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FCPA & Global Anti-Corruption Insights

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

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EXECUTIVE SUMMARY

By sheer number of cases filed, criminal fines, and civil penalties, civil and criminal enforcement under the Foreign Corrupt Practices Act (FCPA) in 2011 fell short of the blockbuster year that was 2010. Nonetheless, 2011 ended as an equally compelling year, as it saw more FCPA-related trials than in any other year in the history of the FCPA. The United States Securities and Exchange Commission (SEC or Commission) and the United States Department of Justice (DOJ or Justice Department) continued their unrelenting focus on FCPA enforcement, resulting in a number of enforcement actions that reinforced several important themes that we have discussed in prior newsletters. Significantly, in 2011 *Lindsey Manufacturing, Inc.* (Lindsey Manufacturing) became the first corporation to be convicted at trial of FCPA violations. However, Lindsey Manufacturing and three of its employees associated with an alleged corruption scheme to bribe employees of a state-owned electric utility in Mexico saw their convictions set aside after serious allegations of prosecutorial misconduct surfaced.

Other individuals were not so lucky, as *Joel Esquenazi* was given the longest prison sentence imposed in an FCPA case to date; *Jeffrey Tesler* agreed to forfeit US$149 million after pleading guilty to violating the FCPA; several *Siemens AG* (Siemens) executives and agents were indicted more than three years after the landmark Siemens FCPA settlement; and *Frederic Bourke* lost his attempt to have his conviction overturned on the basis that something more is needed than "conscious avoidance" of FCPA risks to incur individual criminal liability. That individuals continue to face significant risk of FCPA prosecution and conviction is perhaps the starkest lesson of 2011, and one that must be heeded by multinational corporations and the executives at their helms. Notwithstanding the embarrassment that the government's FCPA enforcement program has suffered in recent months, as a result of lost trials and/or allegations of prosecutorial misconduct, prosecution of individuals for FCPA violations and related offenses appears to be here to stay.

Other themes that emerged in prior years continued to be relevant in 2011: the increasingly global nature of FCPA investigations; the government's continued expectation that companies will voluntarily disclose FCPA concerns and investigate them fully; and the fact that the SEC and the DOJ continue to leverage information they learn in one investigation to widen their enforcement net to reach similarly situated companies in the same industry.

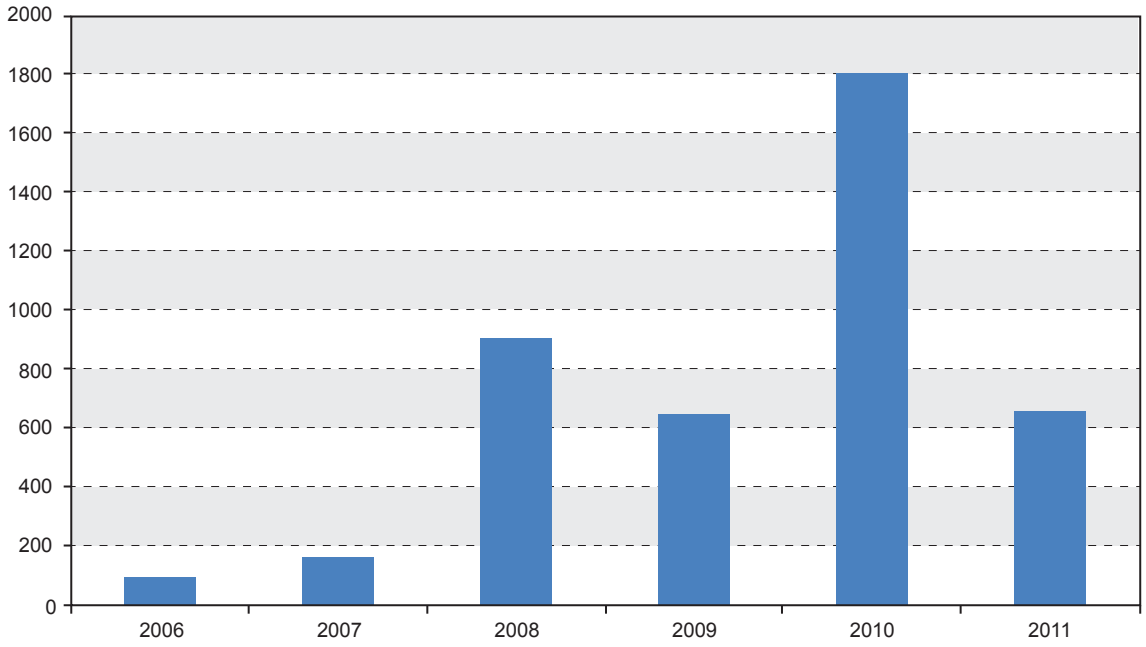
Corporations continue to face challenging questions as they seek to reduce their FCPA exposure: what should drive the decision to disclose potential FCPA violations; what, if anything, do companies gain from such disclosures; what due diligence must companies conduct of their business partners, or of specific business transactions that might trigger potential FCPA liability; and how should a company structure its compliance program to best detect and avoid foreign bribery.

Although the increasing number of FCPA trials provides more opportunities for courts to define the contours of a statute often criticized as vague, companies are largely left to find their way through FCPA traps by studying the enforcement actions already brought by the SEC and the DOJ and the opinion of the Justice Department sought through the opinion release process.

Following any year but 2010, 2011 would have been considered a busy year for FCPA enforcement. Yet even buoyed by late year-end Justice Department and SEC actions against nine former executives and agents of Siemens AG, enforcement levels and the total penalties assessed–criminal fines, civil monetary penalties, and disgorgement–dropped significantly compared to 2010. As Chart 1 below shows, the US$657 million in total FCPA criminal fines and civil penalties imposed was in line with

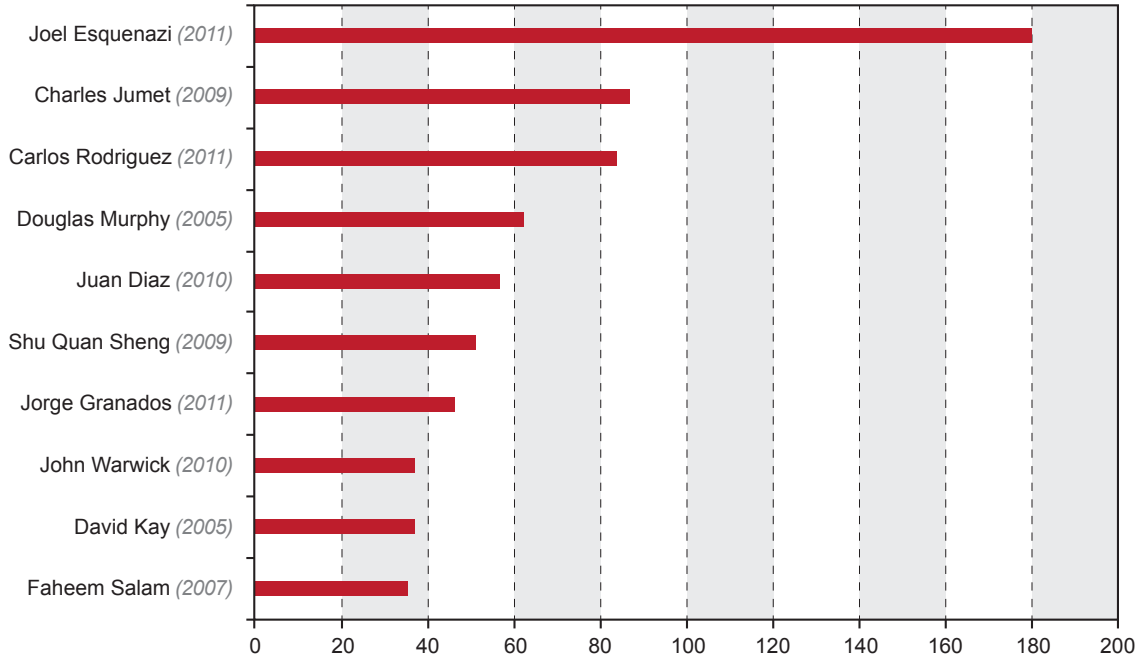
2009 totals, but only about one-third of 2010's total. And the past year's total of 32 enforcement actions, while dwarfed by the 57 in 2010, is on par with the number of enforcement actions in 2008 and 2009. Further, 2011 saw three of the largest FCPA penalties imposed to date: *Magyar Telekom Plc* and *Deutsche Telecom AG* (US$95 million), *JGC Corporation* (JGC) (US$218.8 million), and *Jeffrey Tesler* (US$149 million). In other words, despite the relative drop-off from 2010, the numbers still support the government's stated focus on international corruption.

Chart 1: Total FCPA Penalties Assessed (In US$ Millions)



Despite these numbers, however, one number that reached a record high in 2011 may explain much of the decline compared to 2010; the past year saw a record number of FCPA cases go to trial. 2011's trials included, as discussed further below, acquittals and mistrials for the first and second groups of *SHOT Show* defendants; the convictions (subsequently thrown out for prosecutorial misconduct) of Lindsey Manufacturing and its chief executive officer (*Keith Lindsey*) and chief financial officer (*Steven K. Lee*); and the convictions of Joel Esquenazi and *Carlos Rodriguez*. In this regard,and as reflected in Chart 2 below, 2011 also saw the imposition of the longest prison sentence in the history of the FCPA. Some observers suspect that resource-draining trials, as well as the backlog of investigations commenced over the recent boom period, are the cause of 2011's decline in enforcement action and penalty totals. But regardless of the strength of that connection, few, if any, FCPA watchers believe that the decline marks the beginning of a new trend.

Chart 2: Longest FCPA-Related Prison Sentences
(Total Sentence in Months, Including for Non-FCPA Counts)



This update provides our analysis of the principal themes and important developments emerging from civil and criminal FCPA enforcement, global anti-corruption enforcement, related law enforcement actions, and the broader trends they portend for 2012 and beyond.[1]

OVERVIEW OF THE FCPA

In the maelstrom of outrage that followed the Watergate scandal, and in response to the SEC's extensive investigation into questionable (or illegal) payments by United States corporations to foreign government officials, politicians, and/or political parties, Congress enacted the FCPA in 1977. 15 U.S.C. §§ 78*dd*-1, 78*dd*-2, and 78*ff* (1994), *amended* by Pub. L. No. 105-366, 3302 (1988). To give effect to the Organization for Economic Cooperation and Development (OECD) treaty, Congress amended the FCPA again in 1998. The 1998 amendment added a new § 78*dd*-3 to include the "any person" provision over which the Justice Department has jurisdiction. The FCPA contains two landmark provisions: (i) the anti-bribery provisions; and (ii) the accounting and internal control provisions. Together, these provisions represent Congress's intent to address the problem of American companies bribing foreign government officials and/or their operatives in order to obtain or retain business opportunities.

The Anti-Bribery Provisions

Generally, the anti-bribery provisions of the FCPA prohibit United States issuers, persons or anyone acting at their behest from authorizing, paying, or offering to pay money or anything of value, directly or

indirectly, to any foreign official and/or foreign political party or party official in order to obtain or retain business. A violation of the anti-bribery provisions may be parsed into the following eight elements:

1. use of instrumentality of interstate commerce;
2. to authorize a payment, make a payment, offer a payment, promise a payment;
3. of money or anything of value;
4. with corrupt intent;
5. to a covered person. Covered persons include: (a) foreign official; (b) foreign political party; (c) foreign party official; (d) candidate for foreign political office; and (e) any person while knowing or having reason to know that that person intended to pass any part of the payment to any of the above-enumerated persons;
6. by a covered person. Covered persons include: (a) issuers; (b) domestic concerns; and (c) any officer, director, employee, or agent of such issuer or domestic concern or any stockholder thereof acting on behalf of such issuer or domestic concern;
7. to (a) influence any act or decision of the foreign official in his official capacity; (b) induce such foreign official to do or omit to do any act in violation of the lawful duty of the official; (c) induce such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality; or (d) secure any improper advantage; and
8. in order to assist in obtaining or retaining business for or with, or directing business to, any person.

Payments to facilitate or expedite the performance of "routine governmental action" are not covered under the anti-bribery provisions of the FCPA. The following are examples of expedited payments: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection; mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.

A person charged with violations of the anti-bribery provisions of the FCPA may assert as an affirmative defense that the payment or promise to pay was lawful under the written laws and regulations of the foreign official's country or that the payment or promise to pay was a reasonable and bona fide expenditure such as travel and lodging expenses to (i) promote, demonstrate, or explain products or services, and (ii) execute or perform a contractual obligation.

The FCPA's Accounting Provisions

Embracing a fundamental purpose of the federal securities laws, the accounting and internal control provisions (often referred to as the books and records provisions) require a United States issuer to "make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions" of its assets. The accounting provisions also require that issuers devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that (i) transactions are executed in accordance with management's authorization; (ii) transactions are recorded as necessary to (a) permit preparation of financial statements in conformity with generally accepted accounting principles and (b) maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's authorization, and (iv) the recorded accountability for

assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences. Especially in the context of civil cases, the accounting provisions provide an endless series of bases for the SEC to take action against issuers and their employees because proof of intent is not required. The accounting provisions mandate that no criminal liability shall be imposed for failing to comply with the provisions of Section 13(b)(4) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78*m*(b)(4). However, criminal liability may be imposed where a person knowingly circumvents or fails to implement a system of internal controls, or knowingly falsifies any book, record, or account described above.

KEY ENFORCEMENT AND INVESTIGATIVE DEVELOPMENTS

Lessons from 2011 Enforcement Activity

A review of the enforcement actions brought by the Commission and the Justice Department and the lessons one takes from those enforcement actions reflects the themes that we have emphasized in this newsletter over the last several years. There were no new unanticipated, ground-breaking developments. Rather, the cases brought by the Commission and filed by the Justice Department in 2011 solidify the Commission's and the Justice Department's well settled positions on FCPA enforcement despite the constant and seemingly in vogue refrain from some quarters calling for amending the FCPA and thus yielding its place as the premier enforcement tool in the fight against worldwide corruption.

Setting aside the outlier that is 2010 (which was helped greatly by the 22 individuals that were indicted in connection with the SHOT Show case), 2011 was the busiest year in the history of FCPA enforcement. It boasts the most FCPA trials ever in any given year, the largest number of unsettled Commission enforcement actions ever, the longest sentence ever imposed in an FCPA enforcement action, the largest ever monetary sanction imposed on an individual, and three of the largest ever monetary sanctions imposed on a company or individual. Among the many lessons to be garnered from the enforcement actions brought in 2011, the following stand out as key lessons that merit attention as they are likely to influence how 2012 will unfold:

1. of the 13 enforcement actions the Commission brought against corporations, eight were civil injunctive actions, four were administrative proceedings, and one was resolved by way of a deferred prosecution agreement (DPA). With its new powers under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and its new enforcement tools, the SEC now has more ways to resolve FCPA enforcement actions;

2. of the 11 criminal cases the Justice Department filed against corporations, one was contested, one was pled, five were resolved through non-prosecution agreements (NPAs), and five were resolved through DPAs, with one case involving an NPA for one company (*Magyar Telekom*) and a DPA for the company's parent (*Deutsche Telekom*);

3. under the new leadership of Kara Brockmeyer, who replaced former chief Cheryl Scarboro in September 2011, the Commission's FCPA Unit brought an unprecedented 10 contested civil injunctive actions against seven individuals implicated in the 2008 Siemens record settlement

and three individuals associated with the Commission's settlement with Magyar Telekom and Deutsche Telekom. Whether this is a sign of new things to come from the FCPA Unit remains to be seen;

4. of the civil and criminal actions filed by the Commission and the Justice Department against companies, five involved foreign companies;

5. 13 of individuals charged in 2011 were foreigners and one held dual citizenship;

6. the Commission and the Justice Department appear to be moving away from the mandatory imposition of independent compliance monitors in favor of self-monitoring in corporate settlements. Of the cases involving companies filed in 2011, only one involved the imposition of an independent compliance monitor (JGC Corporation), the others were largely self-monitoring;

7. consistent with the government's position, it appears that companies that voluntarily conduct internal investigations, disclose their findings to the government, and cooperate with the government's investigation tend to do better in settlements with the government;

8. the issue of territorial jurisdiction under the FCPA continues to be vexing, notwithstanding Judge Leon's ruling in the SHOT Show cases where he ruled in favor of *Pankesh Patel* and dismissed one of the counts against him because the government failed to establish under 15 U.S.C. § 78*dd*-3 (the 1998 amendment to the FCPA) that Patel 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. Nevertheless, in the Magyar Telekom settlement, the government based territorial jurisdiction on emails that were transmitted through or stored on servers located in the United States;

9. as discussed in more detail, the unprecedented number of trials taking place in district courts around the country is beginning to develop a body of judicial opinions that is likely to be helpful in interpreting some of the provisions of the FCPA; and

10. undeterred by criticism from the Chamber of Commerce and others, the government continues to bring cases predicated on inadequate pre-acquisition due diligence and defective post-acquisition integration.

These and other lessons from the 2011 docket will be reviewed and examined more extensively in this section. However, what appears to be clear from the 2011 docket is that the government continues to set records in the FCPA area, and we anticipate that this trend will continue in 2012 with over approximately 150 cases on the government's docket.

Continuing Focus on Trials

If the FCPA history books note 2010 for its record-breaking penalty totals, 2011 will be remembered for its record number of trials. Defendants have long lamented the lack of legal precedent in the FCPA area, the result of the nearly universal decision to settle. Many wanted the law to be tested, but no one wanted to bear the risk. 2011, however, saw a number of defendants break from that trend, resulting in some long-awaited case law. And apart from the lengthy sentences handed out to Joel Esquenazi (180 months) and Carlos Rodriguez (84 months) following their jury convictions, the results have been

mixed at best. With one mistrial, one dismissal during trial, and three overturned convictions in 2011, the Justice Department's record at trial this year has been mixed at best.

SHOT Show

Nearly two years ago, under the glare of intense media scrutiny, the government arrested 22 individuals in a massive sting operation connected with the Shooting, Hunting, Outdoor Trade Show and Conference (SHOT Show). As discussed in our last newsletter, three defendants–*Daniel Alvirez*, *Jonathan Spiller*, and *Haim Geri*–pled guilty in the Spring of 2011 and are awaiting sentencing. Judge Richard J. Leon of the United States District Court for the District of Columbia split the remaining defendants into four groups. The first group–*Pankesh Patel, John Benson Weir III*, *Andrew Bigelow*, and *Lee Allen Tolleson*–went to trial on May 16, 2011. On July 7, Judge Leon declared a mistrial when the jury deadlocked.

The mistrial was a major setback for the Justice Department and called into question the appropriateness and effectiveness of the investigative methods so loudly touted by the government after it announced the indictments. In the SHOT Show investigation–which the Justice Department called the largest single FCPA investigation ever–an undercover FBI agent posed as a foreign official supposedly brokering a deal to outfit the presidential guard of an African country when in fact no actual foreign officials were involved. The government's case also relied heavily on an informant, *Richard Bistrong*, who himself had pled guilty to an FCPA violation and other crimes. Indeed, Bistrong was called an "irredeemably corrupt con-man" by defense counsel, who argued that Bistrong and his FBI handlers "were so personally invested" in the government's investigation that they engaged in misconduct, including preventing targets of the investigation from conveying concerns about the lawfulness of transactions to others.[2] The government's reliance on a witness of questionable credibility and controversial investigative tactics likely weakened the government's case in the eyes of the jury.

The Justice Department advised the court after the declaration of a mistrial that it would retry the four defendants.[3] In November, Judge Leon denied the defendants' renewed motion for acquittal and scheduled the re-trial for May 29, 2012.[4]

A jury trial for the second group of defendants–*John M. Mushriqui*, *Jeana Mushriqui*, *R. Patrick Caldwell*, *Stephen Gerard Giordanella*, *John Gregory Godsey*, and *Marc Frederick Morales*–began before Judge Leon on September 27, 2011. It also ended in a setback for the government. After the completion of the government's 12-week presentation of its case, Judge Leon granted defendants' Rule 29 motion for judgment of acquittal with respect to the government's charge that the co-defendants conspired to violate the FCPA (the only charge against Giordanella) finding the government's evidence insufficient to support a conviction.[5] In announcing the dismissal of the conspiracy charge, Judge Leon told Giordanella, "you are excused" and "free to go," bringing to an end what must have been a harrowing ordeal for Giordanella. Then, at the conclusion of the trial, the jury acquitted Caldwell and Godsey outright and was unable to reach a verdict with respect to the Mushriquis and Morales, resulting in a mistrial as to them.[6]

The length of the first two SHOT Show trials has delayed the trial dates for the other defendants. Judge Leon has rescheduled trial for the third group of defendants–*Amaro Goncalves*, *Ofer Paz*, *Israel Weisler*, and *Michael Sacks*–to February 28, 2012, and for the fourth group of defendants–*David Painter* and *Lee Wares*–to May 12, 2012.[7]

United States v. Aguilar

On November 29, 2011, a federal district judge in Los Angeles, California dismissed with prejudice the indictment against Lindsey Manufacturing, its Chief Executive Officer, Keith Lindsey, and its Chief Financial Officer, Steven K. Lee.[8] As discussed in our Summer 2011 newsletter, on May 10, 2011, after only a day of deliberations, a jury in Los Angeles convicted Lindsey Manufacturing, Lindsey, 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. The verdict was an historic one, as Lindsey Manufacturing became the first corporation to be convicted at trial of FCPA violations.

On June 25, 2011, the Aguilar Defendants (excluding Angela Aguilar, who had previously accepted a plea agreement with the government) filed a supplemental brief in support of their motion to dismiss the indictment, claiming prosecutorial misconduct. In a hearing held on June 27, 2011, Judge Howard Matz expressed concern over several aspects of the case, particularly when the government reported that it had located grand jury testimony that it did not provide to the defense despite a court order to do so.[9]

In his strongly worded 41-page decision, Judge Matz described in detail the government's conduct that forced him, "with deep regret," to overturn the convictions and dismiss the indictment:[10]

1. search warrants falsely stated that a particular intermediary had received payments from Lindsey Manufacturing when it had not;
2. language in the search warrant improperly authorized case agents, not just information technology personnel, to review the results of the search;
3. the FBI searched two Lindsey Manufacturing buildings that were not authorized by the warrant;
4. an FBI agent made multiple misstatements and falsehoods before the grand jury;
5. prosecutors failed to produce the grand jury testimony of the FBI agent that made multiple misstatements and falsehoods;
6. without authorization, prosecutors obtained Angela Aguilar's emails from prison, including exchanges with her attorneys;
7. the prosecutor gave an improper willful blindness jury instruction despite the court's order not to; and
8. a government witness attributed a payment to Lindsey Manufacturing that the government had attributed to a different company, yet the government did not disclose the difference to the defendants.

Although perhaps any one or two of these instances standing alone would not have necessitated overturning the convictions, Judge Matz found that taken together they amounted to "a pattern of invidious conduct." The prejudice to the defendants from the government's misconduct was "palpable"–from the very beginning, the defendants "were thrown off balance by being forced to devote enormous effort to responding to and redressing serious and prejudicial wrongs, while at the same time having to defend themselves against the charges."[11] The Justice Department has indicated that it will appeal to the Ninth Circuit.

The week after Judge Matz's order, the Justice Department agreed to vacate the conviction of Angela Aguilar as well, pending its appeal of the dismissal.[12] Regardless of the outcome of the Justice

Department's appeal, Judge Matz's order is sure to affect the way FCPA cases are prosecuted. And even if the Justice Department's appeal is successful, its "invidious conduct" has transformed what had been one of its premiere FCPA victories into one of its highest-profile, and most embarrassing, defeats.

United States v. O'Shea

As our year-end newsletter went to print, the trial of *John Joseph O'Shea*, a former manager of ABB Network Management, a subsidiary of ABB, Inc., began on January 10, 2012. Indicted in 2009, O'Shea allegedly authorized bribes of US$1.9 million to CFE employees (the same Mexican government entity as in *Aguilar*) in exchange for contracts worth US$81 million, the so-called "Third World Tax." O'Shea also allegedly hired *Fernando Maya Basurto*, a Mexican citizen, who purportedly acted as a middleman in the scheme and who has pleaded guilty to conspiracy to violate the FCPA, money laundering, and falsifying records in a federal investigation. On January 16, 2012, however, at the close of the government's case-in-chief, United States District Judge Lynn N. Hughes granted O'Shea's motion to dismiss 12 FCPA counts and one conspiracy count, finding that Basurto's testimony failed to tie O'Shea to the alleged bribery.[12] O'Shea still faces a possible re-trial on money laundering and falsifying records charges. We will discuss the court's ruling more extensively in our 2012 mid-year review.

United States v. Carson

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, pled guilty on July 31, 2009, to violations of the FCPA and the Travel Act.[13]

As we discussed more extensively in our summer 2011 newsletter, pre-trial motions in the *Carson* case resulted in a court ruling denying a motion to dismiss predicated upon defendants' argument that an employee of a state-owned company may not be a "foreign official" under the FCPA.[14] The defendants in *Carson* made virtually identical arguments to those made in *Aguilar*, and the *Carson* court reached the same conclusion, holding that state-owned entities could be instrumentalities under the FCPA but that the determination is a question of fact.

The *Aguilar* and *Carson* decisions provide nine factors to be considered when deciding who qualifies as a foreign government official under the FCPA:

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;
5. the entity is widely perceived and understood to be performing official (i.e., governmental) functions;

6. the foreign state's characterization of the entity and its employees;

7. the foreign state's degree of control over the entity;

8. the purpose of the entity's activities; and

9. the circumstances surrounding the entity's creation.

Among the many interesting legal issues likely to be reviewed in this case is the issue of whether defendants must know that the bribe recipients are government officials.

Recent Indictments Continue Government's Prosecution of Individuals

Former Siemens Executives and Agents Indicted

During a 2010 congressional hearing over FCPA reform, the Justice Department was criticized for failing to prosecute the individuals responsible for large historic FCPA settlements. Perhaps in response to this criticism, eight former executives and agents of Siemens were indicted in the Southern District of New York for conspiracy to violate the anti-bribery, books and records, and internal controls provisions of the FCPA, money laundering, and wire fraud. The indicted defendants, all foreign nationals, are *Uriel Sharef* (a former member of Siemens's central executive committee); *Herbert Steffen* (former CEO of Siemens Argentina); *Andres Truppel* (former CFO of Siemens Argentina); *Ulrich Bock*, *Stephan Signer*, and *Eberhard Reichert* (former senior executives of Siemens Business Services); and *Carlos Sergi* and *Miguel Czysch* (who worked as agents for Siemens). The indictment is based on allegations that the individuals paid more than US$100 million in bribes to secure a US$1 billion contract to produce national identity cards for Argentine citizens.[15] The indictment alleged that the defendants participated in meetings in the United States to negotiate the bribe payments and that at least US$25 million in bribes were funneled through bank accounts in the United States. The indictments are the most recent evidence of the government's commitment to hold individuals, including foreign nationals, accountable for FCPA violations wherever the bribes are paid, if there is a colorable jurisdictional basis. Here the defendants come from Germany, Switzerland, Argentina, and Israel, and allegedly bribed Argentinean government officials to secure contracts on behalf of a German company listed on an United States stock exchange. Speaking at the announcement of these charges, the United States Attorney for the Southern District of New York, Preet Bharara, noted "[i]t is critical that we hold individuals as well as corporations accountable for such corruption as we do today."[16] Echoing the same sentiment, Assistant Attorney General Lanny Breuer stated "[t]his indictment reflects our commitment to holding individuals, as well as companies, for violations of the FCPA."

The SEC has also brought charges against former Siemens employees—six of the former Siemens executives and agents facing criminal charges (Messrs. Sharef, Bock, Sergi, Signer, Steffen and Truppel) and the former CFO of Siemens Business Services (*Bernd Regendantz*).[17] Regendantz has resolved the SEC's charges against him, consenting to the entry of a final judgment that permanently enjoins him from future violations of Sections 30A and 13(b)(5) of the Exchange Act, and Rules 13b2-1 and 13b2-2 thereunder, and from aiding and abetting violations of Exchange Act Sections 30A, 13(b)(2)(A), and 13(b)(2)(B); and orders him to pay a civil penalty of US$40,000, deemed satisfied by Regendantz's payment of a €30,000 administrative fine ordered by the Public Prosecutor General in Munich, Germany.

Longest Prison Sentence in FCPA History Handed Down

On August 5, 2011, Joel Esquenazi was convicted following a two-and-a-half week jury trial of charges that he authorized the payment of over US$890,000 in bribes to Haitian officials at Telecommunications D'Haiti S.A.M. (Haiti Telecom) through a series of shell companies and bank accounts to secure a 50% discount on calling rates between Haiti and the United States.[18] On October 26, 2011, Judge Jose E. Martinez sentenced Esquenazi, the former president of Terra Telecommunications Corp., to 180 months imprisonment (15 years), 60 months for eight counts of violating the FCPA and 120 months for 13 counts of money laundering.[19] It is to date the longest sentence ever imposed in an FCPA case.[20]

The second longest sentence in an FCPA case was imposed on *Charles Paul Edward Jumet* in 2009 for his involvement in a bribery scheme to monopolize contracts for the maintenance and safety of Panamanian waterways.[21] Jumet was sentenced to 87 months imprisonment, 60 months for violating the FCPA and 27 months for making false statements. To date, four other individuals convicted of FCPA violations have received sentences of between 84 and 51 months: Carlos Rodriguez (84 months, 60 months for FCPA violations and 24 months for money laundering), *Douglas Murphy* (63 months), *Juan Diaz* (57 months), and *Shu Quan Sheng* (51 months).[22]

The Esquenazi sentence demonstrates a continued commitment by the Justice Department to seek substantial sentences for individuals who violate the FCPA and related statutes. The sentence also evidences focused cooperation among various government agencies. A press release on the Esquenazi sentencing included not only the standard DOJ declaration about deterring violations of the FCPA,[23] but also a statement from IRS Special Agent Jose A. Gonzalez. Special Agent Gonzalez warned, "[n]o matter how sophisticated the [money laundering] scheme, IRS special agents will uncover it and unscrupulous individuals and businesses will be held accountable for their actions as indicated by these sentences."

As we have reported in prior newsletters, however, judges do not always deliver the lengthy prison sentences the government seeks. For example, *Gerald* and *Patricia Green* were convicted of offering millions of dollars in bribes to Thai officials, using laundered money, to obtain exclusive promotion rights and contracts in connection with the Bangkok International Film Festival.[24] But while the government sought prison terms of 360 months for Gerald Green and 235 months for Patricia Green, the judge sentenced the Greens to six months in prison.[25]

Regardless of the sentences ultimately received by the Greens,[26] the government's sentencing submissions in the cases against the Greens and Esquenazi provide insight into the enhancements the government will seek under the federal sentencing guidelines. The government is likely to seek an enhanced sentence if, for example, a defendant:

1. attempts to camouflage transactions and launder money, United States Sentencing Guidelines (U.S.S.G.) § 2S1.1;
2. assumes a leadership role in the bribery scheme, U.S.S.G. § 3B1.1; or
3. commits another felony in connection with the investigation, such as perjury, U.S.S.G. § 3C1.1.[27]

These enhancements are considered by judges as part of their determination of a sentence that "reflect[s] the seriousness of the offense," "afford[s] adequate deterrence to criminal conduct," and "protect[s] the public from further crimes of the defendant."[28]

Increasing Use of Money Laundering Charges

The Esquenazi and Green prosecutions reflect an emerging strategy in the Justice Department's enforcement of the FCPA. In 2002, the PATRIOT Act classified violations of the FCPA as predicate offenses to the Money Laundering Control Act (MLCA).[29] This classification armed prosecutors with the ability to seek criminal forfeiture of illegally obtained assets and up to 20 years imprisonment for violations of the MLCA.

The government has since instituted several prosecutions charging money laundering violations in addition to, or in connection with, FCPA violations. On July 13, 2011, for example, the Justice Department announced that it had obtained a superseding indictment charging *Cinergy Telecommunications Inc.*, a Florida-based telecommunications company; *Washington Vasconez Cruz*, Cinergy's president; and *Amadeus Richers*, Cinergy's director, with FCPA and money laundering violations.[30] The superseding indictment also charged *Patrick Joseph*, former general director for telecommunications at Haiti Teleco; *Jean Rene Duperval*, a former director of international relations for telecommunications at Haiti Teleco; and *Marguerite Grandison*, Duperval's sister, who served as an intermediary, with money laundering violations. The defendants allegedly participated in a scheme in which Cinergy, with the approval of Cruz and Richers, bribed government officials at Haiti Teleco, including Joseph and Duperval, in exchange for preferred telecommunications rates and other business advantages. The bribes were allegedly concealed through the use of various shell companies, including J.D. Locator Services, Fourcand Enterprises, and Telecom Consulting Services.

Successor Liability: Companies Continue to Face Liability for Inadequate Pre-Acquisition Due Diligence and Defective Post-Acquisition Integration

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. In this regard, 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.

As we discussed in our mid-year review, the Commission and the Justice Department have continued to bring cases predicated in whole or in part on the theory of successor liability. The first half of the year saw cases such as *Ball Corporation, Kraft Foods, Inc.*, and *LatinNode Inc.* The second half of the year continued apace with the following cases again reiterating the importance of conducting robust due diligence prior to any type of business combination and, equally important, ensuring a post-combination integration of the acquiring company's compliance and internal controls systems.

Diageo Settles FCPA Charges Based, in Part, on Successor Liability

Past FCPA enforcement actions have demonstrated that it is critical that companies carefully evaluate and manage the FCPA risk associated with conducting business through third-party agents. On July 27, 2011, London-based *Diageo plc* (Diageo), one of the world's largest producers of premium alcoholic

beverages, resolved charges that it made over US$2.7 million in illicit payments to government officials in India, Thailand, and South Korea in an effort to improve sales or to receive more favorable tax or customs treatment.[31] Most of these illicit payments were made by indirect subsidiaries or joint ventures of Diageo. As part of the settlement, Diageo paid over US$16 million in penalties, disgorgement, and prejudgment interest.

According to the SEC, over a period of six years Diageo made payments in excess of US$1.7 million to Indian government officials responsible for authorizing the sale of its beverages. In Thailand, Diageo allegedly made payments totaling nearly US$600,000 to a Thai official to lobby government officials concerning pending tax and customs disputes. In South Korea, Diageo allegedly made payments amounting to several hundred thousand dollars in travel, entertainment, and other expenses for South Korean government officials involved in significantly reducing corporate tax assessments. In addition, Diageo paid over US$230,000 to South Korean military officials to obtain and retain liquor licenses. These payments were supposedly concealed by recording them as legitimate expenses for third-party vendors or private customers, categorizing them in false or overly vague terms, or, in some instances, failing to record them at all.

At the heart of the SEC enforcement action was also the company's failure to devise and maintain internal accounting controls sufficient to detect and prevent the corruption. The SEC noted that as a result of Diageo's lax oversight and deficient controls, Diageo's subsidiaries routinely used third parties, inflated invoices, and other deceptive devices to disguise the true nature of the payments. Moreover, the SEC charged that "Diageo's history of rapid multinational expansion through mergers and acquisitions contributed to defects in its FCPA compliance programs." In this regard, the SEC alleged that the three implicated Diageo entities were new acquisitions at the time of the corrupt payments and that Diageo knew that the acquired companies had "weak compliance policies, procedures and controls" but failed to correct these deficiencies.

Perhaps most egregious is that some of the illicit payments not only were recorded as legitimate expenses, but also were approved by the compliance department. Indeed, according to the SEC, a senior officer within Diageo's global compliance department explicitly approved the practice of making illicit payments after a Diageo Korea employee explained that the company would face a competitive disadvantage if it refrained.

Highlighting the importance of developing clear policies and adequate internal controls to prevent and detect activities that may constitute violations of the FCPA, the Diageo settlement also underscores the need for corporations to be vigilant in selecting and monitoring third parties that act on their behalf in interactions with foreign officials. One way to prevent these problems is through the development and implementation of a risk-based, rigorous third-party due diligence program to properly identify, mitigate, and respond to the specific risks associated with the use of third parties in these capacities. The Justice Department has not, as yet, filed charges against Diageo.

Former CEO of LatiNode Sentenced to 46 Months

In our Summer 2011 newsletter, we noted that *Jorge Granados*, former CEO of *LatiNode*, had pleaded guilty to conspiring to bribe government officials in Honduras in violation of the FCPA. On September 8, 2011, Granados was sentenced to 46 months in prison.[32] 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. Granados was the fourth former LatiNode executive to plead guilty, joining *Manuel Salvoch*, the chief financial

officer, *Juan Pablo Vasquez*, the chief commercial officer, and *Manuel Caceres*, the vice president for business development. Salvoch, Vasquez, and Caceres are currently scheduled for sentencing in the first quarter of 2012.

Watts Water Settles FCPA Charges Arising out of Its Acquisition of CWV

On October 13, 2011, *Watts Water Technologies, Inc.* (Watts), a producer of water valves and related products, and the former vice president of sales for Watts' subsidiary in China, *Leesen Chang*, entered into an administrative cease and desist order with the SEC to settle charges that it bribed Chinese government officials.[33] Watts established Watts Valve (Changsha) Co., Ltd. (CWV) to purchase the assets and businesses of Changsha Valve Works (Changsha Valve). CWV acquired Changsha Valve in April 2006, and CWV thereafter produced and supplied large valve products for infrastructure projects in China, mostly for state-owned entities.

According to the SEC, CWV made corrupt payments to Chinese government officials to secure recommendation of CWV's valve products to state-owned customers and to create design specifications that favored CWV's valve products. The SEC further alleged that Chang approved the corrupt payments and "knew or should have known that the payments were improperly recorded as commissions." Moreover, the SEC charged that Watts failed to implement FCPA compliance and training programs commensurate with the risks posed by its newly acquired Chinese subsidiary. As part of the order, Watts will pay US$3.7 million in total fines, including disgorgement of US$2,755,815, prejudgment interest of US$820,791, and a penalty of US$200,000. Chang will pay a US$25,000 penalty.

Notably, the SEC included in the Order Instituting Cease-and-Desist Proceedings that Watts learned of potential FCPA violations at CWV as part of its efforts to implement FCPA compliance training. The SEC credited Watts' voluntary disclosure of its internal investigation of the potential FCPA issues at CWV and its implementation of remedial measures, including a direction to all Watts and CWV employees to stop all payments to state-owned entities and its enhancement of its anti-bribery policy.

SEC Uses New Enforcement Tool for the First Time in FCPA Enforcement Action

As we previously discussed in our mid-year review, on January 13, 2010, the Commission 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.

The Cooperation Initiative extends the range of possible options available to the SEC 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 Exchange Act as it did with the October 23, 2001 Seaboard Report (Seaboard Report).

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 SEC Division of Enforcement 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.

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. Along with the cease-and-desist order against Meredith, the Commission also 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.

The SEC can also conclude an investigation by declining to take an enforcement action without any public statement. On October 29, 2009, *Zale Corp.* (Zale) disclosed that the SEC was conducting an investigation regarding its accounting practices. 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. Zale announced the next day that the Commission had closed the investigation without taking action against it. The Commission did not make any public statement 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.

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 US$125,000 to government officials in South America. 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.

The Zale and Apex Silver investigations illustrate circumstances where the SEC declines to bring an enforcement action. At 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. 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. 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. 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 administrative proceeding 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. 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. 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. 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 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." 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. 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.

Tenaris regional sales employees allegedly paid a total of US$32,141 in commissions to a bidding agent through a United States bank. 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.

Even more interesting is the government's failure to identify or announce its basis for territorial jurisdiction. As we discussed with respect to the JGC settlement in our mid-year review, the government's basis for territorial jurisdiction is the transfer of money through United States 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, 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. 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 it 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. If Tenaris breaches the terms of the DPA, Tenaris agreed not to contest or contradict any of the factual allegations set forth in the DPA should the Commission institute an enforcement action. 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 United States 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 but still pay taxes on a profit it no longer had. In essence, Tenaris paid US$4.79 million in disgorgement plus whatever taxes it paid on that profit 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 had (1) 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.

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." 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.

Seaboard, Zale, Apex Silver, Arthrocare, Tenaris, and Carter's illustrate that it is likely a combination of factors, none alone dispositive, that portends an investigation's outcome. The voluntary disclosure of potential violations significantly impacts the likelihood of a more favorable outcome. One analysis concluded that 19 of 25 declinations since 2007 involved self-disclosures. 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 an 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, termination or other appropriate employee action, 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 in 2012 how often and under what circumstances the SEC will resolve FCPA enforcement actions by an NPA or a DPA.

Continuing Industry-Wide Investigations

Pharmaceutical and Medical Device Industries

The Justice Department declared its intention to focus on the pharmaceutical industry in 2009, when Breuer noted that "it is entirely possible, under certain circumstances and in certain countries, that nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product in a foreign country will involve a 'foreign official' within the meaning of the FCPA."[34] With so many opportunities for corrupt payments, Breuer promised that the government "will be intensely focused on rooting out foreign bribery in [the pharmaceutical] industry."

As we reported in our last newsletter, on April 8, 2011, *Johnson & Johnson* (J&J) entered into a US$77.9 million global settlement with the Commission, the Justice Department, and the United Kingdom's Serious Fraud Office (SFO). Pursuant to a deferred prosecution agreement with the Justice Department, J&J admitted that its subsidiaries–including DePuy, Inc., at which a scheme involving the payment of bribes to surgeons at public hospitals in Greece in exchange for purchases of the company's surgical implants originated before J&J acquired DePuy–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).[35] Under the deferred prosecution agreement, J&J agreed to pay a criminal fine of US$21.4 million, a 25% discount from United States sentencing guidelines minimum,[36] likely due in large part to its cooperation with the government regarding the activities of its competitors.

With respect to the SEC settlement, J&J 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. Our partner, Claudius Sokenu, represents certain entities and individuals in connection with this industry-wide investigation.

Oil and Gas Industry

In its third quarter Form 10-Q filed on October 21, 2011, *Halliburton Co.* (Halliburton) disclosed an internal investigation into possible FCPA violations resulting from its operations in Angola.[37] According to the company, Halliburton received an "anonymous email" alleging violations of its Code of Conduct and the FCPA, "principally through the use of an Angolan vendor." The email also alleged "conflicts of interest, self-dealing and the failure to act" on those violations. As a result, Halliburton informed the Justice Department and the SEC that it was initiating an internal investigation, and during the third quarter of 2011, Halliburton met with the Justice Department and the SEC to disclose documents and to brief the agencies on the status of its investigation.

Rounding Out the Enforcement Docket

Alleged FCPA Victims Denied Proceeds from Alcatel-Lucent Settlement

Advocates for the countries in which bribes are paid received a considerable setback on June 17, 2011, when the United States Court of Appeals for the Eleventh Circuit upheld a lower court decision that the Costa Rican electrical company *Instituto Costarricense de Electricidad S.A.* (ICE) was not a victim of *Alcatel-Lucent's* alleged FCPA violations, but was instead a co-conspirator.[38]

The origins of the case lie in a challenge filed in the Southern District of Florida by ICE to the settlement Alcatel-Lucent reached with the SEC and the Justice Department in December 2010.[39] Under the terms of the Alcatel-Lucent settlement, the company entered into a deferred prosecution agreement with the Justice Department and settled civil charges brought by the SEC related to FCPA violations in Costa Rica, Honduras, Malaysia, and Taiwan, and agreed to pay a total civil penalty and criminal fine of US$137 million.[40] On May 2, 2011, ICE challenged Alcatel-Lucent's settlement, under the theory that it was entitled to restitution because of the allegedly illicit payments made to Costa Rican government officials.[41]

The district court denied ICE's petition at a hearing on May 31, 2011, ruling that the issue of whether ICE was a victim or a co-conspirator, due to the significant corruption at ICE and the involvement of high-ranking ICE officials in the allegedly illicit payments, precluded relief. ICE then filed a writ of mandamus with the Eleventh Circuit on June 15, 2011, requesting that the appellate court overturn the district court's decision.[42] However, on June 17, 2011, the Eleventh Circuit denied ICE's appeal, holding that the district court did not clearly err in finding that, rather than being a victim, ICE "actually functioned as the offenders' co-conspirator."[43] It is not entirely clear whether the Eleventh Circuit's ruling will deter similar suits by other foreign governments, as in almost every FCPA case members of those foreign governments will be the recipients of the corrupt payments.

Bridgestone Corporation Settles FCPA and Antitrust Charges

On September 15, 2011, *Bridgestone Corporation* (Bridgestone), a Tokyo-based maker of marine hose and other industrial products, reached a settlement with the Justice Department over alleged violations of the FCPA and the Sherman Act.[44] With regard to the FCPA charges, Bridgestone allegedly authorized

and approved corrupt payments made by local sales agents to employees of state-owned entities in various Latin American countries, including Mexico.[45] Up to this point, the only related FCPA charge had been against *Misao Hioki*, general manager of Bridgestone's international engineered products department, who pleaded guilty to FCPA and antitrust conspiracies in 2008 and was sentenced to two years in prison.

Bridgestone pleaded guilty to both FCPA and antitrust charges and agreed to pay US$28 million in criminal fines. Bridgestone's relatively light criminal fine was, the government said, a result of Bridgestone's cooperation with the government, which included conducting its own internal investigation; voluntarily allowing its employees to be interviewed; and collecting, analyzing, and providing to the government information from its internal investigation. Another mitigating factor was the extensive remediation conducted by the company, which included restructuring its business, terminating many third-party intermediaries, and taking remedial actions against the employees responsible for many of the illicit acts. Thus, the Bridgestone settlements suggest that significant cooperation with prosecutors will likely result in a reduced penalty.

Interests of Justice: Dismissal of Charges against Si Chan Wooh

On October 14, 2011, the Justice Department moved to voluntarily dismiss FCPA charges against *Si Chan Wooh*, the former Executive Vice President and Head of *Schnitzer Steel International* (Schnitzer Steel), citing prosecutorial discretion in the interests of justice and the efficient use of government resources.[46] Wooh had pleaded guilty to conspiracy to violate the FCPA in connection with alleged improper payments by Schnitzer Steel's South Korean subsidiary to Chinese government-owned steel mills to induce the steel mills to purchase from Schnitzer Steel.[47] Subsequent court filings revealed, however, that an FBI agent involved in the investigation expressed doubts regarding the prosecution in light of Wooh's potential status as a whistleblower.[48] The court granted the motion on October 17, 2011.[49]

Embraer Discloses FCPA Investigation

On November 13, 2011, *Embraer S.A.* (Embraer), a Brazil-based aircraft manufacturer, publicly disclosed that it was the subject of an FCPA investigation currently being conducted by the Justice Department and the SEC.[50] According to its disclosure, the company received a subpoena from the SEC relating to possible FCPA violations in three unnamed countries. As a result, Embraer has hired outside counsel to conduct an internal investigation and is cooperating with the government. No other details have so far been made available, but we will continue to monitor this developing investigation.

Walmart Discloses FCPA Investigation

On December 8, 2011, *Wal-Mart Stores Inc.* (Walmart), the retail chain based in Arkansas, disclosed that it is conducting an internal investigation into potential violations of the FCPA.[51] Walmart explained that, as a result of information obtained during a voluntary internal review of its global anti-corruption program and from other sources, it began an internal investigation into whether certain matters, including permitting, licensing, and inspections, were in compliance with the FCPA. Walmart voluntarily disclosed its internal investigation to the Justice Department and the SEC. Walmart concluded its disclosure by stating that based on "facts currently known" it did not believe that the FCPA matters

would have a material adverse effect on its business or financial condition. We will continue to monitor this developing situation.

Second Circuit Upholds "Conscious Avoidance" Instruction in FCPA Case

On December 14, 2011, the United States Court of Appeals for the Second Circuit affirmed Frederick Bourke's conviction for conspiracy to violate the FCPA.[52] Bourke, a co-founder of accessory company Dooney & Bourke, was convicted in June 2009 of participating in a scheme to bribe Azerbaijani government officials. Bourke argued that he was unaware that bribes were paid and appealed his conviction, arguing most notably that an instruction to the jury regarding conscious avoidance was erroneous. The Second Circuit disagreed, holding that evidence that Bourke was aware that bribery was pervasive in Azerbaijan generally, knew that his co-defendant *Viktor Kozeny* was known as the "Pirate of Prague" because of his reputation for "shady dealings," and was recorded musing about whether Kozeny might be paying bribes was sufficient to trigger an instruction that the jury could find "culpable knowledge" required to prove a FCPA violation if it found that "Bourke deliberately avoided confirming his suspicions that [his partners] may be paying bribes."[53]

Aon Settles FCPA-Related Charges

Following its 2009 settlement with the United Kingdom's Financial Services Authority (FSA), on December 20, 2011, *Aon Corporation* (Aon), one of the largest insurance brokerage firms in the world, headquartered in Chicago, resolved FCPA charges brought by the Justice Department and the SEC. According to the Justice Department, Aon's United Kingdom subsidiary, Aon Limited, administered certain training and education funds with Instituto Nacional de Seguros (INS), Costa Rica's state-owned insurance company.[54] But while the supposed purpose of the funds was to provide education and training for INS officials, Aon Limited used a significant portion of the funds to reimburse INS officials for non-training-related activity, including travel with spouses to overseas tourist destinations, or for uses that could not be determined from Aon's books and records. In addition to the alleged payments in Costa Rica, Aon subsidiaries paid over US$3.6 million in improper payments over 14 years in Bangladesh, Egypt, Indonesia, Myanmar, Vietnam, and the United Arab Emirates. Aon agreed to pay a US$1.76 million criminal fine as part of a non-prosecution agreement and US$14.5 million in disgorgement and prejudgment interest to the SEC.[55]

Aon Limited was previously fined £5.25 million by the FSA for failing to take reasonable care to establish and maintain effective systems and controls to counter the risks of bribery and corruption associated with making payments to overseas firms and individuals.[56]

Magyar Telecom and Deutsche Telekom Resolve Long-Running FCPA Investigation

On December 29, 2011, Magyar Telekom, a Hungarian telecommunications company, and Deutsche Telekom, a German telecommunications company and the majority owner of Magyar Telekom, entered into agreements with the Justice Department and the SEC to resolve FCPA charges.[57] According to the Justice Department, Magyar Telekom entered into a secret agreement with Macedonian officials to delay the entrance of an additional mobile license for the Macedonian market. In exchange for the Macedonian officials' cooperation, Magyar Telekom executives engaged in a course of conduct with consultants, intermediaries, and other third parties, including through sham consultancy contracts with entities owned and controlled by a Greek intermediary, to pay €4.875 (US$6 million) under circumstances in which they knew, or were aware that it was highly probable, that all or part of the payment would be passed on to Macedonian officials. Magyar Telekom also made improper payments

through intermediaries to Montenegrin government officials in connection with its acquisition of a state-owned telecommunications company in Montenegro. Payments were recorded as if they related to contractual obligations, but the Justice Department charged that no legitimate services were provided for the payments. Magyar Telekom agreed to pay a US$59.6 million criminal fine as part of a deferred prosecution agreement, and Deutsche Telekom agreed to pay a US$4.36 million penalty as part of a separate deferred prosecution agreement. With respect to the SEC charges predicated on the same allegations, Magyar Telekom also agreed to pay US$31.2 million in disgorgement and prejudgment interest.

Relatedly, the SEC charged three former Magyar Telekom executives–*Elek Straub* (former Chairman and CEO), *Andras Balogh* (former Director of Central Strategic Organization), and *Tamas Morvai* (former Director of Business Development and Acquisitions)–for orchestrating the bribery scheme called the "Protocol of Cooperation" with officials of the Macedonian government to affect key legislation unfavorable to Magyar Telekom. These charges remain pending in the Southern District of New York. We will monitor the proceedings for significant developments.

Some of the takeaways from the Magyar Telekom and Deutsche Telekom settlement include the government's continuing expansive reading of the territorial jurisdiction under 15 U.S.C. § 78*dd*-3 (the 1998 amendment to the FCPA). In Magyar Telekom, the government based jurisdiction on emails that were transmitted through and stored on servers located in the United States. Another interesting aspect of the settlement is that Deutsche Telecom was held liable for accounting and internal controls violations although it owned only 60% of Magyar TeleKom.

The SEC filed a total of 10 litigated cases against executives of Siemens and Magyar Telekom. Whether this unprecedented development marks a new shift in the SEC's enforcement program as some have predicted remains to be seen, particularly with Brockmeyer taking the lead of the FCPA Unit.

SEC's Dodd-Frank Whistleblower Program

The Dodd-Frank Act directed the SEC to make monetary awards to eligible individuals who voluntarily provide original information that leads to successful SEC enforcement actions resulting in the imposition of monetary sanctions over US$1,000,000, and certain related successful actions. The SEC published its 2011 Annual Report on its Dodd-Frank whistleblower program in November 2011.[58] The report notes in an appendix that between August 12, 2011, when the rules setting forth the whistleblower program became final, and September 30, 2011, when the SEC's 2011 fiscal year ended, the SEC received 334 total whistleblower tips, 13 (3.9%) of which were related to FCPA issues. While it is in its early days, this development does not bode well for companies and their compliance programs.

FCPA-Related Civil Litigation

Although the FCPA does not contain a private right of action, civil plaintiffs have found ways to use FCPA enforcement actions as a predicate to file civil claims based on FCPA violations. Many of these suits are brought by a company's shareholders derivatively on behalf of the company and allege that the company's officers and directors breached their fiduciary duties by allowing the payment of bribes and/or failing to implement internal controls to prevent FCPA violations. On August 29, 2011, for example, plaintiffs *M.J. Copeland* and *Leslie Katz* filed separate shareholder derivative suits against

J&J, its Executive Committee, and several of its senior executives for breach of fiduciary duties relating to violations of the FCPA discussed above. The two cases were consolidated under the *Copeland* caption on November 21, 2011, and defendants' motion to dismiss is currently due in February 2012.[59] Other companies facing pending shareholder derivative actions include *Bio-Rad Laboratories, Inc.*, *Tidewater, Inc.*, and *Maxwell Technologies, Inc.*

GLOBAL ANTI-CORRUPTION ENFORCEMENT AND INVESTIGATION UPDATE

When Transparency International released its seventh annual Progress Report on Enforcement of the OECD Anti-Bribery Convention on May 23, 2011, it reported that 21 countries had "little or no" enforcement, nine had "moderate enforcement," and only seven countries had "active enforcement."[60] Transparency International observed that the level of enforcement activity remained the same as noted in its 2010 Progress Report–with no new countries added to either the active or moderate enforcement categories for the first time in six years–which raised concern that the Convention might be "losing momentum." It found that "[t]he Convention has not yet reached the point at which the prohibition of foreign bribery is consistently enforced" worldwide, that "backsliding by enforcing governments is a serious threat" especially in the "troubled global economy," and that the "principal cause of lagging enforcement is lack of political commitment by government leaders" in some of the Convention's countries.

The report also observed that the Convention stresses the need for a comprehensive system of enforcement–including, for example, "sufficient resources, adequate training," and an "adequate complaint procedure and whistleblower protection." While, as Transparency International found, some countries may not yet have the political commitment needed to develop comprehensive systems of enforcement, in 2011 compliance efforts and enforcement actions in the United Kingdom and elsewhere made clear that other countries are making efforts to strengthen anti-corruption enforcement.

The SFO Reinvigorated

The United Kingdom is a prime example of a country that has taken major steps forward in anti-corruption enforcement in recent years. Accordingly, Transparency International's 2011 Progress Report categorized the United Kingdom as an active enforcer. Yet Transparency International also raised issues regarding how rigorously the new United Kingdom's Bribery Act of 2010 (Bribery Act) was to be enforced after it went into effect on July 1, 2011. Further, Transparency International questioned the future enforcement role of the SFO, which faced budget cuts and other challenges.[61]

Transparency International noted its concern that the investigative and prosecutorial powers of the SFO, which is the main prosecuting authority for serious fraud and corruption offenses in the United Kingdom, would be broken up and folded into other government departments.[75] Perhaps as a result of uncertainty regarding the organization, a number of high-profile officials left the SFO, including its general counsel and the head of its fraud group.[62] While it was confirmed in June 2011 that the SFO would not be split up, questions remained as to whether months of uncertainty had an effect on the organization. In June 2011, Richard Alderman, the SFO's director, acknowledged, "[w]e have certainly been damaged by events of the last six months or so. It may be that our results for this current year are not as good as we expected and that is attributable to the conditions we have encountered. We are bringing cases to court and we will have to see what the results are like. Our cases are going

smoothly and we are getting them before a judge and jury, but we will have to see how successful we are with all this."[63]

While the SFO's future role in fighting global corruption was questioned in the first half of 2011, the latter half of 2011 witnessed a reinvigorated SFO and evidenced the United Kingdom's commitment to preventing, investigating, and prosecuting fraud and corruption. In September 2011, Alderman stated that "[h]aving emerged from a period of uncertainty, the SFO is now securely positioned for the future. With this in mind, we are driving through a number of initiatives to further strengthen our resources, build closer links with the City, and reinforce our commitment to our international network of partners."[64] Indeed, in the latter half of 2011, the SFO made clear that it will continue to strengthen its anti-corruption enforcement efforts and work closely with law enforcement agencies around the world.

Although the first prosecution under the new Bribery Act, which went into effect on July 1, 2011, was a relatively minor domestic corruption case, the swiftness with which the Bribery Act was used and the attendant publicity the prosecution received helped reinforce that the United Kingdom intends to fight corruption at all levels.[65] Whether the SFO will use the Bribery Act to vigorously pursue foreign companies, especially where evidence of wrongdoing and key witnesses are largely outside the United Kingdom, remains to be seen. However, Alderman confirmed that the SFO would not just be going after "low hanging fruit."[66] Instead, Alderman confirmed that there is already Bribery Act activity at the SFO that is not in the public domain, including the SFO working with and looking into corporations.

The months following the Bribery Act going into effect have seen the implementation of measures to assist in investigations, such as the SFO's publication of guidance regarding bribery and corruption and the introduction of a new whistleblower initiative, discussed below.[67] The SFO also has encouraged a dialogue with companies that may encounter compliance issues.[68] Further, the latter half of 2011 has seen the SFO use its enforcement powers to vigorously prosecute individuals, including executives of *Innospec, Inc.* (Innospec) and high-profile businessmen such as *Victor Dahdaleh*, discussed below. Alderman has stressed that the involvement of senior executives in reforming corporations, as well as the targeting of senior executives involved in corporate corruption, is key to changing the culture of corruption: "If corruption is happening in parts of their worldwide corporation, then at some stage this is going to emerge and could have a devastating impact on their reputation. Senior executives are recognising more and more that part of managing their business in the modern world means ensuring they have the right ethical culture within the corporation…. Another priority is to look at the role of individuals who are senior members of corporations and who consent to or connive in bribery. We are particularly interested in those who need to play a role in changing the culture of corporations that have corruption challenges."

In sum, with the launch of its new initiatives and enforcement actions in the second half of 2011, the SFO has made clear that it intends to aggressively pursue foreign corruption. The SFO has proved that its role in the fight against global corruption is robust.

The SFO Book: An Opening of the Enforcement Dialogue

Steps taken to increase the profile of the SFO in fighting global corruption include not just prosecuting companies, but also educating them about compliance and cooperating with the government. The SFO is engaging companies in a dialogue regarding how serious economic crime should be dealt with in the United Kingdom, likely in the hope that more companies will seek to comply with anti-corruption laws and cooperate with the government when corruption is discovered. Alderman has stressed the SFO's role in aiding companies to prevent fraud and corruption, stating: "I see my role as being to support these businesses in what they are doing and to provide them with the necessary help that they need from us."

In this vein, in September 2011, the SFO published a 300-page book, available for free download online, titled "Serious Economic Crime: A Boardroom Guide to Prevention and Compliance."[69] In the foreword to the book, Alderman said that its purpose is "to give board-level readers in the UK and international businesses informed commentary on the impact of anti-fraud and anti-corruption legislation."

The introduction to the book, written by contributing editor Harry Travers (a private-sector attorney), states that the British system for fighting fraud and corruption has been criticized, but adds that much has changed at the SFO and a new approach is being emphasized. The introduction also references comparisons of the British system to the American system, noting that, although the United Kingdom has not borrowed wholesale from the United States, it has adopted elements of the American system. In that respect, the SFO is working to educate companies affected by fraud, not just act as an enforcer. It also is encouraging a cultural shift to self-reporting and whistleblowing.

The book contains 36 sections that deal with national and global perspectives on fighting fraud and corruption, detail types of offenses, provide insight on internal investigations, discuss trends in enforcement, and give guidance on voluntary disclosures, plea bargaining, discovery, and much more. It covers a range of substantive offenses, including bribery, fraud, money laundering, anti-competitive conduct, and insider trading. Contributors to the book come from both the public and private sectors, as well as various international non-governmental organizations. This comprehensive book is thus a valuable resource regarding the impact of anti-fraud and anti-corruption legislation in the United Kingdom.

Courting Whistleblowers: SFO Joins SEC in Creating Whistleblower Provisions

Adding new enforcement tools to its arsenal, the SFO has taken steps to encourage whistleblowers to come forward and disclose known violative conduct. On November 1, 2011, the SFO announced "SFO Confidential," a new initiative to help expose fraud and corruption in the United Kingdom and abroad. This initiative allows whistleblowers to report claims to the SFO by phone or online.[70] In addition, the initiative assures that the identity of a whistleblower will be kept secret, providing that callers can remain anonymous except on a need-to-know basis or by court order.[71] This new reporting system is not intended for the victims of fraud, but rather is meant to encourage employees, competitors, or others with information to come forward and assist the SFO in its fight against bribery and corruption, with the confidence that they can remain anonymous. Alderman said, "I want people to come forward and tell us if they think there is fraud or corruption going on in their workplace. Company executives, staff, professional advisors, business associates of various kinds or trade competitors can talk to us in confidence. I have set up a special team to make the SFO readily accessible to whistleblowers, with trained staff sympathetic in dealing with any anxieties people might have about coming forward. I want whistleblowers to feel comfortable about it and use SFO Confidential to help flush out fraud."[72]

In addition to encouraging individuals to come forward, SFO Confidential is also meant to encourage businesses to self-report. In this regard, following the launch of SFO Confidential, Alderman recommended in a speech that in evaluating whether to self-report, companies should consider whether a whistleblower will beat the company to it.[73]

Whether SFO Confidential will lead to more self-reporting or prosecutions remains to be seen. Since the whistleblower provisions of the Dodd-Frank Act became effective in the United States in 2011, there has been a significant uptick in whistleblower reports to the SEC.[74] However, whether there will be a similar uptick in whistleblowing in the United Kingdom is difficult to determine because, unlike the Dodd-Frank Act, SFO Confidential provides no monetary incentive for whistleblowing.[75]

Further, it remains to be seen how the anonymity promised by SFO Confidential will be ensured and how it will affect the program itself. Only time will tell whether the quality of reporting and tips provided will suffer because of anonymity and whether anonymity can be maintained even as cases move forward towards prosecution. What is clear is that the SFO is aggressively publicizing its fight against bribery and global corruption and seeking help in this fight from every quarter.

Innospec Executives Face Criminal Charges

That the SFO is flexing its enforcement power is demonstrated also by its increased prosecution of individuals in 2011, which is most prominently demonstrated by the Innospec case. As we discussed in our summer 2010 newsletter, in March 2010, Innospec, a Delaware corporation, entered into a US$40 million global settlement of at least a dozen criminal charges in the United States and United Kingdom in connection with sales of its fuel additive, tetraethyl lead (TEL). The Innospec investigation started in the United States in connection with Innospec's payment of kickbacks to the former Iraqi government under the OFFP, as well as FCPA violations in connection with bribe payments it made to officials in the Iraqi Ministry of Oil. The DOJ, the SEC, the Office of Foreign Assets Control (OFAC), and the SFO worked together to investigate and prosecute Innospec's conduct in Indonesia and Iraq.[76] For its part, the SFO charged Innospec Limited, a British subsidiary of Innospec, with conspiracy to corrupt, contrary to section 1 of the Criminal Law Act of 1977, after some of the company's directors, executives, employees, and agents allegedly conspired to bribe Indonesian government officials to secure sales of TEL.

In 2010, the SFO hailed the Innospec case as part of the first global settlement reached with a cooperating company and resolved in cooperation with the DOJ, the SEC, and OFAC. In 2011, the SFO continued its vigorous prosecution in the Innospec case by turning its attention to the individuals involved in the matter: *David Turner*, a former Innospec business unit director; *John Kerrison*, former CEO of Associated Octel Corporation (subsequently renamed Innospec Limited); and *Paul Willis Jennings*, former CEO of Innospec Limited.

On October 25, 2011, the SFO charged Turner with conspiring to make corrupt payments to public officials in Indonesia and Iraq to secure contracts for the supply of Innospec products, including TEL.[77] The SFO also charged Turner with conspiring to defraud Ethyl Corporation, an Innospec competitor, by bribing Iraqi officials to provide unfavorable test results on Ethyl Corporation's products. On January 17, 2012, Turner pled guilty.[78]

Two days later, on October 27, 2011, the SFO brought similar charges against Kerrison and Jennings. Kerrison was charged with conspiracy to corrupt by giving or agreeing to give corrupt payments to public officials and other agents of the government of Indonesia as inducements to secure, or as rewards for having secured, contracts from the government of Indonesia for the supply of its products, including

TEL.[79] In an interview last year, Kerrison said "I have not authorised any bribes, backhanders, or other illegal or dubious payments" and claimed he was being made a "fall guy" for Innospec Limited.[80]

Jennings was charged with two counts of conspiracy to corrupt for giving or agreeing to give corrupt payments to public officials and other agents of the governments of Indonesia and Iraq as inducements to secure, or as rewards for having secured, contracts from those governments for the supply of its products, including TEL. Jennings was also charged with conspiring to defraud Ethyl Corporation, by making payments to government officials and other agents of Iraq as an inducement to ensure unfavorable test results on Ethyl Corporation's products.[81]

The Innospec prosecutions suggest that individuals entangled in international corruption cases must now fear criminal prosecution from both sides of the Atlantic. In addition, the SFO's criminal pursuit of individuals in the Innospec case reinforces the view that the United Kingdom, like the United States, is taking a more aggressive posture towards the prosecution of individuals.

While *Ousama Naaman*, an Innospec agent in Iraq, pled guilty in the United States to conspiracy and violating the FCPA,[82] and Turner and Jennings both settled charges with the SEC,[83] neither Turner, Kerrison, Jennings, nor any other Innospec employees have been charged with criminal violations in the United States.

Former Alcoa Agent Charged in the United Kingdom

The SFO's prosecutions of individuals continued in the latter half of 2011 with Victor Dahdaleh, a high-profile businessman with British and Canadian citizenship and a former agent for *Alcoa, Inc.* (Alcoa). On October 24, 2011, Dahdaleh was arrested and charged under pre-Bribery Act laws with corruption offenses relating to contracts for the supply of alumina to a state-owned company in Bahrain.[84] Dahdaleh allegedly paid bribes to officials of Aluminum Bahrain B.S.C. (Alba), a smelting company in Bahrain with majority state ownership. These payments were made from 2001 to 2005 in connection with contracts with Alcoa for supplies of alumina shipped to Bahrain from Australia. Additional payments were also made in connection with contracts to supply goods and services to Alba. Following his arrest, Dahdaleh was released on bail. Although Dahdaleh has not yet formally entered a plea, a spokesperson for Dahdaleh's lawyers stated that Dahdaleh believed the investigation was flawed, that he had not violated the laws of the United Kingdom or any other country where he does business, and that he will vigorously contest the charges.[85]

In February 2008, the Justice Department opened a formal investigation into the Alcoa matter, following a lawsuit Alba filed in Pittsburgh against Alcoa and Dahdaleh alleging a conspiracy to overcharge Alba by hundreds of millions of dollars for the purchase of alumina.[86] Alba alleged that, in exchange for the overpayments, Alcoa and its agent, Dahdaleh, paid kickbacks to at least one senior official at Alba.[87] Alba's lawsuit against Alcoa and Dahdaleh was stayed in 2008 pending the government's investigation, but was reopened in November 2011.[88] Dahdaleh's website states that since the court's ruling reopened the case, he is looking forward to filing a motion to dismiss the complaint.[89]

After opening its investigation into Dahdaleh in July 2009, the SFO has been coordinating with the Justice Department and Swiss authorities.[90] Following his arrest, Dahdaleh said that in accordance with agreed arrangements, he had voluntarily attended an appointment at the police station to face charges of bribery and offences under the Proceeds of Crime Act 2002.[91]

Switzerland Fines Alstom Network Schweiz AG

On November 22, 2011, Switzerland's Office of the Attorney General announced that it had closed criminal proceedings against *Alstom Network Schweiz AG* (Alstom), fining the company CHF2.5 million (Swiss Francs) for negligence and CHF36.4 million as a "compensatory claim" (approximately US$42 million) for not taking "necessary and reasonable" organizational precautions to prevent bribery of foreign public officials in Latvia, Tunisia, and Malaysia.[92] The Swiss government investigated, among other individuals, Alstom's former Compliance Manager for suspected money laundering and bribery, and determined that consultants engaged by Alstom forwarded considerable portions of their success fees to foreign decision-makers in an effort to influence decisions in Alstom's favor.

Other Global Initiatives

On November 1, 2011, Transparency International released its 2011 Bribe Payers Index, which ranks the world's largest economies "according to the perceived likelihood of companies from these countries to pay bribes abroad."[93] Perhaps not surprisingly, the Bribe Payers Index found that China and Russia are countries whose companies are most likely to pay bribes. Despite their positions on the Bribe Payers Index and widespread corruption, 2011 should be viewed as a hallmark year for China and Russia's roles in the global anti-corruption fight. While China and Russia remained at the bottom of the Bribe Payers Index, both countries passed laws criminalizing bribery in 2011.

The passage of these laws demonstrates a new trend toward adopting global anti-corruption standards under domestic laws. As Breuer pointed out, while "passage of foreign bribery laws in China and Russia will not cure the problem of corruption in either country … the steps taken in China, Russia and elsewhere are important ones."[94] Breuer went on to note that, while the passage of the FCPA in 1977 was a milestone, it took decades for the FCPA to become as strong an enforcement tool as it is today and the United States must continue to support global reforms.

China

The Eighth Amendment to the Criminal Law of the People's Republic of China took effect on May 1, 2011, making it a criminal offense for Chinese nationals and companies to bribe officials of foreign governments or international public organizations. This new law applies to Chinese citizens, wherever located, and foreign individuals within China; Chinese domestic enterprises and foreign companies' branches and representative offices within China; and foreign-invested enterprises in China (including joint ventures and wholly foreign-owned enterprises).[95]

The penalties that may be imposed for such bribes depend on the amount of the payment. If the amount is "relatively large" (as translated from Chinese), violators may be imprisoned for no more than three years. If the amount is "huge" (as translated from Chinese), violators may be imprisoned for no less than three years but no more than 10 years and shall be fined.[96] These sentences may be mitigated if the guilty party confesses, but such a confession must be made before the criminal investigation is opened. The Eighth Amendment contains no affirmative defenses, exceptions, or exemptions.[97]

The decision to charge an individual under the law may turn on the amount of the bribe.[98] The Circular issued jointly by the Supreme People's Procuratorate and the Ministry of Public Security in May 2010 allows for prosecution of an individual for commercial bribery only if the amount of the bribe is at least 10,000RMB (approx. US$1,570).[99] If the defendant is an organization, the threshold amount rises to 200,000RMB (approx. US$31,330). The same standard applies to bribing foreign public officials.[100]

Enforcement under the new law will be shaped by the definitions given to the terms of the amendment.[101] Several key phrases are new to the criminal law yet do not have accompanying definitions.[102] Among these are the terms "[i]llegitimate [c]ommercial [b]enefit" and "[f]oreign [p]ublic [o]fficial." Though enforcement efforts in China lack transparency, strict penalties may be expected. The government has, on occasion, punished officials found guilty of accepting bribes with capital sentences.[103] Under the new provisions for bribing foreign officials, the minimum penalty for large bribes is three years.[104] It remains to be seen how the new law will be enforced and to what extent it will lead to cooperation between the Chinese and other governments.

Russia

In May 2011, Russian President Dmitry Medvedev signed a bill outlawing foreign bribery and giving prosecutors the authority to seek large fines for bribery and corruption.[105] The new law was integral to Russia formally being invited to join the Convention Against Bribery at the 50th anniversary of the OECD in May 2011.[106] While enforcement remains an open question and the law is unlikely to have an immediate effect on the culture of corruption that supposedly exists in Russia, it can be viewed as a significant step forward in the global fight against corruption.

THE DOJ PLANS FCPA GUIDANCE AS DEBATE OVER FCPA REFORM CONTINUES

Justice Department Guidance

On August 3, 2011, Assistant Attorney General for Legislative Affairs Ronald H. Weich provided letters to Representatives Sandy Adams and Jim Sensenbrenner that described circumstances in which the Justice Department had declined to prosecute corporations for alleged violations of the FCPA.[107] Weich advised that, pursuant to the internal guidelines set forth in the Justice Department's United States Attorney's Manual, the Justice Department had declined to prosecute matters in which some or all of the following circumstances existed:

1. company voluntarily and fully self-disclosed potential misconduct;
2. company principals voluntarily engaged in interviews with the Justice Department and provided truthful and complete information about their conduct;
3. parent company voluntarily and fully self-disclosed information to the Justice Department regarding alleged conduct by subsidiaries;
4. parent company conducted extensive pre-acquisition due diligence of potentially liable subsidiaries, and engaged in significant remediation efforts after acquiring the relevant subsidiaries;
5. company provided information to the Justice Department about the parent's extensive compliance policies, procedures, and internal controls, which the parent had implemented at the relevant subsidiaries;
6. company agreed to a civil resolution with the SEC, while also demonstrating that a declination was appropriate for additional reasons;

7. a single employee, and no other employee, was involved in the provision of improper payments; and/or

8. the improper payments involved minimal funds compared to the overall business revenues.

In addition to this guidance, on November 8, 2011, Breuer announced that in 2012 the Justice Department "expect[s] to release detailed new guidance on the [FCPA's] criminal and civil enforcement provisions."[108] This announcement marked an unprecedented public commitment by the Justice Department to clarify the scope of the FCPA. Breuer prefaced the declaration with a strongly worded disclaimer, however, when he insisted that the Justice Department has "no intention whatsoever of supporting reforms whose aim is to weaken the FCPA and make it a less effective tool for fighting foreign bribery."

The debate over FCPA reform centers on both the scope of the prohibited conduct and its enforcement. The private sector, championed by the Chamber of Commerce, is urging Congress to narrow the scope of the FCPA in order to ensure the competitiveness of American businesses abroad and the uniformity of enforcement at home.[109] The Justice Department objects to these proposals on the grounds that they represent a move away from the United States' strongly publicized global stance on corruption and jeopardize international efforts to combat bribery.[110] The Justice Department's upcoming guidance may represent the middle ground in the two-year-long debate that has made its way to Congress.

Though Breuer's announcement lacked any details, it created a stir. After a November 8, 2011 oversight hearing, Senator Charles Grassley submitted a list of questions about the forthcoming FCPA guidance to the Justice Department.[111] His inquiries included both pragmatic questions about the logistics of the guidance and more pointed queries that raised the same concerns expressed by the Chamber in its 2010 report. While Breuer's firm refusal to "weaken" the FCPA makes it unlikely that the guidance will narrow the scope of the statute as the Chamber urges, the 2012 guidelines should help companies tailor their compliance efforts to the requirements of the law and may eliminate some of the ambiguities in the FCPA that proposed reforms seek to address.

Law Professors Rebut Chamber of Commerce

In response to the Chamber of Commerce's lobbying to reform the FCPA, law professors David Kennedy and Dan Danielsen published a paper discussing global support for the FCPA.[112] While the paper builds support for the FCPA around the goal of global uniformity and the United States' leadership role in fighting corruption,[113] the authors also criticize the Chamber's dichotomy between advancing the global agenda and protecting domestic business.[114] In rejecting the Chamber's proposed reforms, Kennedy and Danielsen emphasize that the broad language of the FCPA is crucial to allow the statute to adapt and synchronize with the international legal framework.[115]

Kennedy and Danielsen attempt to refute each point in the Chamber's report by recontextualizing the arguments in a global framework, examining standards from case law, and reviewing the history and language of the statute to clarify its scope. The argument centers on explaining the *mens rea* requirement in the statute and its effect as a check on prosecutorial discretion, considered by the Chamber as "the highly aggressive stance the Justice Department is taking to expand the FCPA net beyond its borders."[116] Kennedy and Danielsen address each of the Chamber's five proposals separately.

1. **The Chamber of Commerce called for the inclusion of an affirmative compliance defense.** Kennedy and Danielsen point out that compliance is already factored into the DOJ's analysis at "every stage" of an investigation.[117] They note that the FCPA employs a standard of criminal liability that requires proof of a knowing or corrupt violation or of deliberate ignorance. Under this standard, Kennedy and Danielsen argue that a compliance defense is "simply inappropriate" because any compliance program that allowed violations of the FCPA would be sanctioning knowing or deliberate bribery and therefore could not provide grounds for a good faith affirmative defense. They underscore the paradox of such a proposal by noting that in countries where such a defense is allowed, the charges are based on strict liability theories rather than allowing for conscious disregard of corrupt acts.[118]

2. **The Chamber of Commerce sought to eliminate successor liability.** Kennedy and Danielsen argue that such a proposal merely provides a loophole to escape liability for bribes through corporate restructuring.[119] Rather than discouraging acquisitions, the professors emphasize that successor liability is key to encouraging companies to perform adequate pre-acquisition and post-acquisition due diligence.[120] They note that the Chamber cannot point to an instance in which the DOJ overstepped its bounds to prosecute an acquiring company for acts of the acquired company of which the acquiring company had no knowledge.[121]

3. **The Chamber of Commerce proposed adding a willfulness standard for corporate criminal liability.** Kennedy and Danielsen reject this proposal as inconsistent with both the statute and case law. They point out that the FCPA imposes liability on a corporation when it acts "corruptly" and that this standard requires knowledge of the unlawfulness of the committed act. Thus, the Chamber's assertion that a company could be held liable for acts that it did not know were unlawful was based on an improper reading of the statute.[122] The FCPA already requires knowledge of or intent to achieve an unlawful end through a company's actions. To raise this standard above "corruptly" to "willful," as the Chamber urges, would be to require not only knowledge of the wrongfulness of the act but also knowledge that the act violated the FCPA in particular. Kennedy and Danielsen note that this standard is far too high; indeed, the Supreme Court reserves it for complex statutes only.

4. **The Chamber of Commerce advocated eliminating parent liability for acts of a subsidiary.** Kennedy and Danielsen emphasize that the ability of the Justice Department to hold companies liable for the acts of their subsidiaries is crucial to the global reach of the FCPA.[123] They note that, in the absence of any actual prosecution of parents for wholly independent acts of their subsidiaries, eliminating this tool for enforcement would only weaken the FCPA.

5. **The Chamber of Commerce requested a narrower definition of "Foreign Official".** Kennedy and Danielsen dismiss the necessity of narrowing the definition of "foreign official," noting that many countries are eliminating the distinction between bribery of public officials and commercial bribery. They also assert that in the varied cultural context of international enforcement it is important to have a term broad enough to encompass different understandings of the role of an "official." They conclude that when read in the context of the statute as a whole, to prevent improper influence of foreign governments, the term can be defined by the structure of the government in question.

Two themes run through the rebuttal of Kennedy and Danielsen to the Chamber's proposals. First, the professors emphasize the global context of compliance. They point out that "good compliance practices" are "not a matter of business choice" but rather are "a necessary part of good global

business."[124] This attitude, reflected throughout the paper, emphasizes that the demands of the FCPA are now part of a larger worldwide network. Limiting the statute, as the Chamber urges, may therefore hinder the FCPA's ability to function in that network by rendering it too rigid to adapt to changing global norms. By placing the Chamber's concerns in their proper international context, the professors seek to justify the broad scope of the FCPA.

The second theme of the rebuttal focuses on the reality of enforcement. While the Chamber's report warns that the broad scope of the FCPA leaves American businesses vulnerable to overzealous enforcement, the professors insist that any narrowing of the statute is unwarranted absent a "showing of persistent prosecutorial abuse." Kennedy and Danielsen note that increased enforcement efforts do not evidence DOJ aggression, but rather reflect increased global participation in anti-corruption measures and private sector disclosures.[125] Yet, in praising the evenhandedness of the DOJ's enforcement measures, Kennedy and Danielsen dismiss the possibility of any variation from that past practice.

Indeed, to the extent that the paper focuses on pointing out the business advantages of a broadly worded statute, the issue of DOJ discretion remains largely unacknowledged by Kennedy and Danielsen. While Kennedy and Danielsen emphasize the versatility provided by prosecutorial discretion and the leniency it allows, they do not confront the possibility of its abuse.[126] Instead, they point to the DOJ's pattern of prosecution, emphasizing that the government has engaged in "enforcement activity to target and isolate particularly bad actors and to encourage effective compliance."[127] While such restraint is admirable, it lacks the binding effect of an amendment. Even Kennedy and Danielson seem to acknowledge this, stating that the "wise use of prosecutorial discretion" should be "coupled with careful guidance to business about behavior that may trigger criminal sanction[s]."[128]

Proposed Legislative Reform

At the end of 2011, two bills that would broaden the FCPA were introduced for consideration by the 112th Congress:

1. Representative Ed Perlmutter, a Democrat from Colorado, introduced the *Foreign Business Bribery Prohibition Act of 2011* (H.R. 3531), which if enacted would, in general, authorize American companies to bring suits against foreign companies for violations of the FCPA and seek treble damages.

2. Representative Peter Welch, a Democrat from Vermont, proposed the *Overseas Contractor Reform Act* (H.R. 3538), which if enacted would require the debar of corporations that violate the FCPA from participation in contracts with the United States government.

We will continue to monitor the status of proposed legislation that may impact the scope of the FCPA, as well as the debate regarding FCPA reform.

CONCLUSION

FCPA enforcement in 2011 kept pace with prior years. In the face of continued focus on FCPA enforcement by the Commission and the Justice Department, as well as an increasing global anti-corruption environment, 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.

Endnotes

1 We thank the following, all of whom contributed to this publication: Daniel Bernstein, Alex Berz, Chieko Clarke, Amy Endicott, Dorian Hurley, Meghan C. Martin, William Perdue, Lisa Price, Josephine Qu, Jacob A. Rogers, Pedro G. Soto, and Hui Xu.

2 *See* Defendant Pankesh Patel's Opposition to Government's Motions To Preclude Certain Evidence, Impeachment and Arguments, *United States v. Goncalves*, No. 09-CR-00335 (D.D.C. May 12, 2011), Dkt. Entry No. 365.

3 Zoe Tillman, *Mistrial Declared in FCPA Sting Case*, The Blog Of LegalTimes (July 7, 2011), *available at* http://legaltimes.typepad.com/blt/2011/07/judge-declares-mistrial-in-fcpa-sting-case.html.

4 *See* Minute Order Denying Renewed Motion for Acquittal Pursuant to Fed. R. Crim. P. 29, *United States v. Goncalves*, No. 09-CR-00335 (D.D.C. Nov. 17, 2011); Minute Entry Setting Trial, *United States v. Goncalves*, No. 09-CR-00335 (D.D.C. Jan. 4, 2012).

5 *See* Minute Entry Granting Judgment of Acquittal, *United States v. Goncalves*, No. 09-CR-00335 (D.D.C. Dec. 23, 2011).

6 *See* Judgments of Acquittal, *United States v. Goncalves*, No. 09-CR-00335 (D.D.C. Jan. 31, 2012), Dkt. Entry Nos. 622 (Caldwell) & 623 (Godsey); Minute Entry, *United States v. Goncalves*, No. 09-CR-00335 (D.D.C. Jan. 31, 2012).

7 *See* Minute Entry Setting Trial, *United States v. Goncalves*, No. 09-CR-00335 (D.D.C. Jan. 30, 2012), and Minute Entry Setting Trial, *United States v. Goncalves*, No. 09-CR-00335 (D.D.C. Aug. 4, 2011).

8 Order Granting Motion to Dismiss, *United States v. Aguilar*, No. 2:10-CR-01031 (C.D. Cal. Dec. 1, 2011), Dkt. Entry No. 665 [hereinafter Lindsey Order].

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

10 Lindsey Order, *supra* note 8, at 2.

11 Christopher Matthews, *There Goes Another FCPA Team Conviction (Possibly)*, Wall St. J. (Dec. 12, 2011), *available at* http://blogs.wsj.com/corruption-currents/2011/12/12/there-goes-another-fcpa-conviction-possibly/.

12 Order Resetting Trial, *United States v. O'Shea*, No. 4:09-CR-00629 (S.D. Tex. Nov. 1, 2011), Dkt. Entry No. 106; Order on Acquittal, *United States v. O'Shea*, No. 4:09-CR-00629 (S.D. Tex. Jan. 16, 2012), Dkt. Entry No. 179; see also C.M. Matthews, *Houston Judge Tosses Foreign Bribery Case, Hands DOJ New Setback*, Wall St. J. (Jan. 17, 2012), *available at* http://blogs.wsj.com/corruption-currents/2012/01/17/houston-judge-tosses-foreign-bribery-case-hands-doj-new-setback/?mod=google_news_blog.

13 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), *available at* http://www.justice.gov/opa/pr/2009/July/09-crm-754.html.

14 *See* Order Denying Defendants' Motion to Dismiss, *United States v. Carson*, No. 8:09-CR-00077-JVS (C.D. Cal. May 18, 2011), Dkt. Entry No. 373.

15 *See* Indictment, *United States v. Sharef*, No. 1:11-CR-01056 (S.D.N.Y. Dec. 12, 2011), Dkt. Entry No. 1. According to a letter submitted by the government to the court on December 12, 2011, "The defendants in this case all reside overseas and none of the defendants is currently in custody. As such, none of the defendants will be arraigned in the near future." The court requested that the government submit a status report by May 1, 2012. *See* Endorsed Letter, *United States v. Sharef*, No. 1:11-CR-01056 (S.D.N.Y. Dec. 15, 2011), Dkt. Entry No. 11.

16 Press Release, Justice Dep't, Eight Former Senior Executives and Agents of Siemens Charged in Alleged $100 Million Foreign Bribe Scheme (Dec. 13, 2011), *available at* http://www.justice.gov/opa/pr/2011/December/11-crm-1626.html.

17 *See* SEC Charges Seven Former Siemens Executives with Bribing Leaders in Argentina, SEC Litigation Release No. 22190 (Dec. 13, 2011), *available at* http://www.sec.gov/litigation/litreleases/2011/lr22190.htm.

18 *See* Press Release, Justice Dep't, Two Telecommunications Executives Convicted by Miami Jury on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Aug. 5, 2011), *available at* http://www.justice.gov/opa/pr/2011/August/11-crm-1020.html. *See also* Indictment, *United States v. Esquenazi*, Case No. 09-CR-21010-JEM (S.D. Fla. Dec. 8, 2009), Dkt. Entry No. 3. According to the indictment, Esquenazi ran the show: he allegedly doled out thousands in bribes and even provided a Rolex watch to the President of Haiti's telecommunications company. *Id.* at 8.

19 Judgment in a Criminal Case, *United States v. Esquenazi*, Case No. 09-CR-21010-JEM (S.D. Fla. Oct. 26, 2011), Dkt. Entry No. 629.

20 Press Release, Justice Dep't, Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Oct. 25, 2011) [hereinafter Esquenazi Press Release], *available at* http://www.justice.gov/opa/pr/2011/October/11-crm-1407.html.

21 Judgment in a Criminal Case, *United States v. Jumet*, Case No. 09-CR-397-HEH (E.D. Va. 2009 Apr. 22, 2010), Dkt. Entry No. 20.

22 Carlos Rodriguez, *see* Amended Judgment, *United States v. Esquenazi*, Case No. 09-CR-21010-JEM (S.D. Fla. Nov. 3, 2011), Dkt. Entry No. 637; Douglas Murphy, *see* Judgment, *United States v. Kay*, Case No. H-01-CR-914-S (S.D. Tex. July 1, 2005), Dkt. Entry No. 206; Juan Diaz, *see* Judgment, *United States v. Diaz*, Case No. 09-CR-20346-JEM (S.D. Fla. Aug. 4, 2010), Dkt. Entry No. 38; and Shu Quan Sheng, *see* Judgment, *United States v. Quan-Sheng*, Case No. 2:08-CR-00194 (E.D. Va. Apr. 9, 2009), Dkt. Entry No. 41.

23 Esquenazi Press Release, *supra* note 20 (categorizing Esquenazi's sentence as an example of the "serious consequences of ignoring corporate ethics when doing business abroad").

24 Government's Combined Sentencing Position for Defendants Gerald and Patricia Green, *United States v. Green*, Case No. 2:08-CR-00059-GW (C.D. Cal. Jan. 21, 2010), Dkt. Entry. No. 319 [hereinafter Green Memorandum].

25 Judgment and Probation/Commitment Order, *United States v. Green*, Case No. 08-CR-059-GW (C.D. Cal. Sept. 10, 2010), Dkt. Entry No. 385.

26 The DOJ appealed the sentencing decision but subsequently dropped the appeal. *See* Order Dismissing Appeal, *United States v. Green*, No. 08-50343 (9th Cir. 2011).

27 *See* Green Memorandum, *supra* note 24, at 24 ("Defendants' knowledge of the wrongfulness of their conduct also contributes to the serious nature of their crimes. Defendants and the Governor took elaborate steps to conceal the payments for the Governor."); Government's Response to Defendant Joel Esquenazi's Objections To Pre-Sentence Investigation Report, *United States v. Esquenazi*, Case No. 1:09-CR-21010-JEM (S.D. Fla. Oct. 3, 2011), Dkt. Entry No. 588.

28 *See* 18 U.S.C. § 3553(a).

29 18 U.S.C. § 1956.

30 Press Release, Justice Dep't, Florida Telecommunications Company, Two Executives, an Intermediary and Two Former Haitian Government Officials Indicted for Their Alleged Participation in Foreign Bribery Scheme (July 13, 2011), *available at* http://www.justice.gov/opa/pr/2011/July/11-crm-910.html.

In addition, the government is prosecuting *Juthamas Siriwan*, former Governor of the Tourism Authority of Thailand, and *Jittisopa Siriwan*, Juthamas's daughter, for allegedly receiving US$1.8 million in corrupt payments. *See United States v. Siriwan*, Case No. CR 09-00081 (C.D. Cal.). This underlying conduct was also the subject of the prosecution of Gerald and Patricia Green discussed herein.

31 *See generally* In re Diageo, Securities Exchange Act Release No. 64978 (July 27, 2011), *available at* http://www.sec.gov/litigation/admin/2011/34-64978.pdf.

32 *See* Press Release, Justice Dep't, Former CEO of U.S. Telecommunications Company Sentenced to 46 Months in Prison for Bribing Foreign Government Officials (Sept. 8, 2011), *available at* http://www.justice.gov/opa/pr/2011/September/11-crm-1155.html.

33 *See* Watts Water Technologies, Inc. and Leesen Chang, Securities Act Release No. 65555 (Oct. 13, 2011), *available at* http://www.sec.gov/litigation/admin/2011/34-65555.pdf.

34 Lanny A. Breuer, Prepared Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practice Forum, at 2 (Nov. 12, 2009), *available at* http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-12-09breuer-pharmaspeech.pdf.

35 Johnson & Johnson to Pay More Than $70 Million in Settled FCPA Enforcement Action, SEC Litigation Release No. 21922 (Apr. 8, 2011), *available at* http://www.sec.gov/litigation/litreleases/2011/lr21922.htm.

36 Letter from Justice Department to Eric Dubelier (filed Apr. 8, 2011), *available at* http://lib.law.virginia.edu/Garrett/prosecution_agreements/pdf/johnson.pdf.

37 Halliburton Co., Quarterly Report (Form 10-Q), at 19 (Oct. 21, 2011), *available at* http://ir.halliburton.com/phoenix.zhtml?c=67605&p=irol-SECText&TEXT=aHR0cDovL2lyLmludC53ZXN0bGF3YnVzaW5lc3MuY29tL2RvY3VtZW50L3YxLzAwMDAwNDUwMTItMTEtMDAwMzU0L3htbC9zdWJkb2N1bWVudC8xL3BhZ2UvMTk%3d.

38 *See* Order at 2, *In re Instituto Costarricense de Electricidad*, No. 11-12707-G (11th Cir. June 17, 2011) [hereinafter ICE 11th Circuit Order].

39 ICE's Petition For Relief, *United States v. Alcatel-Lucent*, No. 20907-CR-Cooke (S.D. Fla. May 2, 2011) [hereinafter ICE Petition].

40 *See* Press Release, Justice Dep't, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), *available at* http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html.

41 *See* ICE Petition, *supra* note 39, at 16.

42 *See* Petition for Writ of Mandamus, *In re Instituto Costarricense de Electricidad*, No. 11-12707-G (11th Cir. June 15, 2011).

43 *See* ICE 11th Circuit Order, *supra* note 38, at 2.

44 *See* Press Release, Justice Dep't, Bridgestone Corporation Agrees to Plead Guilty to Participating in Conspiracies to Rig Bids and Bribe Foreign Government Officials (Sept. 15, 2011), *available at* http://www.justice.gov/opa/pr/2011/September/11-at-1193.html.

45 *Id.* The violations of the Sherman Act concerned allegations that Bridgewater was involved in a bid-rigging and price-fixing conspiracy in the United States and elsewhere.

46 Unopposed Motion to Dismiss Information, *United States v. Wooh*, No. 3:07-cr-00244 (D. Or. Oct. 14, 2011), Dkt. Entry No. 53.

47 Press Release, Justice Dep't, Former Senior Officer of Schnitzer Steel Industries Inc. Subsidiary Pleads Guilty to Foreign Bribes (June 29, 2007), *available at* http://www.justice.gov/opa/pr/2007/June/07_crm_474.html.

48 Joe Palazzolo, *DOJ Drops Bribery Charges Against Whistleblower in Schnitzer Steel Case*, Wall St. J. (Oct. 18, 2011), *available at* http://blogs.wsj.com/corruption-currents/2011/10/18/doj-drops-bribery-charges-against-whistleblower-in-schnitzer-steel-case/.

49 Order Granting Unopposed Motion to Dismiss the Information, *United States v. Wooh*, No. 3:07-cr-00244 (D. Or. Oct. 17, 2011), Dkt. Entry No. 54.

50 *See* Embraer S.A., Report of Foreign Issuer (Form 6-K), at 9 (Nov. 2, 2011).

51 *See* Walmart, Quarterly Report (Form 10-Q), at 26 (Dec. 8, 2011), *available at* http://investors.walmartstores.com/phoenix.zhtml?c=112761&p=irol-sec.

52 *United States v. Kozeny*, — F.3d —, 2011 WL 6184494 (2d Cir. Dec. 14, 2011).

53 *Id.* at *7 (finding, alternatively, that the same evidence was properly presented to support the government's contention that Bourke did have actual knowledge of the FCPA violations).

54 Press Release, Justice Dep't, Aon Corporation Agrees to Pay a $1.76 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (Dec. 20, 2011), *available at* http://www.justice.gov/opa/pr/2011/December/11-crm-1678.html.

55 *Id.* (noting the non-prosecution agreement was a result of, *inter alia*, Aon's "extraordinary cooperation" with the DOJ and SEC, "timely and complete disclosure of improper payments," and "early and extensive remedial efforts"); SEC Files Settled FCPA Charges Against Aon Corporation, SEC Litigation Release No. 22203 (Dec. 20, 2011), *available at* http://www.sec.gov/litigation/litreleases/2011/lr22203.htm.

56 *See* Press Release, Financial Services Authority, FSA fines Aon Limited £5.25m for Failings in its Anti-bribery and Corruption Systems and Controls (Jan. 8, 2009), *available at* http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/004.shtml.

57 *See* Press Release, Justice Dep't, Magyar Telekom and Deutsche Telekom Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay Nearly $64 Million in Combined Criminal Penalties (Dec. 29, 2011), *available at* http://www.justice.gov/opa/pr/2011/December/11-crm-1714.html; SEC Charges Magyar Telekom and Former Executives with Bribing Officials in Macedonia and Montenegro, SEC Litigation Release No. 22213 (Dec. 29, 2011), *available at* http://www.sec.gov/litigation/litreleases/2011/lr22213.htm.

58 SEC Annual Report on the Dodd-Frank Whistleblower Program at 1 (Nov. 2011) [hereinafter SEC Dodd-Frank Annual Report], *available at* http://sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf.

59 *See Copeland v. Prince*, Case No. 3:11-CV-04993 (D.N.J.).

60 Transparency International, *Progress Report, 2011 Enforcement of the OECD Anti-Bribery Convention*, at 5 (May 24, 2011) [hereinafter Transparency International 2011 Progress Report], *available at* http://www.transparency.org/news_room/in_focus/2011/oecd_progress_2011.

61 Transparency International 2011 Progress Report, *supra* note 60, at 66-69.

62 Caroline Binham & George Parker, *Anger at plan to split fraud agency*, Fin. Times (May 20, 2011), *available at* http://www.ft.com/intl/cms/s/0/01b4f954-8319-11e0-85a4-00144feabdc0.html#axzz1exDIOSbe. (subscription required)

63 Sean Farrell, *How a Political Row Hit the Fight Against Fraud*, The Independent (June 14, 2011), *available at* http://www.independent.co.uk/news/business/analysis-and-features/how-a-political-row-hit-the-fight-against-fraud-2297182.html. Alderman is scheduled to step down as the SFO's Director in April 2012. On December 16, 2011, British Attorney General Dominic Grieve announced that David Green would succeed Alderman. *See* Press Release, Attorney General's Office, New Serious Fraud Office Director Appointed (Dec. 16, 2011), *available at* http://www.attorneygeneral.gov.uk/NewsCentre/Pages/NewSeriousFraudOfficeDirectorAppointed.aspx.

64 Richard Alderman, Foreword to *Serious Economic Crime: A boardroom guide to prevention and compliance* (Harry Travers, BCL Burton Copeland ed., 2011) [hereinafter Serious Economic Crime], *available at* http://www.seriouseconomiccrime.com/.

65 Press Release, U.K. Crown Prosecution Service, Court Employee Faces First Prosecution Under Bribery Act (Aug. 31, 2011), *available at* http://blog.cps.gov.uk/2011/08/court-employee-faces-first-prosecution-under-bribery-act.html. The defendant in the prosecution, *Munir Patel*, used his position as a court clerk to obtain bribes in exchange for helping at least 53 individuals avoid penalties for driving offenses. He was sentenced to a six-year prison term. *See* Samuel Rubenfield, *Munir Patel, First Bribery Act Convict, Sentenced*, Wall St. J. (Nov. 18, 2011), *available at* http://blogs.wsj.com/corruption-currents/2011/11/18/munir-patel-first-bribery-act-convict-sentenced/.

66 Richard Alderman, SFO Director, Speech at UK Contractors Group (Nov. 4, 2011) [hereinafter Alderman UK Contractors Group Speech], *available at* http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2011/uk-contractors-group.aspx.

67 Serious Economic Crime, *supra* note 64; see also, e.g., SFO, Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions (Mar. 30, 2011), *available at* http://www.cps.gov.uk/legal/a_to_c/bribery_act_2010/; Ministry of Justice, Guidance to help commercial organisations understand the sorts of procedures they can put in place to prevent bribery, *available at* http://www.justice.gov.uk/guidance/making-and-reviewing-the-law/bribery.htm.

68 *See* Alderman UK Contractors Group Speech, *supra* note 66.

69 Serious Economic Crime, *supra* note 64.

70 Press Release, SFO, Blow the Whistle! New Route for Insiders to Unmask Fraud and Bribery (Nov. 1, 2011) [hereinafter Blow the Whistle], *available at* https://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/blow-the-whistle-new-route-for-insiders-to-unmask-fraud-and-bribery.aspx.

71 Press Release, SFO, SFO CONFIDENTIAL - Giving Us Information in Confidence, *available at* http://www.sfo.gov.uk/fraud/sfo-confidential---giving-us-information-in-confidence.aspx.

72 Blow the Whistle, *supra* note 70.

73 During a November 4, 2011 speech, Alderman said: "One of the ways for finding more cases is through reaching out to whistleblowers. You may have seen the publicity earlier this week as we launched SFO Confidential. This is a new approach to whistleblowers asking them to come and talk to us (if necessary anonymously) about allegations of fraud and corruption. We already have a number of cases where whistleblowers have approached us. They are an important source of potential cases for us and we are very anxious to see more. I know some corporations worry about whether to come and see the SFO about problems they encounter. One of the questions for them in their deliberations on this ought to be whether the SFO is approached first by the corporation or by a whistleblower." *See* Alderman UK Contractors Group Speech, *supra* note 66.

74 SEC Dodd-Frank Annual Report, *supra* note 58.

75 Under the Dodd-Frank Act, an individual who provides the SEC with information leading to a successful enforcement action resulting in a monetary sanction of more than US$1 million will receive an award of 10-30% of the sanction.

76 Press Release, SFO, Innospec Limited Prosecuted for Corruption by the SFO (Mar. 18, 2010), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/innospec-limited-prosecuted-for-corruption-by-the-sfo.aspx.

77 Press Release, SFO, Innospec Ltd: Former Executive in Court on Fraud and Corruption Charges (Oct. 25, 2011), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/innospec-ltd--former-executive-in-court-on-fraud-and-corruption-charges.aspx.

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79 Press Release, SFO, Innospec Ltd: Two More Executives Charged with Corruption (Oct. 27, 2011) [hereinafter Jennings and Kerrison Press Release], *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/innospec-ltd-two-more-executives-charged-with-corruption.aspx.

80 Rob Evans & David Leigh, *Former Innospec bosses 'bribed officials to buy toxic chemical*,' The Guardian (Oct. 27, 2011), *available at* http://www.guardian.co.uk/environment/2011/oct/27/innospec-allegations-bribery-toxic-chemical; David Leigh, Rob Evans, & Mona Mahmood, UK firm octel bribed Iraqis to keep buying in toxic fuel additive, The Guardian (June 30, 2010), *available at* http://www.guardian.co.uk/business/2010/jun/30/octel-petrol-iraq-lead.

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82 Naaman was sentenced to 30 months imprisonment. *See* Minute Entry Regarding Sentencing, *United States v. Naaman*, Case No. 1:08-CR-00246-ESH (D.D.C. Dec. 22, 2011).

83 In August 2010, following what the SEC said was his "extensive and ongoing cooperation in the [Innospec] investigation," Turner settled charges with the SEC for authorizing and directing bribes to Iraqi and Indonesian government officials. Turner neither admitted nor denied the SEC's allegations and no civil penalty was imposed on him, but he agreed to disgorge US$40,000. *See* SEC Files Settled Charges Against David P. Turner and Ousama M. Naaman, SEC Litigation Release No. 21615 (Aug. 5, 2010), *available at* http://www.sec.gov/litigation/litreleases/2010/lr21615.htm. The SEC charged Jennings with violating the FCPA by approving bribes to government officials to secure sales of TEL. Without admitting or denying the allegations against him, Jennings agreed to pay a further US$220,000 to settle the SEC's charges. *See* Press Release, SEC Charges Former CEO of Innospec for Role in Bribery Scheme (Jan. 24, 2011), *available at* http://www.sec.gov/news/press/2011/2011-21.htm.

84 Press Release, SFO, Victor Dahdaleh Charged with Bribery (Oct. 24, 2011) [hereinafter Dahdaleh Press Release], *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/victor-dahdaleh-charged-with-bribery.aspx.

85 Dahdaleh Free To Fight Corruption Allegations (Nov. 11, 2011) [hereinafter Dahdaleh Statement], *available at* http://www.victordahdaleh.com/news/view/victor-dahdaleh-free-to-fight-corruption-allegations.

86 Alcoa Inc., Quarterly Report (Form 10-Q), at 14 (Oct. 20, 2011), *available at* http://www.sec.gov/Archives/edgar/data/4281/000119312511275993/d233032d10q.htm.

87 Joe Palazzolo, *Judge Reopens Corruption Lawsuit Against Alcoa*, Wall St. J. (Nov. 11, 2011), *available at* http://blogs.wsj.com/law/2011/11/11/judge-reopens-corruption-lawsuit-against-alcoa/?mod=WSJBlog.

88 Order, *Aluminum Bahrain, B.S.C. v. Alcoa, Inc.*, No. 08-cv-00299-DWA (W.D. Pa. Nov. 8, 2011).

89 Dahdaleh Statement, *supra* note 85.

90 Dahdaleh Press Release, *supra* note 84.

91 Victor Dahdaleh to fight bribery charges (Oct. 24, 2011), *available at* http://www.victordahdaleh.com/news/view/victor-dahdaleh-to-fight-bribery-charges.

92 *See* Press Release, Swiss Office of the Attorney General, Criminal proceedings against Alstom entities are brought to a close (Nov. 11, 2011), *available at* http://www.news.admin.ch/message/index.html?lang=en&msg-id=42300.

93 Transparency International, *Bribe Payers Index 2011,* at 2 (2011) [hereinafter Bribe Payers Index], *available at* http://bpi.transparency.org/results/.

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107 *See* Letter from Ronald H. Weich to Representative Sandy Adams (Aug. 3, 2011), *available at* http://www.mainjustice.com/wp-admin/documents-databases/160-2-DOJ-response-to-6.22.11-FCPA-letter.pdf.

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109 U.S. Chamber of Commerce, Restoring Balance: *Proposed Amendments to the Foreign Corrupt Practices Act* (Oct. 27, 2010) at 6 [hereinafter Chamber FCPA Proposed Amendments], *available at* http://www.uschamber.com/reports/restoring-balance-proposed-amendments-foreign-corrupt-practices-act. Other groups supporting FCPA reform include the New York City Bar Association, whose Committee on International Business Transactions recommends reconsideration of the United States government's increasing enforcement of the FCPA in light of the burdens that this enforcement has placed on American companies. *See* Committee on Int'l Business Transactions of the New York City Bar, The FCPA and its Impact on International Business Transactions – *Should Anything be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption?* (Dec. 2011) (finding that "(1) the United States has pursued, and is currently pursuing, a virtually stand-alone approach to deterring foreign corruption (at least in terms of enforcement activity and the significance of fines and other sanctions), (2) this approach places significant costs on companies that are subject to the FCPA as compared to their competitors that are not–i.e., there is a significant asymmetry in regulation and enforcement–and (3) if these circumstances are unlikely to change (e.g., through a substantial portion of other relevant countries adopting similar enforcement postures), the United States should reevaluate its approach to the problem of foreign corruption."), *available at* http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf.

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111 C. M. Matthews, *Grassley Presses Holder on FCPA Guidance*, Wall St. J. (Nov. 17, 2011), *available at* http://blogs.wsj.com/corruption-currents/2011/11/17/grassley-presses-holder-on-fcpa-guidance/?blog_id=165&post_id=5411.

112 David Kennedy and Dan Danielson, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act* (Sept. 2011) [hereinafter Busting Bribery], *available at* http://www.soros.org/initiatives/washington/articles_publications/publications/busting-bribery-20110916.

113 Busting Bribery at 20-23.

114 Busting Bribery at 18-19 (citing reports showing that American companies lose business due to bribery).

115 Busting Bribery at 29 ("Congressional adoption of the Chamber's proposed amendments to the FCPA would reflect a radical retreat in the global fight against corruption").

116 Chamber FCPA Proposed Amendments, *supra* note 109, at 4.

117 Busting Bribery, *supra* note 112, at 29-31 (An "affirmative defense or 'adequate' or 'good faith' compliance is fundamentally inconsistent with the FCPA's very high standards of corporate criminal liability . . . the existence of a merely formal compliance program is irrelevant to the question of whether knowing, intentional and corrupt behavior took place.").

118 *Id.* at 31 (noting that anti-corruption laws in the United Kingdom and Italy contain a compliance defense for administrative or strict liability offenses but not for those offenses involving a *knowing* violation).

119 *Id.* at 37 (using Alliance One as an example of a company that attempted to escape liability for intentional criminal acts by restructuring).

120 *Id.* at 36 (citing Justice Department, Opinion Procedure Release No. 08-02 (June 13, 2008) as an example of successor liability prompting adequate due diligence).

121 Busting Bribery, *supra* note 112, at 35.

122 See *id.* Kennedy and Danielson also dismiss the Chamber's support for its proposed reform and note that the innocent companies the Chamber claims were wrongly held liable for the acts of subsidiaries pleaded guilty to knowing violations of the FCPA. *Id.*

123 Busting Bribery, *supra* note 112, at 44.

124 Busting Bribery, *supra* note 112, at 33.

125 *Id.* at 13-15 ("As multilateral obligations and national statutes have leveled the ground and private sector self-monitoring and compliance have increasingly become the norm, the DOJ has stepped up its enforcement activities.").

126 *See* Chamber FCPA Proposed Amendments, *supra* note 109, at 3 (asserting that "the DOJ effectively serves as both prosecutor and judge in the FCPA context").

127 Busting Bribery, *supra* note 112, at 11-12.

128 *Id.* at 12-13 (the professors state, however, that sufficient guidance may come "from administrative opinions, from the negotiated outcomes of successful investigations or from judicial opinions").

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