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FCPA, Bribery Act & other Global Anti-Corruption Insights

Update on Recent Enforcement, Litigation, and Compliance Developments

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EXECUTIVE SUMMARY

After a first quarter in which neither the United States Department of Justice (DOJ or Justice Department) nor the Securities and Exchange Commission (SEC or Commission) brought a Foreign Corrupt Practices Act (FCPA) enforcement action, the second quarter of 2013 saw a flurry of activity that reiterated the Justice Department's and the Commission's ongoing commitment to fighting foreign corruption. In April through June 2013, the Justice Department and the Commission settled FCPA enforcement actions with four companies, collecting over US$420 million in criminal fines, civil monetary penalties, and disgorgement, US$400 million of which was collected from French oil and gas company Total S.A. This total eclipses the US$260 million assessed for all of 2012.

The Justice Department's and the Commission's enforcement activities in the first half of 2013 reflected several other trends, including the continued (1) focus on companies doing business in the oil-and-gas and pharmaceutical and medical device industries, which account for three of the FCPA enforcement actions resolved so far in 2013; (2) coordination and cooperation with foreign law enforcement authorities in cross-border investigations; (3) effort to hold individuals accountable, as demonstrated by criminal charges against 12 individual defendants announced by the Justice Department; (4) emphasis on effective compliance programs and cooperation with the authorities once a potential FCPA violation is discovered, as shown by the Commission's use of a non-prosecution agreement for the first time ever to resolve an FCPA matter to reward a company's cooperation; and (5) uncertainty regarding the extent of the FCPA's reach, as courts begin to address issues including the boundaries of their jurisdiction over foreign citizens whose alleged misconduct occurred outside of the United States.

Recent remarks from senior enforcement officials in the United States, as well as in the United Kingdom, confirm that the enforcement of anti-corruption laws remains a top priority. On June 17, 2013, Acting Assistant Attorney General Mythili Raman for the DOJ's Criminal Division stated that "fighting global corruption is, and always will be, a core priority of the Department of Justice."[1] Similarly, in an interview published on June 23, 2013, newly appointed SEC Chair Mary Jo White stated that the Commission intends to continue to bring "a lot" of FCPA cases.[2] And in the United Kingdom, David Green, the director of the Serious Fraud Office (SFO), has said that it is his duty to revive confidence in the SFO as a top-tier prosecutor of serious fraud and corruption.[3]

We analyze these developments and more in this edition of the FCPA, Bribery Act & other Global Anti-Corruption Insights.

KEY ENFORCEMENT AND INVESTIGATIVE DEVELOPMENTS

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

Total SA Pays Nearly $400 Million Penalty to Resolve DOJ and SEC Enforcement Actions

On May 29, 2013, **Total S.A.** (Total), a French oil and gas company whose securities trade on the New York stock exchange, resolved parallel enforcement actions brought by the DOJ and the SEC based on allegations that the company violated the FCPA by paying over US$60 million in bribes to intermediaries of an Iranian official between 1995 and 2004 as part of a scheme to obtain and retain oil rights in Iran.[4]

According to the deferred prosecution agreement (DPA) that Total entered into with the Justice Department and the order entered by the SEC, Total paid US$16 million in bribes between 1995 and 1997 in order to secure a contract with the National Iranian Oil Company (NIOC) for development of Iran's Sirri A and E oil and gas fields.[5] Total made these illicit payments through a purported consulting agreement with an intermediary designated by an Iranian official, who was chairman of an engineering company that was substantially owned and controlled by Iran. In 1997, at the direction of the same Iranian official, Total executed another purported consulting agreement with a second intermediary in order to acquire rights to develop a portion of Iran's South Pars gas field. Over the next seven years, Total made unlawful payments of US$44 million through the consulting contract and obtained from NIOC a 40% interest in the South Pars development. In its internal records, Total mischaracterized these purported consulting payments as "business development expenses." According to the SEC, Total made more than US$150 million in profits through the bribes it paid.[6]

The DOJ filed a criminal information in the US District Court for the Eastern District of Virginia charging Total with conspiracy to violate the anti-bribery provisions of the FCPA and with violations of the FCPA's books and records and internal controls provisions.[7] In a parallel action, the SEC commenced an administrative proceeding and entered an order requiring Total to cease and desist from violating the anti-bribery and accounting provisions of the FCPA.[8]

To settle the charges, Total agreed to pay US$398 million to the US government – US$245.2 million in criminal fines to the DOJ and US$153 million in disgorgement and prejudgment interest to the SEC. Total's combined monetary settlement ranks as the fourth highest in the history of FCPA enforcement. Moreover, as part of its DPA with the Justice Department, Total agreed to retain an independent corporate compliance monitor for a period of three years, to continue to cooperate with US and foreign law enforcement authorities, and to continue to implement and enhance its compliance program and internal controls.[9]

In a separate action, French authorities prosecuted Total, its Chairman and Chief Executive Officer **Christophe de Margarie**, and various other individuals for corruption related to the United Nations' oil-for-food program in Iraq. On July 8, 2013, however, a French court acquitted all the defendants.[10]

SEC Uses a Non-Prosecution Agreement to Resolve Ralph Lauren Enforcement Action

On April 22, 2013, **Ralph Lauren Corporation** (Ralph Lauren) resolved parallel FCPA investigations actions through a non-prosecution agreement (NPA) with the SEC – the Commission's first-ever NPA in a matter involving the FCPA – and a separate NPA with the DOJ. The SEC heralded this NPA as an example of the "substantial and tangible" benefits that companies may earn through the SEC Enforcement Division's Cooperation Initiative.[11]

The SEC and DOJ investigations stemmed from bribes allegedly paid by Ralph Lauren's subsidiary in Argentina (RLC Argentina) to government officials. According to the SEC's NPA, between 2005 and 2009 the General Manager and other employees of RLC Argentina approved approximately US$568,000 in payments to a customs broker to bribe Argentine customs officials in order to secure the importation of Ralph Lauren products into Argentina.[12] The customs broker allegedly submitted invoices with charges for "Loading and Delivery Expenses" and "Stamp Tax/Label Tax" that were used to disguise bribe payments.[13] Moreover, the RLC Argentina General Manager allegedly gave or authorized the giving of gifts worth thousands of dollars to three government officials to improperly secure the importation of Ralph Lauren products.[14]

In 2010, Ralph Lauren implemented a new worldwide FCPA policy. After reviewing this policy, RLC Argentina employees raised concerns about the customs broker. As a result, Ralph Lauren initiated an internal investigation of the allegations and, within two weeks of uncovering the improper payments and gifts, self-reported its preliminary findings to the SEC and DOJ.[15]

The SEC decided not to charge Ralph Lauren with FCPA violations, citing "the company's prompt reporting of the violations on its own initiative, the completeness of the information provided, and its extensive, thorough, and real-time cooperation with the SEC's investigation."[16] The SEC also credited Ralph Lauren's extensive remedial measures, which included: "(1) an amended anticorruption policy and translation of the policy into eight languages, (2) enhanced due diligence procedures for third parties, (3) an enhanced commissions policy, (4) an amended gift policy, and (5) in-person anticorruption training for certain employees."[17] Furthermore, the SEC acknowledged that Ralph Lauren is in the process of winding down all operations in Argentina,[18] though it is unclear to what extent the withdrawal from Argentina is related to FCPA concerns.

As part of its NPA with the SEC, Ralph Lauren agreed to pay US$593,000 in disgorgement and US$141,846 in prejudgment interest. To resolve the DOJ's related criminal investigation, Ralph Lauren agreed to pay a US$882,000 penalty.[19] Ralph Lauren also agreed to provide the DOJ with periodic reports on its ongoing compliance efforts, but it was not required to retain an independent compliance monitor.[20]

The Ralph Lauren matter reflects a continuing trend of investigations by the country in which the bribes were allegedly paid. Following the announcement of Ralph Lauren's settlements with US authorities, Argentine tax authorities reportedly asked the SEC to supply information, including the names of Argentine government officials supposedly involved in the bribery scheme, to assist a newly launched criminal investigation in Argentina.[21]

Parker Drilling Settles Enforcement Actions Relating to Alleged Nigerian Corruption Scheme

Houston-based drilling services company **Parker Drilling Company** (Parker) became the latest in a series of oil and gas service companies to settle allegations arising out of bribes paid by **Panalpina World Transport (Nigeria) Limited** (Panalpina) to Nigerian customs and tax officials. On April 16, 2013, the DOJ announced its entry into a three-year DPA with Parker to resolve a charge that the company violated the FCPA's anti-bribery provisions. On the same day, the SEC announced that Parker had consented to the entry of a final judgment resolving a complaint the SEC filed in federal court in Virginia that enjoins Parker from violating the FCPA's anti-bribery provisions and its accounting provisions.[22]

According to court documents, Panalpina, working on Parker's behalf, avoided certain costs associated with complying with Nigeria's customs laws by falsely claiming that Parker's rigs were exported out of, and then re-imported back into, Nigeria. In late 2002, a Nigerian government commission examined whether Parker had paid applicable duties and tariffs, and brought charges against Parker, resulting in a US$3.8 million fine. Rather than pay the assessed fine, however, Parker ended up paying a Nigerian intermediary US$1.25 million to address the issue. According to the Justice Department: "Two senior executives within Parker Drilling at the time reviewed and approved the intermediary's invoices, knowing that the invoices arbitrarily attributed portions of the money that Parker Driller transferred to the agent to various fees and expenses. The agent succeeded in reducing Parker Drilling's [] fines from $3.8 million to just $750,000."[23]

Under the terms of the DPA, Parker agreed to pay a US$11.76 million penalty. Parker also agreed to implement an enhanced compliance program and internal controls capable of preventing and detecting FCPA violations, to cooperate with the DOJ's ongoing investigations, and to make periodic reports to the DOJ on its compliance efforts. In agreeing to resolve its enforcement action with a DPA, the DOJ took into account Parker's multi-year internal investigation into the conduct at issue and its remediation, which included ending its business relationships with the agents primarily responsible for the corrupt payments, increasing training requirements, and instituting a heightened review of proposals for all the company's contracts.[24]

In addition, under the terms of the consent judgment with the SEC, Parker will pay almost US$4.1 million in disgorgement and prejudgment interest.[25]

Koninklijke Philips Electronics Agrees to Pay $4.5 Million to SEC

On April 5, 2013, the SEC announced the resolution of its investigation into **Koninklijke Philips Electronics** (Philips), a Netherlands-based manufacturer of healthcare goods and services, through an administrative cease-and-desist order. Without admitting or denying the findings in the SEC's Order, Philips agreed to pay approximately US$4.5 million in disgorgement and prejudgment interest.[26]

According to the SEC, Philips' Polish subsidiary, **Philips Polska sp. z o.o.** (Philips Poland), made improper payments to secure contracts for the purchase of medical equipment with Polish healthcare facilities from 1999 through 2007. Under the alleged bribery scheme, Philips Poland employees provided public officials at Polish healthcare facilities with technical specifications of Philips' medical equipment, which were then incorporated into public tenders, thereby increasing the likelihood that Philips Poland would be awarded the government contracts. When Philips was awarded the contracts, the officials (some of whom also decided who won the contracts) were given between 3% and 8% of the net value of each contract awarded. Additionally, according to the SEC, the payments were "falsely characterized and accounted for in Philips' books and records" and "supported by false documentation," and some

Philips Poland employees allegedly kept a portion of the payments themselves as a commission. The SEC alleged that this occurred in at least 30 contract solicitations.

This alleged bribery scheme first came to light in August 2007, when Polish authorities searched three of Philips Poland's offices and arrested two employees. This prompted Philips to conduct an internal audit, which reportedly failed to uncover any improper payments. After Polish authorities then indicted 23 individuals – including three former Philips Poland employees – in December 2009, Philips conducted an internal investigation that found evidence that employees had made unlawful payments and that Philips Poland's books failed to accurately account for the payments. In 2010, Philips self-reported the results of its second internal investigation to the staff of the SEC and to the DOJ.

In resolving this case through an administrative proceeding, rather than through an action brought in federal court, the SEC highlighted Philips' cooperation and the remedial measures Philips implemented, which included (1) retaining three law firms and two auditing firms to conduct internal investigations and to design remedial measures related to third-party due diligence; (2) terminating and disciplining employees; (3) installing new management at Philips Poland; and (4) implementing significant revisions to Philips' global business policies and committing to continued improvement of its anti-corruption training program.

The DOJ has not announced any action against Philips.

China-Based Company That Listed in US through Reverse Merger Settles with SEC

On February 28, 2013, China-based **Keyuan Petrochemicals, Inc.** (Keyuan) resolved an enforcement action brought by the SEC for violations of the anti-fraud, reporting, books and records, and internal controls provisions of the federal securities laws.[27] According to the SEC's complaint, "[b]etween May 2010 and January 2011, in what was its first year as a U.S. public company, Keyuan systematically failed to disclose in its SEC filings numerous material related party transactions," including sales of products, purchases of raw materials, loan guarantees and short-term cash transfers for financing purposes.[28] Keyuan also allegedly maintained an off-balance-sheet cash account for the use of senior executives and to fund both cash and non-cash gifts to Chinese government officials.[29] While the SEC brought anti-fraud, books and records, and internal controls charges, the SEC did not charge Keyuan under the FCPA's anti-bribery provisions.[30]

In addition to the company, the SEC sued Keyuan's former Chief Financial Officer, **Aichun Li**, a North Carolina resident, charging her with aiding and abetting of reporting, books and records, and internal controls violations. Keyuan had hired Li to oversee the financial reporting process for preparing financial statements in conformity with US GAAP and the preparation of the company's SEC filings when Keyuan became listed in the US in April 2010 through a reverse merger with a Nevada shell company.[31]

Without admitting or denying the SEC's allegations, Keyuan and Li consented to the entry of a judgment permanently enjoining them from violations of the federal securities laws they allegedly violated. Keyuan agreed to pay a US$1 million civil penalty, and Li agreed to pay a US$25,000 civil penalty. Li also consented to a two-year suspension from practicing or appearing as an accountant before the SEC.[32] A federal judge in Washington, D.C. approved the settlements on July 2, 2013.[33]

Justice Department and SEC Enforcement Actions against Individuals for Violations of the FCPA

DOJ and SEC Charge US-Based Broker-Dealers with FCPA Violations

On May 7, 2013, the DOJ and SEC announced that they each had filed charges in the Southern District of New York against two individuals affiliated with **Direct Access Partners** LLC (DAP), a broker-dealer headquartered in New York, for their roles in an alleged scheme that generated US$66 million in trading revenue from the state-owned economic development bank in Venezuela.[34] The two targets of the charges, **Tomas Alberto Clarke Bethancourt** (known as Tomas Clarke) and **Jose Alejandro Hurtado**, are DAP traders based in Miami. A month later, on June 12, 2013, the DOJ and SEC announced related enforcement actions against **Ernesto Lujan**, a managing partner at DAP's Miami offices.[35]

According to the criminal complaints, between December 2008 through October 2010, these defendants arranged for the payment of at least US$5 million in bribes to a senior official at Venezuela's state economic development bank in exchange for steering trading business.[36] The defendants also allegedly concealed their scheme by making payments to the government official using intermediary corporations and offshore accounts. The DOJ has charged these three defendants with violating and conspiring to violate the FCPA, the Travel Act of 1961 (Travel Act), and federal money-laundering statutes. The DOJ also filed a civil action seeking the forfeiture of assets held in bank accounts associated with the scheme, as well as several properties in the Miami area related to Hurtado that were purchased using proceeds generated from the scheme.

The SEC brought non-FCPA fraud charges against Clarke and Hurtado, as well as against **Haydee Leticia Pabon**, Hurtado's wife, and **Iuri Rodolfo Bethancourt**, an apparent relative of Clarke. Pabon allegedly received about US$8 million from DAP in the form of "sham finders' fees" for transactions related to the bribery scheme, while Bethancourt's Panamanian shell company allegedly received over US$20 million from DAP in fraudulent proceeds, some of which was used to pay bribes.[37]

The DOJ also filed charges against **Maria de los Angeles González de Hernandez**, the Venezuelan state banking official who, in return for bribes, directed business to DAP.

On May 8, 2013, one day after the Justice Department and SEC announced their enforcement actions, DAP's clearing agent stopped accepting the broker-dealer's trades.[38] DAP formally closed its doors shortly thereafter.

The DOJ heralded its DAP-related prosecutions as a "wake-up call to anyone in the financial services industry who thinks bribery is the way to get ahead."[39] Interestingly, the federal investigation of DAP began with an examination of the broker-dealer by the SEC.[40]

Justice Department Indicts Four Current or Former Alstom Employees

On April 16, 2013, the DOJ announced the unsealing of FCPA charges filed in federal court against a current and a former executive of the Connecticut-based US subsidiary of **Alstom, S.A.** (Alstom), a French transportation infrastructure and power generation company. The current executive, **Frederic Pierucci**, previously held the position of vice president of global sales for Alstom's US subsidiary. He was arrested on April 12, 2013 at the John F. Kennedy International Airport, and, on July 30, he plead guilty to violating, and conspiring to violate, the FCPA. **David Rothschild**, a former vice president of sales of the US subsidiary, pled guilty on November 2, 2012.[41]

Since its April announcement, the DOJ has brought charges against two more former executives. On May 1, 2013, the DOJ announced that it was charging **William Pomponi**, a former vice president of sales at the Alstom's US subsidiary, with violating and conspiring to violate the FCPA, in a superseding indictment.[42] On July 30, the DOJ filed a second superseding indictment against Pomponi and **Lawrence Hoskins** – a former senior vice president for Alstom's Asia region – alleging conspiracy and violations of the FCPA and money laundering laws.[43]

The individual defendants, together with others, allegedly paid bribes to Indonesian officials – including a member of the Indonesian Parliament and high-ranking officials of the Perusahaan Listrik Negara (PLN), a state-owned and controlled electricity company – for assistance in securing a US$118 million contract known as the "Tarahan Project" to provide power-related services in Indonesia.[44] The defendants allegedly attempted to conceal the bribes by engaging two consultants to pass bribes to Indonesian officials, with the defendants turning to the second consultant after becoming dissatisfied with the first's efforts to bribe officials at PLN.

The DOJ also alleges that Alstom's US, Swiss, and Indonesian subsidiaries were each involved in the bidding for the Tarahan Project.[45] In April 2013, an Alstom spokesperson stated that "Alstom has been working constructively with the Department of Justice for the last two years to address any allegations of past misconduct. In the meantime, the company is committed to assuring that it conducts its worldwide business fully in compliance with all laws and regulations."[46]

This is not the first time that Alstom has been in the spotlight for allegations of bribery. On November 22, 2011, Switzerland's Office of the Attorney General announced that it had closed criminal proceedings against Alstom's Swiss subsidiary, **Alstom Network Schweiz AG**. The company was fined CHF2.5 million for negligence and CHF36.4 million as a "compensatory claim" – approximately US$42 million in total – for not taking "necessary and reasonable" precautions to prevent bribery of foreign public officials in Latvia, Tunisia, and Malaysia.[47] The UK has also been investigating Alstom's UK subsidiary, **Alstom Network UK**, in connection with allegations of bribery that led to the arrest of three of its executives in 2010. No charges have been brought against these individuals.[48]

French National Charged with Obstruction of Justice over FCPA Inquiry

Frederic Cilins, a French national, was arrested on April 14, 2013 for allegedly obstructing a grand jury's investigation of potential FCPA and money-laundering violations. According to the DOJ, a federal grand jury sitting in New York has been conducting a criminal investigation since January 2013 into a bribery scheme in which an unnamed mining company made payments to former government officials of the Republic of Guinea in order to win valuable mining concessions there.[49] Cilins has identified himself as a representative of the mining company, reported to be **BSG Resources Ltd.** (BSG).[50]

Cilins allegedly offered to pay a cooperating witness up to US$5 million to provide him with certain documents so that he could destroy them.[51] The cooperating witness is reported to be Mamadie Toure, who is alleged to be the wife of General Lansana Conté, the former dictator of Guinea who signed the contract awarding the concession to BSG.[52] According to the DOJ, Cilins sought to destroy original copies of contracts between the cooperating witness and the mining company and its affiliates. These contracts allegedly revealed that the mining company offered to pay the cooperating witness' company millions of dollars, among other benefits, in exchange for General Conté's help with respect to valuable mining concessions the company sought in the Simandou Region in Guinea.[53]

The Justice Department has charged Cilins with one count of witness tampering; one count of destroying, altering, or falsifying records in a federal investigation; and one count of obstructing a criminal investigation. Cilins pleaded not guilty on May 15, 2013. Bail was set originally at US$15 million by a magistrate judge, but on July 3, 2013, a federal district judge in Manhattan revoked Cilins's bail, finding that Cilins posed a serious flight risk. Trial is currently scheduled for December 2, 2013.[54]

BizJet Executives Indicted for Bribing Latin American Officials

On April 5, 2013, the DOJ unsealed charges against four former executives of **BizJet International Sales and Support Inc.** (BizJet), an Oklahoma-based subsidiary of **Lufthansa Technik AG** (Lufthansa) that provides aircraft maintenance, repair, and overhaul services. As we reported last year, on March 15, 2012, BizJet agreed to pay a US$11.8 million criminal penalty pursuant to a three-year DPA in order to resolve a charge of conspiring to violate the FCPA's anti-bribery provisions. Lufthansa also entered into an NPA in connection with the unlawful payments made by BizJet.

The DOJ indicted these former executives for their participation in a scheme to bribe foreign officials in Brazil, Mexico, and Panama – through direct payments and a shell company – in order to secure government contracts for BizJet.[55] The DOJ revealed that two of the individual defendants had entered guilty pleas on January 5, 2012. **Peter DuBois**, BizJet's former vice president of sales and marketing, pled guilty to one count of conspiracy to violate the FCPA and one count of violating the FCPA. **Neal Uhl**, BizJet's former vice president of finance, pled guilty to one count of conspiracy to violate the FCPA. Although the US Sentencing Guidelines contemplated prison sentences for their crimes, both DuBois and Uhl received a reduced sentence of probation and eight months home detention as a result of their cooperation with the DOJ.

The other two individual defendants – **Bernd Kowalewski**, BizJet's former president and chief executive officer, and **Jald Jensen**, BizJet's former sales manager – were charged with conspiring to violate the FCPA and to launder money, as well as substantive charges of violating the FCPA and money laundering. Kowalewski and Jensen are believed to remain abroad.

Federal Courts Consider Jurisdiction over Foreign Individuals the SEC Claims Violated the FCPA

Judge Finds Jurisdiction over Former Magyar Executives

On February 8, 2013, Manhattan federal Judge Richard Sullivan denied a motion to dismiss the SEC lawsuit charging three former executives from Hungarian telecommunications company **Magyar Telekom** (Magyar) with orchestrating a scheme to bribe government officials in Macedonia and Montenegro.[56] 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) – 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. They also argued that various emails, which for only technological reasons passed through a US-based server, were insufficient to prove the requisite nexus to the US, and 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.[57]

Judge Sullivan denied the defendants' motion in its entirety. With respect to the question of personal jurisdiction, Judge Sullivan analyzed whether the SEC had met its burden of establishing that the

exercise of jurisdiction comported with constitutional due process. In Judge Sullivan's view, the SEC met its burden because it adequately pled conduct designed to violate US securities regulations. The complaint alleged that the defendants "engaged in a cover up through their statements to Magyar's auditors knowing that the company traded [securities] on an American exchange, and that prospective purchasers" – including prospective American investors – "would likely be influenced by any false financial filings."[58]

Judge Sullivan rejected the defendants' argument that the exercise of jurisdiction over them would "automatically imply that 'any individual director, officer, or employee of an issuer in any FCPA case' would also be subject to personal jurisdiction," but noted his decision did not create a *per se* rule regarding employees of an issuer. Specifically, Judge Sullivan found that "[a]lthough Defendants' alleged bribes may have taken place outside the United States (as is typically true in cases brought under the FCPA), their concealment of those bribes, in conjunction with Magyar's SEC filings, was allegedly directed toward the United States."[59]

Judge Sullivan also disagreed with the defendants' other arguments for dismissal. Most notably, he rejected the defendants' statute of limitations argument, concluding that, because the applicable statute – 28 U.S.C. § 2462 – requires "by its plain terms, that an offender must be physically present in the United States for the statute of limitations to run," the SEC's complaint was timely given that defendants were not present in the US.[60] He also found that, because the "means or instrumentality of interstate commerce" clause in the FCPA was a jurisdictional element and therefore did not have a *mens rea* requirement, use of emails routed through the US – even if defendants did not know the emails would go through the US – satisfied this element.[61] And agreeing with a recent decision from the Southern District of Texas, Judge Sullivan held that the FCPA did not require that the SEC allege defendants knew the identities of the "foreign officials" they intended to bribe.[62]

Following the denial of their motion to dismiss, the individual defendants asked Judge Sullivan for permission to file an interlocutory appeal of his order to the US Court of Appeals for the Second Circuit.[63] Judge Sullivan has not yet ruled on defendants' request, which the SEC opposes.[64]

As we have previously reported, Magyar and its parent, **Deutsche Telekom AG**, agreed in December 2011 to resolve the enforcement actions taken against them by paying over US$95 million in criminal fines and civil penalties.

Judge Finds Jurisdiction Lacking over a Former Siemens Executive

On February 19, 2013, Manhattan federal Judge Shira Scheindlin granted defendant **Herbert Steffen**'s motion to dismiss the SEC's complaint that Steffen had violated the FCPA by participating in a bribery scheme to win his former employer, **Siemens AG** (Siemens) a US$1 billion contract for a national identity card in Argentina.[65]

By way of background, in 2008, Siemens paid a record-breaking US$1.6 billion to resolve bribery cases with US and German authorities. Three years later, in December 2011, the SEC charged seven former Siemens employees with FCPA violations relating to the national identity card contract in Argentina.[66] Of the seven individual defendants charged in the SEC's case, only Steffen moved to dismiss the complaint against him. According to the SEC, Steffen violated the FCPA by pressuring another Siemens employee in Argentina to authorize the payment of bribes, resulting in falsified SEC filings, namely the filing of annual and quarterly reports with the SEC that misrepresented Siemens's financial position and included false certifications required by the Sarbanes-Oxley Act. Steffen, a

74-year-old German citizen who was the former CEO of Siemens S.A. Argentina and who had never worked in the United States, argued that the US court lacked personal jurisdiction over him. Judge Scheindlin agreed with Steffen.

Judge Scheindlin was troubled by the lack of a "limiting principle" for the SEC's assertion of jurisdiction over Steffen. In her view, "[i]f this court were to hold that Steffen's support for the bribery scheme satisfied the minimum contacts [required for jurisdiction], even though he neither authorized the bribe, nor directed the cover-up, much less played any role in the falsified filings, minimum contacts would be boundless."[67] Judge Scheindlin rejected the SEC's arguments that minimum contacts could be established from a telephone call that Steffen received from the US or the deposit of some bribery payments in a New York bank (though not at the direction of Steffen).[68] Moreover, Judge Scheindlin determined that the exercise of personal jurisdiction would be unreasonable in light of "Steffen's lack of geographic ties to the United States, his age, his poor proficiency in English … , the burden to defend this suit, and the previous adjudications [in other fora]."[69] Judge Scheindlin's decision suggests that personal jurisdiction in FCPA actions does not automatically extend to all officers, directors, or employees of a foreign issuer whose securities trade on US exchanges, but rather depends on facts specific to each case.

Final Judgment Entered against a Former Siemens Executive and Defaults Certified as to Three Others

In other news related to the SEC's case against former Siemens executives, on April 16, 2013, defendant **Uriel Sharef**, a former Siemens officer and board member, consented to a final judgment, which "enjoins him from violating the anti-bribery and related internal controls provisions of the FCPA and orders him to pay a $275,000 civil penalty, the second highest penalty assessed against an individual in an FCPA case."[70] According to the SEC, Sharef participated in Siemens' bribery scheme by agreeing to pay US$27 million in bribes to senior Argentine officials, meeting with payment intermediaries in the US, and enlisting subordinates to conceal the payments. Sharef is the second individual defendant to settle with the SEC. **Bernd Regendantz**, who the SEC alleged authorized bribe payments after receiving guidance from more senior Siemens officials indicating that he should do so, consented to a final judgment on December 14, 2011.[71]

Moreover, the clerk of court has now formally entered default judgments as to three individual defendants who have not appeared in the case. On April 29, 2013, the clerk of court certified a default as to defendant **Andres Ricardo Truppel**, who the SEC alleged urged more senior executives at Siemens to pay bribes demanded by Argentine government officials.[72] The clerk had previously certified a default as to defendants **Ulrich Bock** and **Stephan Singer**, who the SEC alleged authorized the payment of bribes, on September 19, 2012.[73]

SEC Files Second Amended Complaint against Former Noble Executives

On March 25, 2013, the SEC filed its second amended complaint against former **Noble Corporation** (Noble) executives **Mark Jackson** and **James Ruehlen**, charging that they had violated the FCPA by bribing Nigerian customs officials to process permits related to Noble oil rigs.[74] The SEC's latest complaint drops claims based on conduct that occurred before May 12, 2006. The SEC's willingness to narrow the time frame of its lawsuit likely stemmed from the US Supreme Court's February 2013 decision in *Gabelli v. SEC*, which unanimously held that the limitations period for a claim by the SEC for civil penalties begins to run when the alleged wrongful conduct is completed, not when it is discovered.[75]

Jackson and Ruehlen filed their answer to the SEC's second amended complaint on April 19, 2013.[76] The case remains pending before US District Judge Keith Ellison in Houston.

Haiti Teleco Official Appeals Conviction

Jean Rene Duperval, a former director of international relations at **Telecommunications D'Haiti S.A.M.** (Haiti Teleco), was convicted by a jury and sentenced to nine years in prison last year for laundering bribes from Florida-based **Terra Telecommunications Corp.** (Terra).[77] On February 4, 2013, Duperval asked the US Court of Appeals for the Eleventh Circuit to set aside his conviction because prosecutors had failed to prove that he laundered proceeds from FCPA violations.[78] According to Duperval, no underlying FCPA violations occurred because Haiti Teleco was not an "instrumentality" of the Haitian government. Duperval contends that only a government agency or entity that performs a government function should be considered an "instrumentality" for purposes of the FCPA.[79]

As we have previously reported, two former Terra executives, **Joel Esquenazi** and **Carlos Rodriguez**, challenged their convictions on the ground that Haiti Teleco is not an "instrumentality" of a foreign government. Their appeal, like Duperval's, is pending before the US Court of Appeals for the Eleventh Circuit.

Wal-Mart Bribery Saga Continues

In its annual report filed with the SEC on March 26, 2013, **Wal-Mart Stores, Inc.** (Wal-Mart) disclosed that it incurred US$157 million in legal fees during the 2013 fiscal year (which ended on January 31, 2013) in connection with: (1) ongoing internal and government investigations into alleged violations of the FCPA by its foreign subsidiaries, including **Wal-Mart de México, S.A.B. de C.V.** (Walmex); and (2) related private civil litigation.[80]

Wal-Mart continues to face pressure from 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. On January 10, 2013, the Congressmen sent a letter to the company's Chief Executive Officer, **Michael Duke**, attaching certain Wal-Mart internal documents suggesting that executives such as Duke were aware of potential FCPA violations as early as October 2005.[81] The internal documents include a memorandum prepared by Wal-Mart's outside counsel summarizing one of several interviews with **Sergio Cicero Zapata**, a whistleblower who made allegations of bribery by Walmex. That memorandum was sent to Duke – who, at the time, was head of Wal-Mart's International Division – on October 15, 2005. In response to the Congressmen's letter, Wal-Mart noted that it had already disclosed the attached documents to the DOJ and the SEC. Wal-Mart also argued that the Congressmen had mischaracterized the timing of the events reported in the *New York Times* exposé.[82]

In other news related to the alleged bribery scheme in Mexico, **Graco Ramirez Garrido Abreu** – a Mexican lawmaker identified in emails the Congressmen released as being involved in the negotiation of an alleged bribe on behalf of Walmex – has sued Cicero, the Walmex whistleblower, for making false statements about him.[83] Meanwhile, **Kimco Realty Corp.** – the shopping center operator with which Wal-Mart worked in Mexico and other countries – disclosed in an annual report that it had received a subpoena from the SEC on January 28, 2013 and was subsequently notified of a parallel investigation by the DOJ in connection with the Wal-Mart bribery case.[84]

Wal-Mart has expanded its investigation beyond Mexico to other countries, including India. In late 2012, Wal-Mart suspended several employees of its Indian joint venture, **Bharti Walmart Pvt. Ltd.**, amid allegations of potential bribery.[85] In May 2013, the Indian government closed its investigation of Wal-Mart's business operation, finding insufficient evidence to conclude that Wal-Mart was involved in any unlawful activity in India.[86]

On the private litigation front, Wal-Mart is facing a securities fraud class action and multiple shareholder derivative lawsuits – most (but not all) of which have been consolidated before a federal court in Arkansas and the Delaware Court of Chancery. Notably, in the shareholder derivative action pending in Delaware, the plaintiff is seeking to compel the inspection of Wal-Mart's books and records in order to assess the validity of claims against the company's officers and directors in connection with the Walmex bribery investigation.[87] Wal-Mart initially produced certain documents related to the bribery investigation in Mexico, but the Delaware judge subsequently ordered the company to search its records again, including for documents concerning the company's internal protocols and the FCPA generally.

Update on Industry-Wide Investigations

Pharmaceuticals and Medical Devices

FCPA compliance has remained a significant issue for pharmaceutical and medical device companies, which have been the focus of an industry sweep announced in 2009 by Lanny Breuer, the then Assistant Attorney General for the DOJ's Criminal Division.[88] In addition to the Philips settlement with the SEC discussed above, several other pharmaceutical and medical devices companies found themselves in the news because of FCPA-related investigations.

For example, on February 28, 2013, **Optimer Pharmaceuticals, Inc.** (Optimer), a global biopharmaceutical company, disclosed that it had been investigating whether an attempted stock grant in September 2011 may have involved violations of the FCPA and other applicable laws.[89] The investigation arises from an attempt to grant 1.5 million shares of **Optimer Biotechnology, Inc.** (OBI), a wholly-owned subsidiary, to Optimer's co-founder and then-Board Chairman, **Dr. Michael Chang. Optimer** hired outside counsel to assist in the internal investigation and thereafter voluntarily reported its preliminary findings to the SEC and the DOJ. The preliminary findings included a potentially improper US$300,000 payment to a research laboratory associated with the OBI share grant. Optimer has stated that it will continue to cooperate with the SEC and the Justice Department in their investigation.

Media outlets also reported that **Stryker Corp.** (Stryker), a Michigan-based medical device manufacturer whose products include implants used in joint replacement and trauma surgeries, is now subject to an investigation in Poland, in addition to ongoing investigations by the SEC and the DOJ. Polish prosecutors are evaluating allegations that Stryker employees in Poland offered bribes to hospital officials across the country in order to secure deals. The investigation reportedly involves about 100 people and 51 hospitals.[90] According to Stryker's 2012 annual report, the SEC began investigating the company in 2007, the DOJ started an investigation in 2008, and the company is "fully cooperating with the DOJ and the SEC regarding these matters."[91]

Two medical device manufacturers announced more favorable developments, disclosing in their respective annual reports that the SEC and DOJ had closed their investigations into potential FCPA violations. On February 27, 2013, medical device company **Zimmer Holdings, Inc.** (Zimmer) announced that the SEC and DOJ had advised that they were declining to pursue FCPA enforcement actions

against the company. According to Zimmer, the company cooperated with the government's inquiry into the company's business activities in South America and later the Asia Pacific Region, and it conducted an internal review of its FCPA compliance.[92]

On June 24, 2013, medical device company **Medtronic Inc.** (Medtronic) similarly announced that it had received letters from the SEC and DOJ informing the company that they were closing their investigations without pursuing enforcement actions. Like Zimmer and other medical device manufacturers, Medtronic came under investigation by the SEC and DOJ beginning in 2007 in connection with the sales of its medical devices, in countries including Greece, Poland, Germany, Turkey, Italy, and Malaysia.[93]

Energy Industry

The energy industry also continues to be a focal point for FCPA enforcement authorities. As discussed above, the two largest FCPA settlements this year – Total and Parker – came in the oil-and-gas sector. Meanwhile, the Commission has been looking into the activities of other oil-and-gas companies and trying to promulgate industry-wide rules.

SEC Rule Requiring Oil Companies to Disclose Foreign Payments Vacated by Court

On July 2, 2013, Judge John D. Bates of the US District Court for the District of Columbia vacated a new rule promulgated by the SEC under the Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act) that required oil, gas, and mining issuing companies to include in an annual report information about certain payments made to foreign governments or the US government for the purpose of commercial development of oil, natural gas or minerals (the Rule). In its 30-page decision, the District Court found the SEC had, *inter alia*, "misread the statute to mandate public disclosure of the reports." In the District Court's view, the statute's "plain language poses an immediate problem for the Commission, for it says nothing about the public filing of these reports. To state the obvious, the word 'public' appears nowhere in this provision. The Statute speaks of 'disclosure' and 'an annual report,' not 'public disclosure' and not a 'publicly filed annual report'."[94]

Judge Bates also found the SEC's refusal to waive the Dodd-Frank Act's disclosure requirements for countries that prohibit disclosure of payment information – Angola, Cameroon, China, and Qatar – was "arbitrary and capricious."[95] The District Court held that the SEC's reasoning, which relied "on the blanket proposition that avoiding all exemptions best furthers Section 13(q)'s purpose," "d[id] not hold water," and was not founded on "undert[aking] … specific analysis" of the facts at issue.[96] The District Court found that "[t]he Commission made [a] serious error, denying, based on arbitrary and capricious reasoning, any exemption for foreign law prohibitions, a decision that, by the Commission's own assessment, drastically increased the Rule's burden on competition and cost to investors."[97] The District Court vacated the Rule in its entirety and remanded the matter to the SEC for further proceedings.

The District Court noted that in the cost-benefit analysis it conducted before promulgating the Rule, the SEC calculated a total initial cost of compliance for all issuers of approximately US$1 billion. This ruling is thus a victory for issuers involved in the commercial development of oil, natural gas, or minerals who opposed this Rule, because it vacates the Commission's requirement of public disclosure by filers of relevant payments to foreign governments, many of which would not otherwise have been disclosed to the general public, and as a result relieves them of possible friction and potential loss of business with foreign governments as the result of compliance. On the other hand, the District Court's

ruling does not eliminate the Dodd-Frank Act's reporting requirement itself, and the Commission will now need to decide whether it will seek to appeal the District Court's decision or, if not, how to promulgate a rule that complies with the District Court's order. In the immediate aftermath of the ruling, the Commission said only that it was reviewing the decision.[98]

Tesco Corporation Receives Document Retention Request from SEC Staff

Houston-based Tesco Corporation, which specializes in the development of technology for oil and gas drilling, reported in its quarterly report filed with the SEC on May 6, 2013, that in December 2012 it had received a request from the staff of the SEC to preserve and retain "five categories of documents relating to commercial agents who perform services for the corporate group in a foreign jurisdiction, the Company's general use of commercial agents in that jurisdiction, and compliance with the Foreign Corrupt Practices Act."[99] The company stated that it is cooperating with the SEC staff and has provided the information the SEC staff has requested. The company further stated that its outside counsel has been advised by the SEC staff that no formal order of investigation has been issued.

Monitor Certifies KBR's Anti-Corruption Compliance Program

Houston-based KBR, Inc. (KBR, formerly Kellogg Brown & Root) reported that the independent compliance monitor, which was imposed as part of its (and Halliburton Co.'s) 2009 settlement with the DOJ and SEC over FCPA offenses relating to the Bonny Island scheme in Nigeria, has "certified that KBR's current anti-corruption compliance program is appropriately designed and implemented to ensure compliance with the FCPA and other applicable anti-corruption laws."[100] With this development, the company has now met all of its obligations under the 2009 settlement agreement.

Alcoholic Beverage Industry

As we reported previously, several alcoholic beverage manufacturers and distributors have come under investigation for potential FCPA violations. On March 25, 2013, another player in the industry, Anheuser-Busch InBev SA/NV (Anheuser-Busch), disclosed in its 2012 Annual Report that the SEC is investigating the company's affiliates in India, including its Indian joint venture InBev Indian Int'l Private Ltd., to determine whether violations of the FCPA may have occurred. Anheuser-Busch reported that it is conducting its own investigation and cooperating with the SEC.[101]

SEC Investigation into the Movie Industry Continues

On February 17, 2013, the *New York Times* reported that the Justice Department and SEC's investigation into possible violations of the FCPA by several US movie studios are still ongoing.[102] In April of last year, *Reuters* announced that the SEC sent letters of inquiry to at least five US movie studios – including 20th Century Fox, Disney, and DreamWorks Animation – regarding whether the studios had made payments to government officials in China in violation of the FCPA.[103] According to the *New York Times*, the US government investigation has complicated deal-making between Hollywood and China, which become increasingly significant; last year, China's box office revenues reached US$2.7 billion.[104]

Sentencing Updates

Another Individual Sentenced for Role in Willbros Bribery Scheme

On May 3, 2013, a federal judge in Texas sentenced **Paul Novak** to 15 months in prison, two years of supervised release, and a US$1 million fine for violating and conspiring to violate the FCPA. Novak, a former consultant for **Willbros International** (Willbros), a subsidiary of Houston-based **Willbros Group Inc.**, admitted to helping make over US$6 million in corrupt payments to various Nigerian government officials and officials from a Nigerian political party. The payments were made so that Willbros and a joint venture partner could secure business relating to a natural gas pipeline project in the Niger Delta. At sentencing, the judge noted Novak's cooperation with the DOJ.[105]

Two other former Willbros executives, **Jim Bob Brown** and **Jason Steph**, pled guilty in 2006 and 2007 respectively for their roles in the Willbros bribery scheme and were sentenced in 2010. Both former executives had their sentences reduced in light of their cooperation.

A fourth individual, Willbros's former President **Kenneth Tillery**, was charged for his alleged role in the bribery scheme in an indictment unsealed on December 19, 2008. According to the FBI, Tillery remains a fugitive.

Willbros entered into a DPA with the DOJ in 2008 to resolve FCPA charges, which required Willbros to pay a US$22 million penalty. Willbros completed the DPA to the satisfaction of the DOJ in 2012.

Three Former CCI Employees Sentenced

In March 2013, US District Court Judge James Selna sentenced three more defendants – **Mario Covino**, **Richard Morlok**, and **Flavio Ricotti** – in connection with bribes paid by California-based valve manufacturer **Control Components Inc.** (CCI). CCI pleaded guilty in 2009 to violations of the FCPA and the Travel Act. 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.

Covino, CCI's former worldwide sales director, received a sentence of three years probation, including three months of home detention.[106] Covino pled guilty in January 2009 to conspiracy to violate the FCPA.[107] He was the first CCI employee to plead, and, based on Covino's early acceptance of responsibility and substantial assistance with an investigation of other CCI employees, the DOJ recommended a sentence of probation. According to the DOJ, Covino provided an "insider's view" of CCI and was expected to be a witness at trial.[108]

Morlok, the second CCI employee to plead guilty, received a sentence of three years probation, with a three-month period of home detention.[109] Morlok was CCI's Finance Director from 2002 to 2007. Although he signed off on improper payments, Morlok later became a whistleblower, which helped lead to CCI's internal investigation and voluntary disclosure to DOJ. As with Covino, the DOJ credited Morlok's substantial assistance.[110]

Ricotti, an Italian citizen and resident who served as CCI's Director of Power Business and Vice President for Sales, was sentenced to time served.[111] Ricotti spent 11 months in federal custody after he was extradited to the US. Ricotti was indicted in April 2009, and he pled guilty two years later in April 2011. Judge Selna followed the DOJ's recommendation of time served based on Ricotti's substantial assistance to the government.[112]

As we reported previously, four other CCI executives have also been sentenced for their participation in the bribes paid by CCI. **Stuart Carson**, CCI's former president and CEO, was sentenced to four months in prison, followed by eight months of home detention; **Hong Carson**, CCI's former sales manager and the wife of Stuart Carson, was sentenced to three years probation, including six months of home detention; **Paul Cosgrove**, CCI's former head of sales, was sentenced to 13 months of home detention; and **David Edmonds**, CCI's former Vice President of Worldwide Customer Service, was sentenced to four months in prison followed by four months of home confinement.

Another indicted CCI executive – **Han Yong Kim**, the former head of CCI's Korean business – remains outside the country. On June 11, 2013, Judge Selna denied Kim's renewed motion for leave to make a special appearance in order to challenge the legal sufficiency of the charges against him.[113]

Supreme Court Refuses to Hear Bourke Appeal; Key Witness Against Bourke and Two Others Sentenced

As we have reported previously, **Frederic Bourke Jr.**, a co-founder of accessory company Dooney & Bourke, filed multiple appeals of his conviction for violating the FCPA. Bourke's most recent appeals have focused on testimony offered at trial by Swiss lawyer **Hans Bodmer**, which Bourke argued the government either knew or should have known was false.

After the US Court of Appeals for the Second Circuit in New York denied his appeal in October 2012, Bourke filed a petition for certiorari in the US Supreme Court. On April 15, 2013, the Supreme Court summarily denied Bourke's petition.[114] Bourke reported to jail in May 2013 and must now serve his sentence of a year and a day in prison and pay a US$1 million criminal fine.

Bodmer, the key witness against Bourke, pleaded guilty in 2004 to a conspiracy charge for his role in a bribery scheme involving an oil deal in Azerbaijan. On March 5, 2013, Bodmer was sentenced in a New York federal court to time served, a US$500,000 fine, and forfeiture of US$131,906. Bodmer was arrested in 2003 in South Korea and spent five months in prison there before pleading guilty and agreeing to cooperate with US authorities.[115]

In addition to Bodmer, in April 2013, two individuals associated with **Viktor Kozeny**, the Czech citizen with whom Bourke conspired to bribe Azeri officials to acquire an interest in Azerbaijan's privatized oil and gas production enterprise, were sentenced. **Clayton Lewis**, a principal of an investment advisor, and **Thomas Farrell**, a former Kozeny employee, were each sentenced to time served for their participation in Kozeny's scheme.[116]

Rounding out the Enforcement Docket

IBM Settlement Obtains District Court Approval; Other Potential FCPA Violations Emerge

The SEC's settlement with **International Business Machines Corporation** (IBM) was approved by Judge Richard Leon of the US District Court for the District of Columbia on July 25, 2013, more than two years after IBM agreed with the SEC to pay US$10 million to resolve charges that it failed to comply with the FCPA.[117] The matter involves alleged FCPA books and records and internal controls violations relating to efforts by IBM Korea, LG IBM, IBM (China) Investment Company Limited, and IBM Global Services (China) Co., Ltd. to win government contracts. Under the final judgment Judge

Leon entered, IBM will file reports annually with the court and the SEC describing its efforts to comply with the FCPA. IBM also is required to report to the court and the SEC (1) immediately upon learning that it is reasonably likely that it has violated the FCPA's anti-bribery or books and records provisions, and (2) within 60 days of learning that it is the subject of any investigation or enforcement proceeding by any federal government agency.

IBM may be facing one such investigation based on conduct that occurred outside of Asia. In 2012, IBM notified the SEC that the Polish Central Anti-Corruption Bureau was investigating the company for alleged "illegal activity by a former IBM Poland employee in connection with sales to the Polish government."[118] In a quarterly filing with the SEC on April 30, 2013, IBM disclosed that in addition to the SEC and Polish authorities, the DOJ is now investigating IBM's transactions in Poland. IBM disclosed that the DOJ has sought information regarding its global FCPA compliance program and its public sector business, including transactions in Argentina, Bangladesh, and Ukraine.

Judge Approves Tyco Settlement with SEC

On June 17, 2013, nearly nine months after **Tyco International Ltd.** (Tyco) agreed to pay the SEC over US$13 million to resolve an FCPA enforcement action, Judge Leon approved the settlement.[119] In addition to the settlement with the SEC, Tyco had entered into an NPA with the Justice Department back in September 2012. A subsidiary – **Tyco Valves & Controls Middle East Inc.** – also pleaded guilty to one count of conspiracy to violate the FCPA's anti-bribery provisions. Tyco settled prior FCPA claims in 2006.

Siriwan Trial on Hold for One Year

Prosecutors, still struggling to extradite **Juthamas Siriwan** – the former governor of the Tourism Authority of Thailand – and her daughter, **Jittsopa Siriwan**, filed a supplemental brief in the US District Court in California on January 11, 2013, requesting that Judge George H. Wu allow the indictment to remain on his docket until the Siriwans can be extradited from Thailand.[120] Judge Wu granted the prosecutors' request for a stay, albeit only until March 20, 2014.[121]

Bribery Allegations against Companies Doing Business in China

BHP Billiton Reportedly under Investigation Relating to Its Sponsorship of 2008 Beijing Olympics

On March 13, 2013, *Reuters* reported that the DOJ and the Australian Federal Police were investigating allegations that **BHP Billiton** (BHP), the world's largest mining company, provided improper hospitality and gifts to officials from China as part of its sponsorship of the 2008 Olympics in Beijing, China.[122] BHP supplied materials for the gold, silver, and bronze medals awarded during the Olympics. BHP has stated that it is cooperating with the investigations and that it does not believe it broke anti-corruption laws.

Dun & Bradstreet Corp. Announces Investigation of Possible Bribery

In March 2012, **Dun & Bradstreet Corp.** (D&B) announced that it was investigating possible bribery by its local employees in China.[123] The news followed a report from a Chinese government broadcaster that a China-based D&B marketing unit had been collecting and selling private information about Chinese residents to marketing companies.[124] D&B had instituted an investigation into the improper marketing practices, which may, in turn, have led the company to discover potential bribery. D&B voluntarily reported to the DOJ and SEC.[125] As of its second quarter 2013 reporting, the internal investigation was ongoing.[126]

Microsoft Faces US Scrutiny over Bribery Allegations

On March 19, 2013, the *Wall Street Journal* reported that the DOJ and the SEC "are examining kickback allegations made by a former **Microsoft** representative in China, as well as the company's relationship with certain resellers and consultants in Romania and Italy."[127] The whistleblower has alleged that an executive of Microsoft's China subsidiary instructed the whistleblower to offer kickbacks to Chinese officials in return for software contracts.

Microsoft, through outside counsel, has already conducted a ten-month internal investigation into these allegations and found no evidence of wrongdoing. Microsoft has noted that the whistleblower, whose contract ended in 2008, was involved in a labor dispute with the company in China.

The DOJ and SEC investigations are in the preliminary stages and both agencies have declined to comment. John Frank, Microsoft's vice president and deputy general counsel, has stated that Microsoft will cooperate fully in any government inquiry.

Wall Street Journal Reports DOJ Investigation

On March 17, 2013, the ***Wall Street Journal*** (WSJ) reported that the DOJ was investigating allegations that certain WSJ employees in China had bribed Chinese officials in exchange for information for news articles.[128] The investigation was opened during the course of a broader probe by the DOJ into the WSJ's owner, News Corporation, regarding allegations of phone hacking and bribery at UK tabloids.

According to the WSJ's report, in early 2012, the DOJ approached News Corporation's outside counsel about a whistleblower claim that one or more WSJ employees "provided gifts to Chinese government officials in exchange for information."[129] Specifically, the accusations "related to reporting activity in Chongqing, the power base of disgraced Chinese official Bo Xilai, and covered previous Journal reporting in China."[130] In response, News Corporation "told the [DOJ] that some company officials suspect[ed] [that] the informant was an agent of the Chinese government, [who sought] to disrupt and possibly retaliate against the Journal for its reporting on China's leadership."[131]

A spokesperson for News Corporation's Dow Jones unit, which is the WSJ's publisher, stated that "[a]fter a thorough review of our operations in China conducted by outside lawyers and auditors, we have not found any evidence of impropriety at Dow Jones."[132] Despite News Corporation's findings, the *Associated Press* has reported that the government's inquiry remains open.[133]

International Enforcement Involving Companies That Previously Resolved FCPA Enforcement Actions

Alcatel Malaysia Sales Executive Convicted of Bribery

In late February 2013, **Radziah Ani**, a sales executive of **Alcatel Network Systems Malaysia**, was convicted of bribing a procurement official from state-owned Telekom Malaysia in order to secure a contract to supply a mobile communication system.[134] Ani was charged under Malaysia's Anti-Corruption Act of 1997, and at her trial the prosecution called nine witnesses to establish that she paid the bribe in February 2006. Ani was sentenced to two years in prison and fined approximately RM125,000.

In 2010, **Alcatel-Lucent S.A.** (Alcatel-Lucent) and certain of its subsidiaries agreed to pay more than US$137 million in penalties in connection with coordinated enforcement actions by the DOJ and the SEC.[135] Alcatel-Lucent subsidiaries paid millions of dollars in improper payments to foreign officials for the purpose of obtaining and retaining business in Costa Rica, Honduras, Malaysia, and Taiwan. Alcatel-Lucent admitted that it violated the internal controls and books and records provisions of the FCPA related to the hiring of third-party agents in Kenya, Nigeria, Bangladesh, Ecuador, Nicaragua, Angola, Ivory Coast, Uganda, and Mali.

Latvia Prosecuting Officials in Daimler Bribery Case

In April 2010, **Daimler AG** (Daimler), a German auto manufacturer, settled one of the largest FCPA cases to date for US$185 million.[136] According to court documents, the US government alleged that Daimler and its subsidiaries made hundreds of improper payments worth tens of millions of dollars to foreign officials in at least 22 countries to assist in securing contracts with government customers for the purchase of Daimler vehicles.

Latvia's Prosecutor General's Office has now charged several Latvian officials, including members of the Riga City Council, in connection with allegations that they took bribes from Daimler in exchange for public transport contracts.[137] The Latvian officials, through the Riga municipal public transportation company, Rigas Satiksmes, are alleged to have purchased 117 Daimler-manufactured Mercedes-Benz public transportation buses between 2002 and 2006 in exchange for bribes amounting to approximately EUR€4.3 million (approximately US$5.6 million).

In early 2013, Latvia's Corruption Prevention Bureau referred the matter to the Prosecutor General's Office, requesting that seven officials be charged. So far, six individuals have been charged, including Riga's former advisor on transport affairs and its council's deputy chairman.

Greece Charges DePuy Employees

Five employees at **DePuy**, a subsidiary of Johnson & Johnson, were charged in February 2013 with bribery and money laundering by Greek prosecutors.[138] The five allegedly paid more than US$21.5 million to Greek doctors to promote the company's products between 1998 and 2006. Eight Greek doctors were charged previously with taking bribes and money laundering in the same case. These charges follow Johnson & Johnson's earlier settlement with the DOJ, the SEC and SFO over similar charges in 2011.[139]

Eni SpA CEO under Investigation for Possible Corruption

Milan prosecutors have reported that the CEO of Italian oil company **Eni SpA** (Eni), **Paolo Scaroni**, is under investigation for his potential involvement in an alleged corruption scheme in Algeria involving Saipem, Eni's oil services subsidiary. Although Italian officials raided Scaroni's home and office as part of the investigation, according to the company, Eni and its CEO had no involvement in the allegedly corrupt conduct.[140]

Israeli Judge Pleads Guilty to Taking Bribes from Siemens

Dan Cohen, the former judge in Israel charged with receiving more than US$4 million in bribes from companies including Siemens during his tenure as a director of the state-run Israel Electric Corp. from 1993-2004, pled guilty on July 11, 2013.[141] The bribes paid by Siemens relate to wind turbine contracts that ultimately were awarded to the company. A Tel Aviv court sentenced Cohen to five-and-a-half years in prison, and under his plea agreement Cohen will pay US$1.65 million in fines and have an additional US$1.1 million in assets confiscated. Cohen was returned to Israel from Peru, having fled Israel in 2005. As noted above, in 2008, Siemens paid US$1.6 billion to resolve bribery cases with US and German authorities, and certain former Siemens employees are the subject of an SEC FCPA enforcement action.

Two Former Technip, S.A. Executives Fined In France

In January 2013, a French court fined two former **Technip, S.A.** (Technip) executives – **Jean-Marie Deseilligny**, Technip's then General Manager, and **Etienne Gory**, its then Commercial Manager for Africa – EUR€10,000 (approximately US$13,200) and EUR€5,000 (approximately US$6,600), respectively, for their roles in connection with a scheme to pay Nigerian officials at least US$180 million in bribes in order to obtain contracts to build liquefied natural gas facilities on Bonny Island, Nigeria.[142] In June 2010, Technip agreed to pay a US$240 million criminal penalty and US$98 million in disgorgement to resolve enforcement actions brought by the Justice Department and SEC.

New and Concluded Investigations

Companies Disclosing Investigations into Potential FCPA Violations

In the first half of 2013, a number of companies disclosed the commencement of internal, DOJ and/or SEC investigations into potential FCPA-compliance issues. For example, the SEC has begun to investigate the business practices of **Ericsson**, the Swedish multinational telecommunications company.[143] In early March 2013, **Thomas Lundin**, Ericsson's former general manager, alleged that Ericsson had a "company-approved slush fund" that was used to bribe Romanian officials and decision makers to secure more business and increase the company's market share.[144] The allegations stem from a dispute between Ericsson and Lundin over a sum of more than US$7 million dollars. Ericsson maintains that Lundin stole the money from the company, while Lundin alleges that the money is part of the larger "slush fund" used by the company to pay bribes.[145] According to court records, Ericsson has a network of offshore companies operating out of Cyprus, Liechtenstein, and Switzerland. Lundin claimed that he used this network, with company approval, to bribe two former telecommunications ministers in Romania. Both former ministers – **Dan Nica** and **Sorin Pantis** – have denied accepting a bribe from Lundin. After arbitration in a Swedish court, Lundin has been ordered to repay the US$7 million to Ericsson, plus interest and court costs.[146]

A spokesperson for Ericsson confirmed that in March 2013 Ericsson received a request from the SEC for information concerning the company's "anti-corruption policies." Ericsson has stated that it will cooperate fully with the SEC.[147]

On March 28, 2013, **Image Sensing Systems, Inc.** (Image Sensing), a Minnesota-based technology company, announced that it had opened an internal investigation into possible violations of company policy, internal controls, and laws, including the FCPA, the Bribery Act, and Polish law.[148] Image Sensing launched this investigation after learning that Polish authorities had begun investigating potential violations of Polish law related to tenders in the City of Łodź, Poland. The company terminated the employment of the two Polish employees charged in this matter, and the company has also voluntarily disclosed the matter to both the SEC and the DOJ.

On April 1, 2013, the *Wall Street Journal* reported that **Panasonic Avionic Corporation** (PAC), a subsidiary of **Panasonic Corp.** (Panasonic), had come under investigation by the US government for allegedly paying bribes in violation of the FCPA.[149] PAC manufactures in-flight entertainment and communications systems for Panasonic. The government reportedly issued a retention notice to PAC for information "concerning any benefits or gifts provided, or the payment of anything of value, by Panasonic or PAC to any airline employee or government official[]," and also for documents "reporting rumors, concerns and/or complaints regarding any alleged acts of bribery of [*sic*] corruption by Panasonic or PAC employees."[150]

Archer Daniels Midland Reserves for FCPA Penalties

In March 2009, **Archer Daniels Midland Company** (ADM), one of the world's leading agricultural processors, disclosed to the DOJ, the SEC, and certain unspecified foreign regulators that it had launched an "internal review of its policies, procedures and internal controls pertaining to the adequacy of its anti-corruption compliance program and of certain transactions conducted by the [c]ompany and its affiliates and joint ventures, primarily relating to grain and feed exports … ."[151] More recently, in a May 1, 2013 press release and also in its Form 10-Q filed with the SEC on May 7, 2013, ADM disclosed that it had set aside US$25 million for resolution of a FCPA investigation.[152] The US$25 million provision was an estimate of "potential disgorgement, penalties or fines that may be imposed by government agencies pertaining to this matter."[153]

Companies Disclosing the End of Government Investigations

In the first six months of 2013, several companies reported that FCPA-related investigations had closed without the DOJ and/or the SEC commencing an enforcement action, in addition to the Medtronic and Zimmer matters discussed above.

For example, Minnesota-based **3M Company** (3M) disclosed in its 2012 annual report that "the DOJ and SEC each notified the Company that they are terminating their investigations into possible violations of the FCPA without taking any action or imposing any fines against the Company."[154] In November 2009, 3M voluntarily disclosed to the DOJ, the SEC, and Turkish authorities that it was conducting an internal investigation as a result of reports it had received about potential bribery and bid rigging at its Turkish subsidiary. In September 2012, the Turkish Competition Authority determined that there was insufficient evidence that 3M had violated the Turkish competition law.

Deere & Company (Deere), an Illinois-based farm equipment manufacturer, announced in a January 10, 2013, press release that the SEC had completed its investigation into potential FCPA violations and had declined to pursue an enforcement action.[155] Two years ago, on August 11, 2011, news reports stated that the SEC had begun an investigation into Deere's operations in Russia. Deere said that it fully cooperated with the SEC during the investigation.

Delta Tucker Holdings Inc. (Delta Tucker), the parent company of **DynCorp International Corp.** (DynCorp), announced in its 2012 Annual Report that the DOJ had decided not to prosecute the company over allegations of FCPA violations.[156] In November 2009, DynCorp identified and disclosed to the SEC and the DOJ certain payments made by two subcontractors to expedite the issuance of a limited number of visas and licenses from a foreign government agency that might have violated the FCPA. On February 5, 2013, the DOJ informed Delta Tucker that "their inquiry regarding this matter [had] been closed based upon a number of factors, including, but not limited to, the voluntary disclosure by the company, the thorough investigation undertaken by the company, and the steps taken to enhance the company's anti-corruption compliance program."[157]

IDT Corporation (IDT), a telecommunications provider based in New Jersey, disclosed that in March 2013, the DOJ and SEC informed it that they had closed their investigations of a complaint alleging improper payments were made to foreign officials.[158] According to IDT, on April 1, 2004, a former employee sent a complaint he filed against the company to the United States Attorney's Office for the District of New Jersey, which triggered government investigations. IDT commenced an internal investigation that did not find evidence that the company made improper payments.

Nabors Industries Ltd. (Nabors), an oil drilling and production services firm, disclosed on February 20, 2013, that the DOJ had declined to bring an enforcement action relating to affiliates of the company's engagement of Panalpina, the Swiss logistics firm that was at the center of high-profile FCPA enforcement actions.[159] Nabors announced on July 5, 2007, that the DOJ had begun an investigation into the company's transactions with Panalpina relating to freight forwarding and customs clearance in Kazakhstan, Saudi Arabia, Algeria and Nigeria. The SEC separately advised in 2012 that it had concluded its inquiry without recommending any enforcement action against the company.

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

We reported previously on the Justice Department's first recoveries under its Kleptocracy Asset Recovery Initiative, which seeks to combat foreign official corruption by seizing proceeds that have been laundered through the US. We noted that the Justice Department was seeking forfeiture of a home owned by **Diepreye Solomon Peter Alamieyeseigha**, a former state governor in Nigeria who pled guilty in Nigeria to offenses including money laundering. On May 31, 2013, the Justice Department and the US Immigration and Customs Enforcement (ICE) jointly announced the execution of a forfeiture judgment on the home, which is located in Maryland and has an estimated value of more than US$700,000. Acting Assistant Attorney General Raman stated that, "Foreign officials who think they can use the United States as a stash-house are sorely mistaken… . Through the Kleptocracy Initiative, we stand with the victims of foreign official corruption as we seek to forfeit the proceeds of corrupt leaders' illegal activities."[160]

Changes in the SEC's Enforcement Leadership

The SEC has undergone a period of transition with a series of recent changes in top leadership positions. On April 10, 2013, Mary Jo White was officially sworn in as the 31st Chair of the SEC.[161] White has pledged that one of her highest priorities would be "to further strengthen the enforcement function of the SEC" in a way that is "bold and unrelenting."[162]

Shortly after her confirmation, on April 22, White named George Canellos and Andrew Ceresney as Co-Directors of the Division of Enforcement. Canellos has been at the SEC since July 2009, serving as Director of the SEC's New York Regional Office, Deputy Director of the Enforcement Division, and, most recently, Acting Director of the Enforcement Division. Ceresney joined the SEC from private law practice. Both Canellos and Ceresney served as federal prosecutors under White when she was the US Attorney for the Southern District of New York.[163]

White also described a change to the SEC's historic practice of allowing defendants to resolve charges brought by the SEC without admitting or denying the charges, stating that "we are going to in certain cases be seeking admissions going forward… . To some degree it turns on how much harm has been done to investors, how egregious the fraud is. But [] I emphasize how important the 'no admit, no deny' protocol also will remain for the majority of cases."[164]

SEC Approves More Whistleblower Awards

Nearly one year after paying its first award under the Dodd-Frank Act whistleblower program, the SEC has announced its second award, this time to three unnamed whistleblowers who voluntarily provided the SEC with original information that led to an enforcement action against hedge fund **Locust Offshore Management, LLC** (Locust) and its CEO **Andrey C. Hicks**, for securities fraud.[165] Each of the three whistleblowers will receive 5% of the total recovery from Locust and Hicks, who have been ordered to pay US$7.5 million in civil penalties, disgorgement, and interest to satisfy a default judgment entered against them on securities fraud charges. Notably, the SEC denied a fourth tipster's claim for a reward on the basis that this tipster did not provide any original information that led to a successful enforcement action. To date, the SEC has not yet approved a whistleblower award in an FCPA case.

FCPA-Related Civil Litigation

Siemens Faces FCPA-Related Civil Litigation; Siemens' Chairman Overcomes Shareholder Challenge

Siemens AG, which back in 2008 settled the largest FCPA case in history, continues to face private litigation relating to its international bribery schemes. On January 15, 2013, **Meng-Lin Liu**, a former compliance officer at Siemens AG's Chinese subsidiary, **Siemens China, Ltd.**, filed a whistleblower retaliation complaint in federal court in Manhattan, having also filed a whistleblower disclosure with the SEC in 2011.[166] Liu's complaint alleges that during 2009 and 2010, he uncovered a "culture … of evading and circumventing the anti-corruption due diligence systems required by the FCPA and Siemens' 2008 Plea Agreement."[167] The complaint further alleges a scheme by which the Chinese subsidiary submitted inflated bids to hospitals in China and North Korea for diagnostic and scanning equipment and then sold the equipment at lower prices to import/export agents and companies designated by the hospitals. Liu identified instances of what he claimed were red flags, including "zero presence" entities acting as intermediaries and a lack of contracts among Siemens, the hospital, and

the intermediaries. Beginning in the fall of 2009, Liu allegedly made his compliance concerns known to his superiors, including to the CEO and CFO of the Chinese subsidiary's healthcare division and to the general counsel of Siemens Global Healthcare Sector, yet found his efforts were thwarted. In addition, Liu claims that, as a result of his whistle blowing, he experienced pressure to resign, received unwarranted negative performance reviews and eventually was instructed not to report to work during the pendency of his contract, which Siemens China failed to renew. According to a scheduling order entered on June 21, 2013, Siemens' motion to dismiss will be briefed over the summer, with oral argument on the motion currently scheduled for August 21, 2013.[168]

Two Mexican energy agencies – **Petroléos Mexicanos** and **Pemex-Refinanción** – filed suit in federal court in New York in December 2012 against **Siemens**, **SK Engineering & Construction Co. Ltd.** (a Korean conglomerate), and the companies' joint venture, **CONPROCA S.A. de C.V.** (CONPROCA), over the procurement of a oil refinery modernization contract.[169] The Mexican agencies subsequently dismissed CONPROCA as a defendant.[170] Facing a motion to dismiss filed by the remaining defendants,[171] the agencies filed an amended complaint withdrawing their Travel Act claim, adding fraud claims, and pleading a closer nexus to the United States in support of their Racketeer Influenced and Corrupt Organizations Act (RICO) claims.[172] The amended complaint also includes more detail on the alleged Mexican bribery scheme, based on the testimony of Siemens Mexico's former general counsel, Peter Paul Muller, who confirmed payments of US$2.6 million from Siemens to an unnamed "high ranked official in PEMEX."[173] The amendments, however, were unsuccessful as on July 30, 2013, the court granted defendants' motion to dismiss the amended complaint.[174] The court found that the RICO claim involved extra-territorial conduct – an alleged foreign conspiracy by foreign defendants participating in foreign enterprises – beyond the reach of that statute, and it declined to exercise supplemental jurisdiction over the remaining common law fraud claims.

Furthermore, in addition to these civil claims, institutional shareholder advisory firm Glass, Lewis & Co. LLC recommended that **Gerhard Cromme** not be reelected to Siemens' Supervisory Board.[175] Glass, Lewis cited bribery allegations at both Siemens and ThyssenKrupp AG, another company that Cromme chaired until the end of March 2013. Shareholders nevertheless overwhelmingly reelected the long-time chairman to his position at Siemens.[176]

Disputes between Wynn Resorts and Former Director Kazuo Okada Continue

The fight continues between Las Vegas casino **Wynn Resorts, Ltd.** (Wynn Resorts) and **Kazuo Okada**, a former employee and board member. Among other recent developments, Wynn Resorts sued Okada for breach of his fiduciary duties, asserting that an investigation conducted on behalf of Wynn Resorts by former FBI Director Louis J. Freeh uncovered bribes from Okada to gaming regulators in the Philippines. Okada, in turn, commissioned former Homeland Security Secretary Michael Chertoff to review Freeh's report, and Chertoff has criticized Freeh's report as being seriously flawed.[177]

Meanwhile, in Nevada state court, Wynn Resorts defeated Okada's motion to dismiss, and the court scheduled a trial for April 2014. However, on April 8, 2013, the United States filed a request to intervene in Wynn Resorts' lawsuit against Okada out of concern that Wynn Resorts' civil suit will disrupt its criminal investigation into the underlying allegations about Okada and his company, Universal Entertainment Corp.[178] On May 2, 2013, the court granted a six-month stay.[179]

In addition to the contentious litigation between Wynn Resorts and Okada, Wynn Resorts recommended in its January 3, 2013 proxy statement that shareholders remove Okada from its board of directors.[180] Institutional Shareholder Services Inc., a proxy advisory firm, supported Okada's removal.[181] After

unsuccessfully attempting to enjoin the shareholder meeting,[182] Okada resigned on February 21, a day before the scheduled meeting. Wynn Resorts tallied the votes submitted by mail prior to Okada's resignation and announced a 99.6% approval of Okada's removal.[183]

Wynn Resorts also reported that on July 2, 2013, it received a letter from the Salt Lake Regional Office of the SEC stating that the Staff's informal inquiry regarding Wynn Resorts' donation to the University of Macau Development Foundation had been completed, and the Staff did not intend to recommend enforcement action against the company.[184]

Hewlett-Packard Wins Dismissal of Derivative Suit

Hewlett-Packard Company (HP), the California-based technology company, has continued to win motions to dismiss shareholder derivative suits arising out of allegations that HP bribed foreign officials in Europe. On May 6, 2013, Judge Edward J. Davila of the Northern District of California dismissed the second amended complaint in a suit alleging that several HP officers and directors breached their fiduciary duties and wasted corporate assets by ignoring foreign bribery and "stonewalling" government investigations of the misconduct.[185] The court concluded that the plaintiff could not excuse his filing suit without first presenting his claims to HP's board of directors because he "failed to introduce a reasonable doubt as to the disinterestedness and independence of the Board, the good faith by which the Board investigated the claims he asserted in his Demands, and the informed manner and due care by which the Board rejected his Demands."[186] The plaintiff has filed a notice of appeal with the US Court of Appeals for the Ninth Circuit.[187]

Tidewater Wins Dismissal of Derivative Suit

Tidewater, Inc. (Tidewater), an oil services company ensnared in the Panalpina bribery probe, has been facing a shareholder derivative suit based on allegations that the company paid bribes to foreign officials in Nigeria and Azerbaijan through one of its wholly owned subsidiaries. This suit was filed a few months after Tidewater paid over US$15 million to resolve FCPA charges brought by the Justice Department and SEC in 2010.

Last year, on July 2, 2012, a federal judge in Louisiana dismissed the shareholder's complaint for failure to show that demand on the board of directors was excused, but the judge gave the shareholder an opportunity to amend his complaint. On July 23, 2012, the shareholder filed a motion to stay the proceedings pending his demand on Tidewater's board. The Louisiana federal judge denied the motion to stay and dismissed the complaint with prejudice on March 5, 2013.[188] In the court's view, the plaintiff had ample time to make demand on the board but failed to do so.[189] The court also reasoned that allowing the case to go forward would place an unnecessary burden on Tidewater, which already had completed its investigations into the alleged wrongdoing.[190]

Texas Appeals Court Revives Defamation Suit Based on Statements in Investigative Report to Justice Department

On June 25, 2013, a Texas appeals court allowed Robert Writt, a former Shell Oil Company (Shell) employee, to pursue a defamation suit arising from statements about him that were contained in a report Shell provided to the Justice Department during the course of an FCPA investigation.[191] A trial court ruled that Shell was immune from suit under an "absolute privilege" based on the context of the allegedly defamatory statements regarding Writt's involvement in a bribery scheme in Nigeria. But the Court of Appeals disagreed.

The appeals court refused to extend an absolute privilege to Shell because "neither Shell nor Writt was a party to an ongoing or proposed judicial or quasi-judicial proceeding at the time that Shell made the complained-of statements."[192] The court found the following circumstances relevant: Shell voluntarily met with the Justice Department to discuss the company's business dealings with Panalpina, a freight-forwarding company that was under investigation for violating the FCPA; Shell voluntarily conducted an internal investigation as part of its cooperation with the DOJ; Shell voluntarily gave the DOJ the investigative report containing statements about Writt; and no criminal complaint was filed against Shell until 20 months after Shell handed over the report.[193] The Court of Appeals reasoned that granting an absolute privilege under these circumstances "would have the very dangerous effect of actually discouraging parties from being truthful with law-enforcement agencies and instead encourage them to deflect blame to others without fear of consequence."[194]

Although Shell was not entitled to immunity from suit based on an absolute privilege, the Court of Appeals found that Shell's communication to the DOJ was protected by a "conditional privilege." Under Texas law, this conditional privilege is "applicable when any recognized interest of the public is in danger, including the interest in the prevention of crime and the apprehension of criminals, the interest in the honest discharge of their duties by public officers, and the interest in obtaining legislative relief from socially recognized evils."[195] The Court of Appeals remanded for further proceedings to determine whether the conditional privilege applies to Shell in this case.[196]

Calls for FCPA Reform Continue

On November 14, 2012, the DOJ and SEC jointly released a "Resource Guide on the U.S. Foreign Corrupt Practices Act," which provided a centralized repository of the government's interpretations of many key parts of the FCPA. The Resource Guide did not, however, address many of the concerns raised by critics of the current regime of FCPA enforcement, who continue to seek reform.

In January 2013, the Manhattan Institute for Policy Research released an issue brief titled "The Foreign Corrupt Practices Act: Aggressive Enforcement and Lack of Judicial Review Create Uncertain Terrain for Businesses." The brief criticizes enforcement agencies' widespread use of NPAs and DPAs to settle cases and appeals to Congress to reform the FCPA. The brief requests that Congress clarify the FCPA's reach over foreign businesses that have only limited contact with the United States, the extent to which low-level employees of state-owned enterprises qualify as "foreign officials," and the meaning of "routine government actions" for purposes of determining what is a permissible facilitating payment.[197]

On February 19, 2013, a coalition of business groups led by the US Chamber of Commerce (the Chamber) wrote to the DOJ and SEC regarding the FCPA Resource Guide that the agencies published in November 2012.[198] The Chamber had previously requested guidance on particular issues of concern to the business community. While the Chamber's February 2013 letter expressed appreciation for the DOJ's and SEC's efforts to provide guidance through the Resource Guide, it also identified six issues that the business community would still like to see addressed:

1. **Compliance Programs and Voluntary Disclosures.** The Chamber wants more guidance on how a company's compliance program and voluntary disclosure factor into charging decisions. The Chamber reiterated its desire for Congress to add an affirmative defense to the FCPA based on a company's pre-existing compliance program.[199]
2. **Definitions of "Foreign Official" and "Instrumentality."** The Chamber seeks greater certainty as to who is considered a "foreign official" and "instrumentality" for purposes of the FCPA. According to the Chamber, enforcement agencies have endorsed an extremely fact-specific analysis that relies on a lengthy yet non-exclusive list of factors, some of which are impractical, if not impossible, for businesses to evaluate.[200]
3. **Parent-Subsidiary Liability for Anti-Bribery Violations.** The Chamber requests that the enforcement agencies confirm the limited circumstances in which a parent will be held liable for a subsidiary's conduct and also clarify the agency theory that may be used to prosecute parents.[201]
4. **Successor Liability.** The Chamber wants more guidance on the level of due diligence required in the context of mergers and acquisitions.[202]
5. **Mens Rea Standard for Corporate Criminal Liability.** The Chamber asks the DOJ to adhere strictly to its stated intention to prosecute only corporations that have knowledge of the alleged FCPA violation.[203]
6. **Declination Decisions.** The Chamber requests further insight into decisions to decline to charge companies with violations of the FCPA, noting that transparency is especially important with respect to the FCPA because "(i) it is over 30 years old, not a brand new law; (ii) it is very aggressively enforced, in terms of the number of pending investigations initiated each year and the massive fines and penalties that are sometimes imposed; and (iii) it lacks a material body of case law through which it can be interpreted by the business community."[204]

On April 3, 2013, at the Dow Jones Global Compliance Symposium in Washington, DC, former US Attorney General Alberto Gonzales endorsed the Chamber's FCPA reform agenda. Among other comments, Gonzales indicated he disliked the DOJ's use of NPAs and DPAs in FCPA cases, criticizing their use to pile up enforcement statistics and collect fines.[205]

GLOBAL ANTI-CORRUPTION UPDATE

Developments in the United Kingdom

UK Moves One Step Closer to Deferred Prosecution Agreements

On April 25, 2013, the Crime and Courts bill received royal assent, becoming the Crime and Courts Act of 2013.[206] Under Section 45 and Schedule 17 of the Act, UK prosecutors may begin using DPAs in February 2014.

The use of DPAs will allow companies to resolve potential criminal charges by accepting conditions that may include offering an admitted statement of facts, agreeing to independent monitors, and/or paying fines. In return for such commitments, the Prosecutor (the Director of the SFO or the Director of Public Prosecutions) will refrain from prosecuting criminal charges. Unlike in the US, however, DPAs

in the UK are subject to considerable judicial involvement and may be set aside or altered by a judge, which may limit the ultimate effectiveness of DPAs in the UK criminal justice system.

On June 27, 2013, the Director of the SFO and the Director of Public Prosecutions opened a public consultation on a draft Code of Practice (Code), which proposes an approach for the use of DPAs.[207] In its announcement, the SFO summarized several key features of UK DPAs, namely that they are for fraud, bribery and other economic crimes (but not other types of crime); they are for use with corporations, not individuals; and they are subject to court supervision. The draft Code, in turn, is intended to provide guidance to prosecutors regarding the negotiations of DPAs and their oversight by UK courts. For example, under the proposed Code, prosecutors should consider both the evidence available and the public interest in deciding whether a DPA is appropriate. For more serious offences – indicated by the value of the gain or loss resulting from the conduct, the risk of harm to the public, to unidentified victims, shareholders, employees and creditors, and to the stability and integrity of financial markets and international trade – "the more likely it is that prosecution will be required in the public interest." The draft Code also provides a series of public interest factors for prosecutors to consider, including (a) factors that favor prosecution, including a history of similar conduct, an ineffective compliance program, and the failure to timely report wrongdoing, and (b) factors that favor non-prosecution, including a "genuinely proactive approach" when misconduct is brought to the attention of management; the misconduct representing isolated actions by individuals; and the likelihood that a conviction would have unduly adverse consequences for the company under the law of another jurisdiction. The public consultation period on the draft Code closes on September 20, 2013.

"Star Chamber" Considers Relaxing the Bribery Act

According to British media reports, the "Star Chamber" – a cabinet committee of high-level officials – has agreed to revisit the Bribery Act in light of concerns from the owners of small and medium-sized businesses.[208] The review will focus on (i) facilitation payments, which remain illegal under the Bribery Act, and (ii) whether the cost of compliance is too high for small and medium-sized companies.

This review is a part of the UK's broader "red tape challenge" – a program designed to reduce the 21,000 regulations in force that affect small and medium-sized companies.[209] Although both the Ministry of Justice and the UK Department for Business Innovation and Skills have declined to comment on whether the government intends to seek to amend the Bribery Act, a spokeswoman for the Ministry of Justice has said that, "The Government is clear that the Bribery Act and its associated guidance should not impose unnecessary costs or burdensome procedures on legitimate business. Ministry of Justice and the Department for Business are working together to ensure that small firms understand the requirements and only put in proportionate measures to comply."[210]

SFO Director David Green Addresses Efforts to Improve the SFO

On March 26, 2013, SFO Director David Green delivered a speech before the Fraud Lawyers' Association in which he identified ten fundamental changes that the SFO has seen in the past year.[211] Of particular note, Green focused on (1) the restated role and purpose of the SFO; (2) the new guidance on self-reporting; (3) the reorganization and restructuring of the SFO; and (4) the return to blockbuster funding.

- **Restated Role and Purpose of the SFO:** The SFO restated last October that its primary role is to investigate and prosecute.[212] In his March 26 speech, Green reiterated that the October restatement of purpose was necessary because the SFO's role "had become blurred giving rise to the perception that it did not have the stomach for prosecution and preferred risk-free civil settlements."[213] While Green acknowledged that the SFO would continue to offer civil settlements "in the right circumstances," he reaffirmed that his goal was not to offer "a special easy path for white collar criminals."
- **Guidance on Self-Reporting:** Green also addressed the guidance issued last year on corporate self-reporting, which allows prosecutors to consider self-reporting as a factor in prosecution depending on the facts of the particular case.[214] He explained that the SFO issued the guidance because prior guidance on the issue had implied that the SFO would guarantee settlement in exchange for self-reporting – something he said no prosecutor could rightly do.
- **Reorganization and Restructuring:** In July 2012, the High Court of Justice sharply criticized the SFO's investigation and prosecution of the Tchenguiz brothers for alleged fraud, ultimately throwing out search warrants for being unlawfully obtained.[215] Green acknowledged the mistakes and pledged to better allocate resources in response.[216] Green has restructured the SFO to create case teams that work within four divisions: two bribery divisions and two fraud divisions, each with their own division head. Green also identified a new specialist division to handle issues related to the Proceeds of Crime Act.
- **Blockbuster Funding:** Related to the SFO's restructuring, Green discussed the SFO's use of blockbuster funding, which is additional funding that would be provided by the UK Treasury to the SFO when it is tasked with "exceptional" investigations, such as the LIBOR scandal.

Green also addressed the test for corporate criminal liability, explaining that he thinks the standard should be changed to something akin to the new offence of failing to prevent bribery: "Such an approach would merely add a criminal sanction to existing obligations; it would assist in the reform of poor corporate culture which contributed to the crash; it would underpin the recovery by encouraging clean and stable markets; it would increase investor confidence, assist in more rapid prosecutions and dovetail well with deferred prosecution agreements."[217]

Finally, Green discussed the need to better articulate the benefits of DPAs. As the SFO has increased its intelligence capabilities, Green explained that even if corporations fail to self-report, the SFO will eventually uncover the fraud. Thus, according to Green, DPAs enable corporations to move past bribery and handle problems themselves, while also increasing the likelihood of civil settlements.

Update on Enforcement Actions in the United Kingdom

Rolls-Royce Faces New Allegations of Bribery in China

Last year **Rolls-Royce plc** (Rolls-Royce), a UK corporation, announced that it had conducted an internal investigation into a former employee's allegations of bribery in Indonesia. After Rolls-Royce announced that this investigation had uncovered questionable payments in Indonesia, China and other markets in December 2012, new allegations of bribery surfaced.[218] An anonymous blog poster using the pseudonym "soaringdragon" alleged that Rolls-Royce made improper payments in China to secure US$2 billion in contract deals. According to the poster, Rolls-Royce made payments to Air China in 2005 and to China Eastern in 2010, and an executive at both companies named Chen Qin acted as an intermediary for these transactions. China Eastern has confirmed allegations that Chen

Qin was arrested by Chinese authorities in April 2011, but declined to comment further.[219] Although the SFO has not confirmed whether it will launch an official investigation into the bribery allegations, news outlets have reported that the SFO is considering seeking a civil recovery order, which would include a fine but no criminal charges.[220]

SFO Announces Investigation of ENRC

The SFO announced on April 25, 2013 that it had launched a criminal investigation into whether Eurasian Natural Resources Corporation (ENRC), a UK company, or its subsidiaries in Kazakhstan and Africa engaged in fraud, bribery, and corruption.[221] The investigation reportedly relates to mines in the Democratic Republic of the Congo purchased from diamond tycoon Dan Gertler.[222]

The SFO's investigation follows an internal investigation that ENRC conducted, the results of which ENRC reported to the SFO. ENRC's outside counsel reportedly told the SFO during that presentation that the internal investigation was hampered by uncooperative employees who allegedly forged documents, supplied the wrong computer for investigation, and even went so far as to set up a "false office" for inspection.[223] ENRC Chairman Mehmet Dalman, who was leading the investigation, reportedly resigned because of frustrations that the founders of the company were thwarting his investigation efforts.[224] Furthermore, ENRC's three founders, who currently own 44% of the company, announced in April that they were considering a bid to take the company private again.[225] Some believe that this prompted the SFO to launch its inquiry, while the company remains listed on the London Stock Exchange.

Canada Takes Steps to Increase Anti-Corruption Enforcement

Following criticism from the OECD Working Group on Bribery that its enforcement efforts were "still lagging" and that it "must urgently boost efforts to prosecute,"[226] Canada has strengthened its Corruption of Foreign Public Officials Act (CFPOA) and increased its prosecutions of alleged foreign bribery.

Canada Proposes Significant Strengthening of Anti-Corruption Law

On June 19, 2013, Bill S-14, *An Act to Amend the Corruption of Foreign Public Officials Act*, received Royal Assent, resulting in five amendments to the CFPOA: (1) expansion of the CFPOA's jurisdiction to reach misconduct that occurs abroad engaged in by a Canadian citizen or business; (2) consolidation of the authority to bring CFPOA charges with the Royal Canadian Mounted Police; (3) creation of a new offence relating to books and records that targets concealing bribes paid to a foreign public official; (4) elimination of the CFPOA's facilitation payments exception, although implementation of this amendment has been postponed for an unspecified transition period; and (5) an increase in the maximum sentence of imprisonment applicable to the offence of bribing a foreign public official.[227]

Most significantly, the CFPOA now provides for Canada's jurisdiction over acts that take place outside of Canada's territory. The CFPOA previously required a territorial link between the offense and Canada, and jurisdiction could not be established on Canadian nationality alone. Now, any Canadian citizen, permanent resident, or public body, corporation, society, company, or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a Canadian province who commits an act or omission outside of Canada that would violate the CFPOA may be liable for violating the CFPOA just as if the act or omission were committed in Canada.[228] Other amendments, including the creation of a books and records offence, and the elimination of the facilitation payments exception, bring the CFPOA in line with OECD recommendations.

Griffiths Energy Pays Record Fine in Canada for Bribery

In January 2013, Canadian oil exploration and development company **Griffiths Energy International Inc.** (now doing business as Caracal Energy) agreed to pay a C$10.35 million (approximately US$10 million) fine relating to the bribery of government officials in Chad.[229] The fine is the largest ever collected by the Royal Canadian Mounted Police for violations of the CFPOA. The company admitted to entering into consulting contracts worth C$2 million (approximately US$1.9 million) with Chad Oil Consulting LLC, a company owned by the wife of Chad's then Ambassador to Canada, Mahmoud Adam Bechir, with the intention of improperly influencing him to obtain oil and gas exploration contracts in the African nation.

The company self-reported its violations to the Public Prosecution Service of Canada following an internal investigation. It also has pledged to strengthen its anti-corruption compliance program and internal controls.

Former CEO of SNC-Lavalin Charged, Pleads Not Guilty to Fraud Scheme

Pierre Duhaime, the former CEO of Canadian engineering and construction firm SNC-Lavalin, was arrested in late 2012 and charged by Canadian authorities with fraud, conspiracy to commit fraud, and using forged documents in connection with a contract worth an estimated C$1.3 billion (approximately US$1.25 billion) the company procured to build McGill University Health Centre in Montreal in 2010.[230] Duhaime has pled not guilty to the charges.

According to portions of an affidavit filed in support of a search warrant conducted at the hospital that were released in June 2013, Canadian authorities believe that SNC-Lavalin used a purported contract with a Bahamian company to disguise the transfer of approximately C$22.5 million (approximately US$21.5 million) in kickbacks to the hospital's former director and former planning director in order to secure the construction contract. The kickbacks allegedly were attributed in a company account to a gas project in Algeria but were passed along to hospital officials.

This is the not the first time that allegations have arisen regarding SNC-Lavalin's compliance with anti-corruption laws. In June 2012, two other executives at SNC-Lavalin were charged with bribing officials in Bangladesh in connection with bidding for a US$1.2 billion project. The World Bank Group debarred SNC-Lavalin Inc. – in addition to over 100 of its affiliates – for a period of 10 years following the company's misconduct in relation to the Padma Multipurpose Bridge Project in Bangladesh, as well as misconduct in relation to the World Bank-financed Rural Electrification and Transmission project in Cambodia. Under the terms of the Negotiated Resolution Agreement signed by the World Bank and SNC-Lavalin Group, the debarment can be reduced to eight years if the companies comply with all conditions of the agreement.[231] Under the terms of the Agreement for Mutual Enforcement of Debarment Decisions, this debarment is effective not only as to the World Bank, but also as to the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, and the African Development Bank.

Brazil's Efforts to Combat Corruption

In the first half of 2013, Brazil continued with its efforts to combat corruption. Brazil's long-awaited Anti-Corruption Bill advanced out of Brazil's House of Representatives for consideration by Brazil's Senate. Yet corruption continues to be a major issue in Brazil. In June 2013, protests erupted dramatically throughout Brazil, fueled in part by dissatisfaction with public corruption that protestors believe has deprived the country of needed services, including public transportation.[232]

Brazil's Proposed Clean Company Act Takes One More Step Towards Becoming Law

Brazil's Clean Company Act, which permits Brazilian authorities to pursue civil and administrative liability against corporations (including foreign corporations) found to have engaged in corruption, was approved by special committee of Brazil's House of Representatives in April 2013, passed through Brazil's Senate on July 4, 2013, and signed by President Dilma Rousseff on August 1, 2013. The Act is being heralded as a sign of increased transparency and a commitment to enforcing corporate compliance in Brazil.

Brazil Charges Brookfield Asset Management's Brazilian Subsidiary

In February 2013, Sao Paulo state prosecutors filed civil charges against **Brookfield Asset Management** (Brookfield), one of the largest property investors in the world, alleging that Brookfield's Brazilian subsidiary paid bribes to public officials to win construction permits.[233] Prosecutors claim that Brookfield's Brazilian subsidiary received approval to renovate and expand a shopping mall without making improvements to a nearby overpass that the prosecutors allege were required by municipal regulations. Prosecutors also claim that the subsidiary was able to pay R$6.4 million in fees for the expansion, rather than the R$10.2 million provided for by municipal regulations. In total, the subsidiary allegedly made R$1.27 million in improper payments. The prosecutors have charged 10 defendants including Brookfield's Brazilian subsidiary, two of its top executives, a public official, a former public official, and a third-party vendor that allegedly overstated invoices at the subsidiary's request, so that it could give extra money to the public officials.

Brookfield has stated that it conducted an internal investigation and did not discover any evidence of the bribery scheme. It has publicly denied wrongdoing, claiming the allegations stem from its Brazilian subsidiary's former chief financial officer, who was fired in 2010.

Brazil's Public Ministry Launches an Investigation into Former President Lula

We reported previously on the highly publicized convictions of 25 Brazilian officials for bribery and other offenses related to a vote-buying scandal that was known as the *mensalão*.[234] Following these convictions, Transparency International reported that "the courts were for almost the first time seen as independent of the political superstructure, able to hand out justice and not cowed by people who believe they were above the law."[235]

In April 2013, Brazil's Public Ministry – an independent body of public prosecutors – announced that it had launched an investigation into the involvement of former President Luiz Inácio Lula da Silva in the vote-buying scheme.[236] The investigation followed from testimony given by Marcos Valério de Souza, a businessman who was at the center of the *mensalão* scandal, in September 2012 implicating Lula. According to a press report, de Souza "accused Lula of authori[z]ing loans from state banks, in addition to negotiating campaign contributions from the Portuguese phone company, Portugal Telecom, to the Workers' Party," in violation of Brazil's electoral laws.[237] De Souza reportedly was testifying in an effort to reduce his own 40-year sentence stemming from the scandal.[238]

New Russian Law Requires Companies to Adopt Compliance Programs

On January 1, 2013, Russia amended its anti-corruption law to include an affirmative requirement that all organizations doing business in Russia have an anti-corruption compliance program.[239] The amendment provides guidance on the features of an effective compliance program, which must include: (1) designating specific employees with responsibility for preventing bribery; (2) adopting a code of ethics and professional conduct for all employees; and (3) establishing procedures to prevent the creation and use of false and altered documents. In mandating a compliance program for all companies, Russian law now purports to go beyond what is required by the FCPA and the Bribery Act.

Although Transparency International continues to rank Russia as one of the most corrupt countries in the world, this latest step is one of several Russia has taken to strengthen its anti-corruption laws in recent years. In May 2011, Russia enacted a law outlawing foreign bribery and giving prosecutors the authority to seek large fines for bribery and corruption, and on April 17, 2012, Russia became the 39th nation to accede to the OECD Anti-Bribery Convention.

OECD Working Group on Bribery Releases 2013 Annual Report

The OECD Working Group on Bribery (OECD Working Group) released its 2013 annual report on the OECD Anti-Bribery Convention in June.[240] The 40 member countries that are parties to the convention have agreed to criminalize the payment of bribes to foreign government officials when engaging in international transactions, and the OECD Working Group monitors the implementation of the convention. According to the OECD Working Group, since 1999, when the convention came into force through December 2012, 216 individuals and 90 companies have been sanctioned criminally in 13 countries that are parties to the Anti-Bribery Convention for bribing foreign government officials.[241] "At least 85 individuals and 120 [companies] have been sanctioned in criminal, administrative or civil cases for other offenses related to foreign bribery, such as money-laundering or [books-and-records violations]," in five countries that are parties to the convention.[242] The OECD Working Group estimates that there are approximately 320 investigations currently ongoing in 24 countries that are parties to the convention.[243]

The OECD Working Group's Annual Report also contains an update regarding the status of its peer-evaluation process. The OECD Working Group is currently conducting Phase 3 evaluations, which it expects to conclude in 2014 and which are designed to monitor compliance with the OECD Anti-Bribery Convention and to assess (1) progress made in areas of weakness identified during the Phase 2 review; (2) the impact of any changes in domestic law; and (3) law enforcement efforts and results.

The OECD Working Group has already completed approximately half of its Phase 3 evaluations, including its review of the UK in March 2012. The OECD Working Group commended the UK for the significant increase in foreign bribery enforcement actions in recent years, but also expressed continued concerns about the UK's reliance on civil recovery orders. The OECD Working Group's concern focused on the apparent lack of transparency that comes with civil recovery orders, noting that the "low level of information on settlements made publicly available by UK authorities often does not permit a proper assessment of whether the sanctions imposed are effective, proportionate and dissuasive."[244]

The OECD Working Group's Annual Report also highlighted efforts to work with the newest parties to the convention: (1) Russia, where the OECD Working Group has provided recommendations that include holding companies liable for foreign bribery, sanctioning false or inadequate accounting, and ensuring that bribes paid to foreign government officials are not tax deductible, and (2) Colombia, where the Working Group has provided analogous recommendations. The OECD Working Group's Annual Report also described its engagement with emerging markets that are not currently members to the convention, including China, India, Indonesia, Malaysia and Thailand.

CONCLUSION

The remainder of 2013 promises to be interesting, as the Justice Department and SEC continue their enforcement efforts against companies and individuals suspected of violating the FCPA, companies continue to respond to the guidance the Justice Department and SEC issued in November, and courts continue to address whether the Justice Department's and the SEC's broad interpretations of the FCPA are correct.[245]

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244 *Id.* at 62. The OECD Working Group's Annual Report also includes summaries of its Phase 3 evaluations for Australia, Austria, France, Greece, Hungary, the Netherlands, the Slovak Republic, Spain, and Sweden. *Id.* at Appendix 2.

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