding accounting for certain advertising expenses, causing Zale to file misstated financial statements.[141] Zale announced the next day that the Commission had closed the investigation without taking action against Zale.[142] The Commission did not make any public statements about its decision, but Zale had reported contemporaneously with its October 29, 2009 disclosure that it had taken extensive steps to remediate Higgins' misconduct, including terminating Higgins, restating its financial statements for the years in question, hiring new finance personnel, including a new chief financial officer, providing training, and revamping its internal controls.[143]

In another matter from the first half of 2011, the SEC declined to pursue an enforcement action after initiating an FCPA investigation of *Apex Silver Mines Limited* (Apex Silver). Apex Silver had mining operations in South America before it entered bankruptcy, and before *Golden Minerals Co.* (Golden Minerals), a mining company based in Colorado, became the successor company to Apex Silver in March 2009. Apex Silver conducted an internal investigation in 2005 and 2006, concluding that some of its former senior employees had made improper payments of approximately $125,000 to government officials in South America.[144] Apex Silver self-reported the results of the investigation to the SEC and the Justice Department. Apex Silver subsequently reached an agreement in principle with the SEC to resolve the matter. In 2009, the Justice Department informed Golden Minerals that it had closed its investigation because of the pending settlement with the SEC. On November 19, 2010, the SEC informed Golden Minerals that it had decided to withdraw the enforcement recommendation and close the investigation without recommending enforcement action.[145]

The Zale and Apex Silver investigations illustrate circumstances where the SEC declines to bring an enforcement action. Illustrating the other end of the spectrum is the Commission's enforcement action this year against Arthrocare Corporation (Arthrocare), a medical device company headquartered in Austin, Texas.[146] The Commission alleged that Arthrocare overstated and prematurely recognized revenue related to the sales of one of its products for two years in order to meet aggressive internal revenue targets. Arthrocare's lack of internal controls allowed its employees to engage in the scheme and to hide it from Arthrocare's accounting staff. Arthrocare consented to the entry of a cease and desist order, which did not include a monetary penalty. In its cease and desist order, the Commission detailed the substantial remedial acts undertaken by Arthrocare as well as its cooperation with the enforcement staff as a reason for the seemingly lenient outcome.[147] As part of its remedial efforts,

Arthrocare (1) replaced its senior management team; (2) expanded its legal department; (3) created a compliance department; (4) hired a new corporate controller; (5) expanded its internal audit function; (6) instituted ethics communications from management to employees; (7) provided regular training; and (8) adopted enhanced internal and contract controls. With respect to the investigation, Arthrocare regularly updated the enforcement staff on its efforts, provided documents, responded promptly to requests for information, provided the enforcement staff with access to its consultants, and made its employees available for testimony.[148]

While Zale is an example of the Commission deciding not to institute an enforcement action against a corporation that took extensive steps to "clean house," Arthrocare evinces the Commission giving a corporation credit by bringing a less onerous enforcement action such as a cease and desist order without the imposition of a monetary penalty. In between these two outcomes now lies the potential for a DPA or an NPA. The Commission entered its first NPA on December 20, 2010 with *Carter's, Inc.* (Carter's), a children's clothing manufacturer and retailer, to settle allegations of accounting fraud without imposition of any monetary penalty.[149] The underlying conduct involved primarily the actions of one employee, *Joseph Elles*, a former sales executive vice president. In its enforcement action against Elles, the Commission alleged that Elles fraudulently manipulated the amount of incentive discounts Carter's granted to its largest wholesale customer, Kohl's Corporation (Kohl's), in order to induce Kohl's to purchase more goods from Carter's.[150] Elles granted Kohl's larger discounts than budgeted and concealed the discounts in part by obtaining an agreement from Kohl's that it would defer taking the accommodations until later quarters, contrary to accounting rules that required the discounts to be recorded as expenses when the related sales were made. The sum effect of Elles's actions was that Carter's accommodation expense was underreported in some quarters, while its income in those quarters was overstated. The Commission alleged that Carter's president and its chief financial officer had told Elles that accommodations had to be charged in the current year and to do otherwise was illegal. Despite this, Elles engaged in fraudulent conduct, devised a scheme with his assistant to conceal the fraud, and lied to other Carter's employees when asked about the accommodation charges. While engaging in this allegedly unlawful conduct, Elles exercised options and sold Carter's stock for a before-tax profit of US$4.7 million.[151] The Commission's press release regarding the Elles enforcement action and the Carter's NPA described the conduct by Elles, and then noted that Carter's would not be charged in connection with Elles's conduct. The Commission's press release emphasized that (1) the unlawful conduct at Carter's was relatively isolated; (2) Carter's promptly and completely self-reported the misconduct; (3) Carter's' cooperation with the SEC was exemplary and extensive; (4) Carter's undertook a thorough and comprehensive internal investigation; and (5) Carter's took extensive and substantial remedial actions.

SEC Enforcement Director Robert Khuzami (Khuzami) observed that, "in such circumstances, incentivizing appropriate corporate response to misconduct through the use of [NPAs] is in the best interest of companies, shareholders and the SEC alike."[152] While no monetary penalty was imposed on Carter's, it was required, as part of the NPA, to (1) cooperate fully and truthfully in the investigation and any resulting enforcement action by the SEC or any other proceedings; (2) produce all non-privileged documents and other materials to the Commission; and (3) make its directors, officers, employees and agents available to the Commission for interviews or testimony.

Conversely, the Commission entered its first DPA just a few months later on May 17, 2011 with *Tenaris S.A.* (Tenaris), a global manufacturer and supplier of steel pipe products and related services to the

oil and gas industry, to settle alleged FCPA violations.[153] Tenaris is the first Luxembourg company to be charged under the FCPA. This is yet another example of the government bringing enforcement action against a company from a country with a poor record of enforcing anti-bribery laws. Here, the underlying conduct involved a scheme to obtain a series of four contracts worth US$19 million with the OJSC O'ztashqineftgaz (OAO), a subsidiary of Uzbekistan's state-owned oil and gas company.[154] Tenaris regional sales employees allegedly paid a total of US$32,141 in commissions to a bidding agent through a U.S. bank in New York. Supposedly, the Tenaris employees understood that the bidding agent would use a portion of the commissions to pay OAO officials to obtain confidential bidding information about Tenaris's competitors and to allow Tenaris to submit revised bids to win the contracts. When Tenaris's competitors eventually learned about the scheme, Tenaris agreed to follow the bidding agent's advice that it make additional payments to employees of the Uzbekistani state-owned oil and gas company to avert a potential investigation and the resulting loss of the contracts. The SEC noted that Tenaris's investigation found no records showing that the additional payments were made. OAO eventually cancelled the contracts, but not before Tenaris earned a total profit of US$4.79 million. Tenaris uncovered the scheme when it began an unrelated investigation based on an anonymous tip it received from a third party. Tenaris retained outside counsel to investigate those allegations, met with the SEC and the DOJ staff to report the preliminary findings of the probe, and agreed to conduct an investigation into its global business operations and internal controls, which ultimately resulted in the discovery and disclosure of the Uzbekistani payments. Interestingly, the illicit payments discussed in the Tenaris DPA were those relating to Uzbekistan, not the conduct that prompted the investigation in the first place.[155]

Even more interesting is the government's failure to identify or announce its basis for territorial jurisdiction. As we discuss above with respect to the JGC settlement, the government's basis for territorial jurisdiction is the transfer of money through U.S. correspondent banks. Here, the government again alleged that Tenaris, using the means and instrumentalities of interstate commerce, made a same-day transfer of around US$32,141 through an intermediary bank to someone acting on behalf of Tenaris. Neither the SEC's nor the DOJ's settling papers expanded on what was meant by "intermediary bank." As such, it is not clear whether the account in question belonged, directly or indirectly, to Tenaris or whether, as in Siemens and TSKJ, it was a correspondent account. Should the government's theory of jurisdiction be predicated on the correspondent account, then it remains to be seen how long this aggressive stand will endure in light of the Patel ruling.

The DPA with Tenaris provided that the company would pay approximately US$4.79 million in disgorgement and US$641,900 in prejudgment interest. Additionally, Tenaris resolved alleged FCPA violations with the Justice Department by entering into an NPA under which it agreed to pay US$3.5 million in criminal fines.[156] In total, through the use of a criminal NPA and a civil DPA, Tenaris paid US$8,931,900 to settle with the SEC and the Justice Department.

Under the two-year SEC DPA, Tenaris must (1) provide the SEC with a written compliance certification; (2) review its Code of Conduct annually, and update as appropriate; (3) require directors, officers, and management-level employees to certify compliance with the Code of Conduct on an annual basis; and (4) conduct FCPA training for specified types of current and future employees in certain functions, officers and managers, and other employees in positions of risk. Furthermore, the DPA provides that the SEC retains the right to institute an enforcement action if Tenaris breaches the terms of the DPA. In the event that Tenaris breaches the terms of the DPA, Tenaris agreed that it would not contest

or contradict any of the factual allegations set forth in the DPA should the Commission institute an enforcement action.[157] Effectively, Tenaris agreed to toll the statute of limitations.

What is also interesting about the Tenaris DPA is that the company agreed not to seek or accept a U.S. federal or state tax credit or deduction of any monies paid pursuant to the DPA. The effect of this agreement is that Tenaris would end up paying a penalty (assuming it made a profit), since it would have disgorged the profit and still pay taxes on profits it no longer had. In essence, Tenaris paid US$4.79 million in disgorgement plus whatever taxes it paid on those profits as additional fines. Because companies cannot claim a deduction for fines and penalties in SEC cases, Tenaris should have negotiated a deal where it would not claim a deduction for any payments that were tantamount to a fine.

In announcing the Tenaris DPA, Khuzami noted first that the Tenaris bribery scheme was both "unacceptable and unlawful," but followed that observation with praise for Tenaris's cooperation. Khuzami, as well as the SEC's then-FCPA Unit Chief, Cheryl Scarboro, emphasized certain factors when describing why Tenaris was an appropriate candidate for the Enforcement Division's first DPA, including that Tenaris (1) had shown high levels of corporate accountability and cooperation; (2) immediately self-reported the violative conduct; (3) conducted a thorough internal investigation; (4) cooperated fully with SEC staff; (5) implemented enhanced anti-corruption procedures; and (6) conducted enhanced training. [158]

Khuzami noted further that "[e]ffective enforcement of the [federal] securities laws includes acknowledging and providing credit to those who fully and completely support our investigations and who display an exemplary commitment to compliance, cooperation, and remediation."[159] The Justice Department also recognized Tenaris's cooperation, and noted that the "substantially reduced monetary penalty" of US$3.5 million reflected the Justice Department's commitment to provide meaningful credit for extraordinary cooperation.[160]

Seaboard, Zale, Apex Silver, Arthrocare, Tenaris, and Carter's illustrate that it is likely a combination of factors, none alone dispositive, that portend an investigation's outcome. The voluntary disclosure of potential violations significantly impacts the likelihood of a more favorable outcome. One analysis of past declinations concluded that nineteen of twenty-five declinations since 2007 involved self-disclosures.[161] The severity, extent, and nature of the conduct are equally important factors. In Seaboard, Zale, and Carter's, the underlying conduct was relatively isolated, and could fairly be viewed as the actions of rogue employees, perhaps assisted by one or two others. While few facts are known about the Apex Silver investigation, the misconduct in that case also seemed isolated within a small group of employees. The Tenaris and Arthrocare cases, by contrast, seemed to involve more widespread misconduct, with Arthrocare ultimately deciding it needed to replace its senior management team as part of its remedial efforts.

In the context of whether the SEC staff will recommend a DPA or NPA to the Commission as an appropriate resolution, it seems clear that cooperation is not the sole driver since, from publicly available information, it appears that little distinguishes Tenaris's cooperation from Carter's. Although the SEC praised Tenaris's response and cooperation, it nevertheless did not give Tenaris a free pass or even an NPA, as it did with Carter's. To be sure, a DPA provides welcome advantages compared to a civil or administrative enforcement action. To the extent that Tenaris does not breach the terms of the DPA, the DPA will result in no enforcement action. Perhaps most significantly, the DPA allows Tenaris to

avoid collateral consequences on its ability to conduct its business. However, Tenaris ultimately paid a total of US$8,931,900 million in civil and criminal monetary penalties — nearly twice the profit it made from the allegedly improperly obtained contracts, and approximately 280 times the amount it made in allegedly improper payments.

Although Seaboard, Zale, Apex Silver, Arthrocare, Tenaris, and Carter's do not provide all the answers, all make the point we have discussed before: to position itself on the no-penalty or light-penalty end of the spectrum of SEC enforcement action, a company should understand that the SEC expects to find a pre-existing robust compliance program, immediate self-reporting, a prompt and comprehensive internal investigation into the allegations of misconduct, full cooperation with the Enforcement Division, a comprehensive remediation program that includes enhanced internal controls designed to detect and deter any potential securities law violations (including the FCPA), and adequate training of employees, particularly senior management.

In the end, the SEC's Cooperation Initiative, which has introduced DPAs and NPAs as enforcement tools, provides alternative methods by which companies may resolve alleged violations of the federal securities laws, including the FCPA, on relatively favorable terms. But the SEC's limited deployment of these new tools provides little guidance regarding, among other things, (1) how the SEC intends to use these tools in future enforcement actions; (2) what level of cooperation companies must demonstrate to obtain an NPA or a DPA; or (3) whether there are certain underlying violations that would preclude a company from ever obtaining an NPA or a DPA. It remains to be seen how often and under what circumstances the SEC will resolve FCPA enforcement actions by an NPA or a DPA.

OPINION RELEASE 11-01 PERMITS TRAVEL OF GOVERNMENT OFFICIAL

On June 30, 2011, the Justice Department issued FCPA Opinion Release 11-01.[162] The Requestor, a U.S. adoption services provider, sought the Justice Department's opinion on its plan to pay the expenses of two officials of foreign government agencies to travel to the United States to learn about the Requestor's services. The Justice Department opined that it did not intend to take any enforcement action with respect to the proposed trip. Citing prior opinion releases,[163] the Justice Department indicated that the following factors supported a conclusion that the planned expenses were reasonable and related to the FCPA's affirmative defense for payments related to the promotion, demonstration, or explanation of the Requestor's products or services:

1. the Requestor had no non-routine business before the relevant foreign government agencies;
2. the Requestor's routine business before the relevant foreign government agencies consisted primarily of seeking approval of pending adoptions, which is guided by international treaty and administrative rules with identified standards;
3. the foreign government agencies would select the officials who will visit;
4. spouses and family members would not accompany the officials on the trip;
5. all costs would be paid to the providers and no cash would be paid directly to the officials;
6. souvenirs that the Requestor gave the visiting officials would reflect Requestor's business and/or logo and would be of nominal value;

7. the Requestor would not fund any other entertainment or side trips;
8. the trip was scheduled for two days only;
9. the travel expenses were reasonable and necessary to educate the officials about the Requestor's business.

Opinion Release 11-01 covers no new ground, but instead complements the Justice Department's prior opinions on promotional expenses, such as Opinion Release 07-01 and Opinion Release 07-02, which concerned trips by government delegations from Asia to visit U.S. companies to learn more about the companies' operations and services. In both requests, the Justice Department characterized the related expenses as consistent with the promotional expenses defense.

LEGISLATIVE UPDATE

The Chamber of Commerce Lobbies for FCPA Reform

In the political sphere, the U.S. Chamber of Commerce (Chamber of Commerce), the nation's largest pro-business lobbying group, has been pushing for reform of the FCPA. It hired former U.S. Attorney General Michael Mukasey (Mukasey) to lobby Congress for changes to the FCPA. The Chamber of Commerce began its lobbying efforts in October 2010, arguing that the FCPA is ambiguous and that the extreme positions taken by U.S. law enforcement agencies in enforcing the FCPA have injured U.S. business.[164] As part of that effort, the Chamber of Commerce released a paper titled *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*. Specifically, the Chamber of Commerce proposed:

1. adding a compliance defense;
2. limiting an acquiring company's liability for the prior acts of its target;
3. adding a "willfulness" requirement for corporate criminal liability (presumably beyond just the FCPA);
4. limiting a company's liability for the acts of a subsidiary; and
5. clarifying the definition of "foreign official."[165]

Perhaps in reaction to these lobbying efforts, on June 14, 2011, only seven months after the Senate held a similar hearing,[166] the Crime, Terrorism, and Homeland Security Subcommittee of the House Judiciary Committee (Subcommittee) held a hearing on the FCPA.[167] In his opening remarks, Subcommittee Chairman Jim Sensenbrenner (R.-WI) remarked that his committee intended to examine the impact of the FCPA and to determine whether the FCPA is needlessly harming American job creation.[168]

Three witnesses, including Mukasey, George J. Terwilliger III, who formerly served as both Deputy Attorney General and Acting Attorney General, and Shana-Tara Regon, the Director of White Collar Crime Policy for the National Association of Criminal Defense Lawyers, all argued for reform. Acting Deputy Assistant Attorney General Greg Andres (Andres) responded to calls for Congress to rein in the government's broad interpretation of the FCPA's provisions.

More specifically, Mukasey focused his remarks at the hearing on the proposed addition of a compliance defense and on potential changes to the definition of "foreign official." With respect to a compliance defense, Mukasey acknowledged the government's position that it already credits companies that implement compliance programs when it makes its decision to prosecute and in negotiating settlement terms, but he observed that such credit depends upon the unlimited discretion of the prosecutor, or

may be available only after the liability phase of a prosecution.[169] Mukasey invited Congress to modify the FCPA to include an affirmative defense for those companies that implement reasonably designed FCPA compliance programs that are rigorously enforced. In addition, so that companies can operate with greater certainty in their interactions with state-owned entities, Mukasey proposed that Congress clarify the definition of "instrumentality" under the FCPA to specify what percentage ownership stake a government must hold in, or what degree of control it must exercise over, a company. Mukasey also proposed clarifying the definition of "foreign official" to cover state-owned company officials of specific rank.

Other possible reforms include providing for a period of repose after acquisitions to allow acquiring companies to conduct FCPA compliance reviews and remediate without the threat of an enforcement action, and creating a statutory safe harbor provision to shield companies with robust compliance programs that self-report any misconduct. Mukasey also proposed raising the intent requirements for corporate liability by adding a "willfulness" requirement.

Andres, not surprisingly, testified that there is substantial guidance available on FCPA enforcement practices in the form of publicized settlement agreements, prosecutorial guidelines, and the advisory opinion release process. In addition, he contended that the notion presented by reformers that companies live in fear of prosecution for providing an official with a cup of coffee or a taxicab fare is overblown; such cases are not the focus of the government's enforcement agenda. Andres testified further that, "I don't think anybody seriously believes that providing a taxi ride to somebody is in fact a violation of the [FCPA]. We've prosecuted cases in which people have turned over suitcases full of cash, $100 bills, amounting to a million dollars."[170] Andres thus rejected the principle of defining bribery by a minimum dollar value.

The remarks by members of the Subcommittee at the hearing suggest that a degree of consensus is developing around the idea that some reform is necessary. Indeed, even the Justice Department's loudest advocate at the hearing, Representative John Conyers (D.-MI), observed that he could support adding a compliance defense to the FCPA and clarifying the definition of a foreign official.[171] Near the conclusion of the hearing, Subcommittee Chairman Sensenbrenner indicated that a bill to reform the FCPA would be drafted.[172] Nevertheless, Congress recessed on August 8, 2011 with no further action taken on reform. It is unlikely that this is the last word on possible reforms to the FCPA.

The Bribery Act Takes Off

While the United States has historically served as the vanguard in the global effort to combat corruption, other countries have taken steps to implement and enforce their own anti-corruption statutes. The July 1, 2011 implementation of the United Kingdom Bribery Act is further reason for multinational corporations to consider the likelihood of parallel investigations by U.S. and foreign anti-corruption enforcement agencies and to pay careful attention to the anti-corruption laws of each market in which they operate.

The Bribery Act replaced and consolidated the previous patchwork of common law and statutory offenses that comprised the United Kingdom's anti-bribery legal framework.[173] The Bribery Act was enacted, at least in part, in response to the public criticism of the United Kingdom's weak anti-corruption laws and of the United Kingdom's prosecution record. Because the Bribery Act threatens criminal liability for conduct that is not prohibited by the FCPA, such as commercial bribery, the making

of facilitation payments, and the failure to prevent bribery committed by associated persons,[174] the Bribery Act requires companies to reexamine their policies and procedures to ensure that they are in compliance with the Bribery Act.

On March 30, 2011, the Ministry of Justice published its much anticipated guidance (Guidance), which is an interpretive release intended to provide clarity on certain of the Bribery Act's provisions.[175] As will be discussed in greater detail below, critical portions of the Guidance — those sections relevant to the jurisdictional reach of the Bribery Act, for instance — offer only limited clarity as to the manner in which prosecutors and courts will interpret the Bribery Act's provisions.

Background

Broadly, the Bribery Act criminalizes both commercial bribery and bribery of foreign government officials, and creates a new corporate offense that holds commercial organizations strictly liable for bribes paid by associated persons on its behalf. In particular, under Section 7 of the Bribery Act, a "relevant commercial organisation" that fails to prevent an "associated person" from paying bribes anywhere in the world will be strictly liable if that associated person acted with the intent of obtaining or retaining business or an advantage in the conduct of business for the relevant commercial organization.[176] In other words, knowledge of or intent to approve an illicit payment is unnecessary so long as the bribe is paid by an associated person who intends to obtain or retain business or a business advantage for the organization. There is, however, a complete defense available if the relevant commercial organization can demonstrate that it had in place "adequate procedures" designed to prevent associated persons from making illicit payments.[177] Thus, insofar as liability for associated persons is concerned, there are two threshold questions. First, what entities qualify as "relevant commercial organisations" and, second, who are "associated persons"?

A relevant commercial organization includes "an incorporated body or partnership which carries on a business or part of a business in the United Kingdom irrespective of the place of incorporation or formation."[178] Thus, on its face, the Bribery Act empowers the SFO to prosecute any non-United Kingdom company for an offense under Section 7 of the Bribery Act even if the company carries out only a part of its business in the United Kingdom, and this is true "irrespective of whether the acts or omissions which form part of the offence take place in the [United Kingdom] or elsewhere."[179] The Guidance does not provide clarity on what it means to be carrying on a part of one's business in the United Kingdom. Instead, it warns that the courts will determine whether a commercial organization "carries on a business" in the United Kingdom, taking into account the particular facts in each case.[180] The Guidance indicates a common sense approach should guide the inquiry and that "organisations that do not have a demonstrable business presence in the United Kingdom would not be caught" under the Bribery Act.[181] For instance, merely listing securities on the London Stock Exchange, unlike under the FCPA, would not independently qualify as carrying on a part of a business in the United Kingdom.[182] Similarly, "having a United Kingdom, subsidiary will not, in itself, mean that a parent company is carrying on a business in the United Kingdom, since a subsidiary may act independently of its parent or other group companies."[183] Some have characterized the Guidance in this regard as an attempt to "rein in the [jurisdictional] scope of the [Bribery Act]."[184] Interestingly, this section of the final Guidance is at odds with the well-publicized posture of SFO Director Richard Alderman (Alderman), who has indicated that the Bribery Act imparts broad jurisdictional reach to United Kingdom courts and that the SFO intends to prosecute Bribery Act cases aggressively to assure that United Kingdom companies enjoy a level playing field, relative to their foreign competitors in international markets.[185]

In light of Alderman's expressed eagerness to test the jurisdictional reach of the Bribery Act, it would be prudent for multinational companies with United Kingdom contacts not to take too much comfort from the inference in the Guidance that jurisdiction under the Bribery Act will not be expansive.

Second, a person is considered associated with a commercial organization if that person performs services for or on behalf of the organization.[186] An associated person can be an individual or an incorporated or unincorporated body, and the capacity in which a person performs services for or on behalf of the organization does not matter.[187] Thus, not only employees (who are presumed to be performing services for their employer) but also agents and subsidiaries may be considered associated persons.[188] Whether a person is performing services for an organization should be determined by examining all the relevant circumstances rather than by considering only the nature of the relationship between the person and the relevant commercial organization.[189]

While the Guidance provides some insight into who is an associated person, the issue is far from clear. The Guidance states that the Bribery Act was drafted so that an associated person would include a person who performs services for or on behalf of a commercial organization, to embrace the whole range of persons connected to an organization who might be capable of committing bribery on its behalf.[190] But the Guidance then tempers its warning. For instance, at least insofar as subcontractors and joint ventures are concerned, the Guidance suggests that the "level of control" — a concept not found in the text of Section 7 of the Bribery Act — is likely one of the relevant circumstances to consider in deciding whether a person who paid a bribe could cause resulting liability for a corporation. The Guidance further notes that where a supply chain involves several entities, or where a prime contractor performs a contract by employing subcontractors, typically only a direct contractual party will be deemed to be performing services for a commercial organization and will, therefore, qualify as an associated person for the purposes of Section 7 of the Bribery Act. For example, parties such as subcontractors will most likely only qualify as persons associated with the prime contractor.[191] Similarly, if an agent makes an illicit payment for the benefit of the subsidiary of a parent company, and in doing so indirectly benefits the parent company, liability is not imputed to the parent without proof of the required intention to benefit the parent. In light of the lack of clarity in the Guidance, relevant commercial organizations will be best served by employing risk-based due diligence as well as anti-bribery representations and warranties when contracting with third parties and requesting, assuming they have the ability to do so, that those third parties in turn adopt similar measures in contracts with those further down the chain.[192]

The Adequate Procedures Defense

As discussed, the Bribery Act provides a complete defense to the otherwise strict liability regime of Section 7 of the Bribery Act for those relevant commercial organizations that have implemented adequate procedures to prevent associated persons from making illicit payments.[193] In this regard, the Bribery Act differs from the FCPA, although, as discussed above, the Chamber of Commerce's call for reform includes adding a compliance defense to the FCPA.[194]

The Guidance sets out six principles that should inform relevant commercial organizations as they design effective procedures to avail themselves of the adequate procedures defense.[195] These principles are intended to be flexible and outcome-focused, and their application will likely differ based on the specific characteristics of each relevant commercial organization. The central theme is that bribery prevention procedures should be proportionate to risk.[196]

1. Proportionate Procedures: The procedures should be proportionate to the bribery risks a corporation faces in light of its business activities. The company should endeavor to cover high-risk interactions, the conduct of third parties, hospitality expenses, facilitation payments, and political and charitable donations, as well as mechanisms to allow whistleblowers to report potential violations.
2. Top-level Commitment: Senior management is responsible for fostering a culture that makes it clear that bribery is never acceptable.
3. Risk Assessment: A commercial organization should assess its risks based upon its business, where it operates, and those with whom it interacts. Risk assessments should be periodic and documented.
4. Due Diligence: A commercial organization should implement due diligence procedures designed to assess risk and mitigate it. Adequate due diligence need only be proportionate to identified risks.
5. Communication (including Training): A commercial organization should ensure that its policies and procedures are embedded and understood throughout the organization through internal and external communication, including training proportionate to the risks it faces.
6. Monitoring and Review: Because risks may change, a commercial organization should ensure that it monitors and reviews its policies and procedures to prevent bribery and to make improvements where warranted.[197]

The SFO has made it clear that it intends to aggressively prosecute foreign corporations whose agents pay bribes to gain a business advantage at the expense of United Kingdom-based businesses.[198] As we await the first case under the Bribery Act, one thing is clear: it would be prudent for relevant commercial organizations that conduct any part of their business in the United Kingdom to update their compliance policies and procedures so that they are in compliance with the Bribery Act.

CONCLUSION

FCPA enforcement in 2011 is on pace with enforcement activities in recent years. In the face of continued focus on FCPA enforcement by the Commission and the Justice Department, as well as increasing global anti-corruption enforcement, companies are well-advised to make sure that their anti-corruption compliance programs are comprehensive and effective, and that adequate policies and procedures are in place to avoid or mitigate potential corruption violations.

We thank the following associates, all of whom contributed to this publication: Bryan L. Adkins, Mauricio J. Almar, Forrest James Deegan, Jessica L. Medina, Matthew Phillips, Jacob A. Rogers, Kate E. Schwartz, and Charles B. Weinograd.

Endnotes

1 *See* Claudius O. Sokenu, Arnold & Porter LLP, *2010 FCPA Enforcement Year-End Review*, Sec. Regulation & L. (Mar. 21, 2011) [hereinafter 2010 FCPA Enforcement Year-End Review], *available at* http://www.arnoldporter.com/public_document.cfm?u=2010FCPAEnforcementYearEndReview&id=17363&key=10D3.

2 *See* Press Release, Justice Dep't, 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.

3 Press Release, Justice Dep't, California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico (May 10, 2011) [hereinafter Aguilar Verdict Justice Dep't Press Release], *available at* http://www.justice.gov/opa/pr/2011/May/11-crm-596.html.

4 *Id.*

5 Amanda Bronstad, *Defense Decries "Flagrant" Misconduct in FCPA Prosecution*, National Law Journal (July 28, 2011), *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202508544403.

6 *United States v. Goncalves*, No. 1:09-CR-00335 (D.D.C. May 16, 2011).

7 Jeremy Pelofsky, *Mistrial in U.S. Bribery Sting After Jury Deadlock*, Reuters (July 7, 2011).

8 *See* Arnold & Porter LLP, FCPA News & Insights 4-6 (Summer 2010), *available at* http://www.arnoldporter.com/public_document.cfm?&id=16479&key=13J3; *see* Press Release, Justice Dep't, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), *available at* http://www.justice.gov/opa/pr/2010/January/10-crm-048.html.

9 *See United States v. Goncalves*, No. 09-CR-00335 (D.D.C. June 1-2, 2011).

10 Superseding Information at 11-14, *United States v. Alvirez*, No. 1:09-CR-00348 (D.D.C. Mar. 5, 2010), Dkt. Entry No. 14.

11 Press Release, Justice Dep't, Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $18.2 Million Criminal Fine (July 31, 2009).

12 *Id.*

13 Press Release, Justice Dep't, Italian Executive of California Valve Company Pleads Guilty to Foreign Bribery Offenses (Apr. 29, 2011), *available at* http://www.justice.gov/opa/pr/2011/April/11-crm-545.html.

14 Press Release, Justice Dep't, Former Executive at California Valve Company Pleads Guilty to Bribing Foreign Government Officials (Jan. 8, 2009) (Covino), *available at* http://www.justice.gov/opa/pr/2009/January/09-crm-016.html; Press Release, Justice Dep't, Former Finance Director of California Valve Company Pleads Guilty to Bribing Foreign Government Officials (Feb. 3, 2009) (Morlok), *available at* http://www.justice.gov/opa/pr/2009/February/09-crm-089.html.

15 Superseding Indictment, *United States v. Esquenazi*, No. 1:09-CR-21010 (S.D. Fla. July 12, 2011), Dkt. Entry No. 419.

16 Press Release, Justice Dep't, California Company and Two Executives Indicted for Their Alleged Participation in Scheme to Bribe Officials at State-owned Electrical Utility in Mexico (Oct. 21, 2010), *available at* http://www.justice.gov/opa/pr/2010/October/10-crm-1185.html [hereinafter Justice Dep't Aguilar Press Release]; Press Release, Justice Dep't, Six Former Executives of California Valve Company Charged in $46 Million Foreign Bribery Conspiracy (Apr. 8, 2009), *available at* http://www.justice.gov/opa/pr/2009/April/09-crm-322.html [hereinafter Justice Dep't Carson Press Release]. We reported on the facts of the *Aguilar* and *Carson* cases in prior issues of this newsletter. *See* 2010 FCPA Enforcement Year-End Review at 16 (Aguilar), *available at* http://www.arnoldporter.com/public_document.cfm?u=2010FCPAEnforcementYearEndReview&id=17363&key=10D3; Arnold & Porter LLP, FCPA News and Insights at 26-27 (Feb. 2010) (Carson/CCI), *available at* http://www.arnoldporter.com/public_document.cfm?&id=15401&key=12B1.

17 First Superseding Indictment, *United States v. Aguilar*, No. 2:10-CR-01031 (C.D. Cal. Oct. 21, 2010), Dkt. Entry No. 48.

18 Indictment, *United States v. Carson*, No. 8:09-CR-00077 (C.D. Cal. Apr. 8, 2009), Dkt. Entry No. 1, *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/carsons/04-08-09carson-indict.pdf.

19 15 U.S.C. § 78dd-2(h)(2)(A).

20 *United States v. Aguilar*, No. CR10-01031-AHM, 2011 WL 1792564, at *1 (C.D. Cal. Apr. 20, 2011).

21 *Id.* at *4.

22 *Id.*

23 *Id.* at *5.

24 *Id.*

25 *Id.* at *8.

26 *Id.* at *10.

27 *Id.* at *6.

28 *Id.* at *6.

29 *Id.* at *1.

30 *See* Aguilar Verdict Justice Dep't Press Release, *supra* note 3.

31 Order Denying Defs. Mot. to Dismiss Counts 1 through 10 of the Indictment at 12, *United States v. Carson*, No. 8:09-CR-00077 (C.D. Cal. May 18, 2011), Dkt. Entry No. 373.

32 *Id.* at 13.

33 *Id.* at 5.

34 *Id.*

35 *Id.* at 7.

36 *Id.*

37 Order Denying Defendant Joel Esquenazi's (Corrected and Amended) Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness, *United States v. Esquenazi*, No. 1:09-CR-21010 (S.D. Fla. Nov. 19, 2010), Dkt. Entry No. 309.

38 *See* Order, *United States v. Nguyen*, No. 2:08-CR-00522 (E.D. Pa. Dec. 3, 2009), Dkt. Entry No. 131.

39 *See* Press Release, Justice Dep't, Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations (Apr. 8, 2011) [hereinafter Justice Dep't Johnson & Johnson Press Release], *available at* http://www.justice.gov/opa/pr/2011/April/11-crm-446.html; Johnson & Johnson to Pay More Than $70 Million in Settled FCPA Enforcement Action, SEC Litigation Release 21922 (Apr. 8, 2011) [hereinafter SEC Johnson & Johnson Litigation Release], *available at* http://www.sec.gov/litigation/litreleases/2011/lr21922.htm; Press Release, SFO, DePuy International Limited Ordered to Pay 4.829 Million Pounds in Civil Recovery Order (Apr. 8, 2011) [hereinafter DePuy Press Release], *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/depuy-international-limited-ordered-to-pay-4829-million-pounds-in-civil-recovery-order.aspx.

40 SEC Johnson & Johnson Litigation Release, *supra* note 39. 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 United Nations escrow account. OFFP investigations have 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 United Nations' escrow account. These payments were typically mischaracterized by suppliers on their invoices to conceal the kickbacks.

41 *See* Complaint at ¶¶ 16, 21, 23, 38, *SEC v. Johnson & Johnson*, No. 1:11-CV-00686 (D.D.C. Apr. 8, 2011), Dkt. Entry No. 1 [hereinafter Johnson & Johnson Complaint].

42 *Id.* at ¶¶ 39, 41.

43 *Id.* at ¶¶ 45-47.

44 *Id.* at ¶¶ 48, 55, 60.

45 DPA, Justice Dep't and Johnson & Johnson (Apr. 8, 2011) [hereinafter Johnson & Johnson DPA].

46 Final Judgment, *SEC v. Johnson & Johnson*, No. 1:11-CV-00686 (D.D.C. Apr. 13, 2011), Dkt. Entry No. 4.

47 *Id.*

48 Johnson & Johnson DPA at 1, *supra* note 45.

49 SEC Johnson & Johnson Litigation Release, *supra* note 39.

50 DePuy Press Release, *supra* note 39.

51 *Id.*

52 *See* Complaint, *Wollman v. Coleman*, No. 3:11-CV-02511 (D.N.J. May 2, 2011), Dkt. Entry No. 1.

53 *Id.* at ¶ 13.

54 *Id.* at ¶ 17.

55 Royal Philips Electronics, Annual Report 2010 at 182 (Feb. 18, 2011), *available at* http://www.philips.com/philips/sharedassets/Investor_relations/pdf/Annual_Report_English_2010.pdf.

56 Reuters, *Philips Says Ex-Staff Investigated in Polish Sales*, Reuters (Feb. 22, 2011), *available at* http://www.reuters.com/article/2011/02/22/philips-idUSLDE71L17D20110222.

57 Rebecca Beyer, *HP Bribery Case Throws Spotlight on Enforcement*, San Francisco Daily J. (Apr. 19, 2010).

58 *See* SEC Litigation Release No. 21889, IBM to Pay $10 Million in Settled FCPA Enforcement Action (Mar. 18, 2011) [hereinafter SEC IBM Litigation Release], *available at* http://www.sec.gov/litigation/litreleases/2011/lr21889.htm.

59 Complaint at ¶ 2, *SEC v. IBM*, No. 1:11-CV-00563 (D.D.C. Mar. 18, 2011), Dkt. Entry No. 1.

60 *Id.*

61 SEC IBM Litigation Release, *supra* note 58. The US$10 million payment breaks down into disgorgement of US$5.3 million, US$2.7 million in prejudgment interest, and a US$2 million civil penalty. *Id.*

62 SEC Litigation Release No. 21920, SEC Files Settled FCPA Case against Comverse (Apr. 7, 2011), *available at* http://www.sec.gov/litigation/litreleases/2011/lr21920.htm; Press Release, Justice Dep't, Comverse Technology Inc. Agrees to Pay $1.2 Million Penalty to Resolve Violations of the Foreign Corrupt Practices Act (Apr. 7, 2011) [hereinafter CTI Press Release], *available at* http://www.justice.gov/opa/pr/2011/April/11-crm-438.html.

63 Complaint at ¶ 2, *SEC v. Comverse Tech., Inc.*, No. 11-CV-1704 (E.D.N.Y. Apr. 7, 2011), Dkt. Entry No. 1.

64 *Id.* at ¶ 27.

65 *Id.* at ¶ 26.

66 *See* CTI Press Release, *supra* note 62.

67 *Id.*

68 *See, e.g.*, Keith M. Korenchuk, Samuel M. Witten & Dawn Y. Yamane Hewett, Arnold & Porter LLP, *Anti-Corruption Compliance: Avoiding Liability for the Actions of Third Parties* (Apr. 2011).

69 Dialogic, Inc., Annual Report (Form 10-K), at 9 (Mar. 31, 2011).

70 *See* SEC Litigation Release No. 21581, SEC Charges California Telecommunications Company with FCPA Violations (June 29, 2010), *available at* http://www.sec.gov/litigation/litreleases/2010/lr21581.htm.

71 *See* Press Release, Justice Dep't, 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; 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. For our discussion of the Panalpina-related settlements, *see* 2010 FCPA Enforcement Year-End Review at 6, *supra* note 1.

72 Tidewater Inc. (Form 10-K) (Mar. 31, 2011).

73 *Id.*

74 *About Hercules Offshore*, Hercules Offshore, Inc., *available at* http://www.herculesoffshore.com/about_overview.html.

75 Hercules Offshore, Inc., Quarterly Report (Form 10-Q), at 7 (April 29, 2011).

76 In 2008, Steven Tyrrell, then-Chief of the Justice Department's Fraud Section, acknowledged heightened interest in potential violations of the FCPA arising out of sovereign wealth fund investments in U.S. companies, including financial institutions. He stated that the "boom of sovereign wealth funds is an area of particular interest to the Justice Department...." Nicholas Rummell, *Cash Crunch Could Result in More Corruption Cases*, Fin. Week (Oct. 7, 2008), *available at* http://www.financialweek.com/apps/pbcs.dll/article?AID=/20081007/REG/810079983/1036.

77 Dionne Searcey & Randall Smith, *SEC Probes Banks, Buyout Shops Over Dealings with Sovereign Funds*, Wall St. J., Jan. 14, 2011, *available at* http://online.wsj.com/article/SB10001424052748704307404576080403625366100.html?mod=googlenews_wsj.

78 *Western Funds Are Said to Have Managed Libyan Money Poorly*, Recent Bus. News (July 1, 2011), *available at* http://www.ourbusinessnews.com/western-funds-are-said-to-have-managed-libyan-money-poorly/.

79 *In the Matter of Ball Corp.*, Exchange Act Release No. 64,123 ¶ 1 (Mar. 24, 2011).

80 *Id.* at ¶ 2.

81 *Id.* at ¶ 10.

82 *Id.* at ¶ 11.

83 *Id.*

84 *Id.* at ¶ 15.

85 *See* Kraft Foods, Inc., Form 10-K, at 16 (Feb. 28, 2011).

86 *Id.*

87 *Id.*

88 *Id.*

89 *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.

90 Press Release, Justice Dep't, 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.

91 *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.

92 *See* eLandia Int'l, Inc., Quarterly Report (Form 10Q/A) at 1 (Sept. 5, 2008).

93 Press Release, Justice Dep't, Former CEO of U.S. Telecommunications Company Pleads Guilty to Foreign Bribery Conspiracy (May 19, 2011), *available at* http://www.justice.gov/opa/pr/2011/May/11-crm-644.html.

94 *Id.*

95 *Id.*

96 *See* Press Release, Justice Dep't, Maxwell Technologies Inc. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $8 Million Criminal Penalty (Jan. 31, 2011) [hereinafter Justice Dep't Maxwell Press Release], *available at* http://www.justice.gov/opa/pr/2011/January/11-crm-129.html; SEC Charges Maxwell Technologies Inc. for Bribery Scheme in China Maxwell to Pay Over $6.3 Million in Disgorgement and Interest, SEC Litigation Release No. 21832 (Jan. 31, 2011) [hereinafter SEC Maxwell Litigation Release], *available at* http://www.sec.gov/litigation/litreleases/2011lr21832.htm.

97 *See* Complaint at ¶¶ 1-4, *SEC v. Maxwell Technologies Inc.*, No. 1:11-CV-00258 (D.D.C. Jan. 31, 2011) [hereinafter Maxwell Complaint], *available at* http://www.sec.gov/litigation/complaints/2011/comp21832.pdf. The alleged bribes were paid from July 2002 to May 2009.

98 DPA, Attachment A, ¶ 14, *United States v. Maxwell Technologies, Inc.*, 11-CR-0329 (Jan. 31, 2011) [hereinafter Maxwell DPA].

99 Maxwell Complaint at ¶ 16, *supra* note 97.

100 *Id.* at ¶¶ 14, 20.

101 SEC Maxwell Litigation Release, *supra* note 96.

102 Justice Dep't Maxwell Press Release, *supra* note 96.

103 Maxwell DPA ¶¶ 10-12, *supra* note 98.

104 *See* Press Release, Justice Dep't, Tyson Foods Inc. Agrees to Pay $4 Million Criminal Penalty to Resolve Foreign Bribery Allegations (Feb. 10, 2011) [hereinafter Justice Dep't Tyson Press Release], *available at* http://www.justice.gov/opa/pr/2011/February/11-crm-171.html; SEC Charges Tyson Foods With FCPA Violations; Tyson Foods to Pay Disgorgement Plus Pre-judgment Interest of More Than $1.2 Million; Tyson Foods to Pay Criminal Penalty of $4 Million, SEC Litigation Release No. 21851 (Feb. 10, 2011) [hereinafter SEC Tyson Litigation Release], *available at* http://www.sec.gov/litigation/litreleases/2011/lr21851.htm.

105 *See* Complaint at ¶ 1, *SEC v. Tyson Foods, Inc.*, No. 1:11-CV-00350 (D.D.C. Feb. 10, 2011), *available at* http://www.sec.gov/litigation/complaints/2011/comp21851.pdf. The alleged payments were made from 2004 to 2006.

106 *Id.* at ¶ 3.

107 Justice Dep't Tyson Press Release, *supra* note 104.

108 *See* DPA ¶¶ 5, 8-9, *United States v. Tyson Foods, Inc.*, No. 1:11-CR-00037 (D.D.C. Feb. 10, 2011).

109 SEC Tyson Litigation Release, *supra* note 104.

110 *See* Cease-and-Desist Order, *In re Rockwell Automation, Inc.*, Exchange Act Release No. 64380 (May 3, 2011), *available at* http://www.sec.gov/litigation/admin/2011/34-64380.pdf.

111 *Id.* at 5.

112 *Id.*

113 *See* Press Release, Serious Fraud Office, Mabey & Johnson Ltd: Former Executives Jailed For Helping Finance Saddam Hussein's Government (Feb. 23, 2011) [hereinafter SFO Mabey Sentencing Press Release].

114 *See* Press Release, Serious Fraud Office, Mabey & Johnson Directors Made Illegal Payments to Sadam Hussein's Iraq to Gain Contract (Feb. 10, 2011).

115 SFO Mabey Sentencing Press Release, *supra* note 113.

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

120 Jonathan Russell, *Medical Exporter Jailed for Six Months for Paying Oil for Food Bribes*, Telegraph (Apr. 13, 2011), *available at* http://www.telegraph.co.uk/finance/financial-crime/8448934/Medical-exporter-jailed-for-six-months-for-paying-Oil-for-Food-bribes.html.

121 *See* Press Release, Justice Dep't, Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba (Mar. 18, 2010), *available at* http://www.justice.gov/opa/pr/2010/March/10-crm-278.html.

122 SEC Litigation Release No. 21822, SEC Files Settled Bribery Charges Against Paul W. Jennings (Jan. 24, 2011), *available at* http://www.sec.gov/litigation/litreleases/2011/lr21822.htm.

123 *Id.*

124 *See* Nate Raymond, *Appointment of Joint U.S.-U.K. Corporate Monitor Signals New Era in Bribery Enforcement*, Law.com (May 23, 2011), *available at* http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202494803671.

125 *Id.*

126 Press Release, Justice Dep't, 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, Justice Dep't, 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, Justice Dep't, 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.

127 Press Release, Justice Dep't, JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $218.8 Million Criminal Penalty (Apr. 6, 2011), *available at* http://www.justice.gov/opa/pr/2011/April/11-crm-431.html.

128 Press Release, SFO, M.W. Kellogg Ltd to Pay 7 Million Pounds in SFO High Court Action (Feb. 16, 2011), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/mw-kellogg-ltd-to-pay-7-million-pounds-in-sfo-high-court-action.aspx.

129 *Id.*

130 *Id.* Alderman said, "[t]he SFO will continue to encourage companies to engage with us over issues of bribery and corruption in the expectation of being treated fairly. In cases such as this, a prosecution is not appropriate. Our goal is to prevent bribery and corruption or remove any of the benefits generated by such activities." *Id.*

131 Press Release, Justice Dep't, U.K. Solicitor Pleads Guilty for Role in Bribing Nigerian Government Officials as Part of KBR Joint Venture Scheme (Mar. 11, 2011), *available at* http://www.justice.gov/opa/pr/2011/March/11-crm-313.html.

132 Laurel Brubaker Calkins, U.K. Lawyer Pleads Guilty in U.S. to KBR Bribery Scheme, Bloomberg (Mar. 11, 2011), *available at* http://www.bloomberg.com/news/2011-03-11/u-k-lawyer-pleads-guilty-in-kbr-scheme-to-bribe-nigerians-over-contracts.html.

133 Press Release, Justice Dep't, UK Citizen Pleads Guilty to Conspiring to Bribe Nigerian Government Officials to Obtain Lucrative Contracts as Part of KBR Joint Venture Scheme (Dec. 6, 2010), *available at* http://www.justice.gov/opa/pr/2010/December/10-crm-1391.html.

134 Enforcement Cooperation Initiative, *available at* http://www.sec.gov/spotlight/enfcoopinitiative.shtml; *see generally* Arnold & Porter LLP, SEC Announces New Guidance for Cooperation with Investigations (Jan. 2010).

135 Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969 [hereinafter Seaboard Report], *available at* http://www.sec.gov/litigation/investreport/34-44969.htm.

136 Office of Chief Counsel, SEC Div. of Enforcement, Enforcement Manual 124 (Aug. 2, 2011), *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

137 *In re Gisela de Leon-Meredith*, SEC Release No. 44970 (October 23, 2001).

138 Seaboard Report at 2, *supra* note 135.

139 *See* James G. Tillen & Marc Alain Bohn, *Declinations During the FCPA Boom*, Bloomberg Law Reports — Corporate Counsel, 2011, at 1 [hereinafter *Declinations During the FCPA Boom*].

140 *See* Zale Corp., Annual Report (Form 10-K), at 13 (Oct. 29, 2009) [hereinafter Zale Oct. 29, 2009 10-K].

141 *See SEC v. Rebecca Lynn Higgins*, No. 11-cv-763 (N.D. Tex. Apr. 14, 2011).

142 Reuters, *Zale Says SEC Not to Recommend Action Against Co.*, Reuters (Apr. 15, 2011), *available at* http://www.reuters.com/article/2011/04/15/idUSL3E7FF1ZE20110415; Rob Bates, *SEC Clears Zale in Investigation*, JCK Magazine (Apr. 15, 2011), *available at* http://www.jckonline.com/2011/04/15/sec-clears-zale-investigation.

143 *See* Zale Oct. 29, 2009 10-K, *supra* note 140.

144 *See* Apex Silver Mines Ltd., Annual Report (Form 10-K), at 19 (Mar. 30, 2006).

145 See Golden Minerals Co., Annual Report (Form 10-K), at 30 (Feb. 16, 2011).

146 *In re Arthrocare Corp.*, Exchange Act Release No. 63,883 (Feb. 9, 2011).

147 *Id.* at 4.

148 *Id.*

149 Press Release, SEC, SEC Charges Former Carter's Executive With Fraud and Insider Trading (Dec. 20, 2010) [hereinafter Carter's Press Release], *available at* http://www.sec.gov/news/press/2010/2010-252.htm.

150 *See* Complaint, *SEC v. Elles*, 10-CV-4118 (N.D. Ga. Dec. 20, 2010).

151 *Id.*

152 Carter's Press Release, *supra* note 149.

153 Tenaris, founded in Argentina and headquartered in Luxembourg, is a foreign private issuer with American Depository Receipts (ADRs) listed on the New York Stock Exchange. Press Release, SEC, Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement (May 17, 2011) [hereinafter SEC Tenaris Press Release], *available at* http://www.sec.gov/news/press/2011/2011-112.htm.

154 DPA, SEC and Tenaris S.A. ¶ 6 (May 17, 2011) [hereinafter Tenaris DPA].

155 *Id.*

156 Press Release, Justice Dep't, Tenaris S.A. Agrees to Pay $3.5 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (May 17, 2011) [hereinafter Justice Dep't Tenaris Press Release], *available at* http://www.justice.gov/opa/pr/2011/May/11-crm-629.html.

157 *See* Tenaris DPA, *supra* note 154.

158 *See* SEC Tenaris Press Release, *supra* note 153.

159 *Id.*

160 Justice Dep't Tenaris Press Release, *supra* note 156.

161 *Declinations During the FCPA Boom* at 1.

162 *See* Justice Dep't, FCPA Review Opinion Procedure Release No. 11-01 (June 30, 2011).

163 The Justice Department cited Opinion Release 07-02 and Opinion Release 07-01.

164 Joe Palazzolo, *U.S. Chamber Of Commerce Presses For Changes To FCPA*, Wall St. J. (Oct. 27, 2010), *available at* http://blogs.wsj.com/corruption-currents/2010/10/27/us-chamber-of-commerce-presses-for-changes-to-fcpa/.

165 *See* U.S. Chamber of Commerce, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act 7* (2010), *available at* http://www.uschamber.com/reports/restoring-balance-proposed-amendments-foreign-corrupt-practices-act.

166 *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).

167 *See Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. (June 14, 2011) [hereinafter June 14, 2011 FCPA Hearing], webcast *available at* http://judiciary.house.gov/hearings/hear_06142011.html.

168 *Id.; see also id.* (Statement of Rep. James Sensenbrenner, Chairman, Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary).

169 *Id.; see also id.* (Statement of Michael Mukasey).

170 June 14, 2011 FCPA Hearing, *supra* note 167.

171 *Id.*

172 *Id.*

173 For more background on the Bribery Act, *see* Arnold & Porter LLP, *UK Government Issues Guidance on the Bribery Act* (Mar. 2011); Arnold & Porter LLP, *UK Government Announces Timing for Implementation of the Bribery Act 2010* (Aug. 2010); Arnold & Porter LLP, *UK Bribery Act 2010*: *An In-Depth Analysis* (May 2010); Arnold & Porter LLP, *New UK Bribery Bill Becomes Law and SFO Receives Judicial Guidance on Settlement Powers* (Apr. 2010); Arnold & Porter LLP, *The SFO Provides Updated Guidance on Its Approach to Enforcing Allegations of Overseas Corruption* (Dec. 2009).

174 An "associated person" is defined as someone who performs services for, or on behalf of, the corporation. It does not matter in which capacity the person does this and all relevant circumstances will be examined to determine whether someone is an "associated person," even where the person is not an employee, agent, or subsidiary. *See* Bribery Act, c. 23, § 8(1) (2010).

175 *See* Ministry of Justice, The Bribery Act 2010: Guidance about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing (Mar. 2011) [hereinafter Guidance]. *See generally* Arnold & Porter LLP, *UK Government Issues Guidance on the Bribery Act* (Mar. 2011).

176 Bribery Act § 7.

177 Bribery Act § 7(2).

178 Guidance, *supra* note 175, at ¶ 34.

179 Bribery Act §§ 7(3), 7(5), 12(5); *see also* Guidance, *supra* note 175, at ¶ 34.

180 Guidance, *supra* note 175, at ¶ 34.

181 *Id.* at ¶ 36.

182 *Id.*

183 *Id.*

184 *See* Simon Bowers, *Serious Fraud Office Vows to Pursue Corrupt Foreign Companies*, The Guardian (Mar. 25, 2011) [hereinafter Bowers], *available at* http://www.guardian.co.uk/law/2011/mar/25/serious-fraud-office-overseas-firms-bribery-act?INTCMP=SRCH.

185 *See*, e.g., Carolina Binham, *SFO Chief Warns of New Global Reach*, Fin. Times (May 23, 2011), *available at* http://www.ft.com/intl/cms/s/0/8c056ce2-8562-11e0-ae32-00144feabdc0.html#axzz1Nz6JkWk4.

186 Bribery Act § 8(1).

187 *See id.* § 8(2).

188 *Id.* § 8(3), (5).

189 *Id.* § 8(4).

190 Guidance, *supra* note 175, at ¶ 37.

191 *Id.* at ¶¶ 39, 41.

192 *Id.* at ¶ 39.

193 Bribery Act § 7(2).

194 *Foreign Corrupt Practices Act: Hearing Before the Subcomm. of Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. at 3-6 (June 14, 2011).

195 Guidance, *supra* note 175, at ¶ 20.

196 *Id.*

197 *Id.*

198 Alderman has commented that the Bribery Act's extraterritorial jurisdictional provision is a crucial means by which the SFO intends to address his primary concern that the Bribery Act would otherwise "put ethical U.K. companies at a disadvantage with the consequential effect on their employees." Richard Alderman, Director, Serious Fraud Office, Remarks at the Third Russia & CIS Summit on Anti-Corruption Conference (Mar. 16, 2011), *available at* http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2011/3rd-russia--cis-summit-on-anti-corruption-conference,-moscow.aspx. He cautioned that "a corporation will be making a very serious mistake if it tried to adopt a very technical approach in order to persuade itself that it did not have to worry about the Bribery Act even though there were some activities and some business presence in the U.K.," and that "[t]he safe assumption in those circumstances is that the Bribery Act will apply." *Id.*; *see also* Barry Vitou & Richard Kovalevsky, *Russian & U.K. Prosecutors: Friends Again? Unethical Russian Business Watch Out* (May 9, 2011), Bribery Act (May 9, 2011), *available at* http://thebriberyact.com/2011/05/09/russian-uk-prosecutors-friends-again-unethical-russian-business-watch-out/; Bowers, *supra* note 184; Richard Tyler, *Bribery Act: SFO Chief Richard Alderman Sees U.K. Courts as a Stumbling Block*, Telegraph (Jan. 20, 2011), *available at* http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8269766/Bribery-Act-SFO-chief-Richard-Alderman-sees-U.K.-courts-as-a-stumbling-block.html.