ARNOLD & PORTER LLP

Summer 2012

FCPA, Bribery Act & other Global AntiCorruption Insights

An Update on Recent Foreign Corrupt Practices Act, U.K. Bribery Act and other Global Anti-Corruption Enforcement, Litigation, and Compliance Developments

TABLE OF CONTENTS

EXECUTIVE SUMMARY 4

OVERVIEW OF THE FCPA 5

The Anti-Bribery Provisions 5

The Accounting Provisions 6

KEY ENFORCEMENT AND INVESTIGATIVE DEVELOPMENTS 7

Unprecedented Loss for the Justice Department's FCPA Program 7

Allegations of Bribery Cover Up Rock Walmart 9

China: FCPA Enforcement Activity Continues 12

Control Components, Inc.: Husband and Wife Defendants and Two Others Plead Guilty 14

The Government Obtains Additional Convictions in the *Haiti Teleco* Case, While Two Previously Convicted Defendants Appeal 16

Sentences Imposed in the Latin Node Inc. (LatiNode) Cases 18

Update on Industry-Wide Investigations 18

Rounding Out the Enforcement Docket 24

FCPA Related Civil Litigation 27

GLOBAL ANTI-CORRUPTION ENFORCEMENT AND INVESTIGATION UPDATE 29

Developments in the United Kingdom 29

China Opens Access to a Centralized Database Of Bribery Convictions 33

Russia Accedes to OECD Convention Against Bribery 33

Brazil: Postponement of the Clean Company Act 34

THE DEBATE REGARDING FCPA REFORM CONTINUES IN ADVANCE OF ANTICIPATED GUIDANCE FROM THE JUSTICE DEPARTMENT 34

The Institute's Request for Guidance 34

Response to the Institute's Request 36

The Impact of the Walmart Allegations on the Institute's Efforts 37

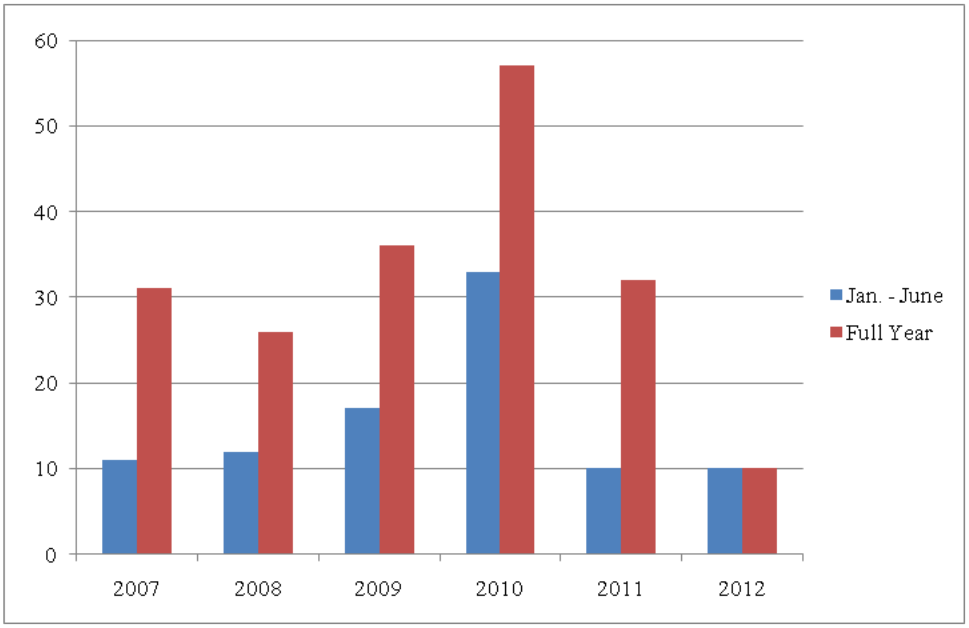
CONCLUSION 37

EXECUTIVE SUMMARY

Albeit a drop from the heights of years gone by, the first six months of 2012 have been another busy period for FCPA enforcement. In the first half of 2012, the government suffered high-profile stinging defeats in two separate criminal trials, as it lost the *SHOT Show* and *O'Shea* cases. Notwithstanding these stinging loses, the Department of Justice (Justice Department) and the Securities and Exchange Commission (SEC or Commission) have achieved some success in the first half of 2012, obtaining sanctions against a former senior executive of Morgan Stanley, *Garth Peterson*, and companies in the energy and pharmaceutical industries. And perhaps the most significant development in the first half of 2012 gained attention not because of the government, but from the New York Times' exposé of sensational allegations of corrupt payments at *Wal-Mart de Mexico* and an alleged cover-up involving certain senior *Wal-Mart Stores, Inc.* executives. We analyze these developments and more in this edition of the FCPA & Global Anti-Corruption Insights.

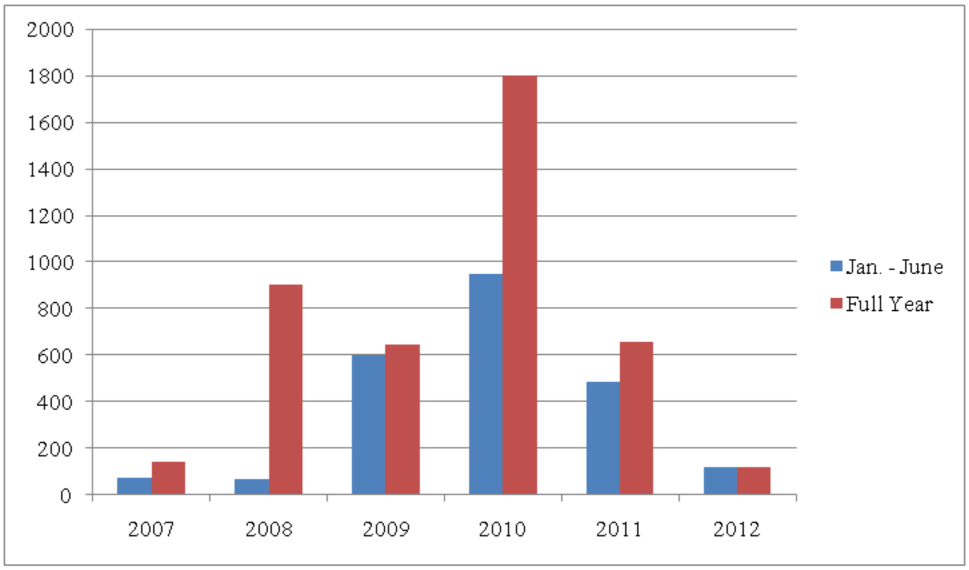
In the first half of 2012, the Justice Department and the Commission combined to charge five companies and five individuals in civil and/or criminal Foreign Corrupt Practices Act (FCPA) enforcement actions.This year's figures, when compared to the mid-year numbers for 2011, reflect a decrease in actions against companies — there had been nine enforcement actions against companies by this point last year. The five actions against individuals, however, are an increase over the tally of one at the halfway point in 2011. More marked than the drop-off in enforcement actions against companies is the drastic decline in penalties assessed. At this stage last year, US$482 million in criminal fines, civil monetary penalties, and disgorgement had been imposed, which itself was a significant decrease from mid-way through 2010. This year, however, has seen only US$120 million in penalties assessed.

Table 1: Number of Enforcement Actions



As we observed in the 2011 year-end review, last year's declines in actions and penalty totals could potentially be explained by the record high number of trials, as well as the backlog of investigations started during the recent boom period. Such an explanation may still have some weight halfway through 2012. The last six months have seen three acquittals, three mistrials, and the dismissal with prejudice of all remaining *SHOT Show* prosecutions. It also saw several significant enforcement actions and allegations of bribery at a leading retailer, which may reinvigorate the enforcement docket.

Table 2: FCPA Penalties Assessed (in millions)



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 amendments added a new Section 78*dd*-3 to include the "any person" provision, which expanded jurisdiction over foreign corporations and nationals. The FCPA contains two landmark provisions: (i) the anti-bribery provisions; and (ii) the accounting and internal control provisions. Together, these provisions represent Congress' intent to address the problem of companies that do business in the US 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 expediting 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 Books and Records 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 or BRICs) 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 endless opportunities 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 books and records provisions of Section 13(b)(2) of the Securities Exchange Act of 1934 (Exchange Act), except where a person knowingly circumvents or fails to implement a system of internal controls, or knowingly falsifies any book, record, or account described above. *See* 15 U.S.C. § 78*m*(b)(4)-(5).

KEY ENFORCEMENT AND INVESTIGATIVE DEVELOPMENTS

Unprecedented Loss for the Justice Department's FCPA Program

SHOT Show Prosecution Ends in Dismissal of All Defendants

One of the Justice Department's highest-profile FCPA cases has now ended in a significant setback for the government. In January 2010, the Justice Department announced that it had arrested 22 individuals in the military and law enforcement products industry in a massive sting operation for allegedly conspiring to bribe foreign officials in West Africa. Known as the SHOT Show case because all but one of the defendants were arrested at the Shooting, Hunting, Outdoor Trade Show and Conference in Las Vegas, the case was once heralded by the Justice Department as a "turning point" in FCPA enforcement.[1] But after two lengthy trials against 10 of the defendants revealed embarrassing details about the government's investigation, yet failed to produce a single conviction, the government has opted to dismiss the indictments against all defendants.[2]

As we discussed in our last newsletter[3], the SHOT Show prosecution was the result of an undercover operation that the Justice Department once touted as its largest single FCPA investigation. The operation involved 150 FBI agents, 14 search warrants executed in the US and seven search warrants executed in the United Kingdom, and hundreds of hours of video and audio recordings of phone calls and meetings between undercover agents and certain of the defendants.

The investigation relied heavily on the cooperation of an informant, *Richard Bistrong*, who had himself previously pled guilty to FCPA violations and other crimes. Defense attorneys later portrayed Bistrong as an "irredeemably corrupt con-man," and argued that Bistrong and his FBI handlers were "so personally invested in the operation and its outcome" that they engaged in misconduct, including preventing targets of the investigation from conveying concerns about the lawfulness of the transaction to others.[4] In this regard, defense attorneys introduced off-color communications between Bistrong and his FBI handlers, which cast doubt on the agents' professionalism and credibility.[5]

Three of the targets of this investigation — *Daniel Alvirez, Jonathan Spiller,* and *Haim Geri* — pled guilty in the Spring of 2011.[6] US District Court Judge Richard J. Leon then split the remaining 19 defendants into four groups for trial. The first group — *Pankesh Patel, John Benson Weir III, Andrew Bigelow,* and *Lee Allen Tolleson* — went to trial shortly thereafter. In July 2011, Judge Leon declared a mistrial when the jury failed to reach a verdict.[7] The second group — *John N. Mushriqui, Jeana Mushriqui, R. Patrick Caldwell, Stephen Gerard Giordanella, John Gregory Godsey,* and *Marc Frederick Morales* — went to trial in the Fall of 2011. After the government's 12-week presentation of its case-in-chief, Judge Leon granted the defense's Rule 29 motion for a judgment of acquittal on the charge of conspiracy to violate the FCPA, the sole charge against Giordanella.[8] When the trial of the remaining defendants concluded, the jury acquitted Caldwell and Godsey and was unable to reach a verdict on the Mushriquis and Morales, resulting in a mistrial as to them.[9]

A report authored by the foreman of the jury in the second trial highlights problems with the government's case. Jurors apparently found that the government's witnesses lacked credibility and were troubled by vague language employed by Bistrong and the undercover agents during the sting, such as using the word "commission" instead of "bribe." The jurors also found little evidence that the defendants acted with the requisite state of mind and saw the government's investigative tactics as underhanded and overreaching.[10]

Faced with these setbacks, the government, in late February 2012, filed a motion to withdraw the indictments against all remaining SHOT Show defendants. The government noted that, of the ten defendants it had tried so far, none had been convicted — mistrials were declared as to seven due to hung juries, and three had been acquitted (two by a jury and one by a judge). The government also observed that the court had prevented it from introducing certain evidence of other crimes the court determined were not sufficiently relevant, which it believed significantly weakened its case, and that four or more trials would require "substantial governmental resources, as well as judicial, defense, and jury resources, … given that the first two trials combined lasted approximately six months."[11]

Judge Leon granted the government's motion, criticizing the government's theory of the case and its investigation.[12] "This appears to be the end of a long and sad chapter of white-collar criminal enforcement," he stated.[13] In late March, the government moved to dismiss the indictments against the three defendants who had pled guilty — Alvirez, Spiller, and Geri — though it left open the possibility of re-filing conspiracy charges against Alvirez.[14] The judge granted the motion, ending the case.[15]

Though the Justice Department insists that its "[FCPA] enforcement efforts are broader than one case,"[16] there is no question that the dismissal of the SHOT Show indictments represents a blow to the government.

O'Shea Acquitted on All Charges

As we reported in our last newsletter, the prosecution of *John Joseph O'Shea* also ended in a defeat for the government. After the government presented its case on FCPA and related conspiracy counts, Judge Lynn N. Hughes of the United States District Court for the Southern District of Texas granted the defense's Rule 29 motion and acquitted O'Shea on the 12 substantive FCPA charges.[17] The judge later granted the government's motion to dismiss the remaining non-FCPA charges against O'Shea.[18]

The government arrested O'Shea in November 2009 on allegations that he authorized bribes to officials at Comisión Federal de Electricidad (CFE), Mexico's state-owned electricity utility. A former manager for a Houston-based subsidiary of Swiss engineering firm ABB Ltd., O'Shea was accused of arranging US$1 million in corrupt payments in order to obtain US$81 million in contracts from CFE. He allegedly hired a Mexican citizen, *Fernando Maya Basurto*, to act as a middleman in the scheme.[19] Basurto pled guilty to conspiring to violate the FCPA, money laundering, and falsifying records, and he testified for the government against O'Shea.[20] Basurto was later sentenced to time served.[21]

After the government's four day presentation of its case against O'Shea, the defense moved for acquittal on the 12 substantive FCPA counts and one conspiracy count. Judge Hughes granted the motion, reasoning that the government had not proven that the payments O'Shea made constituted bribes paid to CFE officials.[22] The court criticized the evidence proffered by the government's "principal witness," Basurto, as "abstract and vague, generally relating gossip" and concluded that Basurto knew "almost nothing" relating to O'Shea.[23] In response to this adverse ruling, the government moved to dismiss the remaining money laundering and false statements charges against O'Shea, citing Judge Hughes' "prior statements and rulings, as well as the resulting collateral estoppel issues associated with the [c]ourt's judgment of acquittal."[24] On February 9, 2012, Judge Hughes granted the motion, concluding the case.[25]

Lindsey Manufacturing Case Ends

On November 29, 2011, United States District Judge Howard Matz dismissed with prejudice the indictment against *Lindsey Manufacturing*, its Chief Executive Officer, *Keith Lindsey*, and its Chief Financial Officer, *Steven K. Lee*, because of prosecutorial misconduct. These defendants had been convicted at trial for their roles in bribing employees of CFE but had their convictions vacated because of prosecutorial misconduct. The government had filed a notice of appeal regarding Judge Matz's decision to preserve its ability to appeal, but on May 25, 2012, it voluntarily withdrew the appeal, thereby ending the entire saga.[26]

Allegations of Bribery Cover Up Rock Walmart

On April 21, 2012, the New York Times reported a detailed account of "a campaign of bribery to win market dominance" undertaken by Wal-Mart de Mexico, the largest foreign subsidiary of Wal-Mart Stores, Inc. (Walmart).[27] The New York Times' investigation — which included interviews with *Sergio Cicero Zapata*, a former Wal-Mart de Mexico lawyer who participated in the bribery scheme before resigning from Wal-Mart de Mexico in 2004 — uncovered evidence indicating that Wal-Mart de Mexico, in a rush to build stores before competitors, may have paid "more than [US]$24 million" in suspected bribes "to obtain permits in virtually every corner of the country."[28] Furthermore, according to the New York Times' report, Walmart conducted an inquiry into what occurred that uncovered evidence of bribery, including evidence that certain of Wal-Mart de Mexico's top executives had taken steps to conceal the bribery from Walmart. But rather than conduct "a full investigation," Walmart allegedly closed its inquiry in short order and, in fact, promoted the Wal-Mart de Mexico chief executive whom Mr. Cicero identified as the "driving force" behind the bribes, *Eduardo Castro-Wright*, to vice chairman of Walmart in 2008. Not surprisingly, Mr. Castro-Wright is retiring in July 2012. According to the New York Times, Walmart's leadership recognized that allegations of potential bribery could have "devastating consequences," and the company chose instead to focus "more on damage control than on rooting out wrongdoing."[29]

Wal-Mart de Mexico's Bribery Scheme

Wal-Mart de Mexico allegedly employed fixers — known as "gestores" — to deliver payments to "anyone with the power to thwart Wal-Mart's growth" and buy "zoning approvals, reductions in environmental impact fees, and the allegiance of neighborhood leaders."[30] Government documents reflected instances in which permits were given within days or weeks after illicit payments were allegedly given to government officials.

According to Mr. Cicero, Wal-Mart de Mexico reportedly increased its use of gestores after Mr. Castro-Wright was promoted to Wal-Mart de Mexico's top position in 2002. Allegedly, the increased use of illicit payments coincided with "very aggressive growth goals" the company set, which included opening stores "in record time[]" as Wal-Mart de Mexico executives faced internal "pressure to do 'whatever was necessary' to obtain permits."[31]

Furthermore, according to Mr. Cicero, the gestores submitted vaguely worded invoices that referred to illicit payments through a system of confidential codes. Supposedly, the company then "purified" the payments by booking them "in accounting records simply as legal fees."[32]

Walmart's Reported Failure to Investigate

On September 21, 2005, Mr. Cicero wrote an email to the general counsel of *Walmart International, Maritza Munich*, describing "irregularities" at the highest levels of management at Wal-Mart de Mexico. Walmart initially considered retaining outside counsel to conduct an internal investigation, but the company rejected outside counsel's proposed investigation plan that called for a four-month review of all payments to anyone who had helped Wal-Mart de Mexico obtain a permit in the past five years. The company chose instead to assign internal resources to conduct a limited, two-week "preliminary inquiry" that would look at permits obtained by a few stores.

The internal preliminary inquiry found evidence that Wal-Mart de Mexico's senior management was aware of the payments to gestores for new store permits. Indeed, the internal review team found that in March 2004, a Wal-Mart de Mexico internal audit raised questions about the gestor payments. The internal auditors' recommendation that Walmart corporate be notified about the gestor payments and certain other findings, however, was removed from the final internal audit report at the direction of Wal-Mart de Mexico's chief auditor, who was allegedly aware of the payments.

Despite uncovering information that gave rise to a "reasonable suspicion" that Mexican and US law had been violated, Walmart reportedly declined to conduct a full investigation supported by professional investigators. As complaints from Wal-Mart de Mexico executives regarding the internal inquiry mounted, Walmart allowed Wal-Mart de Mexico, through its general counsel who was allegedly aware of the payments, to complete the internal preliminary inquiry. Wal-Mart de Mexico finished the preliminary inquiry within a matter of weeks, concluding that no further investigation was required.

The Fallout of the New York Times' Report

As we reported in our last newsletter, Walmart disclosed in a quarterly report filed with the SEC on December 8, 2011 that it was conducting an internal investigation into possible violations of the FCPA, but that the company did not believe the matters under investigation would "have a material adverse effect on our business."[33] That disclosure apparently was prompted by the New York Times' investigation. In addition to ongoing investigations by the Justice Department and SEC alluded to in its December 8, 2011 disclosure, following the New York Times' report, members of Congress have demanded testimony from Walmart executives and Walmart shareholders that have filed a variety of lawsuits:

- On April 23, 2012, Congressmen Elijah Cummings (D-Md.), Ranking Member, Committee on Oversight and Government Reform, and Henry Waxman (D-Cal.), Ranking Member, Committee on Energy and Commerce, sent a letter to Walmart's Chief Executive Officer, *Michael T. Duke*, advising Walmart that their Committee is initiating an investigation into the potential violations of the FCPA reported in the New York Times article.[34] The Congressmen requested a meeting with company officials who could respond to the alleged violations of the FCPA.
- On April 25, 2012, Congressmen Cummings and Waxman sent a letter to the President and Chief Executive Officer of the US Chamber of Commerce, Thomas J. Donohue, inquiring about the two Walmart executives who participated on the board of the Chamber's Institute for Legal Reform, which as discussed below has been an advocate for FCPA reform.[35] The Congressmen expressed concern about a potential conflict of interest for the Walmart executives to advocate "on ways to weaken the [FCPA] at a time

when the leadership of the company was apparently aware of corporate conduct that may have violated the law." The Congressman requested the production of information from the Chamber regarding, among other things, affiliations between the Chamber's Institute for Legal Reform, which worked on FCPA issues, and Walmart.

- Also, on April 25, 2012, Congressmen Cummings and Waxman sent a letter to the Chairman of the Board of Directors of the Retail Industry Leaders Association, Gregg Steinhafel, that questioned the Retail Industry Leaders Association's lobbying with respect to the FCPA, particularly with respect to affiliations between it and Walmart.[36]
- On May 17, 2012, Congressmen Cummings and Waxman sent a letter to Mr. Duke, noting that internal Walmart documents provided previously "appear to confirm the accuracy of the New York Times report and raise additional questions about your company's conduct."[37] The letter requests that the company authorize Ms. Munich, the Walmart International's former general counsel who resigned in 2006, to speak with congressional staff. The letter also requests that the company respond to the Congressmen's April 23, 2012 letter, noting that "a tentatively scheduled [] general briefing on Wal-Mart's 'going forward FCPA compliance monitoring programs'" will "not answer our questions about Wal-Mart's past actions."
- On June 12, 2012, Congressmen Cummings and Waxman sent a letter to Mr. Duke that asked Wal-Mart to have company officials "discuss fully the role Wal-Mart officials may have played in exposing or covering up bribery allegations and whether the alleged improper conduct was part of a broader problem with Wal-Mart's internal controls."[38] Notably, this letter also discloses that Wal-Mart's outside counsel briefed the Committee on May 21, 2012, stating that the outside counsel were retained to review Wal-Mart's operations in Mexico, Brazil and China, and that, based on their review, outside counsel is recommending that Wal-Mart also evaluate its operations in India and South Africa, and that Wal-Mart had requested counsel to perform a "worldwide assessment of the company's anti-corruption policies."
- Multiple lawsuits have been filed against Walmart and its current and former directors and officers by the company's shareholders derivatively on behalf of the company. For example, the California State Teachers' Retirement Systems (CalSTRS), the largest teachers' retirement fund in the US, filed a suit on May 3, 2012 in Delaware Chancery Court alleging breach of fiduciary duty.[39] Walmart has also been sued by a putative class of Walmart shareholders for allegedly engaging in securities fraud by issuing false statements regarding the company's compliance practices in violations of the federal securities laws.[40]
- Institutional shareholders also organized an unsuccessful attempt to oust Walmart's directors from the company's board.[41] Although the re-election of the company's directors at its annual meeting was never really in doubt — the Walton family owns almost half of the company's shares — several efforts to unseat members of the board gained attention in advance of the shareholders' vote, including the efforts of the New York City Pension Funds, which holds over 4.7 million shares;[42] Institutional Shareholder Services (ISS), which has approximately 1,700 clients including asset management firms and pension funds, and Glass Lewis & Co., which has approximately 900 clients including institutional investors;[43] and CalSTRS, which holds 5.3 million shares.[44]

Beyond the growing scrutiny Walmart faces from Congress, the Justice Department, the SEC, and shareholders in the United States, the Mexican Attorney General has commenced an investigation.[45] Although the Mexican government initially dismissed bribery allegations as local in nature, Mexico's President Felipe Calderon has since expressed indignation over the payment of bribes to facilitate transactions amid increasing criticism in the Mexican media.[46]

Walmart's Response

In response, Walmart announced that it was "working diligently" on FCPA compliance, that it had "taken a number of specific, concrete actions" to investigate alleged misconduct in Mexico and at company headquarters in Bentonville, Arkansas, and that it had named Tom Gean, a former United States Attorney for the Western District of Arkansas, to the newly-created position of Global FCPA Compliance Officer.[47]

More recently, in a Form 8-K filed with the SEC on May 17, 2012, Walmart disclosed that its audit committee was conducting an internal investigation into the alleged misconduct at Wal-Mart de Mexico and whether prior allegations of that misconduct was handled properly by Walmart corporate.[48] The Form 8-K stated that Walmart was "conducting a voluntary global review of its policies, practices and internal controls for FCPA compliance," was "engaged in strengthening its global anti-corruption compliance program through appropriate remedial anti-corruption measures," and was "cooperating with investigations being conducted" by the Justice Department and the SEC, and that Wal-Mart de Mexico was cooperating with Mexican government agencies.[49] The company concluded its discussion of the FCPA-related issues by recognizing the risk that these matters may have a material impact on the company's business: "Although [Walmart] does not presently believe that these matters will have a material adverse effect on its business, given the inherent uncertainties in such situations, [Walmart] can provide no assurance that these matters will not be material to its business in the future."[50]

China: FCPA Enforcement Activity Continues

The strong tradition of gift-giving in China[51] creates a high-risk environment and contributes to China's ranking as 75th out of the 183 countries on Transparency International's 2011 Corruption Perceptions Index.[52] In the first half of 2012, US regulators and companies have brought or resolved a number of high-profile actions based on conduct in China.

Proving that an Effective Compliance Program can be a Panacea, Morgan Stanley Avoids Enforcement Action

On April 25, 2012, *Garth R. Peterson*, a former Morgan Stanley real estate executive, resolved FCPA enforcement actions with both the Justice Department and the SEC. Peterson pled guilty to a one-count criminal information charging him with conspiracy to violate the FCPA's internal controls provision, allegedly circumventing Morgan Stanley's internal policies — including a prohibition on bribery — for his own personal enrichment.[53] He also agreed to settle a civil complaint brought by the SEC charging violations of the FCPA's anti-bribery, books and records, and internal control provisions, as well as aiding and abetting a violation of the federal securities laws relating to investment advisors.[54]

Peterson, a US citizen and resident of Singapore, used to run the Shanghai office of Morgan Stanley's global real estate business. During his time with Morgan Stanley in Asia, he developed a personal friendship and secret business relationship with the former chairman of the Yongye Enterprise (Group) Co., a Chinese state-owned entity that wielded substantial influence over real estate investments in Shanghai. Between 2004 and 2007, Peterson arranged to pay himself and the Chinese official a total of US$1.8 million, which he misrepresented to Morgan Stanley as "finder's fees" for real estate deals.[55] Peterson also acquired for himself and the unnamed Chinese official "millions of dollars" in Shanghai real estate from a Morgan Stanley fund. In exchange for these payments and property interests, the Chinese official allegedly "helped" Morgan Stanley "obtain business."[56] Morgan Stanley fired Peterson in 2008 as a result of his FCPA-related misconduct.[57]

Peterson agreed to a settlement of the SEC's charges under which he will be permanently barred from the securities industry, pay approximately US$250,000 in disgorgement, and "relinquish his interest in the valuable Shanghai real estate (currently valued at approximately US$3.4 million) that he secretly acquired through his misconduct."[58] On May 2, 2012, United States District Judge Jack Weinstein of the Eastern District of New York entered a final judgment in the SEC's case against Peterson.[59] Judge Weinstein is scheduled to sentence Peterson in July.[60] According to the Justice Department, "Peterson faces a maximum penalty of five years in prison and a maximum fine of [US]$250,000 or twice his gross gain from the offense."[61]

Notably, the Justice Department and SEC declined to pursue enforcement actions against Morgan Stanley. In its press release announcing Peterson's guilty plea, the Justice Department stated that it had declined to prosecute Morgan Stanley after considering all the available facts and circumstances, noting the company's voluntary disclosure, cooperation with the investigation, and robust internal controls.[62] The Justice Department specifically cited Morgan Stanley's frequent training of employees about anti-bribery laws, regular updating of internal anti-bribery policies, monitoring of transactions, random audits, and extensive due diligence on new business partners. The Justice Department noted in particular that "Morgan Stanley trained Peterson on the FCPA seven times and reminded him to comply with the FCPA at least 35 times."[63] The SEC similarly declined to bring an enforcement action against Morgan Stanley, noting the firm had cooperated with the inquiry, "conducted a thorough internal investigation," and characterizing Peterson as a "rogue employee."[64]

SEC Opens an Investigation into the Movie Industry

On April 24, 2012, Reuters reported that the SEC had sent letters of inquiry to at least five US movie studios, asking for information about whether the movie studios had made payments to government officials in China in violation of the FCPA.[65] According to Reuters, the movie studios to which the SEC had sent inquiry letters included *20th Century Fox, Disney,* and *DreamWorks Animation*. The Chinese film industry is controlled by China Film Group, a state-owned entity, that historically limited foreign films to 20 per year, but which eased that limitation in February 2012. China is one of the world's largest potential markets, with box office revenues growing approximately 35% last year to US$2.1 billion.[66]

Companies Continue to Disclose Ongoing Investigations into Potential Bribes in China

Public disclosures from other US companies made in filings with the SEC in the first half of 2012 reveal the existence of multiple other ongoing investigations into potential FCPA violations in China.

For example, *W.W. Grainger, Dun and Bradstreet,* and *SL Industries, Inc.* disclosed their review of conduct that occurred in China.

W.W. Grainger

W.W. Grainger's annual report for 2011 discusses its continuing internal investigation into possibly improper conduct by its Chinese subsidiary, Grainger China LLC. On January 24, 2012, the Illinois industrial supply company voluntarily disclosed to the Justice Department and the SEC that the company had learned that sales employees may have provided prepaid gift cards to certain customers and that books and records at certain sales offices of Grainger China may have been falsified to disguise the provision of these gift cards. W.W. Grainger is cooperating with the government agencies.

Dun and Bradstreet

On March 18, 2012, New Jersey-based Dun and Bradstreet (D&B) reported that it had commenced a review into allegations that its Chinese subsidiary may have violated the FCPA.[68] D&B acquired the Chinese marketing firm Shanghai Roadway D&B Marketing Services Co. Ltd. (Roadway) in 2009, and Roadway accounted for about US$22 million in revenue and US$2 million in operating income in 2011. D&B is investigating the matter and voluntarily reported possible FCPA violations to both the Justice Department and the SEC. The company disclosed in its quarterly report filed March 31, 2012 (and again in its quarterly report filed May 8, 2012) that it had begun to wind down operations in China because of factors including "the time, cost and management bandwidth required to resolve the current matters."[69]

SL Industries

In its Form 10-K filed March 30, 2012, SL Industries, Inc. — a New Jersey based designer, manufacturer, and marketer of power electronics, motion control, power protection, and other related products used in a variety of industries — disclosed that it was conducting an investigation to determine whether employees of its indirect wholly-owned subsidiaries operating in China "improperly provided gifts and entertainment to government officials" in violation of laws, including the FCPA.[70] The company stated that "the preliminary estimate" of the amounts of the gifts and entertainment did not appear to be material. It also disclosed that its outside counsel contacted the Justice Department and the SEC and agreed to cooperate fully with the agencies.

Control Components, Inc.: Husband and Wife Defendants and Two Others Plead Guilty

On April 16, 2012, husband and wife *Stuart* and *Hong (Rose) Carson* each pled guilty to one count of making a corrupt payment in violation of the FCPA.[71] Stuart Carson is the former president of *Control Components, Inc.* (CCI), and Rose Carson is CCI's former director of sales for China and Taiwan.[72] According to the Justice Department, Stuart Carson faces up to 10 months in prison and Rose Carson faces up to three years of probation, which may include six months of home confinement. The couple is scheduled to be sentenced in the Central District of California in October.[73]

CCI, a California-based valve company, pled guilty in 2009 to violations of the FCPA and the Federal Travel Act of 1961 (Travel Act).[74] As part of the company's plea, CCI admitted that from 2003 through 2007 it made corrupt payments totaling US$6.85 million in more than 30 countries with the aim of securing lucrative contracts that resulted in net profits of US$46.5 million.[75] The bribes allegedly paid by CCI also form the basis of the actions against the Carson defendants.

Additionally, on May 29, 2012, *Paul Cosgrove*, the former director of Worldwide Sales for CCI, pled guilty to making a corrupt payment to a Chinese government official in violation of the FCPA.[76] According to the Justice Department, Cosgrove is scheduled to be sentenced in late August and faces up to 15 months imprisonment pursuant to his plea deal.[77] On June 14, 2012, another CCI executive, *David Edmonds*, also pled guilty to one count of violating the FCPA, with the government agreeing that an appropriate sentence would be a term of imprisonment of 15 months.[78]

Notably, in May 2012, Cosgrove and Edmonds lost a motion to suppress statements that they had made to CCI's outside counsel during an internal investigation into potential FCPA violations.[79] These defendants contended that because the company's lawyers cooperated with the government and informed the government about their interviews, the lawyers were state actors who were required to give *Miranda* warnings. Judge James Selna of the United States District Court for the Central District of California disagreed. In a tentative ruling, Judge Selna stated that "it was in CCI's interest and a legitimate activity to investigate potential criminal conduct in its business operations," but that interest did not convert CCI's investigation into a government action triggering the Fifth Amendment.[80] Moreover, Judge Selna found no evidence of the government's involvement in or coercion of the defendants' interviews.

Three other CCI executives — *Flavio Ricotti, Mario Covino,* and *Richard Morlok* — previously pled guilty to conspiring to violate the FCPA.[81] All five of the individual defendants associated with CCI discussed so far are believed to be cooperating with the government's investigation.

One other CCI executive — *Han Yong Kim* — has been indicted.[82] Kim, the former head of CCI's Korean business, remains at large in South Korea.[83]

As we have discussed in our summer 2011 and winter 2012 newsletters, the *Carson* case is also significant for its judicial interpretation of the terms "foreign official" and "instrumentality" under the FCPA. The defendants in *Carson* sought to shorten the FCPA's reach by arguing that certain state-owned enterprises and their employees do not fit within these definitions. On February 16, 2012, Judge Selna issued an order regarding select jury instructions on the meanings of "foreign official" and "instrumentality" of a foreign government.[84] Judge Selna's order rejected the defendants' proposal for a bright-line test in favor of a "fact-based finding in light of the totality of the circumstances."[85] This ruling followed Judge Selna's May 2011 order denying a motion to dismiss in which he sustained the government's interpretation of who qualifies as a "foreign official."[86] Similar to *United States v. Aguilar*,[87] *Carson* provides a non-exhaustive list of factors relevant to determining whether an entity is an "instrumentality" of a foreign government 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;
9. the circumstances surrounding the entity's creation; and
10. the status of employees under the foreign government's law, including whether employees are considered public employees or civil servants.

Judge Selna added the last factor — the status of employees — to the list in his February order.[88]

The *Carson* "foreign official" order is also noteworthy for addressing the issue of whether a defendant must know that a bribe recipient was a foreign official. Judge Selna ruled that to be found guilty of violating the FCPA, a defendant must have known or believed that the person sought to be influenced was a foreign official; however, the "[b]elief that an individual was a foreign official does not satisfy this element if the individual was not in fact a foreign official."[89]

Government Obtains Additional Convictions in the *Haiti Teleco* Case, While Two Previously Convicted Defendants Appeal

As we have discussed in previous newsletters, in 2011 the Justice Department obtained convictions and lengthy sentences against *Joel Esquenazi*, Terra Telecommunications Corp.'s President (180 months imprisonment) and *Carlos Rodriguez*, Terra's Executive Vice President (84 months imprisonment) for bribing Haitian government officials at the state-owned Telecommunications D'Haiti S.A.M. (Haiti Teleco). In 2012, the Justice Department continued its pursuit of the Haiti Teleco case against other defendants, while Esquenazi and Rodriguez filed appeals, challenging the government's expansive definition of what it means to be an "instrumentality" of a foreign government, the resolution of which could have wide-ranging implications.

Government Adds Charges Against Another Defendant and Obtains Convictions Against Two Others

Through a second superseding indictment filed on January 19, 2012, prosecutors brought charges against *Cecilia Zurita*, Vice President of Cinergy Telecommunications, Inc., adding her as a defendant to its pending case against *Washington Vasconez Cruz*, Cinergy's President and Zurita's husband; and *Amadeus Richers*, a Cinergy director, for allegedly participating in a scheme to bribe Haiti Teleco officials.[90] The indictment alleges that Zurita wrote checks for intermediaries that were used to bribe the Haitian officials and then participated in the cover-up of the bribes by creating false documentation.[91] Zurita, Cruz, and Richers are fugitives.[92]

In addition to bringing charges against Zurita, in the first half of 2012 the Justice Department obtained the convictions of two former Haiti Teleco officials who purportedly accepted bribes. *Patrick Joseph*, the former Director General of Haiti Teleco, pled guilty on February 8, 2012 to one count of conspiracy to commit money laundering.[93] Joseph was sentenced on July 9, 2012 to one year of imprisonment and ordered to forfeit almost US$1 million dollars.[94]

Furthermore, *Jean Rene Duperval*, the former Director of International Relations of Haiti Teleco, was found guilty by a jury, after less than three hours of deliberations, of money laundering and conspiracy on March 12, 2012. The indictment alleged that Duperval accepted a half-million dollars in payments from two Miami telecommunications companies in exchange for special treatment from Haiti Teleco, the sole provider of landline telephone service in Haiti. The Miami companies allegedly made the payments to shell companies controlled by Duperval, calling them compensation for "consulting services" and "international minutes," when no such services actually were rendered. The payments were then allegedly distributed to Duperval, who called them commissions or payroll. Duperval was sentenced on May 21, 2012 to nine years imprisonment, deportation upon completion of his confinement, and forfeiture of approximately US$500,000.[95] Duperval filed a notice of appeal on June 1, 2012.[96]

In one other development, on April 10, 2012 the Justice Department moved to reduce the sentence of *Robert Antoine*, a former Haiti Teleco director of international relations, who pled guilty in March 2010 to one count of conspiracy to commit money laundering. Antoine was sentenced originally on June 9, 2010 to 48 months imprisonment. Prosecutors requested a 50% reduction in his sentence in recognition of his substantial assistance to law enforcement, including his testimony on behalf of the government at trial in subsequent Haiti Teleco proceedings.[97] On May 29, 2012, United States District Court Judge Jose Martinez of the Southern District of Florida granted the motion and amended Antoine's sentence to a term of 18 months imprisonment (a 62.5% reduction), much of which he has already served.[98]

Esquenazi and Rodriguez Challenge the Meaning of "Foreign Official" and "Instrumentality"

On May 9, 2012, Esquenazi and Rodriguez filed their opening appeal briefs in the United States Court of Appeals for the Eleventh Circuit, challenging multiple aspects of their trials and their sentencing.[99] The issues raised include what constitutes an "instrumentality" of a foreign government under the FCPA — an issue not yet addressed by any appellate court — and whether the prosecution violated its obligations under the Supreme Court's decision in *United States v. Brady*, which requires the government to disclose potential exculpatory evidence to defendants.

The FCPA prohibits making corrupt payments to "foreign officials," which the FCPA defines as including "any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality thereof."[100] The FCPA does not, however, define the term "instrumentality."

Esquenazi and Rodriguez argue that Haiti Teleco is not an "instrumentality" of a foreign government, and that Haiti Teleco's employees are thus not "foreign officials," because Haiti Teleco did not perform traditional government functions similar to a government department or agency. Esquenazi and Rodriguez further argue that no evidence of government functionality was ever presented at trial. Instead, it was undisputed that Haiti Teleco was not a department or agency of the Haitian government, and while the government presented evidence that the National Bank of Haiti owned shares of

Haiti Teleco and the Haitian government appoints directors of Haiti Teleco, no evidence established that Haiti Teleco performed services similar to a government department or agency. Esquenazi and Rodriguez argue that the trial court erred by adopting the government's expansive ownership theory of instrumentality and by rejecting their proposed meaning of "instrumentality," limited to government-owned entities that perform some government function.

Other issues that Esquenazi and Rodriguez have raised on appeal include a challenge to the district court's refusal to hold an evidentiary hearing regarding two contradictory declarations signed by Jean Max Bellerive, the Minister of Justice and Public Safety for Haiti. Bellerive initially signed a declaration stating that Haiti Teleco "has never been and until now is not a [s]tate enterprise." The declaration was dated July 26, 2011 — before the jury reached its verdict — but the prosecution did not disclose the declaration until August 9, 2011 — after the jury reached its verdict.

Rodriguez moved for a new trial based on newly discovered evidence and for an evidentiary hearing regarding the declaration, which Esquenazi joined. The defendants argued that a hearing was appropriate to determine whether the government violated *Brady* by failing to disclose that a Haitian official did not believe Haiti Teleco was a state enterprise. In response, the government submitted a second declaration from Bellerive, which the government helped prepare, that purported to clarify that Haiti Teleco was, in fact, a state enterprise. The trial court denied the motion, reasoning that, among other things, the declaration was provided by the government as it became aware of it and that any doubt created by the first declaration was clarified by the second declaration Bellerive signed. On appeal, defendants renewed their argument that an evidentiary hearing is required to determine when the government became aware of *substance* underlying the first Bellerive declaration. This issue raises another question about whether prosecutors, as with those in the SHOT Show and Lindsey Manufacturing cases, allowed zealousness to obtain convictions to compromise their willingness to play by the rules.

Sentences Imposed in the Latin Node Cases

As discussed in previous newsletters, *Latin Node Inc.* (LatiNode) pleaded guilty to violating the FCPA, and four of its former executives pleaded guilty to conspiring to violate the FCPA, in connection with LatiNode's payment between March 2004 and June 2007 of 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. In the first half of 2012, several of the former executives were sentenced.

On April 19, 2012, LatiNode's former vice president for business development, *Manuel Caceres*, was sentenced to 23 months imprisonment for his role in the conspiracy.[101] The court granted the Justice Department's motion for a downward departure from the 60 month sentencing guidelines' range the government and Caceres agreed applied in recognition of his substantial assistance to the government, which included "meeting with the government on several occasions to provide information about LatiNode's conduct in South America and practices of the telecommunications industry in the region as well as providing testimony at the sentencing hearing of his co-defendant, *Jorge Granados*."[102] Granados was sentenced to 46 months imprisonment on September 8, 2011.

On April 25, 2012, LatiNode's former vice president of sales, vice president wholesale division, and chief commercial officer *Juan Pablo Vasquez* was sentenced to three years probation and a US$7,500 fine.[103] Vazquez, who facilitated payments to Honduran government officials in exchange for more competitive rates, pled guilty to conspiring to violate the FCPA.[104]

Finally, on June 8, 2012, LatiNode's former chief financial officer, *Manuel Salvoch*, was sentenced to 10 months imprisonment.[105] Salvoch pled guilty on January 12, 2011, to conspiracy to violate the FCPA and cooperated with the government.[106]

Update on Industry-Wide Investigations

Medical Devices

In recent years, the Justice Department and SEC have turned their attention to corrupt payments made to government-employed healthcare providers around the world. A number of medical device makers, including *Smith & Nephew, Biomet Inc., Stryker Corp., Zimmer Holdings Inc.*, *Wright Medical,* and *Medtronic Inc.*, began internal investigations of potentially corrupt activities and disclosed these investigations to the government. Kara Novaco Brockmeyer, the Chief of the FCPA Unit of the SEC stated, "[t]he SEC will continue to hold companies liable as we investigate the medical device industry for this type of illegal behavior."[107] This first half of this year has certainly shown this statement to be true.

Smith & Nephew

On February 6, 2012, United States-based *Smith & Nephew Inc.* (Smith & Nephew) and its British parent company, *Smith & Nephew plc* (S&N plc) agreed to pay a total of US$22.2 million to settle violations of the FCPA alleged by the Justice Department and SEC. Smith & Nephew is a wholly-owned subsidiary of London-based S&N plc, a maker of orthopedic, endoscopy, and wound-care products. Because S&N plc trades on the New York Stock Exchange, it is an "issuer" within the meaning of the FCPA, and accordingly, is required to make and keep accurate books, records, and accounts of its assets.

According to the criminal information and deferred prosecution agreement (DPA) filed in connection with the Justice Department's case, between 1998 and 2008, Smith & Nephew paid up to US$9.4 million in bribes to publicly employed Greek healthcare providers to induce the purchase of its products.[108] Smith & Nephew allegedly sold its products to a distributor at full price and then transferred the amount of the distributor discount to off-shore shell companies controlled by the distributor. The distributor then allegedly paid "cash incentives" to publicly employed healthcare practitioners. The government further alleged that Smith & Nephew then recorded the payments as "marketing services," and that S&N plc incorporated these records into its books, even though no services were actually performed.[109]

Smith & Nephew commenced a thorough investigation and voluntarily disclosed information about potentially illicit payments to the government. The DPA acknowledges Smith & Nephew's thorough self-investigation of the underlying conduct, its cooperation with the government's investigation, and the remedial efforts and compliance improvements undertaken by the company.

Pursuant to its DPA with the Justice Department, Smith & Nephew agreed to pay a US$16.8 million criminal fine,[110] and pursuant to its settlement with the SEC, S&N plc agreed to disgorge US$5.4

million.[111] The DPA with the Justice Department also requires that Smith & Nephew continue to implement and develop its compliance program and requires Smith & Nephew to retain an independent compliance monitor for 18 months to review its anti-corruption compliance program.[112] In addition, S&N plc agreed to the entry of a court order permanently enjoining further violations of certain sections of the FCPA.[113]

Biomet

In another enforcement action stemming from the industry-wide probe of the medical device industry, on March 26, 2012, US-based orthopedic manufacturer Biomet Inc. ("Biomet") agreed to pay US$22.8 million to settle charges by the Justice Department and the SEC that it had violated the FCPA.[114] The fines include a US$17.2 million criminal penalty and nearly US$5.6 million in disgorgement of profits and prejudgment interest.

According to government's allegations, between 2000 and 2008, Biomet and its wholly-owned subsidiaries made more than US$1.5 million in corrupt payments to doctors at public hospitals in Argentina, Brazil, and China to obtain business. In Brazil and Argentina, Biomet or its distributor allegedly made payments to doctors in public hospitals in exchange for the purchase of Biomet products. In China, Biomet's distributor allegedly gave doctors money and/or travel for purchasing Biomet products.[115]

According to the government, Biomet's internal auditors discovered these improper payments in Brazil in 2002 and in Argentina in 2006. The auditors allegedly notified personnel in the United States about these payments, but the payments still continued until 2008. The improper payments in China by Biomet's distributor apparently came to the attention of Biomet personnel in 2001. To conceal the true nature of these payments to doctors in Argentina, Brazil and China, the company allegedly falsely recorded these improper payments on its books and records as "commissions," "consulting fees," "royalties," or "scientific incentives."[116] In China, Biomet's Director of Internal Audit apparently instructed others to mislabel improper payments to doctors related to clinical trials as "entertainment."[117]

Although Biomet cooperated with the government, the company's failure to address bribery and the complicity of the audit department in foreign bribery likely contributed to the government's insistence in the settlement that Biomet retain a compliance monitor for 18 months. As Kara Novaco Brockmeyer of the SEC's FCPA Unit declared, "[a] company's compliance and internal audit should be the first line of defense against corruption, not part of the problem."[118]

Oil & Gas

In the first half of 2012, the Justice Department and the SEC have continued their long-running assault to root out corruption in the oil and gas industry. While several of the recent Justice Department and SEC enforcement actions relate to the large Nigeria-based corruption scheme involving the TSKJ joint venture — comprised of *Technip S.A., Snamprogetti Netherlands B.V., Kellogg Brown & Root LLC, and JGC Corporation* — the Justice Department and the SEC have also continued to investigate potential violations of the FCPA in Nigeria, Angola and Libya.

Former KBR CEO, Commerical VP, and Attorney Sentenced to Prison over Bribery Scheme

In February 2009, Kellogg Brown & Root LLC (Kellogg), a former Halliburton subsidiary, agreed to pay a US$402 million criminal fine and *KBR, Inc.*, Kellogg's parent, agreed to disgorge US$177 million to settle enforcement actions by the Justice Department and SEC, respectively, for violations of the FCPA.[119] Three years later, the individuals who orchestrated the bribery scheme — Kellogg's former CEO, *Albert "Jack" Stanley*; its former Commercial Vice President, *Wojciech Chodan*; and an attorney serving as an intermediary for KBR, *Jeffrey Tesler* — were sentenced under plea agreements for their roles in the scheme between 1995 and 2004 to pay Nigerian officials at least US$180 million in bribes in order to obtain contracts to build liquefied natural gas facilities on Bonny Island, Nigeria worth approximately US$6 billion.[120]

On February 23, 2012, Stanley was sentenced to 30 months in prison and ordered to pay close to US$11 million in restitution.[121] That same day, Tesler was sentenced to 21 months in prison and was ordered to pay close to US$150 million in forfeitures.[122] On February 22, 2012, Chodan received one year of probation, and was ordered to pay a total of approximately US$750,000 in fines and forfeitures, reflecting his assistance to the government in its prosecution of Tesler.[123]

SEC Charges Three Noble Executives in Bribery Scheme

In November 2010, *Noble Corporation*, a Swiss offshore drilling company with its principal offices in Sugar Land, Texas, resolved charges that it violated the FCPA by paying US$74,000 to a Nigerian freight forwarder knowing that some of the payments would be used to bribe Nigerian customs officials and that it falsely recorded the bribes as legitimate expenses in its financial records.[124] The company agreed to pay a US$2.59 million criminal penalty pursuant to a non-prosecution agreement (NPA) entered into with the Justice Department, which recognized the company's early voluntary disclosure of the bribes, internal investigation of the conduct at issue, cooperation with the government, and implementation of remedial measures. The company also resolved claims brought by the SEC, agreeing to disgorge US$5.5 million.[125]

Following its resolution of charges against the company, on February 14, 2012, the SEC charged three executives with violating the FCPA.[126] According to the SEC's complaint, Noble Corporation's chief executive officer, *Mark A. Jackson*, and a Director and Division Manager of Noble's Nigerian subsidiary, *James J. Ruehlen*, bribed customs officials to process false paperwork purporting to show the export and re-import of oil rigs in a scheme designed to save significant costs associated with obtaining new permits.[127] The complaint alleges that hundreds of thousands of dollars in bribes were paid (including payments that were not the basis of Noble's DPA) through a customs agent for Noble's Nigerian subsidiary with Jackson's and Ruehlen's approval to obtain 11 permits and 29 permit extensions. Jackson is alleged to have approved the payments and concealed them from the company's audit committee and auditors, and Ruehlen is alleged to have prepared false documents, sought approval for the bribes, and processed and paid the bribes.[128] A third company official, *Thomas F. O'Rourke*, a former controller and head of internal audit at Noble, settled the enforcement action brought by the SEC by consenting to the entry of an order requiring him to pay a US$35,000 penalty for assisting in the approval of the bribes and their false recording as legitimate operational expenses.[129]

Both Jackson and Ruehlen have moved to dismiss the SEC's complaint, arguing, among other things, that the complaint fails to distinguish between corrupt payments made to obtain or retain business (*i.e.*, bribes) and otherwise permissible facilitation payments; that the SEC's interpretation of the facilitation payment exception in the FCPA provides unconstitutionally vague notice to individuals; that the complaint fails to allege corrupt intent sufficiently; that the complaint fails to specify the particular books, records or accounts that were allegedly falsified; and that the five-year statute of limitations on most of the alleged conduct has already elapsed.[130]

We will monitor the resolution of these motions to dismiss, which may result in a judicial opinion that provides insight into, for example, the scope of permissible facilitation payments.

Halliburton Faces Angola Bribery Probe

As we reported in our last newsletter[131], the SEC sent *Halliburton* a subpoena related to an investigation into its Angolan operations for possible violations of the FCPA.[132] This subpoena follows Halliburton's October 2011 announcement that it had opened an internal investigation in response to an anonymous e-mail tip about possible corruption. The e-mail at issue, sent in December 2010, indicated that certain current and former personnel violated internal company policies and the FCPA — claims mostly related to the use of an Angolan vendor. Halliburton has briefed the Justice Department and the SEC on the status of its investigation and has indicated that it intends to continue to cooperate with the government agencies.

Cobalt International Energy's Angola Probe

In its Form 10-K for the year ended December 31, 2011, filed with the SEC on February 21, 2012, *Cobalt International Energy Inc.* (Cobalt) revealed that the Justice Department and the SEC have launched a formal probe into allegations that one of its oil drilling contractors bribed foreign officials in Angola.[133] According to the filing, the investigation relates to whether Nazaki Oil and Gas SA (Nazaki), a Cobalt contractor assigned to oil blocks by the Angolan government, bribed senior government officials. The Angolan government "assigned" Cobalt to work with Nazaki and an additional corporation — contractors with whom Cobalt acknowledged it had limited familiarity. Nazaki has denied the allegations.[134]

According to Cobalt's Form 10-K, the allegations first surfaced in the fall of 2010, and by March 2011, the SEC started an investigation into the matter. Cobalt alerted the Justice Department shortly thereafter and disclosed that it is cooperating with both agencies.

SEC Widens Libya-Related Oil and Gas Probe

At least six other companies operating in the oil and gas industry disclosed that they were the subjects of ongoing investigations regarding their operations in Libya. Italy's Eni SpA — the parent of Snamprogetti Netherlands B.V., one of the members of the TSKJ joint venture — disclosed in its annual report that the SEC has issued subpoenas to it relating to potential FCPA violations in Libya. According to its annual report filed with the SEC on April 5, 2012, Eni received a subpoena focused on "certain illicit payments to Libyan officials" relating to the company's activities in Libya between 2008 and 2011.[135] Eni then received a second subpoena at the end of December 2011 asking for additional information relating to the prior subpoena. Eni stated that it was "fully collaborating with" the SEC.[136]

Similarly, France's *Total S.A.*, another major international oil and gas producer, disclosed in its annual report filed with the SEC on March 27, 2012 that it had received a subpoena from the SEC in June 2011 relating to its operations in Libya. Total stated that it was cooperating with the SEC's investigation.[137] It also stated that late in 2011 the company declined a settlement proposal from the Justice Department and the SEC to resolve the agencies' inquiry into whether payments made to Iranian officials under an agreement entered into by a consultant of the company regarding an Iranian gas field violated the FCPA. Total stated that it is continuing discussions with the agencies.[138]

Another international energy company, *Marathon Oil Company*, disclosed in its annual report filed with the SEC, on February 29, 2012, that it received a subpoena from the SEC on May 25, 2011 requiring production of documents related to payments made to the government of Libya, or to officials and persons affiliated with officials of the government of Libya.[139] The company stated that it was cooperating with the SEC.

In addition to Eni, Total and Marathon Oil, three other companies have confirmed Libya-based SEC corruption probes. *Exxon Mobil Corp., ConocoPhillips Co.,* and *Occidental Petroleum Corp.* have each announced that they have received similar SEC subpoenas relating to Libyan operations between 2008 and 2011.[140]

Allegations of Bribes Against Consortiums of Major Oil and Gas Companies in Kazakhstan

In March 2012, the oil ventures *Karachaganak Petroleum Operating BV* (KPO) and *Tengizchevroil LLP* received an anonymous tip regarding allegations of bribery in their Kazakhstani operations. The KPO venture, of which Italy's Eni and UK natural gas company BG Group are the principal operators, and US-based *Chevron* and Russia-based *Lukoil* are minority partners, confirmed in June that they have begun an internal investigation into the matter.[141] Tengizchevroil, a joint venture between Chevron (50% share), ExxonMobil (25%), *KazMunayGas* (20%) and *LukArco* (5%), has likewise confirmed launching an internal investigation.[142] The joint ventures' logistics contractor, *Deutsche Post AG's DHL* unit, has also launched an internal investigation.

According to the whistleblower, KPO authorized DHL to regularly make "extra verification" payments to customs officials in Aksai City, Kazakhstan in exchange for the officials overlooking problems with shipments' paperwork that might otherwise have delayed them for weeks or even months. The alleged payments typically equaled US$400 and were meant to address inconsistencies with shipment documents, such as an extra box of nails in one instance, and two extra gaskets in another, according to media reports.[143] Some accounts suggest that KPO ordered DHL to cease making any such payments, but, upon doing so, DHL found nearly every KPO shipment blocked from passage through customs. DHL allegedly resumed payments the very next day.[144]

Kazak customs authorities reportedly investigated the allegations of corruption, without uncovering any evidence of wrongdoing. In a letter sent to the Wall Street Journal, a Kazak official on the customs committee stated that "evidence of abuse of official position and receiving of illegal gratification from representatives of KPO, was not found in the activities of the executives of the customs post 'Aksai.'"[145]

As for Tengizchevroil, the tipster alleged that the joint venture and DHL participated in a scheme to bribe Kazakhstani customs officials to avoid the officials' delaying shipments due to discrepancies between the description of goods in shipping documentation as compared to the contents of the shipment itself. It also alleged that DHL paid "convoy bribes" on behalf of the joint venture. As a requirement of Kazakh law, cargo vehicles are on occasion required to have an escort through customs. According to the allegations, the logistics agents regularly paid US$150 to US$300 in bribes to customs officials to ensure that escorts did not delay the shipments of Tengizchevroil's equipment. DHL allegedly reimbursed the bribes.[146]

US authorities have yet to confirm whether they have launched a probe into the matter. Kazakhstan's Customs Control Committee, a branch of the country's Ministry of Finance, has launched an on-site audit of the customs post in Aksai City.[147]

Justice Department Closes Hercules FCPA Inquiry

On April 26, 2012, Houston-based drilling company *Hercules Offshore Inc.* announced that the Justice Department had closed a foreign bribery probe into its operations.[148] The company, which specializes in contract drilling, liftboat, and inland barge services, had been notified by the Justice Department in April 2011 that "certain of the Company's activities" were under review for potential violations of the FCPA.[149] The company also received an SEC subpoena in April 2011 and noted that the investigation is continuing.[150]

Rounding Out the Enforcement Docket

Deferred Prosecution Agreement for BizJet

On March 14, 2012, the Justice Department announced a settlement with *BizJet International Sales and Support, Inc.* (BizJet) to resolve a charge of conspiring to violate the FCPA's anti-bribery provisions.[151] BizJet — an Oklahoma-based company that provides aircraft maintenance, repair, and overhaul services — admitted to making over US$400,000 in illegal payments between 2004 and 2010 to obtain and retain service contracts with foreign government entities, including the Mexican Federal Police, the Mexican President's air fleet, and the Panama Aviation Authority, among other foreign government entities. Allegedly, in many instances, BizJet paid bribes directly to the foreign officials and it funneled the bribes through a shell company owned and operated by a BizJet sales manager.[152]

In announcing the settlement, the Justice Department noted that senior BizJet executives — including an executive responsible for BizJet's operations and finances, an executive with oversight of BizJet's efforts to obtain new business and maintain existing business, and an executive who approved the payment of invoices — orchestrated, authorized and approved the unlawful payments. Indeed, two of these executives apparently informed BizJet's board of directors in 2005 that potential customers were demanding US$30,000 to US$40,000 commissions and that BizJet would pay referral fees.[153]

To resolve the FCPA violations, BizJet agreed to pay an US$11.8 million criminal penalty pursuant to a three-year DPA.[154] BizJet's US$11.8 million fine represented an approximately 30% reduction from the bottom of the US Sentencing Guidelines range of US$17.1 million to US$34.2 million.

The Justice Department agreed to a lower penalty in recognition of BizJet's voluntary disclosure following discovery of the FCPA violations during an internal audit connected with the implementation of an enhanced compliance program and BizJet's extraordinary cooperation and extensive remediation.[155]

BizJet's indirect parent company, *Lufthansa Technik AG*, also entered into an NPA in connection with the unlawful payments made by BizJet.[156] Under this agreement, Lufthansa Technik agreed to cooperate with the Justice Department and to continue to implement more rigorous internal controls.

Data Systems Enters into a Deferred Prosecution Agreement

On June 18, 2012, *Data Systems & Solutions LLC* (Data Systems), a company based in Reston, Virginia that provides services at nuclear and fossil fuel power plants, resolved charges that it conspired to violate, and violated, the FCPA's anti-bribery provisions by agreeing to pay an US$8.82 million criminal penalty.[157] According to the Justice Department's press release announcing the disposition, Data Systems paid bribes to officials employed by a Lithuanian-owned nuclear power plant in order to secure contracts to perform plant services.[158] Data Systems disguised the scheme by routing payments to officials at the power plant through several subcontractors located in the United States and abroad.

The resolution of the FCPA charges included a two-year DPA, which acknowledged the company's cooperation and remediation efforts, including its termination of employees responsible for the corruption payments and its implementation of an enhanced due diligence protocol for third-party agents used by the company. The DPA obligates Data Systems to continue to cooperate with the Justice Department and to implement an enhanced compliance program and internal controls designed to prevent and detect FCPA violations.

Fourth Circuit Affirms Former Congressman Jefferson's Bribery-Related Convictions

On March 26, 2012, the United States Court of Appeals for the Fourth Circuit affirmed all but one of former *Congressman William Jefferson's* convictions for bribery and fraud.[159] Jefferson, a Democrat from Louisiana, made headlines in 2006 when the FBI found US$90,000 in the freezer at his Washington, DC-area home.[160] He was charged with violating the FCPA by arranging for bribes to be paid to Nigerian officials in exchange for contracts for his family's companies.[161] In 2009, a jury in the Eastern District of Virginia acquitted Jefferson of the substantive FCPA charge but convicted him on 11 other charges, including conspiracy to violate the FCPA.[162] Jefferson received a 13-year prison sentence,[163] but remained free pending his appeal.[164]

Jefferson's appeal did not focus on the FCPA, though it did concern the meaning of "official acts" under the domestic statute prohibiting bribery of public officials. The Fourth Circuit rejected Jefferson's arguments, ruling that the district court properly instructed the jury that an "official act" may include a congressman's "settled practice."[165] The appellate court reasoned that "[t]he trial evidence showed that Jefferson, as a congressman, had long-standing relationships with businesspersons and investors, and it was his practice to request and receive favors, gifts, and beneficial business deals in exchange for his actions in promoting such businesses, both abroad and domestically, and in ensuring the success of specific business ventures."[166] The jury was therefore "entitled to conclude that Jefferson's actions in connection with both constituent requests and the promotion of trade in Africa fall under the umbrella of his 'official acts.'"[167]

The Fourth Circuit also disagreed with Jefferson's argument that, to satisfy the "quid pro quo" element, the government was required to prove bribes were made in exchange for specific acts: "There was, in this case, an ongoing course of illicit and repugnant conduct by Jefferson — conduct for which he was compensated considerably by those on whose behalf he was acting. An absurd result would occur if we were to deem Jefferson's illicit actions as outside the purview of the bribery statute, simply because he was rewarded by periodic payments to his family's businesses."[168]

Bourke Files "Newly Discovered" Evidence Appeal

In our Winter 2012 newsletter, we discussed the prosecution and conviction of *Frederic Bourke Jr.*, a co-founder of accessory company *Dooney & Bourke*, for violating the FCPA.[169] On December 15, 2011, Bourke lost his appeal challenging the "conscious avoidance" instruction given to the jury.

During the pendency of that appeal, Bourke filed in district court a motion for a new trial on the ground that the government relied upon false testimony from a cooperating witness — Swiss attorney Hans Bodmer.[170] On December 15, 2011, the trial court denied Bourke's motion, reasoning that the government did not know, nor should it have known, of Bodmer's alleged perjury before Bodmer testified.[171] Bourke appealed, and, on April 10, 2012, Bourke filed his opening brief.[172]

Bourke argues that the government either knew or should have known that Bodmer's testimony was false. According to his appeal, the government had in its possession flight records that reflected that Bourke was not in Azerbaijan at the time Bodmer testified the conversation occurred. Bourke's appeal challenges the validity of the use of Bodmer's testimony in light of the flight records, asserting that the records, contrary to what the district court found, were not difficult to read.[173] Bourke argues that "a prosecutor who knows or should know that his witness intends to testify falsely must either convince the witness to correct the falsehood or forego the testimony," rather than allowing the prosecutor to present both the false testimony and the contradictory evidence for the jury to resolve.[174]

Other Companies Disclose FCPA Compliance Issues in Their SEC Filings

In the first half of 2012, several companies disclosed that they were conducting internal investigations into potential FCPA violations. In addition to those companies that disclosed potential issues in China discussed above, other companies — including, for example, *Goodyear Tire and Rubber Company* (Goodyear), *Layne Christensen Company*, and *MTS Systems Corporation* (MTS) — indicated in their SEC filings that they faced potential FCPA issues stemming from potentially violative conduct in other parts of the world.

Goodyear Tire and Rubber Company

In its Form 10-K filed February 14, 2012, Goodyear — the Ohio-based manufacturer of tires — disclosed that it had conducted an internal investigation triggered by an anonymous report received through its ethics hotline in June 2011 that its majority-owned joint venture in Kenya "may have made certain improper payments," and by a report from an employee of its subsidiary in Angola in July 2011 that similar improper payments might have been made there.[175] Goodyear further disclosed that it did not believe that the amounts of the payments in question, or revenue or operating income related to those payments, was material; that it had implemented remedial measures; and that it had voluntarily disclosed the results of its investigation to, and was cooperating with, the Justice Department and the SEC.

Layne Christensen

On March 23, 2012, in connection with the release of its fourth quarter 2011 performance results, Kansas-based drilling company Layne Christensen Company provided an update on its ongoing investigation into potential FCPA violations raised internally in September 2010.[176] The company announced that "the internal investigation, which is continuing, has found documents and information suggesting that improper payments, which may violate the FCPA and other local laws, were made over a considerable period of time, by or on behalf of, certain foreign subsidiaries of the Company to agents and other third parties interacting with government officials in certain countries in Africa relating to the payment of taxes, the importing of equipment and the employment of expatriates."[177] The company voluntarily disclosed the results of its internal investigation to the Justice Department and the SEC, with which it is cooperating.

MTS Systems Corporation

On May 4, 2012, *MTS Systems Corporation* (MTS), a Minnesota-based manufacturer of test systems and industrial position sensors, disclosed that it is investigating "certain gift, travel, and entertainment and other expenses that may have been improperly incurred in connection with some of the Company's operations in the Asia Pacific region."[178] MTS reported that its investigation is not complete, but that it has taken remedial action, including changing its internal control procedures and terminating employees from its Korea office. It also disclosed that it does not believe the expenses at issue will be material and that it has voluntarily disclosed these matters to the Justice Department, SEC, and the US Air Force.

FCPA-Related Civil Litigation

Acquirer of Chinese Company Sues Law Firm Over Allegedly Failed FCPA Due Diligence

On June 6, 2012, *Watts Water Technologies, Inc.* (Watts) brought a malpractice suit against its former outside counsel, alleging that the law firm failed to notify it about potential FCPA violations uncovered in the course of performing legal due diligence on a Chinese company that Watts acquired.[179] According to the complaint filed in Superior Court in Washington, D.C., the law firm's review of the target company identified a document with the target company's written policy of giving kickbacks to Chinese officials in order to obtain business, but the law firm allegedly failed to disclose this important discovery to Watts.[180] Watts alleges that it purchased the Chinese company in reliance on its former law firm's due diligence and suffered damages as a result including a costly investigation, audit, and SEC settlement relating to the FCPA violations.[181] The filing of the suit serves as a reminder of the importance of FCPA due diligence in international transactions, particularly when acquiring a company in a high-risk market.

Courts Interpret Dodd-Frank's Whistleblower Provisions Narrowly

On April 3, 2012, a federal district court in Tennessee interpreted the scope of Dodd-Frank's "catch-all" anti-retaliation provision, which prohibits employers from discharging or otherwise discriminating against whistleblowers who make a disclosure "required or protected under … any [] law, rule or regulation subject to the jurisdiction of the Commission," in the context of a terminated employee who reported third-party agents retained by his employer paid bribes to local Indian government officials to obtain a building permit.[182] The court found that the "catch-all" anti-retaliation provision applies only to matters falling within the SEC's jurisdiction and that "the jurisdiction of the SEC with respect to the FCPA violations is limited only to civil actions to enforce violations by *issuers*."[183] As a result, because defendant *Southern Baptist Convention, Inc.* was not an issuer, the court held that the Dodd-Frank Act did not provide a basis for plaintiff's claim. Notably, the court's finding regarding the scope of the SEC's jurisdiction may differ from how the SEC views its jurisdiction. The SEC has settled enforcement actions against non-issuers — Snamprogetti (2010) and Panalpina, Inc. (2010) — before.

In another matter, on June 28, 2012, a federal district court in Texas dismissed a lawsuit filed against *G.E. Energy (USA), LLC* that similarly alleged plaintiff was improperly terminated for reporting potential violations of the FCPA.[184] The court concluded that because the Dodd-Frank Act's anti-retaliation provisions are silent with respect to extra-territorial application, the provisions did not protect an internal report of alleged bribery that took place in plaintiff's office in Jordan and related to dealings with the Iraqi government. Moreover, the court declined to address plaintiff's argument that the FCPA extends the scope of the Dodd-Frank Act. The court instead focused on the "required or protected" clause of the catch-all anti-retaliation provision and concluded that, because plaintiff failed to establish that the FCPA required or protected his internal report of alleged bribery, plaintiff failed to demonstrate his entitlement to whistleblower protection.

Securities and Derivative Litigation

In the first half of 2012, there were several noteworthy developments in FCPA-related civil litigation. Most notably, on July 2, 2012, *Tidewater, Inc.* (Tidewater), an oil services company ensnared in the Panalpina bribery probe, won its motion to dismiss a shareholder derivative suit premised on the company's violations of the FCPA.[185] In 2010, Tidewater paid over US$15 million to resolve FCPA charges brought by the Justice Department and SEC. A few months after this settlement, a shareholder filed a derivative suit seeking (1) monetary damages for various directors' and officers' alleged "breaches of fiduciary duties, abuse of control, gross mismanagement, waste of corporate assets and unjust enrichment" and (2) injunctive relief sufficient to satisfy the internal controls and books and records provisions of the FCPA.[186] The defendants moved to dismiss the complaint, arguing plaintiff failed to make a formal demand on Tidewater's Board of Directors or show that a demand would have been futile. In granting the motion to dismiss (without prejudice to the plaintiff's ability to seek leave to amend the complaint), a Louisiana federal district court found that complaint was "completely devoid of any specific allegations as to any director or board member to show how they may be so interested or non-independent such that demand on them would have been futile."[187] The court also held that the complaint lacked sufficient allegations of bad faith to excuse demand, finding it "significant that Tidewater's directors voted and voluntarily initiated an FCPA investigation and advised the federal government of their violations before the government even suspected any violations."[188]

In other matters, the parties to a shareholder derivative action against *Bio-Rad Laboratories, Inc.*, which disclosed potential FCPA violations in its annual report to the SEC last year, agreed to dismiss the case without prejudice and to toll the statute of limitations pending the resolution of ongoing Justice Department and SEC investigations.[189]

Alcoa, Inc. (Alcoa), the United States' largest aluminum producer, is reportedly in discussions to settle a private Racketeer Influenced and Corrupt Organizations (RICO) suit, as well as Justice Department and SEC investigations, based on allegations that the company paid millions of dollars in bribes.[190] In 2008, Alba, Bahrain's state-owned aluminum company, filed a US$1 billion RICO action against Alcoa that advanced allegations of bribery, which prompted the Justice Department to launch a criminal investigation. The RICO action was stayed for three years pending the criminal investigation, but when that stay was lifted in November 2011,[191] Alcoa moved to dismiss the complaint.

On June 11, 2012, a Pennsylvania federal district court rejected Alcoa's argument that the alleged RICO "enterprise" was foreign and that it therefore fell outside the reach of the RICO statute.[192] The court found the alleged conduct was sufficiently linked to Alcoa headquarters in Pittsburgh, Pennsylvania to sustain jurisdiction. The court also found the alleged conduct sufficiently particularized to state a claim against individual defendants. Since that ruling, Alcoa has recorded a US$45 million charge — which could expand to US$75 million — as a contingency for the FCPA-related matter.[193] Alcoa was able to obtain dismissal of an FCPA-related shareholder derivative claims lawsuit.[194]

GLOBAL ANTI-CORRUPTION UPDATE

Developments in the United Kingdom

In the first half of 2012, enforcement agencies in the United Kingdom continued developing policies to prevent, investigate, and prosecute foreign fraud and corruption. Recent Serious Fraud Office (SFO) and Financial Services Authority (FSA) actions appear to suggest that both agencies intend to play a role in the continuing fight against corruption. But the scope and efficacy of this role remains subject to debate. There have been few prosecutions under the United Kingdom's Bribery Act and instead, the SFO has taken a more collaborative approach, though the appointment of a new director for the SFO, David Green, may result in more aggressive prosecutions in the future.

David Green Becomes New SFO Director

On April 23, 2012, David Green QC succeeded Richard Alderman as director of the SFO.[195] He is a respected criminal barrister with 25 years of experience as both a prosecutor and defense counsel. In 2004, he became the first director of the Revenue and Customs Prosecutions Office (RCPO), which was established to prosecute tax, drug, money laundering, and import/export offenses. Green served as the RCPO's director for six years until, in 2010, the agency merged with the Crown Prosecution Service (CPS). Subsequently, Green became director of the CPS Central Fraud Group. A year later in 2011, Green returned to private practice before being appointed director of the SFO.[196] His appointment is for a four-year term.

Under Alderman, the SFO went through a steady shift toward more consensual methods of dealing with unlawful corporate conduct using self-reporting, plea negotiations, and civil settlements as alternatives to criminal prosecutions of corruption cases. Whether the SFO under Green's leadership will move away from settled outcomes toward more traditional methods of investigation and prosecution of corporate fraud remains to be seen. Such a shift would be in line with recommendations made in the report issued by the Organisation for Economic Co-operation and Development (OECD) Working Group on Bribery in International Transactions, discussed further below.

Green joined the SFO at a time when its resources are under severe pressure. The SFO has suffered budget cuts that may contribute to the lack of prosecutions under the Bribery Act.[197]

DPAs: A Possible New Enforcement Tool in the SFO's Arsenal

Solicitor General Edward Garnier QC recently announced the commencement of a consultation process regarding draft legislation authorizing the use of DPAs in the United Kingdom, which will be introduced in the next parliament.[198] According to the consultation paper, under a proposed DPA in the United Kingdom, "a prosecutor would lay but would not immediately proceed with criminal charges against a commercial organisation pending successful compliance with tough requirements such as financial penalties, restitution for victims, confiscation of the profits of wrongdoing and measures to prevent future offending."[199] The consultation paper identifies two "key principles" that DPAs will need to fulfill to be effective: transparency — "provid[ing] a process which encourages potential defendants to discuss 'without prejudice' and to ensure that the operation of justice is transparent to the public" — and consistency — "ensur[ing] both prosecutor and commercial organisation are working from common principles when entering into the DPA process, and [giving] both an indication of the likely package of terms, including a penalty, which a court would approve."[200]

Under the current system in the United Kingdom, after prosecutors negotiate plea agreements, the agreements must be reviewed in court. Judges have the discretion to accept or reject such agreements but, unlike in the United States, there is no role for prosecutors to weigh in on the discussion of sentencing. Companies that currently enter into plea agreements with the SFO do so with greater uncertainty as to whether the courts will accept those agreements in sentencing or that the admissions made will not later be used as evidence against them in a trial.

In support of DPAs, Garnier stated that encouraging companies to self-report allows prosecutors to better spend their resources elsewhere while allowing the government to bring more wrongdoers to justice. In his view, DPAs — which reportedly have Director Green's backing as well — would support this goal of using resources more effectively "on those cases where a prosecution is in the public interest."[201]

Update on Enforcement Actions in the United Kingdom

Mabey & Johnson: Moving Beyond Traditional Adversarial Approaches

On January 13, 2012, the SFO announced that it had obtained an Order for *Mabey Engineering Holdings Ltd.*, (Mabey), sole shareholder of *Mabey & Johnson* (M&J), to pay back over £130,000 (approximately US$160,000) in dividend payments it derived from contracts M&J won.[202] M&J had admitted to overseas corruption and breaching United Nations sanctions, and two of its former directors were convicted of making illegal payments in breach of United Nations sanctions. This is the first time the SFO has sought payments already distributed as dividends to investors. Moreover, Mabey was unaware of any illicit behavior by M&J, yet it was nonetheless forced to forfeit dividends it derived from its ownership of M&J.

The SFO's action potentially has broad implications. For example, investors in United Kingdom companies found to have violated the Bribery Act may be forced to pay back dividends derived from the United Kingdom companies, even if the investors are completely unaware of the United Kingdom companies' conduct. Though the SFO has not issued any guidance regarding the circumstances in which it will seek repayment from holding companies, Mabey's forfeiture serves as another reminder of the importance of conducting adequate due diligence and maintaining effective compliance programs at the subsidiary level.

Private Swiss Bank and Former Money-Laundering Reporting Officer Fined by FSA

On May 16, 2012, the FSA fined *Habib Bank AG Zurich* (Habib) £525,000 (approximately US$825,000) and its former money laundering reporting officer *Syed Itrat Hussain* (Hussain) £17,500 (approximately US$27,500), for failure to exercise reasonable care in establishing and maintaining adequate anti-money laundering (AML) systems and controls.[2032]

"Habib is a privately-owned Swiss bank with twelve branches in the United Kingdom [serving] approximately 15,500 customers."[204] The FSA's investigation revealed that during the three-year period between December 15, 2007 and November 15, 2010, Habib allegedly "failed to establish and maintain adequate controls for assessing the level of money laundering risk posed by its customers."[205] "In particular, Habib maintained a high-risk country list which excluded certain high-risk countries" in which it had offices.[206] Habib did not employ any measures to combat the high risks of money laundering that were presented. "Approximately 45% of [Habib's] customers were based outside the United Kingdom and about half of its deposits came from jurisdictions which … had less stringent AML requirements or were perceived to have higher levels of corruption than the United Kingdom," according to independent international organizations.[207] The FSA found that "Habib failed to conduct adequate enhanced due diligence for its higher risk customers."[208]

Hussain, Habib's former money-laundering reporting officer, was fined £17,500 for failing to ensure that Habib had adequate anti-money-laundering systems. According to the FSA, both Habib and Hussain received a 30% reduction in their penalties for early settlement. Without this reduction, the FSA reported that Habib and Hussain would have paid £750,000 and £25,000, respectively.[209]

Bruce Allan Hall Extradited from Australia

Bruce Allan Hall, an Australian national, was extradited and charged at Westminster Magistrates Court with corruption offenses relating to contracts for the supply of goods and services to a Bahraini company from 1998 to 2006.[210] Hall is alleged to have received bribes [while he was] an employee of *Aluminum Bahrain B.S.C.* (Alba), a smelting company in Bahrain, in connection with contracts to supply goods and services to Alba.[211] Hall is charged with conspiracy and substantive corruption counts under the Prevention of Corruption Act, and money laundering under the Proceeds of Crime Act, the predecessors of the Bribery Act which came into effect after the conduct at issue occurred.

Former Innospec CEO Pleads Guilty To Corruption

On June 11, 2012, the SFO announced that *Paul Jennings*, former CEO of *Innospec Limited* (Innospec), a British subsidiary of Innospec Inc., pled guilty to two counts of conspiracy to corrupt in a London court.[212] According to the SFO, Jennings gave or agreed 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 for the supply of Innospec products. The payments to Indonesia were made between February 14, 2002 and December 31, 2008, and the payments to Iraq were made between January 1, 2003 and January 31, 2008.[213] 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.[214]

The SFO reported that two other former senior executives, *Miltos Papachristos*, former Regional Sales Director for the Asia-Pacific region for Innospec, and *Dennis Kerrison*, former Innospec CEO, entered not guilty pleas for similar allegations.[215] Together, they are charged with one count of conspiring to corrupt for 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 Indonesian government for the supply of its products including Tetraethyl Lead by Innospec.[216] The payments were made between February 14, 2002 and December 31, 2008.[217]

Jennings's guilty plea is the third conviction in Innospec's long-running corruption investigation. *Ousama Naaman*, an Innospec agent in Iraq, pled guilty in the United States to conspiracy to violate and violating the FCPA and was sentenced to 30 months imprisonment.[218] Former Innospec Global Sales and Marketing Director *Dr. David Turner* pleaded guilty to conspiracy to corrupt charges in a London court in January 2012.[219] Turner is currently awaiting sentencing.

OECD Working Group Calls for Transparency

Although the United Kingdom has taken steps to increase enforcement of foreign bribery, concerns still remain about transparency as the SFO has been criticized for its emerging practice of settling cases behind closed doors. The OECD Working Group on Bribery issued a report on March 30, 2012, regarding the United Kingdom's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Report).[220] The OECD Report commends the United Kingdom for the "significant increase" in its enforcement activity. Despite the increased enforcement activity, however, the Report outlines a number of concerns regarding transparency in bribery cases.[221]

In its Report, the OECD states that the SFO is not providing enough information about civil settlements and that in some cases it was "unclear" how the SFO and defendants "arrived at" the agreed penalty amount.[222] The Working Group is concerned that, in order "to settle foreign bribery cases, United Kingdom authorities are increasingly relying on civil recovery orders which require less judicial oversight and are less transparent than criminal plea agreements."[223] With less information made publicly available by authorities in settlements, the OECD believes that the United Kingdom deprives the public of the details necessary to assess whether the sanctions imposed "are effective, proportionate, and dissuasive,"[224] and misses an opportunity to provide guidance on, and raise public awareness of, foreign bribery-related issues.

The OECD Report recommends that authorities should publicly disclose information relating to civil settlements of foreign bribery cases, including detailed information of all the key facts, as well as disclosure of the court documents and the settlement agreement itself. If DPAs become a new United Kingdom enforcement tool, these agreements may contain the detail the OECD's Report recommends.[225] In March, Alderman said that transparency is an important issue and that "the resolution of the case will need to be in open court. … The facts are going to need to be explained in detail in open court and documents placed on websites. The judge will need to give a judgment so that the public can see what has happened and can see that the judge has agreed to the proposals."[226]

In addition, the OECD Report recommends that the United Kingdom avoid confidentiality agreements with defendants that prevent the disclosure of settlement information. Although confidentiality agreements encourage the resolution of investigations, their usefulness as a deterrent for future conduct is minimized. The OECD Report recommends that the United Kingdom clarify the meaning of "reasonable and proportionate" hospitality and promotional expenditures and that the United Kingdom move towards "zero tolerance" of facilitation payments, which are not exempt under the Bribery Act.[227]

It remains to be seen whether the United Kingdom will implement all of the recommendations, as there are still unimplemented recommendations of the OECD Working Group dating back to 2005 and 2008.

Survey Finds United Kingdom Bribery Act Foreign to United Kingdom Middle Managers

The OECD's observation that the United Kingdom should seek opportunities to raise awareness of foreign bribery related issues finds additional support in a report released by the Fraud, Investigations and Disputes Services Team at Ernst & Young. Its survey of 1,000 middle managers revealed that only 28% of middle managers in the United Kingdom have heard of the Bribery Act, meaning the vast majority — 72% of middle managers who participated in the survey — have not. Moreover, of the 28%, only 55% felt they had received adequate training on the Act.[228] John Smart, partner at Ernst & Young, suggests that the lack of any reported cases may have given organizations a false sense of security, with some either underestimating their exposure to bribery risks, others failing to see any urgency in ensuring their organizations are compliant, or others not feeling sufficiently educated to offer their staff guidance.[229]

China Opens Access to a Centralized Database of Bribery Convictions

We discussed in our last newsletter the Chinese government's amendment of its criminal laws, effective May 1, 2011, to make it a criminal offense for Chinese nationals and companies to bribe officials of foreign governments or international public organizations.[230] In February 2012, China's Supreme People's Procuratorate (SPP) took another step in the fight against corruption. The SPP, in partnership with other Chinese agencies, announced that, with respect to individual and corporate convictions, it was "opening access to its centralized database of bribery convictions."[231] Businesses operating in China now have a new avenue to check companies and/or individuals with whom they do business for prior bribery convictions, in one centralized database, rather than checking databases in individual provinces. The SPP will also disqualify anyone in its database of bribery convictions from bidding on government projects.

Russia Accedes to OECD Convention Against Bribery

According to Transparency International, Russia ranks as one of the most corrupt countries in the world.[232] However, Russia has taken significant steps toward the adoption of global anti-corruption standards. In May 2011, Russia enacted a law outlawing foreign bribery and giving prosecutors the authority to seek large fines for bribery and corruption.[233] As a result, the OECD invited Russia to join its Convention Against Bribery, and on April 17, 2012, Russia became the 39th nation to accede to the Convention.[234]

The OECD is now conducting systematic reviews of Russia's implementation of anti-bribery laws. These evaluations are part of the process for Russia to gain full admission to the OECD.[235] Russia received its first evaluation in March 2012, with the OECD recommending that Russia (i) "clearly criminalizes offering or promising a bribe, not just the actual payment of one," (ii) cover third parties under the bribery offense, and (iii) implement measures to allow for seizure of illicit assets.[236]

Whether this rhetoric translates into real changes to the culture of corruption in Russia remains to be seen. Vladimir Putin — whose record on corruption has recently drawn the ire of many Russian protesters — returns to the presidency this year, succeeding former President Dmitri Medvedev, who championed several anti-corruption initiates that even he admitted produced "little success."[237] However, the need to quell civil unrest and attract more international investment may cause Putin to implement meaningful reform.

Brazil: Postponement of the Clean Company Act

In 2010, with Brazil awarded the honor of hosting the 2014 FIFA World Cup, the Executive branch of the Brazilian government proposed Legal Project No. 6.826 in an attempt to bring Brazil into compliance with its obligations under the OECD Bribery Convention. Brazil's current anti-corruption law penalizes businesses that engage in corrupt activity only by requiring them to register on a list of ineligible companies, which impedes a company from participating in public bids or entering into government contracts; it does not impose criminal liability on companies for corrupt activities taken by its employees.[238] Legal Project No. 6.826 seeks to expand the basis for corporate liability and to greatly increase penalties for corruption. If the proposed legislation is enacted, businesses may be held liable for the acts of their employees and agents as well as for the corrupt acts of companies they acquire.[239] These new bases for liability would carry much stiffer penalties, including possible fines of up to 20% of the offending company's gross revenue, prohibition on borrowing from public banks, recession of government contracts, and even a suspension of activity in Brazil.[240] At the same time, the law would "establish credit for voluntary disclosure, cooperation, and compliance programs."[241]

Some members of the private sector are resisting the legislation, focusing on the proposed imposition of strict and successor liability for companies as well as the heavy fines such liability carries. In fact, seven of the thirty-five amendments proposed to the bill seek to exclude strict liability for corporations.[242] The committee rejected all of these amendments and is now in consultation with the Executive regarding the legislation, but has yet to produce a final version of the bill.[243] A failure to reach consensus may result in remission of the bill to the full House of Representatives for a vote, a process that could terminate the proposal or delay its adoption until after the OECD's 2014 working group evaluations, thereby derailing the Executive's efforts to bring Brazil into compliance with its OECD Bribery Convention obligations.[244]

DEBATE REGARDING FCPA REFORM CONTINUES IN ADVANCE OF ANTICIPATED GUIDANCE FROM THE JUSTICE DEPARTMENT

On November 8, 2011, Assistant Attorney General Lanny Breuer announced that in 2012 the Justice Department "expect[s] to release detailed new guidance on the [FCPA's] criminal and civil enforcement provisions."[245] Although that guidance has yet to be released, on February 21, 2012, the US Chamber of Commerce's Institute for Legal Reform (the Institute), along with other business associations, wrote to the Justice Department and the SEC to request that the forthcoming guidance address several issues of concern to the business community.[246]

The Institute's Request for Guidance

In its February 21, 2012 letter to the Justice Department and the SEC, the Institute requested guidance from the government regarding the following issues:

Definitions of "Foreign Official" and "Instrumentality." The FCPA does not provide a definition of the term "instrumentality" — which, as noted above, is the subject of the Esquenazi and Rodriguez appeals — and it is currently unclear what types of entities are instrumentalities of a foreign government such that their employees are considered foreign officials under the Act. In place of the fact-specific approach currently used by courts, the Institute requests that the forthcoming guidance address the meanings of "instrumentality" and "foreign official" by:

1. "identify[ing] the percentage ownership or level of control by a foreign government that ordinarily will qualify a corporation as an 'instrumentality.'" The Institute states that "majority ownership or control of a voting majority of outstanding shares [are] appropriate thresholds," consistent with OECD anti-bribery principles;

2. establishing that, for a company to be considered an "instrumentality," the company "typically must perform governmental or quasi-governmental functions"; and

3. identifying relevant exceptions to these definitions, such as for highly attenuated majority ownership (*e.g.*, with certain sovereign wealth funds) and for individuals who work only part-time for a government entity.[247]

Consideration of Compliance Programs in Enforcement Decisions. The Institute requests that the guidance address specific standards for, and components of, an effective FCPA compliance program that would merit favorable consideration in enforcement decisions. The guidance should also describe how voluntary disclosures factor into enforcement decisions.[248]

Parent-Subsidiary Liability. "The FCPA does not set forth [the] circumstances when a parent may be held liable for a foreign subsidiary's violations of the anti-bribery provisions of the FCPA." The Institute requests that "the guidance clarify and confirm that both the Department and the SEC consider parent company liability under the FCPA's anti-bribery provision to extend only to circumstances in which the parent actually authorized, directed or controlled the improper activity of its subsidiary."[249]

Successor Liability. "The Institute requests that the guidance clarify that the Justice Department and SEC "ordinarily will not pursue an enforcement action against a company for pre-acquisition violations by an acquiree" or that, at the very least, reasonable due diligence protects an acquiring company from liability for an acquiree's pre-acquisition conduct. In the Institute's view, the Justice Department's current Opinion Release on post-acquisition due diligence, which it believes requires "the company in question to conduct diligence on a scale equivalent to a massive internal investigation," is "unrealistic and unduly punitive."[250]

***De Minimis* Gifts and Hospitality.** "The Institute requests that the guidance clarify that the Justice Department and SEC "ordinarily will not pursue an enforcement action against a company for pre-acquisition violations by an acquiree" or that, at the very least, reasonable due diligence protects an acquiring company from liability for an acquiree's pre-acquisition conduct. In the Institute's view, the Justice Department's current Opinion Release on post-acquisition due diligence, which it believes requires "the company in question to conduct diligence on a scale equivalent to a massive internal investigation," is "unrealistic and unduly punitive."[251]

***Mens Rea* Standard for Corporate Criminal Liability.** Individual liability under the FCPA's anti-bribery provisions requires willful conduct, but the FCPA "does not contain similar language with regard to corporate liability." The Institute requests that the Justice Department clarify whether, in the Justice Department's view, corporations may be criminally sanctioned without a showing of knowledge of willful misconduct.[252]

Declination Decisions. The Institute requests that the Justice Department publicly provide information about its decisions to close FCPA-related investigations without taking enforcement action, particularly where a "decision is based on the robustness of a company's compliance program."[253]

Other Recurring Issues. The Institute also identified several other recurring issues that it recommended the Justice Department's guidance address:

- best practices and expected prophylactic measures with regard to business relationships with relatives of foreign officials;
- corporate donations to charities that have connections with foreign governments; and
- apprentice programs or secondment arrangements in which employees work for a foreign customer in which a foreign government holds an interest.[254]

Following the letter, on April 11, 2012, Breuer, SEC Director of Enforcement Robert Khuzami, and Commerce Department General Counsel Cameron Kerry met business groups and trade associations at a roundtable hosted by the Chamber of Commerce's Institute of Legal Reform.[255]

Response to the Institute's Request

In a letter dated May 16, 2012, a group consisting of Global Financial Integrity, Open Society Foundations, EarthRights International, Global Witness, International Corporate Accountability Roundtable, and the Director of the Human Rights Litigation Clinic at the University of Minnesota Law School expressed its views regarding the upcoming guidance and responded to the February 21, 2012 letter from the Institute.[256] The group's letter generally opposed the recommendations set forth by the Institute, arguing that:

- A percentage of ownership test for determining what type of entity constitutes an instrumentality of a foreign government is unwise, noting that it is frequently difficult to determine ownership of foreign companies. The group notes instead that "'[i]nstrumentality' refers to a function, not a particular legal structure. If a company or agency acts as an instrument of government policy and is effectively controlled by the government, then it is an instrumentality, regardless of its percentage ownership."[257]
- There currently exists sufficient clarity on the steps a company needs to take to enact an effective compliance program, including from the Good Practice Guidelines issued by the OECD. The group also argues that there should not be an affirmative defense for companies with compliance programs because every company should have a compliance program.
- Additional guidance is not needed with respect to parent-subsidiary liability, noting that the group is unaware of any action taken by the Justice Department where a parent company was ignorant of the conduct of its foreign subsidiary (though the group also argues that parents should not escape liability through willful blindness). Additional guidance with regard to successor liability should reinforce the need for due diligence.
- A blanket monetary exception for *de minimis* gifts set at a numerical threshold would be inappropriate because such a threshold would make it difficult for companies to resist requests for bribes below the threshold amount and because what constitutes a *de minimis* gift varies by country.
- A willfulness requirement is not necessary for corporations, who act through individuals for whom the requisite intent must be found.

The Impact of the Walmart Allegations on the Institute's Efforts

Whatever momentum the Institute's efforts may have has come to a halt, however, following the New York Times' report regarding Wal-Mart de Mexico discussed above. Indeed, as part of their ongoing investigation of Walmart, Congressmen Cummings and Waxman have called into question the lobbying efforts undertaken by the Institute and the Retail Industry Leaders Association (Association) to, in the Congressmen's words, "weaken" the FCPA, given the participation of the targets of FCPA enforcement actions, including Walmart, in both the Institute and the Association.

With respect to the Institute, in a letter dated May 22, 2012, the Congressmen contend that an analysis performed by their staff "reveals that 14 out of 55" Institute "board members were affiliated with companies that were reportedly under investigation for violations or had settled allegations of potential violations to the FCPA"[258] The Congressmen cite, for example, Johnson & Johnson's and Pfizer's participation in the Institute's efforts, noting both companies settled FCPA charges in 2011. The Congressmen express concern about what they perceive to be apparent conflicts of interest, and request additional information regarding, among other items, FCPA investigations involving board members of either the Chamber of Commerce or the Institute and companies that provided funding to the Chamber or the Institute.

With respect to the Association, in a letter also dated May 22, 2012, the Congressmen note that at least five Walmart executives, including Eduardo Castro-Wright and Michael T. Duke, served on the Association's Board and ask the Association to explain what roles the individuals may have played with respect to the Associations' positions on the FCPA.[259]

Congressmen Cummings' and Waxman's investigation is emblematic of the shifting tide in the debate regarding FCPA reform. Even if not substantiated, the sensational allegations Walmart is facing have brought to a halt the momentum that the Chamber of Commerce was able to develop, and they may well embolden the government agencies charged with enforcing the FCPA.

CONCLUSION

Notwithstanding several high-profile defeats suffered by the Justice Department in the first half of 2012, the scrutiny that Walmart now faces as a result of its alleged bribery of Mexican government officials makes it unmistakably clear that anti-corruption enforcement will remain a priority. In the face of continued focus on FCPA enforcement by the Justice Department and the SEC, as well as an increasing global anti-corruption environment, companies are well advised to ensure 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. This lesson was reinforced prominently in the first half of 2012 by the government's decision not to pursue enforcement actions against Morgan Stanley, and to focus instead on the supposedly "rogue" employee Garth Peterson.[260]

Endnotes

1 Press Release, Justice Dep't, Twenty-Two Executives and Employees of Military and Law Enforcement Products

Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), *available at* http://www.justice.gov/opa/pr/2010/January/10-crm-048.html.

2 *See* Government's Motion to Dismiss Pursuant to Fed. R. Crim. P. 48(a), *United States v. Goncalves*, No. 09-CR-00335 (D.D.C. Feb. 21, 2012), Dkt. Entry No. 629 [hereinafter *Goncalves* Motion to Dismiss]; Government's Unopposed Motion to Dismiss Pursuant to Fed. R. Crim. P. 48(a), *United States v. Goncalves*, No. 09-CR-00335 (D.D.C. Mar. 27, 2012), Dkt. Entry No. 693 [hereinafter *Goncalves* Unopposed Motion to Dismiss].

3 Arnold & Porter LLP, FCPA & Global Anti-Corruption Insights (Winter 2012), at 10-13[hereinafter A&P Winter 2012 FCPA Newsletter], *available at* http://www.arnoldporter.com/public_document.cfm?&id=18475&key=12F3.

4 *See* Defendant Pankesh Patel's Opposition to Government's Motion To Preclude Certain Evidence, Impeachment and Arguments at 1, 2, *United States v. Goncalves*, No. 90-CR-00335 (D.D.C. May 12, 2011), Dkt. Entry No. 365.

5 Del Quentin Wilbur, *Racy, vulgar texts hurt Justice Department's largest sting operation targeting foreign bribery*, Wash. Post (Feb. 13, 2012), *available at* http://www.washingtonpost.com/local/crime/racy-vulgar-texts-hurt-justice-departments-largest-sting-operation-targeting-foreign-bribery/2012/02/02/gIQAJZYtBR_story.html.

6 *See* Minute Entry, *United States v. Goncalves*, No. 09-CR-00335 (D.D.C. Mar. 1, 2011) (Alvirez guilty plea); Minute Entry, *United States v. Goncalves*, No. 09-CR-00335 (D.D.C. Mar. 29, 2011) (Spiller guilty plea); Minute Entry, *United States v. Goncalves*, No. 09-CR-00335 (D.D.C. Apr. 28, 2011) (Geri guilty plea).

7 *See* Minute Entry, *United States v. Goncalves*, No. 09-CR-00335 (D.D.C. July 7, 2010).

8 *See* Minute Entry Granting Judgment of Acquittal, *United States v. Goncalves*, No. 09-CR-00335 (D.D.C. Dec. 22, 2011).

9 *See* Minute Entry, United *United States v. Goncalves*, No. 09-CR-00335 (D.D.C. Jan. 30, 2012) (Caldwell and Godsey verdict); Minute Entry, *United States v. Goncalves*, No. 09-CR-00335 (D.D.C. Jan. 31, 2012) (Mushriqui and Morales mistrial).

10 *A Guest Post from the Africa Sting Jury Foreman*, FCPA Professor (Feb. 6, 2012), *available at* http://www.fcpaprofessor.com/a-guest-post-from-the-africa-sting-jury-foreman.

11 *Goncalves* Motion to Dismiss at 1, *supra* note 2.

12 *See* Order, *United States v. Goncalves*, No. 09-CR-00335 (D.D.C. Feb. 24, 2012), Dkt. Entry No. 632.

13 Leslie Wayne, *Bribery Case Falls Apart, and Tactics Are Doubted*, N.Y. Times (Feb. 23, 2012), *available at* http://www.nytimes.com/2012/02/24/business/fbi-bribery-case-falls-apart-and-raises-questions.html?_r=1&pagewanted=all.

14 *Goncalves* Unopposed Motion to Dismiss, *supra* note 2.

15 Order, *United States v. Geri*, No. 09-CR-00335 (D.D.C. Mar. 30, 2012), Dkt. Entry No. 694; Order, *United States v. Spiller*, No. 09-CR-00335 (D.D.C. Mar. 30, 2012), Dkt. Entry No. 695; Order, *United States v. Alvirez*, No. 09-CR-00335 (D.D.C. Mar. 30, 2012), Dkt. Entry No. 696.

16 Wayne, *supra* note 13 (quoting Justice Department spokesperson Laura Sweeney).

17 Order on Acquittal, *United States v. O'Shea*, No. 4:09-CR-00629 (S.D. Tex. Jan. 16, 2012), Dkt. Entry No. 179 [hereinafter *O'Shea* Acquittal Order].

18 Final Dismissal, *United States v. O'Shea*, No. 4:09-CR-00629 (S.D. Tex. Nov. 16, 2011), Dkt. Entry No. 191.

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

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

21 *See* Judgment in Criminal Case, *United States v. Basurto*, No. 4:09-CR-00325 (S.D. Tex. Apr. 5, 2012), Dkt. Entry No. 76.

22 *O'Shea* Acquittal Order, *supra* note 17.

23 *See* C.M. Matthews, *Cooperator In Failed Bribery Case Sentenced To Time Served*, Wall St. J. (Apr. 6, 2012), *available at* http://blogs.wsj.com/corruption-currents/2012/04/06/cooperator-in-failed-bribery-case-sentenced-to-time-served/.

24 Motion to Dismiss Remaining Counts of Indictment at 1, *United States v. O'Shea*, No. 4:09-CR-00629 (S.D. Tex. Feb. 9, 2012), Dkt. Entry No. 190.

25 *O'Shea* Acquittal Order, *supra* note 17.

26 Government's Motion for Voluntarily Dismissal of Appeal, *United States v. Aguilar Noriega*, Case 11-50507 (9th Cir.

May 25, 2012); *see also* Order re Application To Vacate Defendant Angela Maria Gomez Aguilar's Conviction, *United States v. Aguilar Noriega*, Case No. 10-01031 (C.D. Cal. June 1, 2012) (vacating the conviction of a third defendant, *Angela Maria Gomez Aguilar*, who was convicted for conspiracy to commit money laundering).

27 David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. Times (Apr. 21, 2012), *available at* http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html.

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

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

34 Letter from Representatives Elijah Cummings and Henry Waxman to Michael Duke (Apr. 23, 2012), *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Letter_Walmart_04.23.12.pdf.

35 Letter from Representatives Elijah Cummings and Henry Waxman to Thomas J. Donohue (Apr. 25, 2012), *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Letter_Donohue_04.25.12.pdf.

36 Letter from Representatives Elijah Cummings and Henry Waxman to Gregg Steinhafel (Apr. 25, 2012), *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Letter_Steinhafel_04.25.12.pdf.

37 Letter from Representatives Elijah Cummings and Henry Waxman to Michael Duke (May 17, 2012), *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Letter_Walmart_05.17.12.pdf.

38 Letter from Representatives Elijah Cummings and Henry Waxman to Michael Duke (May 17, 2012), *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Letter_Walmart_06.12.12_0.pdf.

39 *See, e.g.*, Verified Shareholder Derivative Complaint, *Cal. State Teachers' Ret. Sys. v. Alvarez*, Case No. 7490 (Del. Ch. May 3, 2012).

40 *See City of Pontiac Gen. Employees' Ret. Sys. v. Wal-Mart Stores, Inc.*, Case 3:12-cv-00457 (M.D. Tenn. May 7, 2012), Dkt. Entry No. 1.

41 Stephanie Clifford, *The Annual Shareholders' Meeting for Wal-Mart, Like Its Stock, Is Buoyant*, N.Y. Times (June 1, 2012), *available at* http://www.nytimes.com/2012/06/02/business/wal-mart-board-challenges-rebuffed.html.

42 Press Release, John C. Liu, NYC Comptroller Liu, Pension Funds to Vote against Five Wal-Mart Directors (May 1, 2012), *available at* http://www.comptroller.nyc.gov/press/2012_releases/pr12-04-044.shtm.

43 Anne D'Innocenzio, *2 key proxy firms urge shareholders oppose CEO*, Associated Press (May 21, 2012), *available at* http://www.usnews.com/news/business/articles/2012/05/21/2-key-proxy-firms-urge-shareholders-oppose-ceo.

44 Press Release, CaLSTRS, CalSTRS to Vote 5.3 Million Shares Against Entire Wal-Mart Board (May 22, 2012), *available at* http://www.calstrs.com/Newsroom/2012/news052212.aspx.

45 *See* Elisabeth Malkin, *Attorney General in Mexico Will Investigate Wal-Mart*, N.Y. Times (Apr. 26, 2012), *available at* http://www.nytimes.com/2012/04/27/business/global/attorney-general-in-mexico-to-investigate-wal-mart.html.

46 *See id.*

47 Press Release, Walmart, Updated Walmart Statement in Response to Recent New York Times Article About Compliance with the U.S. Foreign Corrupt Practices Act (Apr. 24, 2012), *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTM2NzEyfENoaWxkSUQ9LTF8VHlwZT0z&t=1; *see also* Jessica Wohl, *Wal-Mart reveals lawyers, accountants on FCPA issues*, Reuters (Apr. 25, 2012), *available at* http://www.reuters.com/article/2012/04/25/us-walmart-idUSBRE83O0R520120425.

48 Wal-Mart Stores, Inc., Current Report (Form 8-K) (May 17, 2012), *available at* http://investors.walmartstores.com/phoenix.zhtml?c=112761&p=irol-sec#8198557.

49 *Id.* at 2

50 *Id.* at 2-3.

51 *See, e.g.*, Matthew Feeley, *From the Experts: Complying with the FCPA, Staying Competitive in China*, law.com (Jan. 11, 2012), *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202537958639.

52 *See* Transparency International, *Corruption Perceptions Index 2011*, *available at* http://cpi.transparency.org/cpi2011/results/.

53 Press Release, Justice Dep't, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), *available at* http://www.justice.gov/opa/pr/2012/April/12-crm-534.html [hereinafter Peterson DOJ Press Release]; *see also* Information, *United States v. Peterson*, Cr. No. 12-224 (E.D.N.Y. Apr. 25, 2012), Dkt. Entry No. 7.

54 Press Release, SEC, SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud (Apr. 25, 2012), *available at* http://www.sec.gov/news/press/2012/2012-78.htm [hereinafter Peterson SEC Press Release]; *see also* Final Judgment as to Defendant Garth Peterson, *United States v. Peterson*, CV 12-2033, CR 12-224 (E.D.N.Y. May 3, 2012), Dkt. Entry No. 10 [hereinafter Peterson Final Judgment].

55 *See* Peterson SEC Press Release, *supra* note 54.

56 *Id.*

57 *Id.*

58 *Id.*

59 Peterson Final Judgment, *supra* note 54.

60 Memorandum & Order on Plea & Proposed Settlement Agreement, *United States v. Peterson*, Cr. No. 12-224 (E.D.N.Y. Apr. 25, 2012), Dkt. Entry No. 5.

61 Peterson DOJ Press Release, *supra* note 53.

62 *Id.*

63 *Id.*

64 Peterson SEC Press Release, *supra* note 54.

65 Aruna Viswanatha, *Exclusive: SEC probes movie studios over dealings in China*, Reuters (Apr. 24, 2012), *available at* http://www.reuters.com/article/2012/04/24/us-sec-movies-idUSBRE83N15V20120424 [hereinafter Viswanatha Reuters Article]; *see also* Edward Wyatt, Michael Cieply, and Brooks Barnes, *S.E.C. Asks if Hollywood Paid Bribes in China*, N.Y. Times (Apr. 24, 2012), *available at* http://www.nytimes.com/2012/04/25/business/global/sec-asks-if-hollywood-paid-bribes-in-china.html.

66 Viswanatha Reuters Article, *supra* note 65.

67 W.W. Grainger Inc., Annual Report (Form 10-K), at 73 (Feb. 28, 2012), *available at* http://sec.gov/Archives/edgar/data/277135/000027713512000008/gww20111231-10k.htm.

68 The Dun and Bradstreet Corp., Quarterly Report (Form 10-Q), at 56 (Mar. 31, 2012), *available at* http://www.sec.gov/Archives/edgar/data/1115222/000119312512218505/d334013d10q.htm [hereinafter D&B March 2012 10-Q]; The Dun and Bradstreet Corp., Quarterly Report (Form 10-Q), at 37-38 (May 8, 2012), *available at* http://files.shareholder.com/downloads/DNB/1881847914x0xS1193125-12-218505/1115222/filing.pdf.

69 D&B March 2012 10-Q, *supra* note 68, at 56-57.

70 SL Industries, Inc., Annual Report (Form 10-K), at 12 (Mar. 30, 2012), *available at* http://b2i.api.edgar-online.com/EFX_dll/EdgarPro.dll?FetchFilingConvPDF1?SessionID=tzIdFvRZSe_FZ-9&ID=8517994.

71 Press Release, Justice Dep't, Two Former Executives of California Valve Company Plead Guilty to Foreign Bribery Offenses (Apr. 17, 2012), *available at* http://www.justice.gov/opa/pr/2012/April/12-crm-485.html.

72 *Id.*

73 *Id.*

74 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.

75 *Id.*

76 Press Release, Justice Dep't, Former Head of Worldwide Sales at California Valve Company Pleads Guilty to Foreign Bribery Offense (May 29, 2012), *available at* http://www.justice.gov/opa/pr/2012/May/12-crt-682.html.

77 *See id.*

78 *See* Plea Agreement For Defendant David Edmonds, *United States v. Carson*, No. 8:09-CR-00077 (C.D. Cal. May 8, 2012), Dkt. Entry 827.

79 Order Denying Defendants' Motion to Suppress, *United States v. Carson*, No. 09-cr-00077-JVS (C.D. Cal. May 22, 2012), Dkt. Entry 774.

80 *Id.* at 7.

81 Press Release, Justice Dep't, Italian Executive of California Valve Company Pleads Guilty to Foreign Bribery Offenses (Apr. 29, 2011) (Ricotti), *available at* http://www.justice.gov/opa/pr/2011/April/11-crm-545.html; Press Release, Justice Dep't, Former Executive at California Valve Company Pleads Guilty to Bribing Foreign Government Officials (Jan. 8, 2009) (Covino), *available at* http://www.justice.gov/opa/pr/2009/January/09-crm-016.html; Press Release, Justice Dep't, Former Finance Director of California Valve Company Pleads Guilty to Bribing Foreign Government Officials (Feb. 3, 2009) (Morlok), *available at* http://www.justice.gov/opa/pr/2009/February/09-crm-089.html.

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

83 Amanda Bronstad, *Guilty Pleas to Bribing Overseas Officials*, Nat'l L.J. (Apr. 19, 2012), *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1334529157986&Guilty_Pleas_to_Bribing_Overseas_Officials.

84 Criminal Minutes of Order Re Select Jury Instructions, *United States v. Carson*, No. 09-cr-00077-JVS (C.D. Cal. Feb. 16, 2012), Dkt. Entry No. 549 [hereinafter *Carson* Jury Instruction Order].

85 *Id.* at 3.

86 *United States v. Carson*, No. 8:09-cr-00077-JVS, 2011 WL 5101701, at *4 (C.D. Cal. May 18, 2011).

87 *United States v. Aguilar*, 783 F. Supp. 2d 1108 (C.D. Cal. 2011); *see also* Jury Instructions, *United States v. Noreiga*, No. CR10-1031-AHM (C.D. Cal. May 16, 2011), Dkt. Entry. No. 511.

88 *Carson* Jury Instruction Order, *supra* note 84.

89 *Id.* at 11.

90 Second Superseding Indictment, *United States v. Cruz*, 1:09-CR-21010 (S.D. Fla. Jan. 19, 2012), Dkt. Entry 685.

91 *Id.*

92 Press Release, Justice Dep't, Former Haitian Government Official Convicted in Miami for Role in Scheme to Launder Bribes Paid by Telecommunications Companies (Mar. 13, 2012), *available at* http://www.justice.gov/opa/pr/2012/March/12-crm-310.html [hereinafter Haiti Teleco Press Release].

93 Minute Entry re: Change of Plea, *United States v. Joseph*, 1:09-CR-21010 (S.D. Fla. Jan. 19, 2012), Dkt. Entry 705.

94 Judgment as to Patrick Joseph, *United States v. Joseph*, No. 1:09 Cr. 21010 (S.D. Fla. July 9, 2012), Dkt. Entry No. 845; *see also* Plea Agreement, *United States v. Joseph*, No. 1:09 Cr. 21010 (S.D. Fla. Feb. 8, 2012), Dkt. Entry No. 706.

95 *See* Minute Entry re: Judgment and Sentencing, *United States v. Esquenazi*, No. 1:09 Cr. 21010 (S.D. Fla. May 21, 2012), Dkt. Entry No. 814; Order for Entry of Forfeiture, *United States v. Duperval*, No. 1:09 Cr. 21010 (S.D. Fla. May 21, 2012), Dkt. Entry No. 815.

96 *See* Notice of Appeal, *United States v. Esquenazi*, Case No. 09-CR-21010-JEM (S.D. Fla. June 1, 2012), Dkt. Entry No. 826.

97 *See* United States' Motion for Reduction of Sentence Pursuant to Fed. R. Crim. Pro. 35, *United States v. Antoine*, Case No. 09-CR-21010 (S.D. Fla. Dec. 8, 2009), Dkt. Entry No. 797; *see also* Samuel Rubenfeld, *Prosecutors Move To Reduce Former Haitian Official's Sentence*, Wall St. J. (Apr. 11, 2012), *available at* http://blogs.wsj.com/corruption-currents/2012/04/11/prosecutors-move-to-reduce-former-haitian-officials-sentence/.

98 *See* Amended Judgment in a Criminal Case, *United States v. Antoine*, Case No. 09-CR-21010 (S.D. Fla. May 29, 2012), Dkt. Entry No. 824.

99 *See* Brief of Appellant, *United States v. Esquenazi*, Case No. 11-15331 (11th Cir. May 9, 2012); Corrected Initial Brief of Appellant, *United States v. Rodriguez*, Case No. 11-15331 (11th Cir. May 11, 2012).

100 15 U.S.C. § 78dd-1(f)(1)(A).

101 Minute Entry, *United States v. Granados*, Case No. 1:10CR20881 (S.D. Fla. Apr. 19, 2012), Dkt. Entry No. 111; *see* also Judgment in a Criminal Case, *United States v. Caceres*, Case No. 1:10CR20881 (S.D. Fla. Apr. 25, 2012),

Dkt. Entry No. 112.

102 Government's Motion for Downward Departure Pursuant to Section 5K1.1 of the US Sentencing Guidelines and 18 U.S.C. § 3553(a) at 2, *United States v. Caceres*, Case No. 1:10CR20881 (S.D. Fla. Apr. 19, 2012), Dkt. Entry No. 96.

103 Judgment in a Criminal Case, *United States v. Vasquez*, Case No. 1:10CR20894 (S.D. Fla. Apr. 25, 2012), Dkt. Entry No. 52.

104 Statement of Offense, *United States v. Vasquez*, Case No. 1:10CR20894 (S.D. Fla. Jan. 21, 2011), Dkt. Entry No. 18.

105 Judgment in a Criminal Case, *United States v. Salvoch*, No. 10-CR-20893 (S.D. Fla. June 8, 2012), Dkt. Entry No. 62.

106 Plea Agreement, *United States v. Salvoch*, No. 10-CR-20893 (S.D. Fla. Jan. 12, 2011), Dkt. Entry No. 22.

107 Press Release, SEC, SEC Charges Smith & Nephew PLC with Foreign Bribery (Feb. 6, 2012), *available at* http://www.sec.gov/news/press/2012/2012-25.htm.

108 *See* Information, *United States v. Smith & Nephew Inc.*, No. 1:12-cr-00030 (D.D.C. Feb. 6, 2012), Dkt. Entry No. 1 [hereinafter Smith & Nephew Info.]; Letter from Justice Department to Paul Gerlach & Angela Burgess, *United States v. Smith & Nephew Inc.*, No. 1:12-cr-00030 (D.D.C. Feb. 15, 2012), Dkt. Entry No. 3.1 [hereinafter Smith & Nephew DPA]; Press Release, Justice Dep't, Medical Device Company Smith & Nephew Resolves Foreign Corrupt Practices Act Investigation (Feb. 6, 2012), *available at:* http://www.justice.gov/opa/pr/2012/February/12-crm-166.html.

109 Smith & Nephew Info., *supra* note 108, at 5.

110 Smith & Nephew DPA, *supra* note 108, at 5.

111 *See* SEC Charges Smith & Nephew PLC with Foreign Bribery, Litigation Release No. 22252 (Feb. 6, 2012), *available at* http://www.sec.gov/litigation/litreleases/2012/lr22252.htm [hereinafter S&N plc Litigation Release].

112 Smith & Nephew DPA, *supra* note 108, at 6-7.

113 S&N plc Litigation Release, *supra* note 111.

114 *See* Press Release, Justice Dep't, Third Medical Device Company Resolves Foreign Corrupt Practices Act Investigation (Mar. 26, 2012), *available at* http://www.justice.gov/opa/pr/2012/March/12-crm-373.html.

115 *See* Information, *United States v. Biomet, Inc.*, No. 12-cr-00080 (D.D.C. Mar. 26, 2012), Dkt. Entry No. 1.

116 *See id.* at 6-12.

117 *See id.* at 12.

118 Press Release, SEC, SEC Charges Medical Device Company Biomet with Foreign Bribery (Mar. 26, 2012), *available at* http://www.sec.gov/news/press/2012/2012-50.htm

119 *See* Press Release, Justice Dep't, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009), *available at* http://www.justice.gov/opa/pr/2009/February/09-crm-112.html. Other participants of the TSKJ joint venture have also settled FCPA charges against them. Technip agreed to pay a $240 million criminal penalty and $98 million in disgorgement on June 28, 2010 to resolve enforcement actions brought by the Justice Department and SEC. Ten days later, on July 7, 2010, Snamprogetti and its parent *Eni SpA* agreed to pay a $240 million criminal penalty and $125 million in disgorgement to resolve enforcement actions brought by the agencies. On April 11, 2011, JGC agreed to pay a $218.8 million criminal penalty to resolve an enforcement action brought by the Justice Department.

120 *See* Press Release, Justice Dep't, Former Chairman and CEO of Kellogg, Brown & Root Inc. Sentenced to 30 Months in Prison for Foreign Bribery and Kickback Schemes (Feb. 23, 2012), *available at* http://www.justice.gov/opa/pr/2012/February/12-crm-249.html.

121 Minute Entry, *United States v. Tesler*, 4:09CR00098 (S.D. Tex. Feb. 23, 2012).

122 Minute Entry, *United States v. Tesler*, 4:09CR00098 (S.D. Tex. Feb. 23, 2012).

123 Minute Entry, *United States v. Tesler*, 4:09CR00098 (S.D. Tex. Feb. 22, 2012).

124 *See* Press Release, Justice Dep't, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties (Nov. 4, 2010), *available at* http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html.

125 *Id.*

126 *See* Press Release, SEC, SEC Charges Three Oil Services Executives With Bribing Customs Officials in Nigeria (Feb. 24, 2012) *available at* http://www.sec.gov/news/press/2012/2012-32.htm [hereinafter Noble Executives SEC Press Release].

127 *See* Complaint, *SEC v. Jackson*, No. 4:12-cv-00563 (S.D. Tex. Feb. 24, 2012), Dkt. Entry No. 1.

128 *See id.* at 7-36.

129 *See* Noble Executives SEC Press Release, *supra* note 126; Complaint, *SEC v. O'Rourke*, No. 4:12-cv-00564 (S.D. Tex. Feb. 24, 2012).

130 *See* Motions to Dismiss For Failure To State A Claim, *SEC v. Jackson*, No. 4:12-cv-00563 (S.D. Tex. May 8, 2012), Dkt. Entry No. 35 (Jackson) and No. 36 (Ruehlen).

131 *See* A&P Winter 2012 FCPA Newsletter, *supra* note 3, at 22.

132 *See* Halliburton Co., Quarterly Filings (Form 10-Q), at 19 (Oct. 21, 2011), *available at* http://www.sec.gov/Archives/edgar/data/45012/000004501211000354/edsept201110q_final.htm.

133 *See* Cobalt Int'l Energy, Inc., Annual Report (Form 10-K), at 50-51 (Feb. 21, 2012), *available at* http://www.sec.gov/Archives/edgar/data/1471261/000104746912001183/a2207234z10-k.htm.

134 *Id.*

135 *See* Eni SpA, Annual Report (Form 20-F), at F-92 (Apr. 5, 2012), *available at* http://www.sec.gov/Archives/edgar/data/1002242/000131143512000005/sj0412en20f2011.htm#192.

136 *Id.*

137 *See* Total, S.A., Annual Report (Form 20-F/A), at F-94-95 (Mar. 27, 2012), *available at* http://www.sec.gov/Archives/edgar/data/879764/000119312512134298/d278816d20fa.htm#rom278816_38

138 *See id.* at F-93-94.

139 Marathon Oil Corp., Annual Report (Form 10-K), at 29 (Feb. 29, 2012), *available at* http://www.sec.gov/Archives/edgar/data/101778/000119312512088742/d270787d10k.htm.

140 *See* Joe Palazzolo, *SEC Eyeing ExxonMobil's Ties to Libyan Sovereign Fund*, Wall St. J. (June 20, 2011), *available at* http://blogs.wsj.com/corruption-currents/2011/06/20/sec-eyeing-exxonmobiles-ties-to-libyan-sovereign-fund/.

141 C.M. Matthews and Joe Palazzolo, *Oil Giants Launch Bribe Probes in Kazakhstan*, Wall St. J. (June 6, 2012), *available at* http://online.wsj.com/article/SB10001424052702303296604577450442633804840.html [hereinafter KPO Probe].

142 C.M. Matthews, *Second Oil Venture Probes Corruption Allegations in Kazakhstan*, Wall St. J. (June 13, 2012), *available at* http://blogs.wsj.com/corruption-currents/2012/06/13/second-oil-venture-probes-corruption-allegations-in-kazakhstan/ [hereinafter Tengizchevroil Probe].

143 *See* KPO Probe, *supra* note 141.

144 *See id.*

145 C.M. Matthews, *Kazak Authorities Say No Evidence of Corruption at Customs Post*, Wall St. J. (July 2, 2012), *available at* http://blogs.wsj.com/corruption-currents/2012/07/02/kazak-authorities-say-no-evidence-of-corruption-at-customs-post/.

146 *See* Tengizchevroil Probe, *supra* note 142.

147 C.M. Matthews, *KPO Probe Highlights Customs Risks*, Wall St. J. (June 8, 2012), *available at* http://blogs.wsj.com/corruption-currents/2012/06/08/kpo-probe-highlights-customs-risks/.

148 *See* Hercules Offshore Inc., Current Report (Form 8-K), at 2 (Apr. 26, 2012), *available at* http://www.faqs.org/sec-filings/120426/HERCULES-OFFSHORE-INC_8-K/.

149 *See* Hercules Offshore Inc., Current Report (Form 8-K), at 2 (Apr. 7, 2011), *available at* http://www.sec.gov/Archives/edgar/data/1330849/000095012311033751/h81264e8vk.htm.

150 *Id.*

151 Press Release, Justice Dep't, Bizjet International Sales and Support Inc., Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $11.8 Million Criminal Penalty (Mar. 14, 2012), *available at* http://www.justice.gov/opa/pr/2012/March/12-crm-321.html [hereinafter BizJet DOJ Press Release].

152 *Id.*

153 *See* Information, *United States v. Bizjet Int'l Sales and Support, Inc.*, Case No. 12CR61, (N.D. Okla. Mar. 14, 2012), Dkt. Entry No. 2.

154 Deferred Prosecution Agreement, *United States v. Bizjet Int'l Sales and Support, Inc.*, No. 12-CR-61 (N.D. Okla. Mar. 14, 2012), Dkt. Entry No. 4.

155 *Id.*

156 Letter from Justice Dep't to Jay Holtmeier (Dec. 21, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/lufthansa-technik/2011-12-21-lufthansa-npa.pdf; *see also* BizJet DOJ Press Release, *supra* note 151.

157 Press Release, Justice Dep't, Data Systems & Solutions LLC Resolves Foreign Corrupt Practices Act Violations and Agrees to Pay $8.82 Million Criminal Penalty (June 18, 2012), *available at* http://www.justice.gov/opa/pr/2012/June/12-crm-768.html.

158 *Id.*

159 *United States v. Jefferson*, 674 F.3d 332 (4th Cir. 2012).

160 *See* Philip Shenon, *F.B.I. Contends Lawmaker Hid Bribe in Freezer*, N.Y. Times (May 22, 2006), at A1, *available at* http://www.nytimes.com/2006/05/22/washington/22jefferson.html.

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

162 *See* Jonathan Tilove, *Guilty on 11 Counts: Jefferson Faces Lengthy Sentence, Possible Restitution*, New Orleans Times-Picayune (Aug. 6, 2009), at 1, *available at* http://www.nola.com/timespic/stories/index.ssf?/base/library-161/1249536844306950.xml&coll=1.

163 Jonathan Tilove, *Jefferson Gets 13 Years in Jail*, New Orleans Times-Picayune (Nov. 14, 2009), *available at* http://www.nola.com/politics/index.ssf/2009/11/william_jefferson_sentenced_ye.html.

164 Samuel Rubenfeld, *Appeals Court Upholds Congressman's FCPA Conspiracy Conviction*, Wall St. J. (Mar. 26, 2012), *available at* http://blogs.wsj.com/corruption-currents/2012/03/26/appeals-court-upholds-congressmans-fcpa-conspiracy-conviction/.

165 *Jefferson*, 674 F.3d at 357.

166 *Id.* at 356.

167 *Id.* at 357-58.

168 *Id.* at 359. The only question on which the Fourth Circuit agreed with Jefferson was whether the district court in Virginia had jurisdiction over his honest services wire fraud offense. The appeals court vacated this conviction on the ground that venue was improper in Virginia for a phone call between Ghana and Kentucky. *Id.* at 368-69.

169 A&P Winter 2012 FCPA Newsletter, *supra* note 3, at 24.

170 Motion of Frederic A. Bourke Jr. for New Trial Based on Newly Discovered Evidence (with accompanying Memorandum of Law in Support), *United States v. Bourke*, Case 05-CR-518 (S.D.N.Y. Mar. 9, 2011), Dkt. Entry Nos. 278 & 279.

171 Opinion and Order, *United States v. Bourke*, Case 05-CR-518 (S.D.N.Y. Dec. 15, 2011), Dkt. Entry No. 292.

172 Initial Brief and Special Appendix For Defendant-Appellant, *United States v. Kozeny*, No. 11-5390-CR (2d Cir. Apr. 10, 2012), Dkt. Entry No. 25.

173 *See id.* Bourke notes that the government presented the flight records at trial through an intern who summarized them in a chart. In this regard, Bourke appeals the district court's refusal to hold an evidentiary hearing to determine what happened with the flight records before trial.

174 *Id.* at 27.

175 The Goodyear Tire & Rubber Co., Annual Report (Form 10-K), at 21 (Feb. 14, 2012), *available at* http://www.goodyear.com/investor/pdf/10k/2011_10K_w-exhibits.pdf.

176 Layne Christensen Co., Current Report (Form 8-K), at 4 (Mar. 23, 2012), *available at* http://files.shareholder.com/downloads/LAYN/1815505068x0xS1171843-12-1003/888504/filing.pdf.

177 *Id.*

178 MTS Systems Corp., Quarterly Report (Form 10-Q), at 32 (May 3, 2012), *available at* http://www.sec.gov/Archives/edgar/data/68709/000114036112022906/form10q.htm.

179 Complaint, *Watts Water Techs., Inc. v. Sidley Austin, LLP*, No. 0004847-12 (D.C. Super. Ct. June 6, 2012).

180 *Id.*

181 *Id.*; *see also* Cease and Desist Order, *In the Matter of Watts Water Techs., Inc.*, Admin. Proc. No. 3-14585 (Oct. 13, 2011)

182 *See Nollner v. S. Baptist Convention, Inc.* --- F. Supp. 2d ---, 2012 WL 1108923, at *9-10 (M.D. Tenn. Apr. 3, 2012); *see also* 15 USC § 78u-6(h)(1)(A)(iii).

183 *Id.* at *8.

184 *See Asadi v. G.E. Energy (USA), LLC*, Civ. A. No. 4:12-345, 2012 WL 2522599, at *4-5 (S.D. Tex. June 28, 2012).

185 Order and Reasons, *Strong v. Taylor*, Civil Action No. 11-392 (E.D. La. July 2, 2012), Dkt. Entry No. 50.

186 *Id.* at 4.

187 *Id.* at 29.

188 *Id.* at 26.

189 *See* Bio-Rad Laboratories, Inc., Quarterly Report (Form 10-Q) (May 10, 2012), *available at* http://ir.10kwizard.com/filing.php?ipage=8255860&rid=23&attach=ON&doc=1&source=432&welc_next=1&fg=23 (citing *City of Riviera Beach Gen. Emp.'s' Retirement Sys. v. Schwartz*, Case No. MSC11-00854 (Cal. Super. Ct.)).

190 Samuel Rubenfeld, *Alcoa Offers Cash Payment to Settle RICO Suit*, Wall St. J. (July 11, 2012), *available at* http://blogs.wsj.com/corruption-currents/2012/07/11/alcoa-offers-cash-payment-to-settle-rico-suit/?mod=google_news_blog; *see also* Press Release, Alcoa, Alcoa Reports $0.00 Per Share From Continuing Operations; Income Of $0.06 Per Share Excluding Special (July 9, 2012), *available at* http://www.alcoa.com/global/en/news/news_detail.asp?pageID=20120709006497en&detailType=invest&newsYear=2012 [hereinafter Alcoa Press Release].

191 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.

192 Opinion and Order of the Court, *Aluminum Bahrain B.S.C. v. Alcoa, Inc.*, Civil Action No. 8-299 (W.D. Pa. June 11, 2012), Dkt. Entry No. 97.

193 *See* A Alcoa Press Release, *supra* note 191.

194 Associated Press, *Alcoa: Shareholder's Alba lawsuit 'lacks merit,'* Yahoo.com (June 20, 2012), *available at* http://finance.yahoo.com/news/alcoa-shareholders-alba-lawsuit-lacks-164720722.html.

195 Serious Fraud Office, Director David Green CB QC: Biography, *available at* www.sfo.gov.uk/about-us/who-we-are/director.aspx (last visited June 12, 2012) [hereinafter Green Biography]; Press Release, SFO, New SFO Director David Green (Apr. 23, 2012), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/new-sfo-director-david-green.aspx.

196 *See* Green Biography, *supra* note 195.

197 *See* Emma Rowley, *Serious Fraud Office needs proper funding, warns Tchenguiz judge*, The Telegraph (May 24, 2012), *available at* http://www.telegraph.co.uk/finance/financial-crime/9288330/Serious-Fraud-Office-needs-proper-funding-warns-Tchenguiz-judge.html.

198 Ministry of Justice, Consultation Overview: Deferred Prosecution Agreements, *available at* https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/consult_view.

199 *Id.*

200 Ministry of Justice, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements (2012), *available at* https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/consult_view.

201 Government consults on proposals for deferred prosecution agreement framework, out-law.com (May 17, 2012), *available at* http://www.out-law.com/en/articles/2012/may/government-consults-on-proposals-for-deferred-prosecution-agreements-framework/.

202 Press Release, SFO, Shareholder agrees civil recovery by SFO in Mabey & Johnson (Jan. 13, 2012), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/shareholder-agrees-civil-recovery-by-sfo-in-mabey--johnson.aspx.

203 Press Release, FSA, FSA fines Habib Bank AG Zurich £525,000 and money laundering reporting officer £17,500 for anti-money laundering control failings (May 15, 2012), *available at* http://www.fsa.gov.uk/library/communication/pr/2012/055.shtml.

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.*

208 *Id.*

209 *Id.*

210 Press Release, SFO, Bruce Hall charged with corruption and money laundering (Feb. 15, 2012), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/bruce-hall-charged-with-corruption-and-money-laundering.aspx.

211 *Id.*

212 Press Release, SFO, Innospec Ltd: Former CEO admits making corrupt payments (June 11, 2012) [hereinafter Jennings Press Release], *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/innospec-ltd--former-ceo-admits-making-corrupt-payments.aspx.

213 *Id.*

214 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.

215 Jennings Press Release, *supra* note 212.

216 *Id.*

217 *Id.*

218 *See* Minute Entry Regarding Sentencing, *United States v. Naaman*, Case No. 1:08-CR-00246-ESH (D.D.C. Dec. 22, 2011).

219 Press Release, SFO, Innospec Ltd: Former director pleads guilty to corruption (Jan. 17, 2012), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/innospec-ltd-former-director-pleads-guilty-to-corruption.aspx.

220 OECD, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom (Mar. 2012), *available at* http://www.oecd.org/dataoecd/52/19/50026751.pdf [hereinafter OECD Report].

221 *Id.* at 5.

222 *Id.* at 20.

223 *Id.* at 5.

224 *Id.* at 21.

225 OECD Report, *supra* note 220, at 23.

226 Richard Alderman, Director, SFO, Address at the Said Business School's Seminar: Enforcing the law on fraud and corruption, does self-reporting pay? (Mar. 6, 2012), *available at* http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2012/enforcing-the-law-on-fraud-and-corruption-does-self-reporting-pay.aspx.

227 OECD Report, *supra* note 220, at 5, 59.

228 News Release, Ernst & Young, 72% of middle managers still unaware of Bribery Act, reveals Ernst & Young survey (Apr. 12, 2012), *available at* http://www.ey.com/UK/en/Newsroom/News-releases/12-04-12---72-per-cent-of-middle-managers-still-unaware-of-Bribery-Act.

229 *Id.*

230 A&P Winter 2012 FCPA Newsletter, *supra* note 3, at 31.

231 Shan Nair, *China's fight against bribery and corruption*, Wall St. J. (May 2, 2012), *available at* http://articles.marketwatch.com/2012-05-02/commentary/31520562_1_bribery-anti-corruption-check-companies.

232 *See* Transparency International, *Bribe Payers Index 2011*, at 2 (2011), *available at* http://bpi.transparency.org/results.

233 Joe Palazzolo, *Russia Criminalizes Foreign Bribery*, Wall St. J. (May 5, 2011), *available at* http://blogs.wsj.com/corruption-currents/2011/05/05/russia-criminalizes-foreign-bribery/; *see also* Press

Release, OECD, OECD welcomes Russia introducing law to make foreign bribery a crime (May 5, 2011), *available at* http://www.oecd.org/document/36/0,3746,en_21571361_44315115_47769508_1_1_1_1,00.html.

234 OECD, Russia joins OECD Anti-Bribery Convention (Feb. 17, 2012), http://www.oecd.org/document/37/0,3746,en_21571361_44315115_49695141_1_1_1_1,00.html.

235 *Id.*

236 *See* Samuel Rubenfeld, *OECD Begins Evaluating Russian Anti-Bribery Laws*, Wall St. J., (Mar. 22, 2012), *available at* http://blogs.wsj.com/corruption-currents/2012/03/22/oecd-begins-evaluating-russian-anti-bribery-laws/.

237 *Russia's presidency: The beginning of the end of Putin*, The Economist, (Mar. 3, 2012), *available at* http://www.economist.com/node/21548941; *Medvedev to chair anti-corruption council meeting*, Itar-Tass (Mar. 13, 2012), *available at* http://www.itar-tass.com/en/c32/364542.html.

238 Cristine Prestes, *Cresce resistência a projeto anticorrupção*, Agência de Notícias, Polícia Federal (May 4, 2012), *available at* http://www.dpf.gov.br/agencia/pf-na-midia/jornal/2012/maio/cresce-resistencia-a-projeto-anticorrupcao [hereinafter Prestes Brazil Article].

239 *See* Matteson Ellis, *Businesses Push Back Against Brazil Foreign Bribery Bill*, Corporate Compliance Insights, (May 16, 2012), *available at* http://www.corporatecomplianceinsights.com/businesses-push-back-against-brazil-foreign-bribery-bill/ [hereinafter Ellis Brazil Article].

240 Prestes Brazil Article, *supra* note 238.

241 *See* Ellis Brazil Article, *supra* note 239.

242 *Ao punir empresas, PL mira o corruptor*, Valor Econômico, (May 29, 2012), *available at* http://www.valor.com.br/politica/2680502/ao-punir-empresas-pl-mira-o-corruptor.

243 *Id.*

244 Ellis Brazil Article, *supra* note 244.

245 A&P Winter 2012 FCPA Newsletter, *supra* note 3, at 33 n.108 (citing Lanny A. Breuer, Assistant Attorney General Speaks at the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), *available at* http://www.justice.gov/criminal/pr/ speeches/2011/crm-speech-111108.html).

246 Letter from US Chamber of Commerce et al. to Lanny Breuer, DOJ, & Robert Khuzami, SEC (Feb. 21, 2012), *available at* http://www.instituteforlegalreform.com/sites/default/files/FCPA%20Guidance%20Letter-2-21-12_4_.pdf [hereinafter Institute Letter to DOJ/SEC].

247 *Id.* at 3.

248 *Id.* at 4.

249 *Id.* at 4-5.

250 *Id.* at 6-7

251 Institute Letter to DOJ/SEC, *supra* note 246, at 7-8.

252 *Id.* at 8-9.

253 *Id.* at 9.

254 *Id.* at 9-10.

255 Samuel Rubenfield, *US Officials Meet with Chamber, Trade Groups Over FCPA Guidance*, Wall. St. J. (Apr. 11, 2012), *available at* http://blogs.wsj.com/corruption-currents/2012/04/11/us-officials-meet-with-chamber-trade-groups-over-fcpa-guidance/; Press Release, US Chamber of Commerce, Business Coalition Engages in Discussion with Administration Regarding Foreign Corrupt Practices Act (Apr. 11, 2012), *available at* http://www.uschamber.com/press/releases/2012/april/business-coalition-engages-discussion-administration-regarding-foreign-cor.

256 Letter from Raymond Baker et al. to Lanny Breuer and Robert Khuzami (May 16, 2012), *available at* http://www.scribd.com/doc/94317165/Letter-to-DOJ-and-SEC-Re-FCPA-Guidance.

257 *Id.* at 2.

258 Letter from Representatives Elijah Cummings and Henry Waxman to Thomas J. Donohue (May 22,

2012), *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Letter_Donohue_05.22.12.pdf.

259 Letter from Representatives Elijah Cummings and Henry Waxman to Gregg Steinhafel (May 22, 2012), *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Letter_Steinhafel_05.22.12.pdf

260 We thank the following, all of whom contributed to this publication: Daniel Bernstein, Alex Berz, Chieko Clarke, Amy Endicott, Dawn Y. Yamane Hewett, Meghan C. Martin, William Perdue, Jacob A. Rogers, and Pedro G. Soto.

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

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

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

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

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

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

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

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

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

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

Arthur Luk
Partner
Washington, DC
+1 202.942.5393
arthur.luk@aporter.com

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

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

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

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

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

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

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

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