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FCPA, Bribery Act & other Global Anti-Corruption Insights

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

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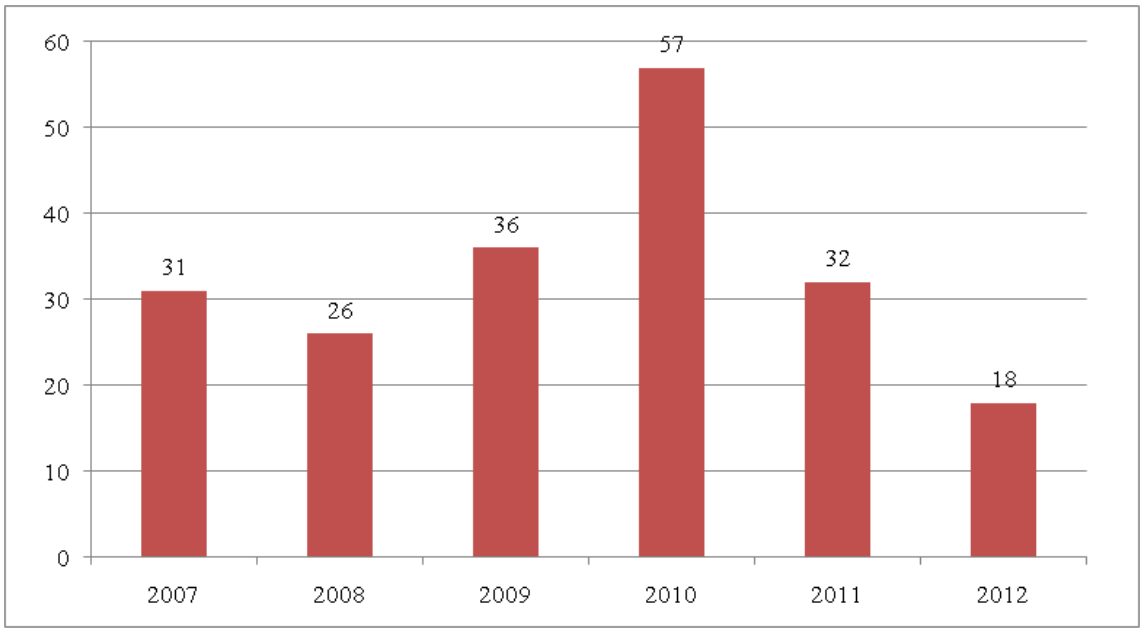
EXECUTIVE SUMMARY

The second half of 2012 concluded another busy year of anti-corruption enforcement activity around the world. Both the United States Department of Justice (DOJ or Justice Department) and the Securities and Exchange Commission (SEC or Commission) pursued alleged violations of the Foreign Corrupt Practices Act (FCPA) across a variety of industries, while continuing to advance broad theories of liability under the FCPA. Moreover, in November 2012, the Justice Department and the Commission released long-awaited guidance that compiles their interpretations of the FCPA in a single document. Outside the United States, anticorruption efforts continued as well, most notably in the United Kingdom, where the Serious Fraud Office (SFO), under a new director, asserted its role as the prosecutor of violations of the United Kingdom's anti-bribery laws. We analyze these developments and more in this edition of the FCPA & Global Anti-Corruption Insights.

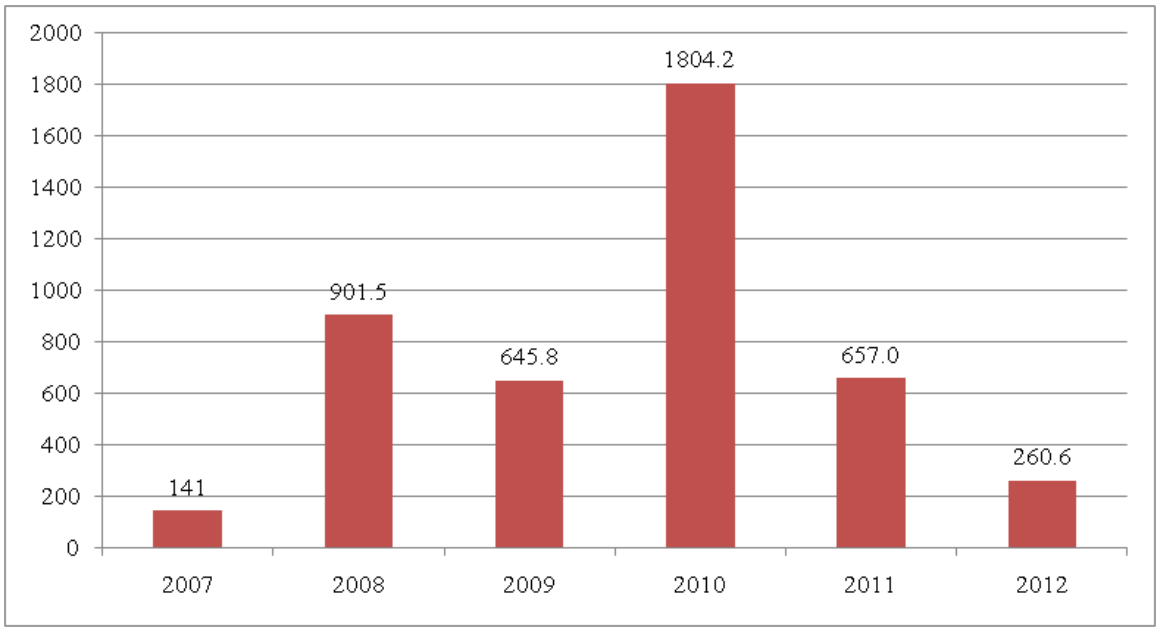
In 2012, the Justice Department and the Commission combined to charge 12 companies and 6 individuals with criminal and/or civil violations of the FCPA, for a total of 18 enforcement actions. 6 of these enforcement actions involved parallel proceedings brought by both the Justice Department and Commission against the same company or individual, 5 actions were brought by the Justice Department only, and 7 actions were brought by the Commission only. This year's total reflects a decrease in enforcement actions when compared to the 32 enforcement actions taken in 2011, and the 57 enforcement actions taken in 2010.

Table 1: Number of Enforcement Actions



More marked than the drop-off in enforcement actions is the drastic decline in penalties assessed, continuing a decrease from the record high set in 2010. In 2012, the Justice Department and the Commission collected US$260.6 million in criminal fines, civil monetary penalties, and disgorgement compared to US$657 million in 2011. The 2012 total is the lowest since 2007.

Table 2: FCPA Sanctions Assessed (in millions)



Some have speculated that 2012's decline in enforcement actions and sanctions is attributable to individual defendants litigating cases rather than settling, efforts to work through a backlog of investigations commenced over the recent boom period, and large-scale investigations that remain ongoing. But regardless of the cause, few, if any, believe that the decline marks the beginning of a new trend. To the contrary, the Justice Department's and Commission's guidance confirms their commitment to vigorous enforcement of the FCPA for years to come.

KEY ENFORCEMENT AND INVESTIGATIVE DEVELOPMENTS

Notable Corporate FCPA Enforcement Actions Resolved by The Justice Department and/or SEC

In the second half of 2012, the Justice Department and the Commission brought several notable enforcement actions against corporate defendants that continued several trends. These actions continue to make clear that (1) parent companies may remain liable for, and thus must implement appropriate internal controls over, their foreign subsidiaries; (2) companies engaging in cross-border transactions must evaluate merger-and-acquisition targets for their compliance with anti-corruption laws through "risk-based" due diligence; and (3) the government continues to press industry-focused enforcement activities, most notably in the pharmaceutical and medical device sector. Moreover, the Justice Department and the SEC appear more willing to allow companies to report on the status of their post-resolution compliance efforts, rather than to require independent monitors as a condition of settlement. Indeed, as discussed below, one company avoided an independent monitoring obligation even though it was charged with violating the FCPA for the second time in six years.

Orthofix International N.V.

On July 10, 2012, **Orthofix International N.V.** (Orthofix), a Texas-based medical device manufacturer, agreed to pay US$5.2 million to settle FCPA charges relating to a bribery scheme in Mexico.[1] According to the complaint filed by the SEC in the Eastern District of Texas, Orthofix's wholly owned Mexican subsidiary Promeca S.A. de C.V. (Promeca) paid over US$300,000 in bribes – euphemistically referred to as "chocolates" – to Mexican officials over a period of approximately seven years in order "to obtain lucrative sales contracts with government hospitals."[2] Those bribes came in the form of cash, vacation packages, laptop computers, televisions, and appliances. Initially, Promeca accounted for its improper payments as cash advances to executives. Promeca later began to falsely account for the payments as promotional and training expenses, which, in some instances, passed through front companies. Based on this conduct, the SEC charged Orthofix with violations of the FCPA's books and records and internal controls provisions.[3]

Orthofix also entered into a three-year deferred-prosecution agreement (DPA) with the Justice Department to resolve one count of violating the FCPA's internal controls provisions.[4] As part of the DPA, Orthofix agreed to pay a criminal fine of US$2.22 million.

In addition, Orthofix must provide reports regarding its remediation efforts and implementation of a compliance program to the SEC for two years and to the Justice Department for three years. The SEC and the Justice Department did not, however, require Orthofix to hire a compliance monitor. This may be because Orthofix self-reported the issues in Mexico when it learned of the bribery scheme from a Promeca executive. Orthofix has since terminated the Promeca executives who orchestrated the scheme and has taken "significant remedial measures," including implementation of an enhanced compliance program.[5]

Nordam Group Inc.

On July 17, 2012, **The NORDAM Group Inc.** (Nordam), a privately-held aircraft maintenance company based in Oklahoma, entered into a three-year non-prosecution agreement (NPA) with the Justice Department to resolve an FCPA enforcement action. From 1999 to 2008, Nordam, through a subsidiary and an affiliate, paid bribes to employees of Chinese state-owned and state-controlled airlines, in order to obtain aircraft maintenance, repair, and overhaul contracts. The affiliate's bribery scheme included the creation of fictitious entities, which entered into sales agreements that funded improper payments to customers. Nordam made roughly US$2.48 million in profits from US$1.5 million in bribes. Several US employees of Nordam were aware of and approved the bribes.[6]

As part of its NPA, Nordam agreed to pay a US$2 million criminal fine, which fell below the range provided for under the US Sentencing Guidelines. The Justice Department stated that this fine was "appropriate because Nordam fully demonstrated to the department, and an independent accounting expert retained by the department verified, that a fine exceeding US$2 million would substantially jeopardize the company's continued viability."[7]

In addition, Nordam agreed to the continued implementation of a more robust compliance program. The Corporate Compliance Program described in Attachment B to the NPA specifically addressed Nordam's use of third-party vendors, requiring the company to institute "appropriate due diligence and compliance requirements pertaining to the retention and oversight of all agents and business partners."[8] It also addressed due diligence in mergers and acquisitions, requiring Nordam to "conduct appropriate risk-based due diligence on potential new business entities;" "ensure that the Company's

policies and procedures regarding the anti-corruption laws apply as quickly as is practicable to newly acquired businesses or entities merged with the Company;" and "[c]onduct an FCPA-specific audit of all newly acquired or merged businesses as quickly as practicable."[9]

Pfizer Inc.

On August 7, 2012, pharmaceutical giant **Pfizer Inc.** (Pfizer) resolved FCPA enforcement actions with both the Justice Department and the SEC.[10] The FCPA charges stemmed from the conduct of two Pfizer subsidiaries – Pfizer H.C.P. Corp. (Pfizer H.C.P.) and Wyeth LLC (Wyeth) – which allegedly made improper payments to employees of government-run healthcare systems, including hospital administrators and other health care professionals.

Pfizer H.C.P. entered into a two-year DPA with the Justice Department and paid a US$15 million fine to resolve criminal charges concerning bribes paid in Bulgaria, Croatia, Kazakhstan, and Russia.[11] According to allegations made in court documents, Pfizer H.C.P. improperly made payments to government officials through sham consulting contracts, an exclusive distributorship, improper travel, and cash payments. Upon learning of improper conduct within Pfizer H.C.P. in 2004, Pfizer (the parent) conducted a preliminary investigation and made a voluntary disclosure to the Justice Department and the Commission. Pfizer subsequently undertook a global review of its operations and extensive remedial efforts. Pfizer also cooperated with the Justice Department's investigations of other companies and individuals. As a result, the Justice Department credited Pfizer H.C.P.'s cooperation by reducing the criminal fine imposed by 34% from the bottom of the recommended fine range calculated under the US Sentencing Guidelines.[12] The Justice Department did not require that Pfizer retain a compliance monitor.[13]

The Justice Department's settlement with Pfizer H.C.P. is significant for the specific measures that Pfizer (the parent) agreed to undertake in order to enhance its anti-corruption program. Those measures include, among others, appointing new compliance executives, implementing a new policy regarding interaction with healthcare professionals, and agreeing to perform due diligence on third-party agents, business partners, and acquired entities. With respect to acquisitions, the DPA provides that "Pfizer has ensured and will continue to ensure that, when practicable and appropriate on the basis of an FCPA risk assessment, new business entities are only acquired after thorough risk-based FCPA and anti-corruption due diligence was conducted by a suitable combination of legal, accounting, and compliance personnel." Pfizer further agreed to the implementation of enhanced anti-corruption policies "as quickly as is practicable."[14]

In addition to the criminal action, the Commission settled alleged books and records and internal controls violations arising from operations in China, the Czech Republic, Indonesia, Italy, Pakistan, Serbia, and Saudi Arabia, in addition to Bulgaria, Croatia, Kazakhstan, and Russia (the countries mentioned in the DPA).[15] Pfizer agreed to pay approximately US$26.3 million in disgorgement and prejudgment interest to resolve the Commission's case. Separately, Wyeth – which Pfizer had acquired in 2009 – agreed to pay approximately US$18.9 million in disgorgement and prejudgment interest for the alleged FCPA violations of its own subsidiaries that took place before, during, and after its acquisition by Pfizer.[16]

The SEC did not allege that Pfizer was responsible for Wyeth's alleged misconduct, perhaps because Pfizer conducted a risk-based review of Wyeth's global operations and voluntarily reported its findings to the SEC's staff and because Pfizer promptly integrated Wyeth's business entities into Pfizer's system of internal controls. Pfizer further agreed to provide the Commission with reports describing its FCPA and anti-corruption remediation over a two-year period.[17]

Tyco International Ltd.

On September 24, 2012, Swiss manufacturing company **Tyco International Ltd.** (Tyco) agreed to pay more than US$26 million to settle parallel proceedings brought by the Justice Department and the SEC.[18] The enforcement actions were based on conduct discovered during the global internal investigation and FCPA compliance review Tyco performed in connection with a prior settlement with the SEC in 2006 stemming from allegations of accounting fraud, disclosure failures, and FCPA violations.[19] Tyco's investigation and compliance review spanned 454 legal entities in 50 separate countries and resulted in the termination of more than 90 employees.[20]

This past September, Tyco entered into an NPA with the Justice Department based on books and records and internal controls violations over the course of a decade in a number of different countries including China, India, Thailand, Bosnia, Croatia, Serbia, Iran, Saudi Arabia, Libya, Congo, Niger, and Turkey.[21] In addition, **Tyco Valves & Controls Middle East Inc.** (TVC-ME) – a Tyco subsidiary headquartered in Dubai and incorporated in Delaware – pleaded guilty to one count of conspiracy to violate the FCPA's anti-bribery provisions.[22] From 2003 to 2006, TVC-ME allegedly conspired to bribe employees of state-owned oil and gas companies in Saudi Arabia, the U.A.E., and Iran.[23] TVC-ME relied on a "[l]ocal [s]ponsor" in Saudi Arabia to disguise improper payments through fictitious invoices for consultancy and equipment costs.[24] TVC-ME agreed to pay a US$2.1 million fine, which will be included in Tyco's US$13.68 million total criminal liability.[25] Tyco's NPA recognizes the parent company's voluntary disclosure and cooperation, as well as implementation of enhanced compliance programs, termination of responsible employees, severance of contracts with responsible third-party agents, and closure of subsidiaries with compliance failures.[26]

To settle the Commission's civil action, Tyco agreed to pay over US$13 million in disgorgement and prejudgment interest.[27] The SEC charged Tyco with engaging in illicit payment schemes over the course of a decade in Germany, China, France, Mauritania, Thailand, Turkey, Hong Kong, Malaysia, United Kingdom, Saudi Arabia, Poland, Egypt, Congo, Niger, and Madagascar.[28] According to the complaint, employees at Tyco's Turkish subsidiary were aware that a New York City-based sales agent was making corrupt payments, as evidenced by an internal e-mail in which one employee of a Tyco subsidiary wrote: "Hell, everyone knows you have to bribe somebody to do business in Turkey. Nevertheless, I'll play it dumb if [the sales agent] should call."[29] The settlement is awaiting final approval by a federal district judge.

Tyco emerged from these enforcement actions, its second with the SEC in less than six years, without a compliance monitor and with relatively low fines compared to other companies that had uncovered such widespread misconduct. The SEC attributed the relative leniency to Tyco's "extensive efforts to identify and remediate its wrongdoing."[30] In particular, the SEC noted that Tyco conducted a global review and internal investigation for potential FCPA violations and voluntarily disclosed its findings to the SEC while implementing significant, broad-spectrum remedial measures.

Eli Lilly and Company

On December 20, 2012, **Eli Lilly and Company** (Eli Lilly) agreed to pay US$29.4 million to settle alleged violations of the FCPA's anti-bribery, books and records, and internal controls provisions. The US$29.4 million consisted of US$14.0 million in disgorgement, US$6.7 million in prejudgment interest, and US$8.7 million in civil penalties.[31] The civil complaint, filed in the US District Court for the District of Columbia, alleged that Eli Lilly's foreign subsidiaries paid bribes to government officials in Russia, Brazil, China, and Poland.[32]

In Russia, Eli Lilly's subsidiary allegedly entered into "marketing" and "service" agreements worth more than US$7 million with off-shore third parties chosen by government customers or distributors, despite knowing little or nothing about those entities.[33] According to the SEC, these offshore entities rarely provided any services and in some instances were used to funnel money to government officials in order to obtain business for the subsidiary.[34] In Brazil, Eli Lilly's subsidiary allegedly sold a drug at an unusually high discount to third-party distributors, who then convinced government health officials to purchase the Eli Lilly product in exchange for a bribe of approximately 6% of the purchase price.[35] In China, employees of Eli Lilly's subsidiary allegedly submitted false expense reports to disguise purchases of "gifts and entertainment for government-employed physicians."[36] And in Poland, an Eli Lilly subsidiary allegedly made donations totaling US$39,000 to a charitable organization founded by the director of a regional government health authority.[37] More generally, the SEC alleged that Eli Lilly's Audit Department had no procedures designed to assess FCPA compliance and did not undertake heightened review of transactions with offshore entities.[38] Eli Lilly did not admit or deny the allegations as part of the settlement.[39]

In its press release, the SEC emphasized what in its view was Eli Lilly's lackluster response to subsidiaries' questionable activities. Indeed, Eli Lilly acknowledged that it was notified of the FCPA investigation in August 2003, but the conduct at issue continued in foreign countries as late as 2009.[40] According to Antonia Chion, Associate Director in the SEC Enforcement Division, "[w]hen a parent company learns tell-tale signs of a bribery scheme involving a subsidiary, it must take immediate action."[41]

In its press release regarding the settlement, Eli Lilly stated that it "has made improvements to its global anti-corruption compliance program, including: enhancing anti-corruption due diligence requirements for relationships with third parties; implementing compliance monitoring and corporate auditing specifically tailored to anti-corruption; enhancing financial controls and governance; and expanding anti-corruption training throughout the organization."[42]

Individual Defendants Challenge Justice Department and SEC Interpretations of the FCPA

Individual defendants are increasingly challenging aspects of the Justice Department's and the SEC's interpretation of the FCPA. In the second half of 2012, (1) two defendants raised on appeal a challenge to the Justice Department's broad interpretation of what constitutes an "instrumentality" of a foreign government; (2) two defendants moved to dismiss the SEC's claims that certain payments constituted illegal bribes, as opposed to lawful facilitation payments; and (3) several foreign defendants moved to dismiss the SEC's claims by arguing that the SEC failed to adequately allege that the FCPA provided jurisdiction over them. Defendants are also challenging the SEC's interpretation of the applicable statute of limitations.

Esquenazi and Rodriguez Attack the Justice Department's Broad Interpretation of "Instrumentality" of a Foreign Government

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). Esquenazi and Rodriguez appealed, raising an issue with respect to what constitutes an "instrumentality" of a foreign government under

the FCPA. The FCPA prohibits making corrupt payments to "foreign officials," and it defines a "foreign official" as "any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality thereof." The FCPA, however, does not define "instrumentality," and no appellate court has interpreted the term.

At trial, prosecutors presented evidence that Haiti's national bank owned shares of Haiti Teleco and that the Haitian government appointed Haiti Teleco's directors. On appeal, Esquenazi and Rodriguez argue that Haiti Teleco is not an "instrumentality" of a foreign government because, notwithstanding indicia of government ownership and control, Haiti Teleco did not perform traditional government functions similar to a government department or agency.[43] The defendants also focus on the significance of a declaration from the Haitian prime minister that Haiti Teleco was never a state enterprise. Briefing is now complete, and the US Court of Appeals for the Eleventh Circuit is scheduled to hear oral argument in April 2013.[44]

Although no appellate court has previously interpreted the term "instrumentality" under the FCPA, district courts have developed a non-exhaustive list of factors to consider. The court in *United States v. Aguilar* identified factors including whether:

1. the entity provides a service to the citizens – indeed, in many cases to all the inhabitants – of the jurisdiction;
2. the key officers and directors of the entity are, or are appointed by, government officials;
3. the entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such as entrance fees to a national park;
4. the entity is vested with and exercises exclusive or controlling power to administer its designated functions; and
5. the entity is widely perceived and understood to be performing official (i.e., governmental) functions.[45]

The court in *United States v. Carson* subsequently identified a number of other factors in addition to those mentioned by the *Aguilar* court that should be considered in determining whether a business entity constitutes an instrumentality under the FCPA, including:

1. the foreign state's characterization of the entity and its employees;
2. the foreign state's degree of control over the entity;
3. the purpose of the entity's activities; and
4. the circumstances surrounding the entity's creation.[46]

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

Noble Corporation Executives Obtain Partial Dismissal of SEC Complaint

As we previously reported, former Noble Corporation (Noble) executives **Mark Jackson** and **James Ruehlen** moved to dismiss SEC charges that they violated the FCPA by bribing Nigerian customs officials to process permits related to Noble oil rigs. Jackson and Ruehlen argued primarily that the five-year statute of limitations had already run on most of the conduct alleged; that the SEC's complaint failed to distinguish corrupt payments from permissible facilitation payments; and that the SEC failed to allege FCPA violations with the required particularity – for example, that the defendants knew the identity of the foreign officials they allegedly bribed.[47] The SEC filed its opposition brief on June 22, 2012, and Jackson and Ruehlen filed their replies on July 13, 2012, completing the briefing on the motion.[48]

The federal court in Houston handling the case heard oral argument on November 13, 2012, and, on December 11, 2012, issued a 61-page decision granting the defendants' motion in part while permitting the SEC to replead.[49] District Judge Keith Ellison agreed with the defendants that several claims seeking monetary penalties were barred by the applicable statute of limitations because "the vast majority of the misconduct alleged occurred" more than five years before the complaint was filed.[50] In the court's view, the SEC, which did not enter into a tolling agreement with the defendants, failed to plead sufficient facts regarding a "continuing violation" that remained ongoing within the limitations period. Judge Ellison denied the defendants' motion, however, to the extent the SEC is seeking injunctive relief.[51]

Although the court accepted the defendants' argument that the SEC bears the burden of negating the FCPA's facilitation payments exception, the court construed that exception narrowly and held that, at least with respect to payments for permits based on false paperwork, the SEC had met its pleading burden.[52] The court explained that "it would be perverse to read into the [FCPA] a requirement that a defendant know precisely which government official, or which level of government official, would be targeted by his agent; a defendant could simply avoid liability by ensuring that his agent never told him which official was being targeted and what precise action the official took in exchange for the bribe."[53] Judge Ellison acknowledged that this conclusion differed from that of Judge Lynn Hughes who, in the *O'Shea* case, stated that a criminal bribery conviction required the government to establish a particular promise to a particular person for a particular benefit.

The SEC filed an amended complaint on January 25, 2013, and Jackson and Ruehlen currently have until February 22, 2013, to move to dismiss the amended complaint or answer the amended complaint's allegations.

Siemens Executive Seeks Dismissal of SEC's Complaint

As we reported last year, the Justice Department and the SEC charged several **Siemens AG** (Siemens) executives and agents with FCPA violations arising out of the landmark Siemens bribery case.[54] In October 2012, the SEC informed the federal court in Manhattan where the cases are pending that the agency had reached an agreement-in-principle to settle the charges against defendant **Uriel Sharef**, a former member of Siemens' managing board.[55]

Meanwhile, defendant **Herbert Steffen**, the former head of Siemens' Argentina business, moved to dismiss the SEC's complaint against him.[56] Steffen, a German citizen who has not lived in or travelled

to the US on business during the time period relevant to the SEC's complaint, contends that the court in New York lacks personal jurisdiction over him. Specifically, he argues that his position as an officer of a New York Stock Exchange issuer and his receipt of telephone calls from the US are an insufficient jurisdictional basis.[57] Steffen also seeks dismissal on the ground that the SEC's claims are barred by the five-year statute of limitations.[58]

In response, the SEC contends that Steffen is subject to personal jurisdiction because his conduct caused foreseeable consequences in the US, namely the filing of annual and quarterly reports with the SEC that misrepresented Siemens' financial statements and included false certifications required by the Sarbanes-Oxley Act of 2002 (SOX).[59] The SEC further argues that the statute of limitations does not apply to Steffen because (a) he lived outside the US during the relevant five-year period and, according to the SEC, the statutory period runs only when the defendant is in the US, and (b) the bribery scheme that he was a part of concluded less than five years before the complaint was filed.[60] As this newsletter went to print, District Judge Shira Scheindlin granted Steffen's motion to dismiss for lack of personal jurisdiction. We will discuss this decision more extensively in our next newsletter.

Magyar Executives Challenge the FCPA's Jurisdiction

Last December, the SEC charged three former Magyar Telekom executives with orchestrating a bribery scheme with officials of the Macedonian government to affect key legislation unfavorable to the Hungarian telecommunications company.[61] Magyar Telekom and Deutsche Telekom, a German telecommunications company and the majority owner of Magyar Telekom, entered into agreements with the Justice Department and the SEC to resolve FCPA charges, paying over US$95 million in total in criminal fines and civil penalties.[62]

In October, the three individual defendants – **Elek Straub** (former Chairman and CEO), **Andras Balogh** (former Director of Central Strategic Organization), and **Tamas Morvai** (former Director of Business Development and Acquisitions) – jointly asked a federal judge in Manhattan to dismiss the SEC's lawsuit.[63] The defendants argued that as Hungarian nationals who lived and worked outside the US during the time frame of the SEC's complaint, they lack the "minimum contacts" with the US required for a US court to have personal jurisdiction over them.[64] They also asserted that various e-mails, which for only technological reasons passed through a US-based server, were insufficient to prove the requisite nexus to the US.[65] Moreover, the defendants argued that the SEC's action is time barred because the SEC filed its charges more than five years after the alleged conduct and after defendants had left the company.[66]

In response, the SEC argued that personal jurisdiction over the individual defendants is appropriate because they caused harm to investors in the US by falsifying Magyar Telekom's books and records and making false statements to auditors.[67] The SEC also asserted that the defendants' use of interstate commercel – in this case, through email – need not have a corrupt intent so long as the use was in furtherance of the bribery scheme.[68] With respect to the timeliness of the complaint, the SEC contended that the five-year statute of limitations does not apply where, as here, the defendants were outside the US the entire time.[69]

Oral argument on the defendants' motion to dismiss was held on January 17, 2013. As this newsletter went to print, District Judge Richard Sullivan issued an order denying the defendants' motion,[70] and we will discuss this decision more extensively in our next newsletter.

Justice Department and SEC Issue Much-Anticipated Guidance

On November 14, 2012, the Justice Department and the SEC issued *A Resource Guide on the U.S. Foreign Corrupt Practices Act* (the Guidance),[71] approximately one year after Assistant Attorney General for the Criminal Division Lanny Breuer announced their intention to do so. While it does not provide groundbreaking insights into the FCPA, the Guidance provides a centralized repository of the government's interpretation of many key parts of the FCPA, and includes illustrative examples designed to help prevent future violations of the FCPA.

To be sure, the Guidance states that it is "non-binding, informal, and summary in nature, and the information contained herein does not constitute rules or regulations."[72] But despite this disclaimer, at an FCPA conference just days after the Guidance was issued Principal Deputy Chief of the Fraud Section of Justice Department Jeffrey H. Knox said that the public can rely on the Guidance and can expect that US regulators will act consistently with the Guidance.[73]

Instrumentality of a Foreign Government

As noted above and by the US Chamber of Commercel – a leading proponent for FCPA reform – the FCPA does not provide a "clear uniform definition" of what constitutes an "instrumentality" of a foreign government.[74] Perhaps because this issue is being litigated in the Eleventh Circuit, the Guidance merely notes that the term instrumentality is "broad" and cites the non-exhaustive list of factors district courts have used, including in the *Aguilar* and *Carson* decisions discussed above. The Guidance further states that the Justice Department and the SEC "have long used" a multi-part analysis of the "entity's ownership, control, status, and function."[75]

The Guidance does offer the Justice Department's and SEC's view that an entity is less likely to be considered an instrumentality if the foreign government does not own or control more than 50 percent of the entity.[76] However, the Guidance adds that an entity with less than 50 percent government ownership can still be considered an instrumentality of the state for purposes of the FCPA if a government exercises substantial control over the entity.[77]

Gifts and Entertainment

In response to concerns that disproportionate amounts were being spent investigating unimportant payments,[78] the Guidance states that the US government is not interested in prosecuting companies or individuals who provide nominal gifts such as "cab fare, reasonable meals and entertainment expenses, or company promotional items," because such gifts are unlikely to influence a foreign official.[79] It further notes that the DOJ's and SEC's anti-bribery enforcement actions have focused on small payments and gifts only when they comprise part of a systemic or long-standing course of conduct.[80] The "hallmark" of appropriate gift giving is that the gift is being "given openly and transparently," with no corrupt intent.[81]

The Guidance notes that the Justice Department and the SEC expect that an effective compliance program will focus less on "modest entertainment and gift-giving" and more on bigger-ticket items.[82] Although the government did not define "modest," at an FCPA conference soon after the Guidance was issued, Justice Department FCPA Unit Chief Charles E. Duross stated that taking a foreign official to a US$200 dinner would not be considered appropriate.[83]

Parent Liability

The Guidance reaffirms the government's view that unlawful acts taken by a subsidiary can be imputed to the parent under traditional agency principles.[84] The fundamental characteristic of an agency relationship is the degree of control the parent exercises over its subsidiaries. In this regard, according to the Guidance, the government evaluates "the parent's knowledge and direction of the subsidiary's actions, both generally and in the context of the specific transaction."[85]

The Guidance states that if a wholly owned subsidiary acts independently, its misconduct is not automatically attributed to the parent solely because the parent owns the subsidiary. If, however, the foreign entity making the illicit payments acts as a *de facto* operating division of the parent, and the employees identify themselves as employees of the parent, knowledge and control will be imputed to the parent for misconduct committed by the operating division.[86]

Successor Liability

The Guidance emphasizes that if a successor company conducts pre-acquisition due diligence, self-reports any misconduct found in the due diligence process, and implements proper controls and compliance programs post-closing, it is unlikely that the government will bring an enforcement action against the successor company for the predecessor's unlawful conduct.[87] A successor will be prosecuted, however, if it continues the predecessor's unlawful conduct.[88]

Facilitating Payments Exception

Although the Guidance gives a slight nod to "facilitating" or "expediting" payments made to further "'routine governmental action' that involve[] non-discretionary acts," it comes as no surprise that the Justice Department and the SEC construe the facilitating payments exception narrowly. The government has brought enforcement action against companies that made what on the surface may have appeared to be facilitating payments. For example, the Justice Department and the SEC found that a company violated the FCPA when it made small, routine payments to Indian officials charged with conducting pre-shipment inspection of goods to ensure that the products would be cleared for shipment. The total amount paid in one year was approximately US$2,000, with payments ranging from US$67 to US$358 per inspection.[89] In this regard, the Guidance does nothing to change the practical reality that it may be difficult to determine whether a payment qualifies as a facilitating payment as opposed to an improper payment, particularly for employees on the ground who are asked to make that distinction.

Accounting Provisions

While the Guidance does not announce any new interpretations of the FCPA's accounting provisions, it nevertheless makes several important points that are worth noting. The Guidance reaffirms the Justice Department's and SEC's expansive view of the reach of the accounting requirements, such as the ability to assert aiding-and-abetting liability against subsidiaries for their parents' violations, even though the subsidiaries themselves are not subject to the FCPA's accounting provisions.[90] The Guidance also sets forth the SEC's view that Section 404 of SOX applies to controls relating to bribery. As the Guidance indicates, SOX requires internal controls directed towards detecting illegal acts and fraud, including bribery, that could result in a "material misstatement of the company's financial statements."[91]

Declinations

With the exception of the recent Morgan Stanley case, US enforcement agencies have previously been tight-lipped about FCPA declinations, and, among other proposed reforms, the US Chamber of Commerce has requested that the Justice Department issue declination decisions on a no-name basis.[92] Although DOJ continues to maintain its position that it will not issue declination decisions, the Guidance reveals that "in the past two years alone, DOJ has declined several dozen cases against companies where potential FCPA violations were alleged."[93]

The Guidance makes clear that the decision to bring or decline an enforcement action under the FCPA remains a matter of prosecutorial discretion and that the pre-existing factors set forth in the Justice Department's *Principles of Federal Prosecution and Principles of Federal Prosecution of Business Organizations*, and the SEC's Division of Enforcement, Enforcement Manual, continue to guide the exercise of that discretion. In an attempt to provide transparency, the Guidance notes that the Justice Department declined to prosecute matters where some or all of the following seven circumstances were present:

1. a corporation voluntarily and fully disclosed the potential misconduct;
2. corporate principals voluntarily engaged in interviews with [Justice Department] and provided truthful and complete information about their conduct;
3. a parent company conducted extensive pre-acquisition due diligence of potentially liable subsidiaries and engaged in significant remediation efforts post-acquisition;
4. a company provided information about its extensive compliance policies, procedures, and internal controls;
5. a company agreed to a civil resolution with the SEC while also demonstrating that criminal declination was appropriate;
6. only a single employee was involved in the improper payments; and
7. the improper payments involved minimal funds compared to overall business revenues.[94]

Beyond this list, the Guidance provides six instances of declinations that reflect the significance of voluntary self-reporting, conducting internal investigations, taking immediate action against employees involved in misconduct, and improving existing compliance programs.

Compliance

The Guidance makes clear that an effective anti-corruption compliance program is a corporate imperative. While the Guidance recognizes that a one-size-fits-all compliance program does not exist (and it does not try to come up with one), the Guidance does provide additional clarity as to what the Justice Department and the SEC expect to see in compliance programs. For example, the Guidance highlights that companies should make risk-based determinations and not review every transaction or relationship to the same degree. Further, the Guidance offers some specific examples of programs that companies have adopted and imbedded in their companies.

Due Diligence Reviews

The Guidance explains, as recent settlements including Pfizer and Nordam suggested, that an effective anti-corruption compliance program must employ risk-based reviews. By way of example, the Guidance recognizes that "[d]evoting a disproportionate amount of time policing modest entertainment and gift-giving instead of focusing on large government bids, questionable payments to third-party consultants, or excessive discounts to resellers and distributors may indicate that a company's compliance program is ineffective."[95] The Guidance further explains that "performing identical due diligence on all third-party agents, irrespective of risk factors, is often counterproductive, diverting attention and resources away from those third parties that pose the most significant risks."[96]

Training

The Guidance highlights that multinational companies should implement multifaceted training programs, including both web-based and in-person trainings. The training usually "covers company policies and procedures, instruction on applicable laws, practical advice to address real-life scenarios, and case studies."[97] The Guidance also emphasizes that companies should ensure that their trainings are adequately designed for the target audience.[98]

Incentives

The Guidance recognizes that effective anti-corruption compliance programs should not only contain strong disciplinary guidelines, they should also reward good behavior. Examples include incorporating adherence to compliance as "a significant metric for managements' bonuses," "recognizing compliance professionals and internal audit staff," and making "working in the company's compliance organization a way to advance an employee's career."[99]

Effective Compliance Program - A Potential Panacea?

Within recent months, US enforcement agencies have signaled that good compliance programs, coupled with complete cooperation, can lead to a declination. In addition to the Morgan Stanley declination, the Justice Department recently terminated a DPA with **Pride International, Inc.** (Pride) – discussed in more detail below – a year early because of the company's improvements in its compliance program.[100]

The Guidance Does Not Address All Concerns

However, the Guidance does not address all of the concerns that have been raised by critics of the FCPA and its enforcers. For example, a recent study published by two New York University Law School professors concludes that, based on their statistical analysis of FCPA settlements from 2004 to 2011, there is "no evidence to support the hypothesis that voluntary disclosure or cooperation or remediation [by improving corporate compliance programs] correlates with reduced total monetary penalties."[101] Despite widespread coverage of this study, the Guidance does not attempt to disprove its findings. Rather, the Guidance reiterates the fact that, under the Justice Department's Sentencing Guidelines and SEC's *Seaboard* factors, cooperation and self-disclosure can be taken into account in FCPA resolutions,[102] gives examples of declinations that all involve self-reporting to the government,[103] and emphasizes the importance of a strong compliance program.[104]

Justice Department Issues Two Opinion Releases

As the Guidance explains, another way that the Justice Department provides guidance is through an opinion release. Companies may request an opinion as to whether certain specified, prospective conduct conforms to the Justice Department's current enforcement policy regarding the FCPA's anti-bribery provisions.[105]

Opinion releases are infrequent, however, as over the past five years, the Justice Department has issued an average of two per year.[106] And the process may take time because the Justice Department may issue supplemental requests for information. Of the two opinion releases issued in 2012, one took seven months from the date the initial request was submitted (February 15, 2012) through the date the opinion was released (September 18, 2012), and the second – a request similar in subject to other multiple prior Justice Department opinion releases – took two months from initial submission (August 21, 2012) through opinion release (October 18, 2012).

Foreign Official

On September 18, 2012, the Justice Department issued Opinion Procedure Release No. 12-01 in response to a request from a US lobbying firm.[107] The lobbying firm sought to contract with a third-party consulting company that employed a member of a foreign country's royal family to, among other things: (a) advise the lobbying firm on cultural awareness issues in dealing with the foreign country's officials and businesses; (b) act as the lobbying firm's sponsor in the foreign country; and (c) help establish the lobbying firm's office in the foreign country. The member of the royal family did not hold a position in the foreign country's government. Specifically, the lobbying firm requested an Opinion Release to address whether the royal family member is a foreign official under the FCPA and whether the requestor's proposed engagement with the consulting company would result in any enforcement action by the Justice Department.

The Justice Department concluded that the lobbying firm's engagement of the consulting company could go forward without risk of an enforcement action because mere membership in the royal family of the foreign country by itself does not automatically qualify that person as a foreign official. According to the Justice Department, the question of whether a member of a royal family is a foreign official requires a fact-intensive, case-by-case determination that will turn on, among other things:

1. the structure and distribution of power within a country's government;
2. a royal family's current and historical legal status and powers;
3. the individual's position within the royal family;
4. an individual's present and past positions within the government;
5. the mechanisms by which an individual could come to hold a position with governmental authority or responsibilities (such as, for example, royal succession);
6. the likelihood that an individual would come to hold such a position; and
7. an individual's ability, directly or indirectly, to affect governmental decision-making.[108]

The Justice Department based its opinion on a determination that the royal family member in question has no power to affect the foreign country government's award of the engagement the requestor seeks. Among other things, the royal family member has no:

1. official or unofficial title or role in the foreign country's government;
2. official or unofficial power over any aspect of the foreign country's governmental decision-making process, executive function, administration, finances, or, indeed, any aspect whatsoever of the government, including specifically the direct or indirect power to award the business the lobbying company sought; or
3. relationship – personal, professional, or familial – with the decision-makers in the foreign country's government who will decide whether to award the business the lobbying company sought.[109]

In declining to take enforcement action, the Department also considered steps that the requestor and the consulting company had taken to comply with the FCPA and other anti-bribery laws, including the consulting company principals' adoption of the Good Practice Guidance on Internal Controls, Ethics and Compliance issued by the Organization for Economic Cooperation and Development (OECD) and pledge that all partners and employees would be bound by the procedures covered in the Good Practices Guide.

Travel and Promotional Expenses

The Justice Department issued its second opinion release of the year on October 18, 2012.[110] This opinion responded to a request from 19 non-profit adoption agencies headquartered in the United States that proposed to host 18 government officials involved in a foreign country's overseas adoption process. Opinion Release 12-02 does not cover much new ground; it largely follows prior Opinion Releases 07-01, 11-01, and 07-02, all of which similarly concerned promotional expenses related to hosting foreign officials in the US.

The Justice Department determined that funding the proposed trip to the United States "is a reasonable and bona fide expenditure that is directly related to the promotion, demonstration, or explanation of the [adoption agencies'] products or services."[111] Specifically, the trip "will allow the government officials to meet with the [agencies'] employees and to inspect the [agencies'] offices and case files."[112] The government officials will also have an opportunity to meet with families who have adopted children from the foreign country.

In addition to the purpose of the trip, the Justice Department also considered the amount and method of expenditure by the adoption agencies. The Justice Department noted, for example, that the amount to be spent on hotels and meals will not exceed the rates of the United States General Services Administration, that only high-ranking officials will get business-class airfare (which is permitted by the foreign country's government), that no spouses or family members of the government officials will be hosted, and that all expenses will be paid directly to the providers, not the government officials.[113]

Wal-Mart Bribery Saga Continues

In our last newsletter, we covered the New York Times' April 21, 2012 exposé on a bribery campaign allegedly undertaken by **Wal-Mart de Mexico**, the largest foreign subsidiary of Wal-Mart Stores, Inc. (Wal-Mart).[114] In a December 17, 2012 follow-up to its first article, the New York Times detailed an alleged bribery scheme totaling more than US$300,000 in connection with the construction of a store on land not zoned for commercial development, over significant opposition to the building of the store on a protected archeological site near pyramids in Teotihuacán that already suffered from traffic congestion.[115] According to the New York Times' investigation, "Wal-Mart de Mexico was not

the reluctant victim of a corrupt culture that insisted on bribes as the cost of doing business. Nor did it pay bribes merely to speed up routine approvals. Rather, Wal-Mart de Mexico was an aggressive and creative corrupter, offering large payoffs to get what the law otherwise prohibited."[116] The New York Times reported that it had identified 19 sites for which Wal-Mart de Mexico bribed government officials, including (a) eight bribe payments totaling US$341,000 to allow Wal-Mart de Mexico to build "a Sam's Club in one of Mexico City's most densely populated neighborhoods, without a construction license, an environmental permit, or an urban impact assessment, or [] a traffic permit", and (b) nine bribe payments totaling US$765,000, as a result of which "Wal-Mart built a [] refrigerated distribution center in an environmentally fragile flood basin north of Mexico City, … where electricity was so scarce that many smaller developers were turned away."[117]

In the second half of 2012, Wal-Mart expanded its internal bribery probe into other foreign countries beyond Mexico and faced continuing legal challenges from US government agencies, Congress, and private litigants. On the government side, Wal-Mart remains under investigation not only by the Justice Department and the SEC but also by Congress. Congressmen Elijah Cummings (D-Md.), Ranking Member of the House Oversight Committee, and Henry Waxman (D-Cal.), Ranking Member of the House Energy and Commerce Committee, have sent four letters to Wal-Mart's Chief Executive Officer, Michael T. Duke, seeking information in response to the April New York Times article. In their most recent letter, dated August 14, 2012, the Congressmen expressed frustration that Wal-Mart has "not produced a single document we have requested [and has] not allowed us to speak to any Wal-Mart employees responsible for compliance with the [FCPA]."[118] The Congressmen also noted that internal company documents obtained from unnamed sources suggest that Wal-Mart may have had compliance issues relating not only to bribery, but also to 'questionable financial behavior' including tax evasion and money laundering in Mexico.[119] Although Congress cannot bring a civil or criminal enforcement action against Wal-Mart, a congressional investigation can draw unwanted public attention to the company and possibly lead to a broadening of the Justice Department's and SEC's investigations.

On the private litigation front, Wal-Mart's quarterly report filed with the SEC on September 6, 2012 disclosed that the company is currently defending 11 lawsuits stemming from the Mexico bribery allegations, including a putative class action filed in federal court alleging securities fraud that tracks the allegations set forth in the April New York Times article and multiple derivative lawsuits asserting that Wal-Mart's officers and directors breached their fiduciary duties in connection with their oversight of Wal-Mart's compliance with the FCPA.[120] Although Wal-Mart had spent more than US$100 million on FCPA-related matters in 2012, in its most recent report filed with the SEC on December 4, 2012, the company reiterated that it did not currently expect these lawsuits to have a material effect on its financial condition or results of operations.[121]

Amid these investigations and lawsuits, Wal-Mart has taken steps to consolidate its compliance, ethics, investigations, and legal offices. It has hired a new global chief compliance officer.[122] In addition, Wal-Mart has expanded its internal investigation to other foreign countries, including Brazil, China, and India.[123] Indeed, Wal-Mart announced that it had suspended several employees of its Indian joint venture, Bharti Walmart Pvt. Ltd., pending the completion of its investigation.[124] The suspended employees reportedly included Bharti Walmart's CFO and members of its legal team. Additionally, India's government recently appointed a retired judge to lead an inquiry into Wal-Mart's lobbying efforts in India after Wal-Mart disclosed in a report to the US Senate that it had spent US$25 million on lobbying in the past four years, including on issues related to "enhanced market access for investment in India."[125]

The fallout from the Wal-Mart investigation is not limited to Wal-Mart itself. Reuters has reported that US authorities, in the wake of the Wal-Mart scandal, are considering a wide-ranging investigation into FCPA violations in the retail industry.[126]

Update on Industry-Wide Investigations

Pharmaceuticals and Medical Devices

The enforcement actions against Eli Lilly, Pfizer, and Orthofix discussed above reveal that the pharmaceutical and medical device industry remains a focus of the Justice Department's and the SEC's FCPA enforcement efforts. In addition to those three companies, several other pharmaceutical and medical device companies have reported ongoing internal investigations into potential FCPA violations to the Justice Department and the SEC.

For example, **Nordion, Inc.** (Nordion), a Canadian global health sciences company, disclosed on August 8, 2012 that it had opened an internal investigation into compliance irregularities.[127] The company reported that "[t]hese issues relate to potential improper payments and other related financial irregularities in connection with the supply of materials and services."[128] Nordion has hired outside counsel and external forensic and accounting firms to conduct the investigation under the direction of a special committee of the board of directors. Nordion's outside counsel have met with the Justice Department and the SEC, as well as Canadian authorities.

Teva Pharmaceutical Industries Ltd. (Teva), the world's largest manufacturer of generic drugs and Israel's largest company by revenue, is among the most recent pharmaceutical companies subject to inquiry in the US government's investigation into the pharmaceutical industry's FCPA compliance.[129] In a public filing dated August 2, 2012, Teva disclosed that it had received a subpoena from the SEC seeking information about the company's FCPA compliance in Latin America, and in a public filing dated November 1, 2012, Teva disclosed that the Justice Department had sent it informal document requests in October 2012.[130] Teva has engaged outside counsel to conduct an internal investigation and is complying with the requests.

Fresenius Medical Care AG (Fresenius), a German dialysis machine manufacturer, disclosed on August 1, 2012 that it had become aware of conduct that could violate anti-bribery laws, including the FCPA.[131] Fresenius voluntarily disclosed these allegations to the SEC and Justice Department and has retained outside counsel to conduct an internal investigation.[132]

In an interview with Bloomberg discussed in a report published on August 1, 2012, **Olympus Corporation** (Olympus) chairman Yasuyuki Kimoto indicated that the Japanese endoscope maker had discovered "irregularities" in its activities in Brazil.[133] Kimoto stated that the company might "agree" to some violations of the FCPA relating to "travel, meal, and entertainment expenses paid by [the company's] US subsidiary to trainee Brazilian doctors."[134] Olympus reported the suspect activities to the Justice Department in 2011.[135] Olympus made headlines previously for admitting accounting fraud – the company attempted to hide investment losses by paying inflated fees on several acquisitions – that led to a loss of over US$3 billion in market value. The company replaced its entire board of directors in April 2012 and on May 22, 2012, Olympus management announced that it had set up a compliance committee to ensure adherence to legal requirements.[136]

Energy Industry

Scrutiny also continued in the energy industry in the second half of 2012, as several large oil-and-gas companies disclosed ongoing government investigations into their compliance with anti-bribery laws. Notably, the Justice Department, for the first time, terminated a DPA early based on a company's ongoing compliance efforts, and the SEC issued a controversial disclosure rule that requires oil-and-gas producers to disclose payments of $100,000 or more to foreign governments.

Halliburton Opens Angola and Iraq-Centered Investigations

Oil and gas services giant **Halliburton Company** (Halliburton) indicated in a quarterly report filed with the SEC in October that it had opened a new investigation into potentially illicit payments made as part of its operations in Angola and Iraq.[137] According to the company, the alleged payments were made to third-party agents for customs clearance and visa issues. The allegations reportedly surfaced over two years ago when a whistleblower brought them to the company's attention. The company is reportedly cooperating with the Justice Department and the SEC on the investigation.[138]

This is not the first FCPA investigation for Halliburton. In 2009, Halliburton and one of its subsidiaries, **Kellogg, Brown & Root** (KBR), paid US$579 million, one of the largest settlements in FCPA history, in connection with a bribery scheme for oil and gas exploration in Nigeria known as the Bonny Island scheme.[139]

Further, in an action related to the 2009 settlement, the Organised Civil Society Organisations (CSOs) of Nigeria have reportedly requested that the Nigerian Federal Government disclose the identities of former Nigerian government officials and other individuals involved in the Bonny Island scheme.[140] The CSOs have argued that, much as the United States has opted to prosecute Halliburton officials over the Bonny Island scheme conduct, the Nigerian government should prosecute all Nigerians involved in the scheme. The Nigerian government has not signaled any intent to assent to the request.

Milan Prosecutor Launches Corruption Inquiry into Saipem

Saipem S.p.A. (Saipem), a contractor servicing the oil and gas industry, announced that it had received a notice of inquiry from the Italian Prosecutor for Milan relating to an investigation of alleged corruption that took place through 2009 in connection with Algerian contracts.[141] Italian prosecutors also served a notice of inquiry on the company's then Chief Operating Officer of the company's Engineering & Construction business unit, Pietro Varone, who was suspended by Saipem's Board of Directors. Further, the Chief Executive Officer and Deputy Chairman of Saipem, Pietro Franco Tali, resigned, citing his belief that the resignation would better enable the company to respond to the inquiry.[142] The Company has since launched an internal investigation.

Expro Re-Investigates Kazakhstan-Based Allegations

Expro International (Expro), an oil field management company owned by a private equity consortium, received allegations in May 2012 from a tipster that two of its former operations coordinators in western Kazakhstan oversaw and approved bribes to customs officials for several years in an effort to avoid customs delays.[143] Expro had previously investigated similar allegations in Kazakhstan and, according to its counsel, "the [c]ompany firmly believes it properly resolved [them] years ago." Nonetheless, media reports suggest that the company has communicated to the tipster that it "wish[es] to review the issues you raise."[144]

As we reported in our last newsletter, a consortium of oil companies and a logistics arm of Deutsche Post AG's DHL are also investigating alleged improper payments for the movement of goods through the same customs point as Expro – Aksai, an outpost across the border from Russia, near one of Kazakhstan's richest oil and gas deposits, the Karachaganak field.[145]

Total S.A. Reserves for Possible FCPA Settlement

We reported in our last newsletter that in late 2011, France's **Total S.A.** (Total), a major international oil and gas producer, had declined a settlement proposal from the Justice Department and the SEC to resolve inquiries into payments made to Iranian officials by one of Total's consultants.[146] However, Total disclosed on August 1, 2012, that it had reserved €316 million (approximately US$410 million) for a potential settlement with the agencies in connection with the FCPA allegations. Total noted that settlement discussions, though not yet finalized, had "accelerated" and that the US agencies had "proposed draft agreements that could be accepted."[147] In its November SEC filing, the company disclosed that it had reduced the reserve to €308 million (approximately US$398 million) without providing further explanation.[148] A €308 million settlement would rank among the top five largest FCPA settlements to date.

For First Time Ever, DOJ Terminates FCPA DPA Early, Citing "Good Behavior"

On November 2, 2012, the Justice Department, for the first time ever, moved to terminate an FCPA-related DPA ahead of schedule for "good behavior."[149] **Pride International, Inc.** (Pride), a Houston-based company, and its French subsidiary, **Pride Forasol**, were charged with FCPA violations relating to the payment of bribes to government officials in Venezuela, India, and Mexico. According to the DPA, the bribes were paid to extend oil drilling contracts for three oil rigs operating offshore, to settle a customs dispute, and to avoid customs duties and penalties for rig operations. In addition to entering into a three-year DPA with the Justice Department, Pride settled an enforcement action with the SEC.

In its motion to dismiss the criminal information and terminate the DPA, which a federal court granted on November 5, 2012,[150] the Justice Department noted that Pride had "adhered to its compliance undertakings required by the DPA." In particular, Pride instituted and maintained a compliance and ethics program; instituted and maintained internal controls and procedures related to accurate record keeping; and it reduced its reliance on third-party business partners and implemented third-party due diligence requirements, among other undertakings. Notably, Pride was recently acquired by *Ensco*, and the Justice Department may have seen this as a fresh start.

Two Oil-and-Gas Companies Disclose the End of Panalpina-Related Inquiries

Schlumberger N.V. (Schlumberger) reported in October of 2012 that the Justice Department had closed a foreign bribery investigation into the company.[151] The inquiry stemmed from the wide-ranging bribery probe into Swiss logistics company Panalpina and roughly a dozen of its clients. Schlumberger reportedly cooperated with the Justice Department throughout the inquiry.

Nabors Industries Ltd. (Nabors) disclosed on November 2, 2012 that the SEC had declined to pursue an enforcement action relating to Nabors' contacts with Panalpina.[152] Although Nabors added that the Justice Department had not concluded its inquiry, the company stated that it did not expect that the Justice Department's final determination would have an adverse effect on it. Nabors began an internal investigation after the Justice Department initiated an inquiry in 2007, focusing on transactions with Panalpina in Kazakhstan, Saudi Arabia, Algeria and Nigeria.[153]

SEC Adopts Extractive Issuers Disclosure Rule

As part of its implementation of Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), the SEC has adopted a rule requiring issuers that (a) file an annual report with the SEC and (b) engage in the commercial development of oil, natural gas, or minerals, to disclose all payments of at least US$100,000 that they make during the course of a fiscal year to the US or foreign governments in exchange for extracting resources.

Proponents of the new rule believe it will combat corruption and promote transparency. Opponents of the new rule, including SEC Commissioner Daniel Gallagher, have argued unsuccessfully that the rule puts US and other publicly-traded oil and gas companies at a competitive disadvantage as compared to national oil companies in Russia, China, Iran, and Venezuela among others, which do not operate in the highly transparent, intensely regulated world of US issuers and will gain a competitive advantage through these rules.[154] Estimates for companies across the sector to comply with the rule vary greatly, reaching up to US$400 million in annual costs after the first year of implementation. Not surprisingly, a business coalition led by the American Petroleum Institute, the US Chamber of Commerce, the Independent Petroleum Association of America, and the National Foreign Trade Council is challenging the SEC's rule.[155]

Alcoholic Beverage Industry

The pharmaceutical and energy industries are not the only sectors facing intensified enforcement efforts. As we reported in our Winter 2012 Newsletter, in July 2011, alcoholic beverage maker **Diageo Plc** was the subject of an SEC enforcement action.[156] In the second half of 2012, two other spirit producers disclosed that they were conducting internal investigations of potential FCPA violations.

Following a report by the Times of India, Illinois-based **Beam Inc.** (Beam), maker of Jim Beam whiskey and other brand-name spirits, confirmed an investigation into potential FCPA violations.[157] The Times of India article cited whistleblower complaints related to excise duty violations and invoicing problems, among other things.[158] Beam went public last year and its shares are listed on the New York Stock Exchange.

Central European Distribution Corporation (CEDC), one of the world's largest producers of vodka, also disclosed that it had uncovered potential FCPA violations related to gift-giving.[159] In a restatement of its consolidated financial statements, CEDC disclosed that during an audit committee internal investigation concerning changes in the management of its Russian subsidiary, the company discovered potential breaches of the FCPA's books and records provision and potentially other FCPA provisions.[160] In response to the restated financial statements, shareholder Joseph Z. Khakshour filed a complaint in Delaware Chancery Court to inspect CEDC's books and records, to investigate potential wrongdoing, mismanagement and breaches of fiduciary duties by the members of the Company's management and Board or others.[161] CEDC supposedly twice denied his request.[162]

Furthermore, on November 16, 2012, CEDC sent a letter to its shareholders to ensure them that, contrary to allegations by Roustam Tariko, Chairman of Russian Standard and a CEDC shareholder, it was not aware that any of its current executives are under investigation with respect to FCPA violations or otherwise.[163] However, the following week, in its third-quarter 2012 filing, CEDC confirmed that it had been contacted by the Justice Department regarding its previous disclosure and that it was fully

cooperating with the Justice Department and the SEC.[164] Recognizing weaknesses in the company's internal controls, CEDC has taken several remedial steps, including expanded Audit Committee responsibilities (e.g., direct reporting from newly appointed Chief Compliance Officer and General Counsel), improved training, and more frequent evaluation of FCPA compliance.[165]

Former Digi CFO Settles SEC Charges of Evading Internal Controls

On September 28, 2012, the SEC filed a complaint in the United States District Court for the District of Minnesota against **Subramanian Krishnan**, former Chief Financial Officer of Minnesota-based computer hardware manufacturer, **Digi International Inc.** (Digi).[166] According to the SEC, between 2005 and 2010 Krishnan engaged in a course of conduct that resulted in company funds being used to pay for unauthorized travel and entertainment expenses, including his own, which caused the company to file inaccurate quarterly and annual reports with the SEC.[167] Krishnan allegedly operated a system of internal controls that allowed him to approve the expenses at issue, contrary to the company's policy requiring chief executive officer approval. Krishnan also allegedly made inaccurate statements to Digi's outside auditors and in Digi's public filings regarding the purported effectiveness of the company's internal controls.[168]

Krishnan consented to a final judgment without admitting or denying the SEC's allegations. The final judgment bars him from serving as an officer or director of a publicly traded company and permanently enjoins him from violating various provisions of the securities laws, including from aiding and abetting violations of the FCPA's books and records provisions.[169] In addition, Krishnan consented to disgorgement, prejudgment interest, and a civil penalty in to-be-determined amounts.[170]

Digi began an internal investigation back in 2010 following allegations regarding possible violations of [its] gifts, travel and entertainment policy for activities in the Asia Pacific (APAC) region by three individuals in Hong Kong and its chief financial officer.[171] On August 2, 2010, Digi announced that it had completed its investigation, voluntarily disclosed the allegations and its investigation to the Justice Department and the SEC, taken remedial action including strengthening monitoring of its operations in foreign locations, and received confirmation from the government agencies that they would not be pursuing an enforcement action.[172]

Sentencing Updates

Richard Bistrong Receives 18-Month Prison Sentence

Despite a request by both the defendant and the government for no prison time, Judge Richard Leon of the United States District Court of the District of Columbia sentenced **Richard Bistrong** to 18 months imprisonment for bribing a foreign official and exporting military products to Iraq without a license.[173] Bistrong served as a key government informant in the government's ultimately unsuccessful prosecution of 22 individuals through a massive sting operation in connection with the Shooting, Hunting, Outdoor Trade Show and Conference (SHOT Show). Judge Leon recognized the defendant's substantial assistance to the government but concluded that a prison term was necessary to serve the public interest in deterrence.

Garth Peterson Sentenced to Nine-Month Prison Term

Garth R. Peterson, the former Morgan Stanley executive who pleaded guilty to conspiracy to violate the FCPA's internal controls provision, received a nine-month prison sentence from United States District Judge Jack Weinstein of the Eastern District of New York.[174] Judge Weinstein indicated that Peterson's harsh upbringing, family responsibilities, and financial suffering justified a sentence that was considerably shorter than the 51-60 month term sought by prosecutors.[175] As we reported in our last newsletter, Peterson previously ran the Shanghai office of Morgan Stanley's global real estate business, where he secretly arranged inside deals with a Chinese official in order to steer business to Morgan Stanley.[176] Morgan Stanley's voluntary disclosure, cooperation with the investigation, and robust internal controls – including frequent anti-bribery training programs – helped the company avoid an enforcement action.

Four Control Components Executives Sentenced

As we have reported in previous newsletters, California-based valve manufacturer Control Components Inc. (CCI) pleaded guilty in 2009 to violations of the FCPA and the Federal Travel Act of 1961 (Travel Act).[177] 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.

Several former CCI employees were also prosecuted in connection with the bribes paid by CCI. On September 13, 2012, **Paul Cosgrove** – former head of sales at CCI – was sentenced to 13 months of home confinement and a US$20,000 fine for making a corrupt payment to a Chinese government official in violation of the FCPA. In deciding against a prison term, Judge James Selna of the Central District of California cited Cosgrove's age (60) and extensive medical problems.[178] Cosgrove had pleaded guilty in May.[179]

On November 5, 2012, Judge Selna sentenced two other CCI executives – **Stuart Carson**, CCI's former president and CEO, and his wife, **Hong "Rose" Carson**, CCI's former sales manager – who each had pleaded guilty on April 16, 2012, to one count of making corrupt payments in violation of the FCPA. Stuart Carson was sentenced to four months' imprisonment followed by eight months' home detention and a US$20,000 fine. This sentence reflected credit for Carson's cooperation with the government – he was willing to testify against Cosgrove and another former CCI executive, **David Edmonds** – but also his role as a "major participant" in CCI's bribery scheme.[180]

Rose Carson argued for a lenient sentence because of her unique personal background. Unlike her co-defendants, Carson was born in China and lived there until age 26; even the prosecution acknowledged that Ms. Carson "lacked the American education and early business training of her co-defendants."[181] Although Judge Selna declined to find a "cultural" defense to the FCPA, he credited her willingness to testify against Cosgrove and Edmonds.[182] He sentenced Ms. Carson to three years probation, with a period of six months home detention; a US$20,000 fine; and 200 hours of community service.[183]

Finally, on December 17, 2012, Edmonds, CCI's former Vice President of Worldwide Customer Service, was sentenced to eight months' confinement, split between four months of imprisonment and four months of home detention, and a US$20,000 fine.[184] Edmonds pleaded guilty to a single bribery transaction involving Public Power Corporation of Greece, though in imposing his sentencing Judge Selna noted Edmonds' involvement in at least 13 other bribery transactions between 2003 and 2007, and concluded that Edmonds was "an integral part" of CCI's scheme, "albeit closer to the linelevel, for a number of years."

US Struggles to Extradite Former Thai Official

US prosecutors informed a federal judge in California that they had not received a response to their request to extradite a Thai government official who was indicted nearly four years ago for her role in a bribery scandal involving the Bangkok international film festival.[185] This prosecution has garnered attention both because of the US government's extradition struggles and because of the novel legal approach taken against a foreign official who is beyond the scope of the FCPA.

By way of background, in September 2009 husband-and-wife film producers **Gerald** and **Patricia Green** were convicted of paying over US$1.8 million in bribes to a Thai official in return for contracts related to the film festival in Bangkok.[186] The Greens ultimately received six-month jail sentences for their FCPA violations.[187] In addition to the Greens, the United States also brought charges against **Juthamas Siriwan** – the former governor of the Tourism Authority of Thailand – and her daughter, **Jittsopa Siriwan**.[188] Although the charges were based on the Siriwans' receipt of bribes from the Greens, the US government could not prosecute these Thai citizens under the FCPA because the FCPA does not criminalize the receipt of bribes by foreign government officials. Accordingly, the government used a different statute, alleging violations of, and conspiracy to violate, the Money Laundering Control Act of 1986.[189] The anti-money laundering statute criminalizes the transportation, transmittal or transfer of a monetary instrument with the intent to promote the carrying on of specified unlawful activity – in this case, the alleged bribery of a foreign official in violation of the FCPA.[190]

The Thai defendants have argued in a yet-to-be-decided motion to dismiss the indictment that the government's use of money laundering charges is improper because money laundering must be separate and distinct from the underlying offense that generated the money to be laundered.[191] It remains to be seen how courts will react to the US government's use of statutes other than the FCPA to prosecute foreign officials for their role in bribery schemes.

Further complicating the US government's attempts at extradition, the Thai defendants asserted in a status report that, because they are now facing prosecution in Thailand, Thailand has formally postponed extradition under provisions of the US-Thai Extradition Act and the US-Thai Extradition Treaty.[192] Moreover, the Thai defendants argued that to prosecute them in the US for substantially similar offenses would constitute double jeopardy, in violation of the US-Thai Extradition Treaty.[193]

Rounding Out the Enforcement Docket

IBM Settlement Still Pending District Court Approval

As we reported in our Summer 2011 newsletter, International Business Machines Corporation (IBM) entered into a settlement with the SEC for alleged violations of the books and records and internal controls provisions of the FCPA.[194] The SEC alleged that employees of IBM's subsidiaries and a majority-owned joint venture made improper cash payments and provided gifts to and paid travel and entertainment expenses for government officials in South Korea and China.[195] IBM agreed to pay US$10 million, consisting of US$5.3 million in disgorgement, US$2.7 million in prejudgment interest, and a US$2 million penalty.[196]

Nearly one year after the consent was filed in the United States District Court for the District of Columbia, Judge Richard Leon has not approved the proposed settlement.[197] Instead, during a December 20, 2012, status conference, Judge Leon reportedly said that he would not approve a settlement unless

IBM was required to report all potential violations of the FCPA's accounting provisions, not just issues underlying the specific bribes alleged in the SEC's complaint. IBM countered that, as a practical matter, it would be impossible to identify all such accounting issues. Judge Leon alluded to other federal judges – most notably Judge Jed Rakoff in the Southern District of New York – who have subjected settlements proposed by the SEC to more rigorous review. This is only the second FCPA case filed by the SEC since 2010 – in addition to the Tyco matter discussed above, which also is pending before Judge Leon – that has not been approved by the presiding judge within three months.

Bourke Loses Another Appeal

In our last two newsletters, we reported on the prosecution and conviction of **Frederic Bourke Jr.**, a co-founder of accessory company Dooney & Bourke, for violating the FCPA and on his appeal seeking a new trial on the grounds of "newly discovered" evidence.[198] Bourke's appeal focused on testimony offered at trial by Swiss lawyer Hans Bodmer, which Bourke argued the government either knew or should have known was false.

On November 28, 2012, the US Court of Appeals for the Second Circuit affirmed the district court's denial of Bourke's request for a new trial. While Bourke relied on a prosecutor's statement during oral argument that – according to Bourke – was an admission that the government knew Bodmer's testimony was false,[199] the court agreed with the government that "the only natural reading of the statement is that in a *hypothetical* situation where the government knew about the discrepancy, the government counsel believed it would be unethical to 'coach' the witness by confronting him with those inconsistencies."[200] Moreover, the court made clear that Bourke failed to demonstrate, as required, that Bodmer actually committed perjury.[201] Bourke's counsel indicated he intended to ask the court to reconsider its decision, and Bourke remains free on bail during the pendency of his appeals.[202]

Supreme Court Rejects Alcatel-Lucent "Victim's" Restitution Claim

As discussed in our Winter 2012 newsletter, the US Court of Appeals for the Eleventh Circuit refused to overturn the Southern District of Florida's denial of restitution to **Instituto Costarricense de Electricidad** (ICE), a Costa Rican state-owned utility company, under the Crime Victims' Rights Act.[203] Deciding the case on a writ of mandamus, the Court of Appeals upheld the lower court's determination that ICE was not a victim of Alcatel-Lucent's bribery scheme, but rather that ICE was a co-conspirator.[204] In addition to the writ of mandamus, ICE simultaneously filed a direct appeal in the cases against Alcatel-Lucent and its subsidiaries. However, the Court of Appeals dismissed the consolidated appeals. In one case, the Eleventh Circuit held that it had no jurisdiction to hear the appeal because the DPA was not a final judgment;[205] in the other case, the court held that, as a non-party victim, ICE had no standing to appeal its denial of restitution outside of the writ of mandamus.[206]

On November 1, 2012, ICE filed a petition for a writ of certiorari arguing that the Crime Victims' Rights Act does not limit the broad general right of appellate courts to review district courts' final decisions.[207] However, on December 10, 2012, the US Supreme Court summarily denied ICE's petition.[208]

Justice Department Recovers Proceeds of Corruption Under Its Kleptocracy Asset Recovery Initiative

In the second half of 2012, the Justice Department made its first recoveries under its Kleptocracy Asset Recovery Initiative. The Initiative, announced by Attorney General Eric Holder in July 2010 at the Arab Forum on Asset Recovery,[209] seeks to combat large-scale foreign official corruption by

recovering proceeds that have been laundered through the US.[210] The Justice Department's Asset Forfeiture and Money Laundering Section oversees the Initiative as part of a joint effort with the Justice Department's Fraud Section and the SEC's Office of International Affairs.[211]

On June 28, 2012, in the first forfeiture obtained under the Initiative, a federal district court in Massachusetts ordered forfeiture of approximately US$400,000 received by **Diepreye Solomon Peter Alamieyeseigha**, a former state governor in Nigeria.[212] Alamieyeseigha had pleaded guilty in Nigeria to several offenses, including money laundering. The Justice Department is separately seeking forfeiture of a home in Maryland owned by Alamieyeseigha.[213]

The Justice Department obtained its second recovery under the Initiative on July 23, 2012, also from a former Nigerian state governor, **James Onanefe Ibori**, and his English solicitor. In 2012, Ibori was convicted in the United Kingdom of money laundering and conspiracy to defraud; his solicitor was convicted of money laundering and other related crimes in 2010.[214] A federal court in the District of Columbia issued a restraining order under seal that affects a home in Houston, Texas and two brokerage accounts, together worth more than US$3 million. The Department of Justice subsequently filed a supplemental application in October 2012 seeking the restraint of approximately US$7 million worth of additional assets held by Ibori and his associates.[215]

Lastly, on October 23, 2012, a federal court in the Western District of Virginia entered a final forfeiture judgment against a house owned by the former President of Taiwan, **Shui-Bian Chen**, and his family through a British Virgin Islands shell company.[216] The following day, a final forfeiture judgment was entered in the Southern District of New York against Chen's Manhattan condominium. The properties are worth approximately US$2.1 million.[217] According to the Justice Department, the forfeitures related to approximately US$6 million in bribes paid to former first lady Sue-Jen Wu by Yuanta Securities Co. Ltd. to ensure the company's successful bid for a financial holding company.[218]

While the US is not obligated to repatriate forfeited property, the Justice Department has announced its intention to return stolen money to its rightful owners – the people and governments from whom the assets were taken.[219]

New and Concluded Government Investigations

Companies Disclosing Investigations into Potential FCPA Violations

In the second half of 2012 a number of companies disclosed ongoing government investigations. For example, on July 18, 2012, wireless technology company **Qualcomm Inc.** (Qualcomm) disclosed that it was the subject of Justice Department and SEC investigations.[220] The company reported that it had uncovered instances of gift giving, special hiring consideration, or other benefits to individuals associated with Chinese state-owned companies or agencies, and that it was cooperating with the government. More recently, on November 7, 2012, Qualcomm reported that its Audit Committee, with the assistance of independent counsel and independent forensic accountants, had commenced a broader review of the company's compliance with the FCPA.[221]

Automatic teller machine manufacturer **NCR Corp.** (NCR) disclosed on August 14, 2012 that it had launched an internal investigation into allegations from an anonymous whistleblower that, if true, could constitute FCPA violations.[222] In an October earnings call, NCR stated that it is cooperating with authorities, including the SEC, which served a subpoena on the company, and the Justice Department, which has received copies of the whistleblower communications.[223] The investigation spans conduct that occurred in China, the Middle East, and Africa.

Ohio-based glass manufacturer **Owens-Illinois, Inc.** (Owens-Illinois) disclosed in its third-quarter Form 10-Q that an internal investigation had revealed potential FCPA violations, as well as potential violations of internal policy and local law.[224] The company did not indicate which of its wide-ranging foreign operations are implicated. Owens-Illinois also said that it voluntarily disclosed the matter to the Justice Department and the SEC.

In its third-quarter 2012 SEC filing, **LyondellBasell Industries NV** (LyondellBasell), a Netherlands-based plastics, chemicals and refining company, reported that it had identified "an agreement related to a former project in Kazakhstan under which a payment was made that raises compliance concerns" under the FCPA.[225] LyondellBasell disclosed that it had engaged outside counsel to investigate the potential compliance issues, and that it had voluntarily disclosed the matter to, and was cooperating with, the Justice Department and the SEC.

NASDAQ-listed South African technology company **Net 1 UEPS Technologies, Inc.** (Net 1) disclosed that it is being investigated by the Justice Department, the SEC, and the FBI for possible violations of the FCPA.[226] In a Form 8-K filed with the SEC on December 4, 2012, the company said that the SEC and the Justice Department are investigating payments to officials of the Government of South Africa in connection with securing a contract with the South African Social Security Agency to provide social welfare and benefits payments.[227] The government's investigation involves matters similar to those raised by AllPay Consolidated Investment Holdings Limited (AllPay) (whom Arnold & Porter LLP represents) – an unsuccessful bidder for the contract – in a suit filed in South Africa to set aside the contract awarded to Net 1.[228] A South African court found that the contract was awarded through an "illegal and invalid" process, but nevertheless declined to set aside the award. The rulings of the South African court are on appeal to the Constitutional Court of South Africa.

Companies Disclosing the End of Investigations

The second half of 2012 brought better news for other companies. For example, by letter dated July 19, 2012, the Justice Department informed **Academi LLC** (Academi, formerly Blackwater Worldwide) that it had closed an investigation into bribery allegations arising from a New York Times report on the company's conduct in Iraq.[229] In declining to prosecute Academi for violating the FCPA, the Justice Department cited the company's cooperation and its enhanced compliance program. Separately, Academi signed a three-year DPA with the United States Attorney's Office in the Eastern District of North Carolina relating to various export-control and arms-trafficking violations.[230]

On August 1, 2012, **Huntsman Corporation** (Huntsman), a global chemical manufacturer headquartered in Texas, disclosed that the Justice Department and the SEC had ended their investigations with decisions not to take enforcement action against the company.[231] Beginning in May 2010, Huntsman conducted an internal investigation of the operations of its majority-owned joint venture in India, including payments made by employees of the joint venture to Indian government officials. The company voluntarily reported the matter to the Justice Department and the SEC, and it took steps, such as the termination of certain management employees, to stop the allegedly illicit payments.

In its second-quarter report filed with the SEC on July 26, 2012, **W.W. Grainger** (Grainger) disclosed that an internal investigation did not substantiate initial information suggesting significant use of gift cards for improper purposes.[232] Last January, Grainger informed the Justice Department and the SEC of its investigation, and in a third-quarter report filed with the SEC on November 1, 2012, Grainger disclosed that the Justice Department had closed its investigation in August, although its filing did not report on the status of the SEC's investigation.[233] The Illinois-based company had previously indicated that it was investigating potential violations of the FCPA by its Chinese subsidiary, Grainger China LLC.[234]

On November 30, 2012, **Grifols S.A.** (Grifols), a Spanish pharmaceutical company, disclosed that the Justice Department had declined to prosecute it for alleged FCPA violations by Talecris Biotherapeutics Holdings Corp. (Talecris), a US company that it acquired from the Bayer Group in June 2011.[235] Talecris had disclosed an FCPA investigation prior to the acquisition. According to Grifols, the Justice Department credited Grifols' significant cooperation with the government's investigation.[236]

First Award Issued under Dodd-Frank Whistleblower Program

The SEC continues its implementation of a whistleblower program established under the Dodd-Frank Act. The whistleblower program provides monetary awards to eligible individuals who voluntarily provide original information that leads to successful SEC enforcement actions resulting in the imposition of monetary sanctions over US$1 million. In its 2012 status report, the whistleblower program reported that since August 2011, it has received thousands of tips, from all 50 states and 49 countries, at an average of about eight per day.[237] Of the 3,001 whistleblower tips received during the past fiscal year, 115 related to the FCPA.[238]

On August 21, 2012, the SEC announced its first whistleblower award, though in a non-FCPA case.[239] The award recipient, who wished to remain anonymous, provided documents and other significant information that allowed the SEC's investigation to move at an accelerated pace and prevent the fraud from ensnaring additional victims.[240] The whistleblower's assistance led to a court ordering more than US$1 million in sanctions, of which approximately US$150,000 has been collected thus far. The whistleblower was awarded 30% of what the SEC collected, the maximum percentage payout allowed by law.[241]

FCPA-Related Civil Litigation

Alcoa Settles Bribery-Based RICO Suit with Bahrain Company

As we have discussed in previous newsletters, **Alba**, Bahrain's state-owned aluminum company, filed an action against US aluminum producer Alcoa Inc. (Alcoa) seeking US$1 billion in damages based on allegations that bribery led Alba to overpay for raw materials in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO).[242] Alcoa settled with Alba in October for US$85 million, bringing an end to Alba's four-year lawsuit.[243] Investigations by the Justice Department and the SEC remain ongoing, though Alcoa has disclosed in its SEC filings that the company is exploring whether a settlement can be reached.[244]

Court Grants Wynn Resorts Attorneys' Fees after Improper Removal to Federal Court

On August 21, 2012, a United States District Court in Nevada granted Las Vegas casino giant **Wynn Resorts** attorneys' fees in connection with litigation against a former casino employee who had allegedly bribed gaming regulators in the Philippines.[245] Wynn Resorts originally sued the former employee in Nevada state court for breach of fiduciary duty. The defendant tried to remove the case to federal court, arguing that the claim against him turned on an interpretation of the FCPA.[246] The federal judge disagreed, sending the case back to state court and awarding Wynn Resorts US$148,583 in attorneys' fees on the ground that the defendant had no basis for bringing the removal motion in the first place.

Smith & Wesson Wins Motion to Dismiss Derivative Suit

On July 25, 2012, **Smith & Wesson Holding Corp.** (Smith & Wesson) won its motion to dismiss a derivative suit alleging that Smith & Wesson's officers and directors failed to put in place effective FCPA controls and oversight.[247] The derivative suit, which shareholders brought in Massachusetts federal court, came on the heels of the unsuccessful indictment of Smith & Wesson Vice President Amaro Goncalves in connection with the Justice Department's SHOT Show sting operation.[248] In dismissing the derivative action against Smith & Wesson, the Massachusetts district court found that the plaintiffs had failed to show that a demand on the company's board of directors would have been futile. The court ruled that a Nevada state court's decision in 2009 that demand would not have been futile with respect to "essentially the same [Smith & Wesson] board" applied and that, even in the absence of issue preclusion, the plaintiffs had failed to plead sufficient facts to demonstrate the futility of a board demand.[249]

According to a recent SEC filing, Smith & Wesson remains the subject of ongoing Justice Department and SEC investigations that it believes relate to potential FCPA violations.[250]

Halliburton Settles FCPA-Based Shareholder Derivative Action

On July 9, 2012, Halliburton settled a shareholder derivative action filed against it three years earlier that charged board members with facilitating improper activities that, among other things, violated the FCPA through the Bonny Island scheme in Nigeria.[251] Under the settlement, the company agreed to implement changes to its corporate governance and certain internal controls. Most notably, the company agreed to the adoption of a "clawback" provision that allows it to reclaim incentive compensation provided to former officers and directors found by a court or the company itself to have engaged in illegal behavior. The company also agreed to strengthen the role of its audit committee and to establish a Management Compliance Committee. It further agreed to improve its compliance training, among many other enhancements to its code of business conduct and other elements of its compliance program.

Siemens Faces Civil Suits in the United States

Court Stays Proceedings in Alien Tort Statute Case

In September, Carlos Morán, a former employee of Argentinean watchdog agency Sindicatura General De La Nación, filed an Alien Tort Statute suit against **Siemens** in the Southern District of Florida.[252] Morán alleges that Siemens ordered his assault and numerous threats after he threatened to disclose bribes he believed were paid by Siemens to various Argentinean officials in connection with a US$1 billion National Identity Card project contract. Morán seeks US$100 million in damages. In addition to filing a motion to dismiss, Siemens won a stay of the proceeding pending the outcome of the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, which will address the reach of the Alien Tort Claims Act.[253] If the Supreme Court has not reached its decision by June 30, 2013, the Florida court will reevaluate the stay.

Mexican Agency Files Suit

Siemens may also face suit in New York related to alleged bribery in Mexico.[254] Two Mexican energy agencies, **Petroléos Mexicanos** and **Pemex-Refinanción**, filed a complaint seeking US$1.5 billion in damages for alleged losses related to the performance of an oil refinery project. Siemens and **SK Engineering & Construction Co. Ltd.**, a Korean conglomerate, entered into a joint venture named **CONPROCA S.A. de C.V.** (CONPROCA) to procure a contract to modernize Mexican oil refineries. The Mexican agencies allege that the joint venture paid bribes both to obtain the contract and to maintain it after the joint venture exceeded its projected budget.[255] On December 24, 2012, the Mexican agencies filed a motion to stay the case pending the completion of other proceedings between the Mexican agencies and CONPROCA that are under way in Mexico and New York relating to performance of the contract.[256]

GLOBAL ANTI-CORRUPTION UPDATE

Developments in the United Kingdom

Enforcement efforts in the United Kingdom continued apace in the second half 2012. The SFO issued revised policies emphasizing its prosecutorial function – signaling, perhaps, a shift away from civil resolutions – and the Ministry of Justice continued its push to make DPAs available to prosecutors.

"Revised" Policies

On October 9, 2012, only a little more than a year after the Bribery Act 2010 took effect, the SFO issued revised policies and guidelines, replacing prior guidance issued in early 2011.[257] In what may be a response to criticisms of the SFO while under the leadership of former Director Richard Alderman, the SFO's guidance emphasizes that:

- The SFO's primary role is to investigate and prosecute. The revised policies make it clear that there will be no presumption in favor of civil settlements.
- Decisions to prosecute unlawful activity will be governed by the full code test in the Code for Crown Prosecutors (Full Code Test), which weighs the sufficiency of the evidence and public interest factors, including the significance of the sentence for the unlawful activity, and the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions.[258]

The revised policies relate to three facets of the Bribery Act: business expenditures, facilitation payments, and corporate self-reporting.

Business Expenditures

The SFO's recently released policies on business expenditures offer no real changes, stating that while bona fide hospitality and promotional expenditures are recognized as an important part of doing business, it is also the case that bribes are sometimes disguised as legitimate business expenditures."[259] The guidance notes that more lavish expenditures – beyond what may be reasonable in the particular circumstances – are more likely to support an inference that the expenditures were intended to encourage or reward improper performance, or to influence an official. Other factors that may call into question the legitimacy of the expense include expenditures that are not clearly connected with legitimate business activity or are concealed.

Facilitation Payments

Similarly, the guidance on facilitation payments reiterates existing policy: facilitation payments are, as they always have been in the United Kingdom, illegal.[260] That said, the questions and answers issued as part of the guidance explain that the SFO will exercise its discretion in determining whether to prosecute facilitation payments.[261] Under the Full Code Test, factors that tend to support a prosecution include:

1. large or repeated payments, which are more likely to attract a significant sentence;
2. payments that are planned for or accepted as part of a standard way of conducting business, which may indicate the offence was premeditated;
3. payments that may indicate an element of active corruption of the official in the way the offence was committed; and
4. not following a commercial organization's clear and appropriate policy for facilitation payment requests.

On the other hand, factors that tend against prosecution include:

1. a single small payment, which is likely to result in only a nominal penalty;
2. the payment(s) comes to light as a result of a genuinely proactive approach involving self-reporting and remedial action;
3. following a commercial organization's clear and appropriate policy setting out procedures to follow if facilitation payments are requested; and
4. the payer being in a vulnerable position arising from the circumstances in which the payment was demanded.

Self-Reporting

The revised policies state that the SFO will take corporate self-reporting into consideration in determining whether to prosecute only if it is part of a genuinely proactive approach adopted by the corporate management team, including whether the corporation provided sufficient information, made witnesses available, and disclosed the details of the internal investigation.[262] In this regard, the revised policies note that each case will turn on its own facts and point out that self-reporting is no guarantee that a prosecution will not follow.[263]

United Kingdom Moves Forward with Deferred Prosecution Agreements

As we reported in our last newsletter, then-Solicitor General Edward Garnier QC commenced a consultation process regarding the use of DPAs.[264] The Ministry of Justice (Ministry) announced that it received positive responses from its consultation request, with 86% of those respondents indicating that DPAs would be a good addition.[265] Consequently, on October 23, 2012, the Ministry advised that it was adding DPAs to the Crime and Courts Bill currently before Parliament. Prosecutors are not expected to be able to make use of DPAs until 2014.[266]

As in the United States, United Kingdom DPAs will entail a voluntary agreement with a prosecutor whereby, in return for complying with a range of conditions, the prosecutor will defer a criminal prosecution and if, at the end of the deferral period, the prosecutor is satisfied that the conditions have been fulfilled, there will be no prosecution. However, United Kingdom DPAs will differ in several aspects from United States DPAs, and there is some question as to whether DPAs will prove to be as effective in the United Kingdom as they are perceived to be in the United States.

Under the Ministry's proposal, United Kingdom DPAs will be available only to organizations (commercial or otherwise) that are alleged to have committed economic crime, in particular fraud, offenses under the Bribery Act 2010, and money laundering. DPAs will not be available to individuals, nor will they be available to organizations that are alleged to have been involved in non-economic crime.

Furthermore, according to the Ministry, its proposal will provide for greater judicial involvement and transparency than DPAs in the United States. The Ministry stated that "under our plans, the judiciary will play a vital independent role in this process to ensure that DPAs are properly scrutinised, transparent and in the interests of justice. They will be empowered to block them if they do not agree that they are an appropriate response to the organisation's wrongdoing." And with regard to the level of transparency, the Ministry stated that "there will be public scrutiny of the process – the public will know what wrongdoing has taken place and the sanctions for it, including any penalty that has been paid. The final hearing will be held in open court and the final agreement will be published by the prosecutor."

Given the possibility that judges may set aside the agreement reached between company and prosecutor or alter the terms of the agreement, corporations may be reluctant to enter into DPAs that do not yield a definitive outcome. This uncertainty arguably will deter self-reporting and self-investigation, both of which are required if United Kingdom prosecutors are to tackle economic crime as effectively as their United States counterparts.

SFO Director David Green Addresses Revised Policies and DPAs before the House of Commons

On November 13, 2012, SFO Director David Green answered questions from the House of Commons' Justice Committee regarding the SFO's revised policies and DPAs. Green reiterated that the policies were intended to restate the prosecutorial purpose of the SFO: "We are primarily a crime-fighting agency. The perception seems to have arisen in the past that the SFO was anxious to do deals, and more willing to do deals, because it had no real stomach for prosecutions. That cannot be right."[267] Green went even further when he chastised those who call for additional guidance from the SFO. "In addition, frankly, so far as I am concerned, we are not there to give advice to people. They can get their advice from their lawyers and their other experts, which they have in spades. I am not there, nor are my staff, to give advice. We are there to investigate and prosecute serious fraud, bribery and corruption."[268]

In addition, in response to concerns that the SFO might prefer DPAs to prosecution, Green stated that it was his hope that DPAs would allow the SFO's overall caseload to increase without reducing the number of prosecutions. In his view, DPAs will not become "a universal panacea for corporate misconduct. They will be used in the right circumstances only. An example of what I think would be the right circumstance is where an incoming board chooses to self-report past misconduct by a previous board, which it has unearthed and proactively investigated."[269]

SFO Faces Budget Cuts Again

The SFO's budget has been cut progressively since 2008, when its budget was £53.5 million (approximately US$85 million), to £35.9 million (approximately US$57 million) in 2010/2011.[270] Its budget is forecasted to decrease even further to £31.3 million (approximately US$50 million) by 2014/2015.[271] The OECD Working Group on Bribery expressed concern about these budget cuts in its most recent report on the United Kingdom, warning that the cuts in resources could lead to an emphasis on plea negotiations and self-reporting in lieu of prosecution, which may lead to a decrease in transparency.[272] In this regard, the OECD Working Group expressed concern that the SFO was - at least before the issuance of its latest guidance – relying increasingly on civil recovery orders, which require less judicial oversight and are less transparent than criminal plea agreements. [273]

The OECD Working Group's concerns may have come to fruition in the Tchenguiz case. **Robert** and **Vincent Tchenguiz**, who made their fortunes in real estate, were investigated by the SFO and Icelandic authorities for their alleged role in the collapse of Kaupthing Bank.[274] The SFO applied for search warrants on March 4, 2011, and executed them several days later at the brothers' homes and offices.[275]

The Tchenguiz brothers, however, challenged the validity of the search warrants. Their efforts were rewarded on July 31, 2012, when the High Court declared that the warrants issued to the SFO were unlawfully obtained by misrepresentation and non-disclosure to the issuing judge.[276] The High Court emphasized that many of these problems were the result of the continuing budget cuts to the SFO: "The investigation and prosecution of serious fraud in the financial markets requires proper resources, both human and financial. It is quite clear that the SFO did not have such resources in the present case. … It is clear that incalculable damage will be done to the financial markets of London, if proper resources, both human and financial, are not made available for such investigations and prosecutions in the financial markets of London."[277]

While the SFO acknowledged that serious mistakes were made in connection with the application for search warrants in this case, SFO Director Green pledged to meet the new budget constraints.[278] Green observed: "We need to redefine what an SFO case is.… When our resources are finite they must be concentrated on strategic rather than across the board."[279]

In his remarks before the House of Commons Justice Committee, Green further responded to the question of whether the SFO would be able to accomplish its mission with the "massive reduction in resources." Green responded that while the funding was sufficient for "day-to-day work," the reduction in resources will pose problems if the SFO is tasked with "exceptional" investigations. Because the SFO cannot turn down cases because of funding issues, he suggested that "Blockbuster funding" – additional funding procured when the SFO investigates extremely large cases – might be the best solution. Green cited the LIBOR investigation as an example: the Treasury underwrote £3.5 million (US$5.6 million) in surge funding to cover the LIBOR investigation should the SFO fail to absorb the costs into its budget.[280]

SFO Faces Harsh Criticism

On November 26, 2012, the Crown Prosecution Service Inspectorate released a report highly critical of the SFO.[281] The report, which was based on an inspection conducted in March and April 2012, made clear that "[a]t present, the SFO carries out some of its casework to a high standard, but there is clear room for improvement."[282]

The SFO's case selection process and case management were among the areas most heavily criticized. For instance, the report stated "identification of potential cases appears to have been driven by referral, media coverage, and very informal intelligence gathering in some cases."[283] The report further noted that when intelligence is collected, "the SFO needs to [deal with it] more systematically, with an integrated, centralised process known and used by all staff."[284] Additionally, the report concluded that the SFO did not have enough suitable lawyers with sufficient skill and experience to conduct the level of work necessary for complex fraud investigations,[285] much of which was attributed to a lack of funding.[286]

Update on Enforcement Actions in the United Kingdom

Former CEO of Innospec Ltd. admits to more wrongdoing

On July 30, 2012, the SFO announced that Innospec's former CEO **Paul Willis Jennings** pleaded guilty to one charge of conspiracy to corrupt Iraqi officials.[287] Jennings admitted to his role in a conspiracy to induce Iraqi officials to ensure that government tests on MMT, a competitor product, concluded with an unfavorable assessment.[288] As reported in our previous newsletter, Jennings already pleaded guilty to two counts of conspiracy to corrupt government officials of Indonesia and Iraq to secure government contracts.[289]

The SFO has charged three other individuals in connection with Innospec. Former Innospec Regional Sales Director **Militades Papachristos** was charged with one count of conspiracy to corrupt on February 10, 2012.[290] Former Global Sales and Marketing Director **David Turner** plead guilty to conspiracy to corrupt.[291] And former CEO **Dennis Graham John Kerrison** stands charged with conspiracy to corrupt.[292]

The Innospec cases remain one of the best examples of international cooperation in conducting a joint bribery investigation. Both the United States and the United Kingdom engaged in a joint investigation after it was uncovered that Innospec routinely paid bribes, totaling more than US$9.2 million, to sustain sales of tetraethyl, an antiknock fuel additive, to state-owned refineries in Iraq and Indonesia.[293] The SEC announced on March 18, 2010 that Innospec had agreed to a global settlement for US$40.2 million, US$12.7 million of which went to the SFO.[294] Notably, however, Lord Justice John Thomas criticized the approach in his sentencing of Innospec, making clear that in the United Kingdom "a court must rigorously scrutinize in open court in the interests of transparency and good governance the basis of that plea and to see whether it reflects the public interest."[295] Although Lord Thomas agreed not to impose a fine in excess of the agreed-upon US$12.7 million, he emphasized that the SFO should not expect that the High Court would do so in the future.[296]

Oxford Publishing Ltd.

In July 2012, the SFO announced a civil settlement with **Oxford Publishing Ltd.**, a wholly-owned subsidiary of Oxford University Press (Oxford), for £1,895,435 (approximately US$3,045,000) plus prosecution costs.[297] This settlement is the latest in a long line of civil recovery orders obtained by the SFO, including the recent case of Macmillan Publishers Limited.[298]

In 2011, after Oxford became aware of irregular contract practices in its educational publishing business, it conducted an internal investigation and discovered that its Kenyan and Tanzanian subsidiaries in East Africa bribed government officials to win competitive tenders and contracts between 2007 and 2010.[299] Oxford reported the results of its internal investigation to the SFO in November 2011.

The SFO opted not to prosecute and resolved the matter instead by obtaining civil recovery orders under the United Kingdom Proceeds of Crime Act 2002. Although the SFO has been criticized for relying too heavily on civil settlements, SFO Director David Green CB QC voiced support for the decision not to prosecute in light of Oxford's self-reporting.[300]

This settlement also responded to criticism that past civil settlements have lacked transparency: for the first time, the SFO provided details on the methodology used to determine the amount of the civil recovery order, announcing that the settlement was based on the gross revenue derived from the suspect contracts, less costs incurred.[301]

EADS Subsidiary Comes under Investigation

The SFO has opened a criminal investigation into allegations concerning **GPT Special Project Management Ltd.** (GPT), a subsidiary of European Aeronautic Defence and Space Company (EADS), regarding aspects of a transaction between GPT and Saudi Arabia.[302] The investigation, which also includes allegations that United Kingdom Ministry of Defence officials learned of potential improper payments in 2008 but took no action, centers around possible bribes totaling £14.5 million paid to Saudi Arabian officials in the forms of luxury cars, jewelry, and cash to secure a £2 billion communications contract with the Saudi National Guard. These allegations were brought to the attention of investigators in May 2011 by Lieutenant Colonel Ian Foxley, a former employee of GPT, who told investigators he was fired from his position as program director because of concerns he raised about possible bribery.[303]

In addition to the SFO's inquiry, EADS is being investigated by prosecutors in Germany and Austria. According to news reports based on information provided by Austrian authorities, on November 6, 2012, the Munich Public Prosecutor's Office raided EADS' headquarters in Ottobrunn, the offices of Cassidian (the EADS division responsible for the Eurofighter project) in Unterschleissheim, and the Eurofighter's management offices in Hallbergmoos, in connection with an investigation of possible corruption in EADS' sale of its Eurofighter jets to Austria.[304] The raids in Germany coincided with searches of several homes in Austria and Switzerland.[305] No arrest warrants have been issued so far, but more than a dozen individuals may be under investigation.

Abbot Group Settles with Scotland's Crown Office

The Crown Office – responsible for prosecuting bribery in Scotland – recently announced a £5.6 million settlement with the **Abbot Group** under the United Kingdom Proceeds of Crime Legislation.[306] Abbot self-reported improper payments made in 2007 to secure overseas contracts, becoming the first company to meet the criteria established by the Crown Service in 2011 under its self-reporting initiative.[307] The fraud was initially uncovered during a routine tax audit in May 2011; Abbot subsequently hired counsel and accountants to conduct an internal investigation of a 12-year period.[308] The £5.6 million represents the profits Abbot made under the questionable contracts.[309] Further details of the improper payments have not been disclosed because of the potential for future criminal prosecution.[310]

Rolls-Royce Discloses Internal Investigation

Rolls-Royce Holdings Plc (Rolls Royce) recently conducted an internal investigation into allegations of fraud following a request from the SFO.[311] Dick Taylor, a former employee, had alleged that Rolls-Royce made improper payments totaling US$20 million to Tommy Suharto, the son of the late Indonesian President Suharto, to secure a contract with the national airline Garuda for aircraft engines in 1990.[312] Taylor began airing the allegations as early as 2006.[313]

The internal investigation revealed questionable payments in Indonesia, China, and other unspecified markets.[314] Rolls-Royce has said that it will cooperate fully.[315]

Four Charged for Role in Nigerian Corruption Scheme

On December 17, 2012, the SFO announced charges against four individuals for their role in a Nigerian corruption scheme involving **Swift Technical Energy Solutions Ltd.** (Swift), the Nigerian subsidiary of the Swift Group of companies.[316] Agents and employees of Swift, a provider of manpower for the oil and gas industry, allegedly paid bribes in 2008 and 2009 totaling £180,000 (approximately US$288,000) to tax officials in Nigeria to reduce or delay taxes paid on behalf of workers placed by Swift. The SFO's investigation began after the City of London Police referred the case.

As a result of the investigation, the SFO brought two counts of conspiracy to corrupt against four British nationals: **Paul Jacobs**, Swift's former CFO; **Bharat Sodha**, Swift's former Tax Manager; **Nidhi Vyas**, Swift's former Financial Controller; and **Trevor Bruce**, Swift's former Area Director for Nigeria. A preliminary hearing is set for February 22, 2013, before the Southwark Crown Court. The Swift Group is cooperating with the SFO's investigation and is not, as yet, facing criminal charges.

Anti-Corruption Efforts in France

The OECD Working Group on Bribery recently issued a report on anti-corruption efforts in France expressing concern about the lackluster response of the authorities in actual or alleged cases of foreign bribery involving French companies.[317] The report focused on the low number of foreign bribery proceedings (33) and resulting convictions (5) since France joined the OECD Convention, particularly given the significant role of French companies in the global economy.[318] The report was especially critical of the low number of proceedings against corporations. As of the Phase 3 report, only one company has been convicted of foreign bribery, and the conviction is subject to appeal.[319]

The report highlighted a number of areas that the OECD Working Group views as obstacles to prosecution in France. For instance, French law requires proof of direct involvement by a public official in awarding a contract or other business advantage – a burden that may require the cooperation of the bribed official's home country.[320] Additionally, the report noted that "[i]n practice, the law enforcement authorities tend to perceive [corporations] as victims rather than perpetrators of a bribery offense."[321]

The second half of 2012 did see a French court fine **Safran Group** (Safran), a defense contractor, €500,000 (approximately US$630,000) for bribing government officials in Nigeria to win a contract worth €170 million (approximately US$214 million) to make identity cards.[322] The court dismissed charges against two company executives, who, had they been convicted, faced sentences of up to 18 months' imprisonment and fines of up to €15,000 each (approximately US$19,000). Safran, 30% of which was acquired by the French government after the bribery occurred, announced its intention to appeal.

Colombia Joins the OECD Convention

On November 12, 2012, Colombia announced that it would become the 40th party to the OECD Anti-Bribery Convention effective January 19, 2013.[323] Although bribing a foreign official has been illegal in Colombia since 2000, the country will need to modify its laws to comply with the OECD convention.

Anti-Corruption Legislation Still Pending in Brazil

As we discussed in our last newsletter, new anti-bribery legislation that increases liability and penalities for corporations is slated to become law in Brazil by the end of 2013. Moreover, in the second half of 2012, the Brazilian Supreme Court convicted and sentenced multiple former high-level government officials for public corruption, a development that is being hailed as another sign of growing intolerance of bribery in Brazil.

The *Mensalão* Trial

In October 2012, the Brazilian Supreme Court convicted 25 public officials in a well-publicized domestic corruption trial.[324] The proceeding has been nicknamed "mensalão," which means "big monthly allowance" and derives from the large monthly stipends totaling at least R$35 million (approximately US$16.8 million) paid from public funds to opposition politicians by members of former president Lula da Silva's administration and other members of Lula's Worker's Party in order to secure support in Congress.[325]

Those convicted of bribery and other related offenses include: **José Dirceu**, Lula's former chief of staff and co-founder of the Worker's Party; **José Genoino**, the former president of the Worker's Party; and **Delubio Soares**, the former treasurer of the Worker's Party.[326] Dirceu was sentenced to 130 months and ordered to pay a fine of R$676,000 (approximately US$325,000); Genoino was sentenced to 83 months; and Soares was sentenced to 97 months, though these sentences could be appealed.[327] In addition, three current legislators were convicted and face the prospect of being stripped of their offices[328] pursuant to Brazil's new *ficha limpa* – "clean slate" – law, which prohibits those convicted of crimes from running for federal office.[329]

The convictions have been touted as proof of the judiciary's independence.[330] Many of the justices who presided over the trial were appointed by Lula or his successor Dilma Roussef, both of whom were elected from the Worker's Party.[331] Indeed, Chief Justice Joaquim Barbosa, whose approach has earned him the nickname "Batman of Brazil," is reportedly considering whether information suggesting some of Lula's personal expenses were paid out of a slush fund merits opening an investigation of Lula.[332]

Brazil's Corporate Anti-Bribery Bill

Brazil's Clean Company Act is pending in a special committee in the legislature's chamber of deputies. Although the special committee has completed most of its work, local elections have diverted legislators from achieving the quorum needed to proceed.[333]

In an interview conducted shortly after the *mensalão* verdicts, Representative Carlos Zarattini, the head of the special committee, questioned whether the outcome might actually impede efforts to pass the legislation.[334] While Zarattini still believes that the legislation will pass, he noted that the verdict has led some to question the wisdom of vesting what they view as an activist judiciary with the additional authority to impose liability upon corporations. Other members of the legal community, however, downplay Zarattini's concerns.

Even if the bill passes, enforcement of the new law will pose its own set of challenges. For example, Brazil's 5600 municipal governments lack the institutional framework for administrating the legislation.[335] State and local governments will be given 180 days after the bill passes to establish enforcement mechanisms.

China Provides Guidance Regarding Bribery Enforcement

We discussed in previous newsletters the Chinese government's efforts to invigorate its criminal prosecution of bribery.[336] As part of its ongoing efforts to fight corruption, on December 26, 2012, China's Supreme People's Court and its Supreme People's Procuratorate issued guidance regarding several issues related to the application of its criminal laws in bribery cases.[337] The new guidance explains, for example, that individuals who pay government officials with bribes of more than RMB 10,000 (approximately US$1,600) are subject to criminal prosecution and that voluntary self-reporting of a bribe before a prosecution is initiated may mitigate the penalty imposed.

Transparency International Releases Its 2012 Corruption Perceptions Index and Its Annual Progress Report

In the second half of 2012, Transparency International – a global non-profit organization headquartered in Berlin, Germany with over 90 chapters worldwide – released several reports to further its goal of developing and implementing effective measures to fight corruption. These reports, including its Corruption Perceptions Index and its Annual Progress Report, provide insights into how countries are, or are not, combating corruption.

Transparency International Releases Its 2012 Corruption Perceptions Index

On December 5, 2012, Transparency International released its 2012 Corruption Perceptions Index (CPI).[338] Transparency International has released a CPI every year since 1995, scoring countries and territories based on their perceived level of public sector corruption. This year, the CPI scored a total of 176 countries and territories using a new scale of 0 to 100 (a change from its previous scale of 0 to 10.0, reflecting an effort to simplify the CPI's underlying methodology), with a score of 0 indicating a perception of high corruption. The scores are based on a combination of surveys, which consider factors such as government accountability and enforcement of anti-corruption laws.

Two-thirds of all countries scored below a 50, indicating "a serious corruption problem" remains. In this regard, according to Transparency International, "[m]any of the countries where citizens challenged their leaders to stop corruption – from the Middle East to Asia to Europe – have seen their positions in the index stagnate or worsen."[339]

For 2012, Denmark, Finland and New Zealand tied for first place with scores of 90, which Transparency International attributed to "strong access to information systems and rules governing the behaviour of those in public positions." Afghanistan, North Korea and Somalia tied for last with scores of 8, due to "the lack of accountable leadership and effective public institutions underscor[ing] the need to take a much stronger stance against corruption."[340] The United Kingdom ranked 17th with a score of 74 (tied with Japan), and the United States ranked 19th with a score of 73.

Transparency International Releases Its Annual Progress Report

In September 2012, Transparency International released its 8th annual progress report on country enforcement efforts of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business.[341] Parties to the OECD Convention, adopted in 1997, agreed to criminalize foreign bribery. The progress report reviews enforcement efforts in all party countries except Russia and Iceland.[342]

Each country is assigned one of four classifications: Active, Moderate, Little, or No Enforcement.[343] Only countries with a high number of open enforcement actions and a high level of sanctions are given the status of Active Enforcement.[344] The United States and United Kingdom, along with Denmark, Germany, Italy, Norway, and Switzerland, were classed as Active Enforcement Countries in 2012.[345]

The 2012 progress report noted several positive developments. There was an increase in the number of enforcement actions brought in Active Countries: the United States leads with 275 cases commenced since the OECD Convention's entry into force through 2011.[346] In addition, three countries – Austria, Australia, and Canada – moved up in classification and are now categorized as Moderate Enforcement Countries.[347] Despite this progress, the report concluded that the "overall level of enforcement remains inadequate."[348] This conclusion was based in large part on the fact that the number of Active Countries has remained stagnant at seven for the past three years. Additionally, the report found that the deterrent effect of enforcement efforts in Moderate Countries is not sufficient enough to have an impact upon bribery.

CONCLUSION

While 2012 was a down year if measured by the number of enforcement actions taken or by the amount of fines, penalties and disgorgement assessed, it was a year that nevertheless reflected the Justice Department's and SEC's commitment to vigorous enforcement of the FCPA. 2013 promises to be another interesting year with courts expected to decide whether the Justice Department's and the SEC's broad interpretations of the FCPA are correct and with companies responding to the Justice Department's and the SEC's Guidance.[349]

Endnotes

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2 Complaint For Violations of the Federal Securities Laws at 3, *SEC v. Orthofix Int'l N.V.* (E.D. Tex. July 10, 2012), *available at* http://www.sec.gov/litigation/complaints/2012/comp-pr2012-133.pdf.

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12 Pfizer DPA, *supra* note 11, at 6-7.

13 DOJ Pfizer Press Release, *supra* note 10.

14 Pfizer DPA, *supra* note 11, at Attachment C.2.6.

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16 Pfizer SEC Press Release, *supra* note 10.

17 *Id.*

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19 Complaint, *SEC v. Tyco Int'l Ltd.*, 1:12-CV-01583 (D.D.C. Sept. 24, 2012), Dkt. Entry No. 1, *available at* http://www.sec.gov/litigation/complaints/2012/comp-pr2012-196.pdf [hereinafter Tyco Complaint].

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26 *See* Letter from Justice Dep't to Martin J. Weinstein (dated Sept. 20, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/tyco-intl/2012-09-20-tyco-intl-npa-sof.pdf.

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30 *Id.*

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35 Eli Lilly Complaint, *supra* note 32, at 8-9.

36 *Id.* at 7.

37 *Id.* at 3-4.

38 *See id. generally.*

39 Eli Lilly SEC Press Release, *supra* note 31.

40 Press Release, Eli Lilly and Company, Lilly Reaches Agreement with U.S. Securities and Exchange Commission (Dec. 20, 2012), *available at* http://newsroom.lilly.com/releasedetail.cfm?ReleaseID=728165; *see also* Eli Lilly Complaint, *supra* note 32.

41 Eli Lilly SEC Press Release, *supra* note 31.

42 *Id.*

43 Reply Brief of Appellant Joel Esquenazi at 11-34, *United States v. Esquenazi*, Case No. 11-15331 (11th Cir. Oct. 4, 2012); Reply Brief of Appellant Carlos Rodriguez at 1-16, *United States v. Esquenazi*, Case No. 11-15331 (11th Cir. Oct. 4, 2012).

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45 *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011).

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47 Motion 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).

48 Response in Opposition to Motion to Dismiss, *SEC v. Jackson*, No. 4:12-cv-00563 (S.D. Tex. June 22, 2012), Dkt. Entry No. 37; Reply in Support of Motion to Dismiss, *SEC v. Jackson*, No. 4:12-cv-00563 (S.D. Tex. July 13, 2012) Dkt. Entry No. 40 (Ruehlen) and 41 (Jackson).

49 Memorandum and Order, *SEC v. Jackson*, No. 4:12-cv-00563 (S.D. Tex. Dec. 11, 2012), Dkt. Entry No. 87 [hereinafter Jackson Order].

50 *Id.* at 49.

51 The issue of whether the statute of limitations applicable to penalties sought by the SEC in FCPA enforcement actions is triggered when the SEC discovers an alleged violation – or whether instead the five-year period begins once the alleged misconduct occurs – is before the US Supreme Court this term. *See Gabelli v. SEC*, No. 11-1274. The Supreme Court heard oral argument on January 8, 2013.

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53 *Id.* at 21.

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55 Christopher M. Matthews, *A Former Siemens Exec Settles with SEC, Another Fights,* Wall St. J. (Oct. 19, 2012). Terms of the settlement have not yet been announced.

56 Memorandum of Law in Support of Defendant Herbert Steffan's Motion to Dismiss the Complaint for Lack of Personal Jurisdiction and Failure to File within the Statute of Limitations, *SEC v. Sharef*, No. 11-cv-09073 (S.D.N.Y. Oct. 12, 2012), Dkt. Entry No. 24.

57 *Id.* at 3-7.

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59 Plaintiff SEC's Memorandum in Opposition to Defendant Steffan's Motion to Dismiss the Complaint, *SEC v. Sharef*, No. 11-cv-09073, at 1, 12-14 (S.D.N.Y. Nov. 13, 2012), Dkt. Entry No. 28.

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65 *Id.* at 22-25.

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67 Plaintiff SEC's Mem. in Opp. to the Defendants Joint Mot. to Dismiss the Compl., *SEC v. Straub*, No. 11 Civ. 9645, at 1, 20-21 (S.D.N.Y. Dec. 5, 2012), Dkt. Entry No. 41.

68 *Id.* at 2, 29-32.

69 *Id.* at 23-27.

70 Memorandum and Order, *SEC v. Straub*, No. 11 Civ. 9645 (S.D.N.Y. Feb. 8, 2013), Dkt. Entry No. 42.

71 A complete copy of the Guidance is *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

72 Guidance at ii.

73 Remarks of Jeffrey H. Knox, Principal Deputy Chief of the Fraud Section of DOJ, ACI's 28th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2012) [hereinafter Knox Remarks].

74 Letter from the U.S. Chamber of Commerce to DOJ and SEC, at 2 (Feb. 21, 2012), *available at* http://www.instituteforlegalreform.com/sites/default/files/FCPA%20Guidance%20Letter-2-21-12_4_.pdf [hereinafter Feb. 2012 Chamber of Commerce letter].

75 See the Guidance at 20 for a full list of factors to guide the analysis of whether an entity is an instrumentality of the state.

76 Guidance at 21.

77 *Id. See also* Information, *United States v. Alcatel-Lucent France, S.A.*, Case No. 1:10-cr-20906 (S.D. Fla. Dec. 27, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-lucent-sa-etal/12-27-10alcatel-et-al-info.pdf (subsidiaries of a foreign issuer violated the FCPA when they paid bribes to employees at a Malaysian telecommunications company where the government had 43% ownership, because the government held the status of a special shareholder, had veto power over all major expenditures, and controlled important operational decisions).

78 Foreign Corrupt Practices Act: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 112th Cong. at 56-57 (June 14, 2011) (testimony of Michael Mukasey) (describing a case where the DOJ asked a company to conduct an investigation regarding a taxi fare that had been self-reported; the investigation cost a few hundred thousand dollars).

79 Guidance at 15.

80 *Id.*

81 *Id.*

82 *Id.* at 58.

83 Remarks of Charles Duross, Chief of FCPA Unit at DOJ, ACI's 28th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2012).

84 Guidance at 27. A parent can also be held directly liable for the actions of a subsidiary if it directed the unlawful conduct or otherwise participated in the unlawful conduct. *Id.* However, a parent will not be held liable for a subsidiary's actions if the subsidiary acts independently and maintains its own books and records. *Id.*

85 *Id.*

86 Knox Remarks, *supra* note 73; *see also* Information, *United States v. Siemens Aktiengesellschaft*, 08-CR-367-RJL (D.D.C. Dec. 12, 2008), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-12-08siemensakt-info.pdf (liability imputed to German parent company where employee of operating division in Argentina paid out bribes to foreign officials per instructions from the parent company).

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89 *Id. See also* Letter from SEC to Eric Dubelier, Appendix A, *United States. v. Wabtec Corp.* (Feb. 8, 2008), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/westinghouse-corp/02-08-08wabtec-agree.pdf; *see also* Complaint, *SEC v. Wabtec Corp.*, No. 08-cv-706 (E.D. Pa. Feb. 14, 2008), *available at* http://www.sec.gov/litigation/complaints/2008/comp20457.pdf.

90 Guidance at 45.

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100 Government's Unopposed Motion to Dismiss Criminal Information, *United States v. Pride Int'l, Inc.*, Crim. No. 4:10-cr-00766 (S.D. Texas, Nov. 2, 2011), Dkt. Entry No. 20, *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/pride-intl/11-02-12-pride-international-motion-to-dismiss.pdf.

101 Stephen J. Choi and Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, NYU Law and Economics Research Paper No. 12-15, at 21 (Dec. 19, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116487&download=yes.

102 Guidance at 52-56.

103 *Id.* at 77-79.

104 *Id.* at 56-63.

105 *See* 28 C.F.R. part 80.

106 Justice Dep't, Fraud Section, FCPA Opinions, *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/.

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109 *Id.* at 6.

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113 *Id.* at 2-3.

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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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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