



Foreign Corrupt Practices Act
Mid-Year Alert
2008

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INTRODUCTION

The first half of 2008 has seen no abatement in the continued trend of increasingly aggressive enforcement of the Foreign Corrupt Practices Act (“FCPA”). Indeed, there have already been more enforcement actions in the first half of 2008 than the annual total in any previous year other than 2007. Moreover, although the record-setting \$44 million combined penalty levied against Baker Hughes in April 2007 has yet to be eclipsed, there have been a number of very large penalties. For example, in late 2007 and early 2008, Chevron Corporation and AB Volvo entered into Oil-for-Food related settlements of \$30 million and \$19.6 million, respectively. In May 2008, Willbros Group, Inc. settled FCPA charges with the Securities and Exchange Commission (“SEC”) and Department of Justice (“DOJ”) for a combined \$32.3 million. In fact, a government official has publicly speculated that a \$100 million FCPA settlement may not be far off.

Through the DOJ and SEC enforcement proceedings and two DOJ Opinion Procedure Releases, the Government continues to emphasize the importance of conducting thorough due diligence, whether in the transactional setting, when retaining agents or after potentially problematic conduct is identified. Certain other themes also emerge from recent FCPA activity, including (i) the use of independent compliance monitors in connection with FCPA settlements; (ii) the increase in FCPA-related civil lawsuits; and (iii) while not simply a recent phenomenon, regulators continue to stress the importance of self-disclosure of potential FCPA violations.

After a brief discussion on the statutory requirements of, and penalties under, the FCPA, this 2008 Mid-Year Alert provides: (i) a description of FCPA settlements to date from 2007 and 2008 in reverse chronological order (pages 3-38); (ii) a discussion of other FCPA and related developments, including (a) important recent DOJ Opinion Procedure Releases; (b) several ongoing or recently concluded criminal matters; (c) a spate of FCPA-related civil litigation and the introduction of legislation that would create a limited private right of action under the FCPA; (d) a controversy regarding the appointment of compliance monitors; (e) proposed revisions to the Principles of Federal Prosecution of Business Organizations; and (f) World Bank-related developments (pages 39-66); (iii) a sampling and discussion of select corporate disclosures (pages 67-73); and (iv) summary and analysis of certain critical lessons to be learned from these and other related developments (pages 74-81).

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TABLE OF CONTENTS

	<u>Page</u>
FCPA Elements and Penalties	1
FCPA Settlements	3
2008	3
Faro Technologies, Inc.....	3
AGA Medical Corporation	4
Willbros Group, Inc.	4
Activities in Nigeria.....	5
Activities in Ecuador.....	6
Activities in Bolivia	7
Enforcement Actions Against Individuals	7
Pacific Consolidated Industries LP (Leo Winston Smith and Martin Self).....	8
ITXC Corporation (Yaw Osei Amoako; Steven J. Ott; and Roger Michael Young)	9
AB Volvo	10
Flowserve Corporation.....	12
Westinghouse	13
2007	14
Lucent Technologies, Inc.....	14
Akzo Nobel	15
Robert W. Philip	16
Chevron Corporation	18
Ingersoll-Rand.....	19
York International Corp. (“York”)	20
Monty Fu (Syncor).....	23
Bristow Group Inc. (“Bristow”).....	25
Chandramowli Srinivasan (EDS).....	26
Paradigm	26
Textron	29
Delta & Pine Land Company	30
Si Chan Wooh.....	31
Christian Sapsizian (Alcatel-Lucent)	31
Baker Hughes Inc.....	32
Charles Martin (Monsanto).....	34
Dow Chemical Corporation	35
El Paso Corporation	36
Vetco International Ltd.	37
Other FCPA and Related Developments	39

Opinion Procedure Releases	39
DOJ Opinion Procedure Release 08-02	41
DOJ Opinion Procedure Release 08-03	45
Criminal Matters	45
United States v. William J. Jefferson.....	45
United States v. Victor Kozeny, Frederic Bourke, Jr. and David Pinkerton	46
United States v. Kay	48
BAE Systems	49
Gerald and Patricia Green.....	52
Chiquita.....	53
ERHC Energy	54
United States v. Giffen.....	55
Civil Litigation.....	56
FCPA-Related Civil Litigation	56
Foreign Business Bribery Prohibition Act of 2008 (H.R. 6188)	60
Monitors.....	60
FCPA Compliance Monitors.....	60
McNulty Memorandum Update.....	62
McNulty Memorandum Update.....	62
World Bank-Related Developments	63
World Bank Group Guidance on Doing Business in Nigeria.....	63
World Bank Department of Institutional Integrity.....	64
Company Disclosures.....	67
Siemens AG	67
Bausch & Lomb	68
AON Corporation.....	68
INNOSPEC Inc.....	69
ITT Corp.	69
eLandia International, Inc.	69
ABB	70
NATCO Group, Inc.	70
Customs Investigations	70
Medical Device Investigations.....	71
Summary and Analysis.....	74

FCPA Elements and Penalties

The FCPA has two fundamental components: (i) the anti-bribery prohibition in section 30A of the Securities Exchange Act of 1934 (“Exchange Act”)¹ (the “anti-bribery” provisions), and (ii) the books and records and internal control provisions in sections 13(b)(2)(A)² (the “books and records” provision) and 13(b)(2)(B)³ (the “internal controls” provisions) of the Exchange Act, respectively. The DOJ and the SEC have joint jurisdiction to prosecute violations of the anti-bribery provisions. The SEC has jurisdiction to enforce violations of the books and records and internal controls provisions.

The FCPA’s anti-bribery provisions prohibit, among other things, (i) an act in furtherance of, (ii) a payment, offer or promise of, (iii) anything of value, (iv) to a foreign official,⁴ or any other person while knowing that such person will provide all or part of the thing of value to a foreign official, (v) with corrupt intent, (vi) for the purpose of (a) influencing an official act or decision, (b) inducing a person to do or omit an act in violation of his official duty, (c) inducing a foreign official to use his influence with a foreign government to affect or influence any government decision or action, or (d) securing an improper advantage, (vii) to assist in obtaining or retaining business.⁵

The term “foreign official” is broadly defined to mean any officer or employee of a foreign government, agency or instrumentality thereof, or of a public international organization, or any person acting in an official capacity on behalf of such government, department, agency, or instrumentality, or public international organization.⁶ The term foreign official has been construed by federal prosecutors to include employees, even relatively low-level employees, of state-owned institutions.

Under the FCPA, “a person’s state of mind is ‘knowing’ with respect to conduct, a circumstance, or result” if he or she has actual knowledge of the conduct, circumstance or result or “a firm belief that such circumstance exists or that such result is substantially certain to occur.”⁷ In addition, knowledge of a circumstance can be found when there is a “high probability” of the existence of such circumstance.⁸ According to the legislative history,

[T]he Conferees agreed that “simple negligence” or “mere foolishness” should not be the basis for liability. However, the Conferees also agreed that the so called “head-in-the-sand” problem – variously described in the pertinent authorities as “conscious disregard,” “willful blindness” or “deliberate ignorance” – should be covered so that management officials could not take refuge from the act’s

1 15 U.S.C. §§ 78dd-1(a), 78dd-2.

2 15 U.S.C. § 78m(b)(2)(A).

3 15 U.S.C. § 78m(b)(2)(B).

4 The FCPA further prohibits payments to foreign political parties and officials thereof.

5 See 15 U.S.C. §§ 78dd-1(a).

6 15 U.S.C. §§ 78dd-1(f)(1).

7 *Id.*

8 See 15 U.S.C. § 78dd-1(f)(2)(B).

prohibition by their unwarranted obliviousness to any action (or inaction), language or other “signaling device” that should reasonably alert them of the “high probability” of an FCPA violation.⁹

The FCPA’s books and records and internal control requirements¹⁰ compel every issuer that has publicly registered securities to make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer, and maintain a system of robust internal accounting controls.¹¹

The FCPA imposes both criminal and civil penalties. The DOJ has exclusive jurisdiction to prosecute criminal violations of the FCPA. The DOJ and the SEC share jurisdiction over civil enforcement actions. An entity faces a maximum criminal fine of \$2 million per violation of the FCPA’s anti-bribery provisions.¹² Moreover, if an FCPA violation results in pecuniary gain or loss to the entity, an alternative statutory maximum fine is the greater of twice the gross gain or twice the gross loss.¹³ Individuals who willfully violate the FCPA’s anti-bribery provisions face a maximum criminal fine of \$250,000 per violation (or up to twice the amount of the gross gain or loss derived from the offense), imprisonment for not more than five years, or both.¹⁴

Civil penalties for FCPA violations include imposition of a monetary penalty, disgorgement and injunctive relief.¹⁵ The FCPA provides for civil fines up to \$10,000 against any entity that violates the anti-bribery provisions as well as against any officer, director, employee, or agent who willfully violates the anti-bribery provisions.¹⁶ These fines are not indemnifiable by a person’s employer or principal.¹⁷

An entity that willfully violates the FCPA’s accounting provisions may be fined up to \$25 million or up to twice the amount of the gross gain or loss derived from the offense. Individuals who willfully violate the FCPA’s accounting provisions may be fined up to \$5 million and imprisoned for up to twenty years.¹⁸

9 H.C.R. No. 100-576, at 920 (1988).

10 The “books and records” and “internal controls” provisions were passed as part of the original FCPA legislation out of concern over companies improperly recording payments on their books and records and failing to fully account for illicit “slush” funds, from which improper payments could be made. These provisions, however, have broader application than simply within the context of the FCPA. For purposes of this Mid-Year Alert, when violations of these provisions are alleged in the context of improper payments to foreign officials or similar conduct, they are referred to as violations of the FCPA’s books and records and internal controls provisions. When violations occur in situations not involving improper payments (*see, e.g.*, the Willbros Group settlement discussed *infra*), they are described as the Exchange Act’s books and records and/or internal controls provisions.

11 15 U.S.C. § 78m(b)(2)(A)&(B).

12 15 U.S.C. §§ 78dd-2(g)(1)(A), 78ff(c)(1)(A).

13 18 U.S.C. § 3571(d).

14 15 U.S.C. §§ 78dd-2(g)(2)(A), 78ff(c)(2)(A), as amended by 18 U.S.C. § 3571.

15 15 U.S.C. §§ 78ff(c), 78dd-2(g)(1)(B).

16 15 U.S.C. §§ 78dd-2(g), 78ff.

17 15 U.S.C. § 78dd-2(g)(3).

18 15 U.S.C. § 78ff(a).

FCPA Settlements

2008

Faro Technologies, Inc.

On June 5, 2008, Faro Technologies, Inc. (“Faro”), a publicly-traded company specializing in computerized measurement devices and software, settled civil charges with the SEC for violating the FCPA’s anti-bribery, books and records and internal controls provisions in connection with improper payments to Chinese government officials. In the SEC proceeding, Faro agreed to cease and desist from future violations, hire an independent compliance monitor for a period of two years, and pay approximately \$1.85 million in disgorgement and prejudgment interest. In a related proceeding, Faro entered into a two-year non-prosecution agreement with the DOJ and agreed to pay a \$1.1 million criminal penalty.

According to the SEC, Faro began direct sales of its products in China in 2003 through its Chinese subsidiary, Faro Shanghai Co., Ltd. (“Faro China”), which was overseen by Faro’s Director of Asia-Pacific Sales (“sales director”). In May 2003, Faro hired a country sales manager to assist in selling its products. After receiving his employment contract, the country manager apparently asked if he could do business “the Chinese way.” Faro officers learned that this was a reference to paying kickbacks or providing other things of value in order to induce sales of Faro products. After seeking an opinion into the legality of such payments under Chinese law, Faro officers orally instructed the sales director and country manager not to make such payments.

In 2004, however, the Faro China sales director began authorizing the country manager to make corrupt payments to employees of state-owned or controlled entities in China to secure business for Faro. These payments were known as “referral fees” and ranged up to 20-30% of the contract price. To conceal the payments, the sales director instructed Faro China employees to alter account entries to remove any indication that the payments were going to Faro’s “customers.” In doing so, the Sales Director stated that he “did not want to end up in jail” as a result of “this bribery.”

In February 2005, a new Faro officer e-mailed an article to the sales director regarding another U.S. company being prosecuted for bribery in China and instructed the sales director to have the article translated for Faro China’s employees. Rather than cease the payment scheme, however, the sales director authorized the country manager to continue making payments through third-party intermediaries described as “distributors.” Faro China continued making the improper payments in such a manner until early 2006.

Faro’s Chinese subsidiary made over twenty improper payments totaling \$444,492 from which it generated a net profit of over \$1.4 million. The SEC complaint asserts that Faro lacked a system of internal controls appropriate to detect the improper payments and provided “no training or education to any of its employees, agents, or subsidiaries regarding the requirements of the FCPA” during the relevant time. Faro also improperly recorded the payments in its books

and records, inaccurately describing them as legitimate “selling expenses.” Faro voluntarily disclosed the payments to the government.

AGA Medical Corporation

On June 3, 2008, AGA Medical Corporation (“AGA”), a privately-held medical device manufacturer based in Minnesota, entered into a three-year deferred prosecution agreement with the DOJ relating to improper payments made to Chinese doctors employed by state-owned hospitals and a Chinese patent official, and agreed to pay a \$2 million criminal penalty. The DOJ filed a criminal information against AGA in the U.S. District Court for the District of Minnesota charging the company with one count of conspiracy to violate, and one count of violating, the FCPA.

According to the criminal information, from 1997 through 2005, a high-ranking officer and part owner of AGA, two AGA employees responsible for international sales, and AGA’s Chinese distributor agreed to pay kickbacks to physicians that made purchasing decisions for Chinese hospitals to induce them to purchase AGA’s products.

The payments apparently started after the distributor informed AGA that the hospitals were requesting a 10% “discount” on AGA’s products and the physicians were requesting a corresponding 10% “commission.” E-mail records indicated that AGA officials approved the payments and were kept apprised of the scheme’s progress and status. The criminal information does not provide a total dollar amount of payments to Chinese doctors, but states that as of 2001 over \$460,000 in such “commission” payments had been made. Although the criminal information indicates that AGA generated sales of approximately \$13.5 million during the relevant period, it does not specify what portion of these sales were linked to the improper conduct.

Further, according to the DOJ, between 2000 and 2002, AGA sought several patents in China, and a high-ranking AGA official agreed to make payments to a Chinese patent official through AGA’s Chinese distributor in order to have the patent applications expedited and approved. The criminal information indicates that at least \$20,000 in payments were made or agreed to in connection with AGA’s patent approvals.

The DOJ announced that it agreed to defer prosecution (and dismiss the criminal information after three years if AGA abides by the terms of the agreement) in recognition of AGA’s voluntary disclosure, thorough review of the improper payments, cooperation with the DOJ’s investigation, implementation of enhanced compliance policies and procedures, and engagement of an independent monitor.

Willbros Group, Inc.

On May 14, 2008, Willbros Group Inc. (“Willbros Group”), an international oil and gas pipeline company with headquarters in Tulsa, Oklahoma prior to 2000 when it moved them to Houston, Texas, and four of its former employees settled civil charges with the SEC for violating the FCPA’s anti-bribery, books and records and internal controls provisions in connection with

the payment of bribes to officials in Nigeria and Ecuador, and for violating the anti-fraud provisions of the Securities Act (Section 17(a)) and Exchange Act (Section 10(b) and Rule 10b-5 thereunder) in connection with a fraudulent scheme to reduce taxes in Bolivia. The SEC settlement requires Willbros Group to pay \$10.3 million in disgorgement and prejudgment interest and also contained civil penalties for certain of the former employees (discussed further below).

In a related proceeding, Willbros Group and its subsidiary Willbros International Inc. (“Willbros International”) entered into a deferred prosecution agreement with the DOJ in which they agreed to pay a \$22 million criminal penalty and engage an independent monitor for three years in connection with the Nigerian and Ecuadorian bribery schemes. In connection with the deferred prosecution agreement, Willbros Group and Willbros International agreed to a limited waiver of attorney-client privilege, applicable to the DOJ only, and agreed to implement a compliance and ethics program designed to prevent further violations of the FCPA.

Activities in Nigeria

Beginning in at least 2003, Willbros Group, acting primarily through three operating subsidiaries, sought to obtain two significant Nigerian contracts: (i) the onshore Eastern Gas Gathering Systems (“EGGS”) project, which was divided into Phases I and II; and (ii) an offshore pipeline contract. The EGGS and offshore pipeline projects were run by separate joint-ventures, both of which were majority-owned by the Nigerian National Petroleum Corporation (“NNPC”) and were operated by subsidiaries of major international oil companies. The SEC’s complaint asserts that Willbros Group and its subsidiaries paid over \$6 million in bribes in connection with these projects, from which Willbros Group realized approximately \$8.9 million in net profits.

Willbros West Africa, Inc. (“Willbros West Africa”) formed a consortium with the subsidiary of a German engineering and construction firm to bid on the EGGS project. According to the SEC’s complaint, in late 2003, while Willbros West Africa was bidding on Phase I of the project, Willbros International’s former president (who is not named in the complaint) and Jason Steph, Willbros International’s onshore general manager in Nigeria, devised a scheme with employees of Willbros West Africa’s joint venture partner to make payments to Nigerian officials, a Nigerian political party and an official in the executive branch of Nigeria’s federal government to obtain some or all of the EGGS work. The SEC’s complaint states that the former president caused Willbros West Africa to enter into a series of “consultancy agreements” that called for 3% of the contract revenues to be paid out to a consultant. Certain of Willbros Group’s former employees, including Steph, were allegedly aware that the consultant intended to use the money paid to him under the “consultancy agreement” to bribe Nigerian officials. In July and August 2004, after approval by the NNPC and its subsidiary, the National Petroleum Investment Management Services (“NAPIMS”), the Willbros West Africa consortium executed contracts with the EGGS joint venture operator for portions of the EGGS Phase I project.

In January 2005, the former president of Willbros International resigned and the company's audit committee began an internal investigation into allegations of unrelated tax improprieties. When the internal investigation expanded to include Willbros Group's Nigerian operations, the "consulting" agreement was canceled and payments ceased. When Steph and another former Willbros employee, Jim Bob Brown, learned that cutting off the payments could jeopardize Willbros International's opportunity to seek a contract for Phase II of the EGGS project, they engaged a second consultant and agreed to pay \$1.85 million to cover the outstanding "commitments" to the Nigerian officials. To come up with the \$1.85 million, Brown caused Willbros West Africa to borrow \$1 million from its consortium partner and Steph borrowed \$500,000 on behalf of a separate Willbros Nigerian subsidiary from a Nigerian gas and oil company to cover the payments to Nigerian officials. In addition, Steph directed the withdrawal of \$350,000 from a Willbros petty cash account for the same purpose. These funds were transferred to the second consultant for payment to Nigerian officials.

As with the EGGS project, Willbros Group, through the former president of Willbros International, agreed to pay at least \$4 million in bribes to Nigerian officials in connection with the offshore pipeline contract. According to the DOJ and SEC, by October 2004, some of these payments had been made, although an exact amount is not indicated.

Finally, the SEC's complaint asserts that between the early 1990s and 2005, Willbros Group employees abused petty cash accounts to pay Nigerian tax officials to reduce tax obligations and to pay officials within the Nigerian judicial system to obtain favorable treatment in pending court cases. To facilitate the improper payments, certain Willbros Group employees used fictitious invoices to inflate the amount of cash needed in the petty cash accounts. Ultimately, at least \$300,000 of petty cash was used to make these types of improper payments.

Activities in Ecuador

According to the SEC and DOJ, in late 2003, the former president of Willbros International instructed an Ecuador-based employee to pursue business opportunities in that country. The employee advised Brown, who was supervising the company's business in Ecuador, that Willbros Servicios Obras y Sistemas S.A. ("Willbros Ecuador") could obtain a \$3 million contract (the "Santo Domingo project") by making a \$300,000 payment to officials of PetroEcuador, a government-owned oil-and-gas company. Brown approved the request, which required \$150,000 to be paid upfront and \$150,000 to follow after the completion of the project. After making this agreement, Willbros Ecuador received a letter of intent for the Santo Domingo project, and the company made the first \$150,000 payment.

While the Santo Domingo project was ongoing, however, the relevant officials at PetroEcuador were replaced. Both the original officials and the incoming officials insisted on receiving payments, and Brown and Willbros International's former president authorized the Ecuador employee to broker a deal. Brown attended the meeting with the Ecuadorian officials as well, where it was agreed that the company would pay the former officials \$90,000 and the new officials \$165,000. As a result of this agreement, Willbros retained the Santo Domingo project, which ultimately generated \$3.4 million in revenue for the company, and was awarded a second

project. When the bribes relating to the second project were discovered in 2005, Willbros Group relinquished the project.

Willbros Group falsely characterized the payments made to the Ecuadorian officials as “consulting expenses,” “platform expenses,” and “prepaid expenses” in its books and records.

Activities in Bolivia

According to the SEC complaint, Willbros Group, through certain of its former employees, further engaged in a fraudulent scheme to minimize the tax obligation of the company’s Bolivian subsidiary, Willbros Transandina.

In late 2001, the subsidiary was awarded a contract to complete a pipeline as part of a joint venture. Willbros Transandina was required to pay 13% of its receipts for the project as a value added tax (“VAT”). It was, however, allowed to offset the taxes to a certain extent by the VAT it paid to its vendors. Willbros International’s former president and others thus orchestrated a scheme whereby Willbros Transandina falsely inflated the VAT it owed to vendors through a series of fictitious transactions and invoices.

Similarly, Willbros International’s former president directed accounting personnel to materially understate the amount of Foreign Withholding Taxes that Willbros Group owed as a foreign company doing business in Bolivia.

Enforcement Actions Against Individuals

In addition to its action against Willbros Group, the SEC settled charges against several Willbros employees. Steph was charged with violating the FCPA’s anti-bribery provisions, knowingly circumventing Willbros Group’s internal controls or knowingly falsifying its books and records, and aiding and abetting Willbros Group’s FCPA violations as a result of his role in the fraudulent payments made to Nigerian government officials. Steph will pay a civil penalty in connection with the judgment that has yet to be determined. On November 5, 2007, Steph pleaded guilty in a parallel proceeding brought by the DOJ. Steph is awaiting sentencing, which is set for September 26, 2008.

Gerald Jansen, a former employee of Willbros International who served as an Administrator and General Manager in Nigeria and allegedly routinely approved the payment of invoices out of petty cash which he knew were false and which were used to make payments to Nigerian tax and court officials, was charged with knowingly circumventing Willbros Group’s internal controls or knowingly falsifying its books and records, and with aiding and abetting Willbros Group’s violations of the FCPA’s anti-bribery, books and records and internal controls provisions. Jansen was ordered to pay a civil penalty of \$30,000. The DOJ has not taken action against Jansen.

Like Jansen, Lloyd Biggers, a former employee of Willbros International who allegedly knowingly procured false invoices used to make payments to Nigerian tax and court officials, was charged with knowingly circumventing Willbros Group’s internal controls or knowingly

falsifying its books and records, and with aiding and abetting Willbros Group's violations of the anti-bribery and books and records provisions. Biggers consented to a permanent injunction against such future violations. Biggers was not ordered to pay a civil penalty, and the DOJ has not taken action against Biggers.

Carlos Galvez, a former employee of Willbros International who worked in Bolivia and used fictitious invoices to prepare false tax returns and other records, was charged with knowingly circumventing Willbros Group's internal controls or knowingly falsifying its books and records, and with aiding and abetting Willbros Group's violations of the Securities Exchange Act Section 10(b), and the Exchange Act's books and records and internal controls provisions. Galvez was ordered to pay a civil penalty of \$35,000. The DOJ has not taken action against Galvez.

On September 14, 2006, former Willbros employee Jim Bob Brown pleaded guilty to one count of conspiring to violate the FCPA in connection with his participation in the Nigeria and Ecuador bribery schemes described above. Among other things, Brown's plea agreement indicates that he "loaned" a suitcase filled with \$1 million in cash to a Nigerian national with the intent that it be passed on to Nigerian officials. Brown is scheduled to be sentenced on October 24, 2008.

Pacific Consolidated Industries LP (Leo Winston Smith and Martin Self)

On May 8, 2008, Martin Self, a partial owner and former president of Pacific Consolidated Industries ("PCI"), a private company that manufactured air separation units and nitrogen concentration trolleys for defense departments throughout the world, pleaded guilty to violating the FCPA's anti-bribery provisions in connection with payments to a relative of a United Kingdom Ministry of Defense ("UK-MOD") official in order to obtain contracts with the Royal Air Force valued at over \$11 million. Previously, on June 18, 2007, Leo Winston Smith, former executive vice president and director of sales of PCI, was arrested after being indicted by a federal grand jury in Santa Ana, California on April 25, 2007 in connection with the same scheme.

According to the charging documents, in or about October 1999, Self and Smith caused PCI to enter into a marketing agreement with the UK-MOD official's relative. The marketing agreement provided for the relative to receive commission payments, from which he made payments to the UK-MOD official. The plea agreement with Self indicates that, beginning in late 1999, he "was aware of the high probability that the payments to the [r]elative were made for the purpose of obtaining and retaining the benefits of the UK-MOD contracts...." Despite such awareness, Self "failed to make a reasonable investigation of the true facts and deliberately avoided learning the true facts." Between 1999 and 2002, Self and Smith caused over \$70,000 in payments to be made to the relative of the UK-MOD official through the bogus marketing agreement. In addition, Smith's indictment indicates that beginning around 2002, Smith caused approximately \$275,000 in payments to be made on behalf of the UK-MOD official for the purchase of a villa in Spain. In return, the UK-MOD official awarded a contract to PCI valued at approximately \$6 million, on which Smith received commissions of approximately \$500,000.

The indictment alleges that Smith did not report these commissions on his 2003 United States tax returns.

Smith is scheduled to stand trial in July 2008. Self is to be sentenced in September 2008. Self's plea agreement suggests an eight-month prison term.

In late 2003, after the alleged conduct, PCI was acquired by a group of investors and re-named Pacific Consolidated Industries, LLC ("PCI LLC"). PCI LLC discovered the payments in a post-acquisition audit and referred the matter to the DOJ.

ITXC Corporation (Yaw Osei Amoako; Steven J. Ott; and Roger Michael Young)

On April 18, 2008, final judgments were entered against Yaw Osei Amoako, Steven J. Ott, and Roger Michael Young, all former officials of ITXC Corp. ("ITXC"), resolving anti-bribery and books and records FCPA charges brought by the SEC and DOJ. Previously, on July 25, 2007, Ott and Young pleaded guilty to conspiring to violate the FCPA and the Travel Act in connection with corrupt payments to foreign telecommunications officials in Africa. As of July 2008, Ott and Young were awaiting sentencing; they each face up to five years in prison and a \$250,000 fine.

Also on July 25, 2007, Amoako, who had pleaded guilty in September 2006 to charges arising out of the same scheme, was sentenced to 18 months in prison for conspiring to violate the FCPA and the Travel Act. Amoako was ordered to pay a \$7,500 fine and to serve two years of supervised release (beyond his 18 month sentence).

The SEC and DOJ alleged that Amoako, Ott, and Young participated in a scheme to bribe government officials in Nigeria, Rwanda, Senegal, and Mali to obtain contracts with government-owned telephone companies on behalf of ITXC, a publicly traded telecommunications company based in New Jersey. Amoako served as ITXC's regional director for Africa and reported directly to Young, the former Managing Director for Africa and the Middle East. Young, in turn, reported to Ott, the former Executive Vice President of Global Sales. ITXC apparently frequently used third party sales agents or representatives in Africa because it did not have its own employees stationed there.

In 2000, Amoako, at the direction of Ott and Young, traveled to Africa and hired a former senior official of the state-owned Nigerian telecommunication company ("Nitel") to represent ITXC in connection with ITXC's bid for a Nitel contract. The strategy failed, however, in that the former Nitel official irritated the current Nitel decision-makers and failed to secure the contract for ITXC. In 2002, in connection with another competitive bid, Amoako, with Ott's and Young's approval, entered into an agency agreement with the then-Nitel Deputy General Manager in exchange for his assistance in awarding the contract to ITXC. In return, they promised him a "retainer" in the form of a percentage of profits from any contract that ITXC secured. The contract was awarded to ITXC and Ott, Young and Amoako negotiated and/or approved over \$166,000 in payments to the agent. ITXC earned profits of \$1,136,618 million on the contract.

Between August 2001 and May 2004, Ott, Young and Amoako entered into, or attempted to enter into, similar agency agreements with employees of state-owned telecommunications companies in Rwanda, Senegal, Ghana and Mali in order to induce these employees to misuse their positions to assist ITXC in securing contracts. For example, Amoako, at the direction of Ott and Young, arranged for ITXC to pay over \$26,000 to an employee of Rwandatel, the wholly-owned government telephone company of Rwanda, in order to negotiate favorable terms for an ITXC contract. ITXC entered into an agreement that provided for the agent to receive \$0.01 for each minute of phone traffic that ITXC completed to Rwanda, Burundi and Uganda even though the agent was providing no legitimate services in connection with the contract. Ultimately, ITXC realized \$217,418 in profits on the Rwandatel contract.

In total, ITXC made over \$267,000 in wire transfers to officials of the Nigerian, Rwandan and Senegalese telecommunications companies and ITXC obtained contracts with these carriers that generated profits of over \$11.5 million. In addition to his participation in the above schemes, Amoako received a \$50,000 kickback from the scheme in Nigeria and embezzled \$100,411 from ITXC in connection with the bribery in Senegal.

In May 2004, ITXC merged with Teleglobe International Holdings Ltd. (“Teleglobe”). In February 2006, Teleglobe was acquired by Videsh Sanchar Nigam Limited (“VSNL”).

AB Volvo

On March 20, 2008, AB Volvo (“Volvo”), a Swedish transportation and construction equipment company, settled civil charges with the SEC for violating the FCPA’s books and records and internal controls provisions in connection with improper payments made under the Oil-for-Food Programme for Iraq (“OFFP”) from approximately 1999 to 2003. AB Volvo and two of its wholly-owned subsidiaries also entered into a deferred prosecution agreement with the DOJ for conspiracy to commit wire fraud and violate the FCPA’s books and records provisions. Under the agreements, Volvo agreed to pay over \$19.6 million in combined fines and penalties, including over \$8.6 million in disgorgement and pre-judgment interest, a \$4 million civil penalty and a \$7 million criminal penalty.

The United Nations established the OFFP in 1996 in an effort to provide Iraqi citizens with humanitarian aid from funds the Iraqi government received through its sale of oil. Under the program, the Iraqi government, through the State Oil Marketing Organization (“SOMO”), negotiated and contracted with private companies to sell its oil, with the purchase price to be paid to a U.N.-controlled escrow account that funded the humanitarian purchases.

On April 22, 2004, the United Nations Security Council passed a unanimous resolution endorsing an inquiry into corruption in the OFFP, calling upon all 191 member states to cooperate. On September 7, 2005, former Federal Reserve Chairman Paul Volcker presented his final report to the U.N. Security Council (the “Volcker Report”). Since the Volcker Report’s release, the DOJ and SEC, with the participation of other federal agencies, have settled FCPA-related enforcement actions against eight companies. Numerous other investigations are ongoing.

The violations uncovered took two general forms. First, beginning in the middle of 2000, Iraqi officials demanded secret kickbacks on the sale of humanitarian goods in the form of “After Sales Service Fees” (“ASSFs”). After the Iraqi government accepted a humanitarian supplier’s bid for the sale of goods, it would inform the supplier that the ASSFs were required in order to win the contract. Initially, the Iraqi government and the humanitarian supplier entered into side agreements to reflect the secret kickback, which by October 2000 was typically 10% of the contract price. Eventually, these side agreements became unnecessary because of widespread knowledge about the ASSF scheme, and the supplier would simply increase its original contract price by 10%.

Second, under the OFFP, Iraqi government officials had the authority to select companies that had the right to purchase Iraqi oil. From approximately August 2000 to March 2003, Iraqi officials working for SOMO conditioned the distribution of oil allocations on the recipient’s agreement to pay kickbacks in the form of surcharges on each barrel of oil. The surcharges typically ranged from \$0.25 to \$0.30 per barrel, although they reached as high as \$0.50 per barrel. SOMO sold the oil at below market prices to allow purchasers to receive a sufficient profit margin on the allocations. Despite the OFFP requirement that all payments be made to the Escrow Account, the oil surcharges were paid into bank accounts in Jordan and Lebanon established in the names of SOMO or other Iraqi agencies and entities.

Because these payments were made to a governmental entity, not government officials personally, the FCPA enforcement actions have generally consisted of books and records and internal controls violations and not anti-bribery allegations. Several of these enforcement actions have also revealed misconduct by the subject companies unrelated to the OFFP.

During the OFFP, Volvo participated in the sale of trucks, construction equipment and spare parts to the Iraqi government through a French subsidiary, Renault Trucks SAS (“Renault”), and a Swedish subsidiary, Volvo Construction Equipment, AB (“VCE”). Between 1999 and 2003, Renault and VCE made or authorized nearly \$8.6 million in improper kickback payments in connection with approximately 35 contracts. Volvo’s total gain from contracts involving improper payments was nearly \$7.3 million.

According to the government, Renault entered into approximately 18 contracts with Iraqi ministries for specialty vehicles. Renault typically subcontracted out the body-building work associated with these contracts. Between November 2000 and July 2001, Renault devised a scheme whereby its subcontractors would inflate the price of their body-building work by approximately 10% and then pass this amount to the Iraqi government. Renault internal documents indicated that had Renault made the payments in its own name, “we would have been caught red-handed.” Renault made approximately \$5.1 million in improper payments in connection with these contracts and authorized an additional \$1.25 million.

According to the SEC, as early as 1999, VCE’s corporate predecessor, Volvo Construction Equipment International, AB (“VCEI”), made improper payments to Iraqi ministries in connection with OFFP contracts. VCEI made the payments through a Jordanian agent on two contracts with SOMO and one contract with the Ministry of Housing and

Construction. VCEI, also through the agent, purchased a car for the Ministry of Housing and Construction. Collectively, the payments and cost of the car totaled over \$100,000.

After the imposition of ASSFs in 2000, VCEI and its distributors entered into five additional contracts that involved improper payments. In a November 2000 internal memo, VCEI employees noted that the ASSF demands were a “clear violation of the UN Embargo Rules.” VCEI sought counsel from the Swedish Embassy in Amman, Jordan. The embassy contacted the U.N. regarding the kickback demands, indicating that VCEI (which was not identified by name) had informed the embassy that it would refuse to sign the contract. Nevertheless, VCEI went forward with the transaction, which included the ASSF payments.

Initially, VCEI made the ASSF payments on its own behalf through its agent. Later, VCEI attempted to distance itself from the scheme by having the agent act as its distributor in Iraq. In this capacity, the agent would purchase vehicles from VCEI and re-sell the vehicles to the Iraqi government at an inflated price. VCEI knew that the agent was submitting inflated contracts and sold its products to the agent at a price that allowed the agent to make improper ASSF payments. When VCEI’s relationship with the Jordanian agent faltered, it began using a Tunisian distributor to facilitate the improper ASSF payments. In total, VCEI made or authorized over \$2.2 million in improper ASSF payments.

As a result of the “extent and duration” of the improper payments, the improper recording of those payments and Volvo management’s failure to detect the payments, the SEC determined that Volvo violated the FCPA’s internal controls provisions. The SEC specifically noted that “[a]lthough Volvo knew of endemic corruption problems in the Middle East, it appeared to take on faith, without adequate confirming steps, that its managers and employees were exercising their duties to manage and comply with compliance and control issues.” The SEC also determined that Volvo failed to properly record in its books and records the improper payments, characterizing them instead as commission payments, body-building fees or costs of sales.

Flowserve Corporation

On February 21, 2008, Flowserve Corporation (“Flowserve”), a Texas-based supplier of oil, gas and chemical industry equipment, agreed to settle civil charges with the SEC for violating the FCPA’s books and records and internal controls provisions in connection with illegal payments to Iraq under the OFFP. Flowserve and its wholly-owned French subsidiary Flowserve Pompes SAS (“Flowserve Pompes”) also entered into a three-year deferred prosecution agreement with the DOJ charging Flowserve Pompes with conspiracy to violate the wire fraud statute and the FCPA’s books and records provision. In total, Flowserve agreed to pay over \$10.5 million in fines and penalties, including over \$3.5 million in disgorgement and prejudgment interest, a \$3 million civil penalty and a \$4 million criminal fine. In Holland, Flowserve’s Dutch subsidiary, Flowserve B.V., also agreed to enter into a criminal disposition with Dutch prosecutors and pay an undisclosed fine.

Flowserve participated in the OFFP through Flowserve Pompes and Flowserve B.V. According to the SEC’s complaint, from 2001 to 2003, these subsidiaries entered into twenty

sales contracts with Iraqi government entities that involved illegal surcharge payments. Flowserve Pompes and Flowserve B.V., with the assistance of Jordanian agents, made \$646,488 in improper surcharge payments and authorized an additional \$173,758 in such payments.

Flowserve Pompes entered into 19 contracts that included improper ASSF payments. The 10% surcharges were memorialized in a side letter to the Iraqi Ministry of Oil that described the charges as “engineering services, installation, and commissioning.” The payments were made through a Jordanian agent by having the agent submit inflated invoices for reimbursement to Flowserve Pompes, and were recorded as if they were installation and service payments. The contract documents that Flowserve Pompes submitted to the U.N. omitted any reference to the ASSF payments, instead inflating the price of the equipment sold without discussing the price increase. The French subsidiary ultimately made \$604,651 in improper payments and authorized an additional \$173,758 in payments that were not ultimately made.

The SEC’s complaint also charges Flowserve B.V. with making a \$41,836 kickback payment in connection with a contract to provide water pump parts to an Iraqi government-owned gas company. In August 2001, Flowserve B.V.’s agent advised the company that it was required to make a 10% kickback payment in connection with the contract, and expected to be reimbursed for such payment. Flowserve B.V. rejected a proposal to conceal the kickbacks by having the agent serve as a distributor and pay the ASSF out of his margin. Instead, Flowserve B.V.’s controller increased the cost of the purchase order and passed the difference to the agent. Flowserve B.V. agreed to, and ultimately did, pay the agent a “special project discount” commission which covered the amount of the kickback and effectively doubled the agent’s standard 10% commission to 20%.

The SEC charged that Flowserve failed to devise and maintain an effective system of internal controls sufficient to prevent or detect the transactions by its two subsidiaries. In addition, Flowserve violated the FCPA’s books and records provisions by improperly recording payments to its agents as legitimate expenses.

Westinghouse

On February 14, 2008, Westinghouse Air Brake Technologies Corporation (“Wabtec”) settled civil charges with the SEC for violating the FCPA’s anti-bribery, books and records, and internal controls provisions in connection with improper payments made by Wabtec’s fourth-tier, wholly-owned Indian subsidiary Pioneer Friction Limited (“Pioneer”) to employees of India’s state-controlled national railway system. In the SEC proceeding, Wabtec agreed to pay over \$288,000 in disgorgement and prejudgment interest and a civil penalty of \$87,000. Wabtec also entered into a three-year non-prosecution agreement with the DOJ relating to the same and other similar conduct. Under that agreement, Wabtec agreed to pay a \$300,000 fine, implement rigorous internal controls, undertake further remedial steps and continue to cooperate with the DOJ.

The Indian Ministry of Railroads (“MOR”) controls the national railway system and is responsible for soliciting bids for various government contracts through the Indian Railway

Board (“IRB”). Pioneer sells railway brake blocks to, among other customers, train car manufacturers owned or controlled by the Indian government. According to the SEC’s complaint, from at least 2001 to 2005, Pioneer made more than \$137,400 in improper payments to employees of India’s state-run railway system to induce them to consider or grant competitive bids for government contracts to Pioneer. In 2005, the IRB awarded Pioneer contracts that allowed it to realize profits of \$259,000.

In order to generate the cash required to make the payments, Pioneer directed “marketing agents” to submit invoices for services rendered. Marketing agents are companies that submit invoices and collect payments on behalf of other companies. Although the invoices indicated that payments were due for services rendered in connection with various railway projects, they were in fact fictitious and no such services were ever rendered. Once Pioneer paid the invoice, the “marketing agent” would return the cash to Pioneer minus a service fee that the agent kept for itself. Pioneer then used the cash to make the improper payments.

The SEC complaint indicates that Pioneer kept the cash generated from the false marketing agent invoices in a locked metal box and also kept separate records (that were not subject to annual audits) reflecting the improper payments. In addition, contrary to Indian law and Wabtec policy, Pioneer destroyed all records relating to the improper payments after a single year, leaving only records from 2005 available for review.

Although the DOJ agreement is based in part on the improper payments discussed in the SEC’s complaint, the DOJ also noted that Pioneer made improper payments in order to “schedule pre-shipping product inspections; obtain issuance of product delivery certificates; and curb what Pioneer considered to be excessive tax audits.” The DOJ noted that after discovering the payments, Wabtec engaged outside counsel to conduct an internal investigation, voluntarily reported its findings to, and cooperated fully with, the DOJ, and instituted remedial measures.

2007

Lucent Technologies, Inc.

On December 21, 2007, Lucent Technologies, Inc. (“Lucent”) settled charges with the DOJ and the SEC for violating the FCPA’s books and records and internal controls provisions in connection with its payment of more than \$10 million for over 300 trips by approximately 1,000 employees of Chinese state-owned or controlled telecommunications enterprises, which were either existing or prospective Lucent customers. In the SEC proceeding, without admitting or denying the allegations, Lucent consented to an injunction from violating the books and records and internal controls provisions, and agreed to pay a civil monetary penalty of \$1.5 million. Lucent also entered into a two-year non-prosecution agreement with the DOJ, which requires the company to pay a \$1 million criminal penalty and to adopt new or modify existing internal controls, policies and procedures. The settlements concluded a multi-year investigation into Lucent’s activities prior to its November 2006 merger with Alcatel SA.

According to the SEC and DOJ, the majority of the trips were ostensibly designed either to allow Chinese officials to inspect Lucent’s factories in connection with a proposed sale (“pre-

sale” trips) or train the officials regarding the use of Lucent’s products in connection with ongoing contracts (“post-sale” trips). The SEC alleged that Lucent spent more than \$1 million on 55 “pre-sale” visits and more than \$9 million on 260 “post-sale” visits.

The settlement documents assert that despite the supposed business purpose for the trips, in fact, the Chinese officials spent little to no time visiting Lucent’s facilities. Rather, the officials spent the majority of their time visiting popular tourists destinations, including Las Vegas, Disney World and the Grand Canyon.

For example, on one pre-sale trip in 2002, Lucent paid more than \$34,000 for the Deputy General Manager and Deputy Director of the Technical Department of a Chinese-government majority-owned telecommunications company to visit the United States. During the trip, the Chinese officials spent three days on business activities and more than five days on visits to Disney World and Hawaii. Internal documents associated with the trip indicated that Lucent employees considered the Deputy General Manager to be a “decision maker” and described the trip as an important opportunity to enhance Lucent’s relationship with this individual prior to the award of an important project. According to the SEC, in October 2002, Lucent was awarded a portion of this project worth a reported \$428 million. The travel-related expenses associated with these “pre-sale” visits were recorded in Lucent’s books and records in expense accounts designated for items such as international freight costs or “other services.”

The “post-sale” trips were typically characterized as “factory inspections” or “training” visits. The factory inspections were initially intended as a way to demonstrate Lucent’s technologies and products to its Chinese customers. Around 2001, however, Lucent began outsourcing (including to China) most of its manufacturing operations and factories, which left its customers with few facilities in the United States to visit. Nevertheless, Lucent continued to provide its customers with “factory inspection” trips to the United States and other locations. These trips cost between \$25,000 and \$55,000 per trip. Similarly, the “training” visits were designed to offer some training, but often included extensive sightseeing, entertainment and leisure activities. Among other things, Lucent provided its visitors with per diems, paid for them to visit tourist attractions and paid for them to travel from training locations to leisure locations. As with the pre-sale trips, Lucent improperly recorded the expenses associated with these visits in its books and records as, among other things, costs for “other services.”

The SEC complaint asserts that Lucent lacked the internal controls to detect and prevent trips that contained a disproportionate amount of sightseeing and leisure, rather than business purposes, and improperly recorded many of the trips in its books. The complaint states that these violations occurred because “Lucent failed, for years, to properly train its officers and employees to understand and appreciate the nature and status of its customers in China in the context of the FCPA.”

Akzo Nobel

On December 20, 2007, Akzo Nobel N.V. (“Akzo Nobel”), a Netherlands-based pharmaceutical company, settled a civil complaint with the SEC for violating the FCPA’s books

and records and internal controls provisions in connection with improper After Service Sales Fee payments under the Oil-for-Food Program. In the SEC action, Akzo Nobel agreed to disgorge over \$2.2 million in profits and pre-judgment interest, and pay a civil penalty of \$750,000.

In a related proceeding, Akzo Nobel entered into an unusual non-prosecution agreement with the DOJ contingent upon the resolution of a Dutch prosecution of Akzo Nobel's subsidiary N.V. Organon ("Organon"). In the Dutch proceeding, Organon was expected to pay approximately €381,000. Under the non-prosecution agreement, if the Dutch proceeding was not successfully resolved, Akzo Nobel agreed to pay \$800,000 to the United States Treasury.

According to the SEC complaint, from 2000 to 2003, two of Akzo Nobel's subsidiaries, Organon and Intervet International B.V. ("Intervet"), authorized and made \$279,491 in kickback payments in connection with pharmaceutical contracts entered into under the OFFP. During the OFFP, Intervet used two agents, Agent A and Agent B, who were paid jointly regardless of which agent secured the contract. Prior to August 2000, each agent received a 5% commission. After August 2000, their commissions were reduced to 2.5% due to pricing pressures.

In September 2000, Agent A informed Intervet that Iraqi officials were demanding an illegal surcharge in connection with an agreement that Agent A was negotiating, which Intervet refused to make. The agent indicated that he would "handle" the situation, and was witnessed by an Intervet employee handing an envelope to an Iraqi representative at a contract signing. Thereafter, Agent A requested reimbursement for his payment of the ASSF on Intervet's behalf. Intervet agreed to revert to the pre-August 2000 arrangement under which the two agents received 5% commissions, half of which would then be passed on to the Iraqi government. Similarly, Organon made improper surcharge payments in connection with three contracts, all of which also involved Agent A. These surcharge payments were made by increasing the commission owed to Organon's agent. Akzo Nobel's total profits from contracts in which illegal ASSF payments were made amounted to more than \$1.6 million.

The SEC determined that Akzo Nobel violated the internal controls provisions based, in part, on the "extent and duration of the improper illicit payments made by [the] two Akzo Nobel subsidiaries and their agents" as well as "the failure of Akzo Nobel's management to detect these irregularities." In addition, by improperly recording the payments as legitimate commission payments, Akzo Nobel violated the FCPA's books and records provision.

Robert W. Philip

On December 13, 2007, the SEC filed settled charges against Robert W. Philip, former Chairman and CEO of Schnitzer Steel Industries ("Schnitzer"), for violating the FCPA's anti-bribery provisions and for knowingly circumventing Schnitzer's internal controls or knowingly falsifying Schnitzer's books and records. Philip also was charged with aiding and abetting Schnitzer's books and records and internal controls violations in connection with the above conduct. Without admitting or denying the allegations, Philip agreed to an order enjoining him from future violations of the FCPA and to disgorge approximately \$169,863 in bonuses, pay approximately \$16,536 in prejudgment interest, and pay a \$75,000 civil penalty.

Previously, on October 16, 2006, Schnitzer and its wholly owned South Korean subsidiary, SSI International Far East, Ltd. (“SSI Korea”), settled FCPA charges with the SEC and DOJ in connection with improper payments made to employees of state-owned steel mills in China, and privately-owned steel mills in China and South Korea. The SEC administrative proceeding found that Schnitzer had violated the FCPA’s anti-bribery and books and records and internal controls provisions and ordered Schnitzer to cease and desist from future violations of those provisions. Schnitzer was also ordered to appoint an independent compliance monitor and pay disgorgement and prejudgment interest of over \$7.7 million. In the DOJ proceeding, Schnitzer entered into a three-year deferred prosecution agreement while SSI Korea, which is described in the criminal information as “Schnitzer Steel’s agent in South Korea and China,” pleaded guilty to conspiring to violate, and violating, the FCPA’s anti-bribery and books and records provisions as well as the wire fraud statute. SSI Korea was ordered to pay a \$7.5 million criminal fine in connection with its plea.

According to the Schnitzer and Philip charging documents, in 1995, Schnitzer acquired an entity known as Manufacturing Management Inc. (“MMI”) and MMI’s South Korean subsidiary. It renamed the entities SSI International, Inc. (“SSI International”) and SSI Korea, respectively, and used these subsidiaries to facilitate Schnitzer’s scrap metal sales throughout Asian. SSI Korea and SSI International adopted MMI’s practice of making improper payments to managers of both government-owned and privately-owned steel mills in South Korea and China to induce them to purchase scrap metal from Schnitzer. According to the DOJ and SEC, the government-owned steel mills are considered “instrumentalities” and their officers and employees “foreign officials” under the FCPA. According to the SEC, although the managers of the private steel mills are not “foreign officials,” Schnitzer violated the FCPA by failing to properly account for and disclose the payments to those managers in its internal records and public filings.

The improper payments took the form of (i) “kickbacks” typically ranging from \$3,000 to \$6,000 per shipment and paid out of the revenues that Schnitzer generated from a sale, and (ii) “overpayments” from the steel mill customers that Schnitzer would then “refund” to certain managers, in amounts ranging from \$3,000 to \$15,000. Both types of payments were funded from secret off-book accounts and were typically made in cash. Between 1999 and 2004, Schnitzer allegedly made approximately \$205,000 worth of improper payments to managers of government-owned steel mills in China and over \$1.6 million in improper payments to managers of privately-owned steel mills in China and South Korea. According to the SEC’s complaint against Philip, he authorized these payments and directed Schnitzer staff to conceal the payments in Schnitzer’s books and records by describing them as “sales commissions,” “commission to the customer,” “refunds,” or “rebates.” Further, in May 2004, after Schnitzer’s compliance department uncovered the improper payments and prohibited further such payments, Philips authorized SSI personnel to make two additional payments to managers in South Korea.

In addition to the kickbacks and overpayments, Schnitzer also made smaller cash payments, sometimes characterized as “gratuities,” and non-cash gifts to managers of Chinese and South Korean customers in connection with scrap purchases. The non-cash gifts included a

\$2,400 watch, extensive entertainment and gift certificates. Philip allegedly knew of authorized these payments and gifts as well.

The improper payments made to government-owned steel mills generated revenue for Schnitzer of approximately \$96 million and net profits of approximately \$6.3 million on 30 sales transactions. The improper payments made to privately-owned steel mills apparently generated revenue of over \$500 million.

The SEC alleged that, in addition to authorizing the payment of bribes and directing that the payments be misreported in Schnitzer's books, Philip neglected to educate Schnitzer staff about the requirements of the FCPA and failed to establish a program to monitor its employees, agents and subsidiaries for compliance with the Act. In so doing, Philip aided and abetted Schnitzer's violations of the FCPA's internal controls provisions.

Chevron Corporation

On November 14, 2007, Chevron Corporation ("Chevron") entered into a non-prosecution agreement with the DOJ and a separate agreement with the Office of Foreign Assets Control of the U.S. Department of the Treasury ("OFAC") in connection with FCPA and related violations in connection with oil purchases the company made under the OFFP between April 2001 and May 2002. Chevron also settled civil charges with the SEC for violating the FCPA's books and records and internal controls provisions. In total, Chevron will pay \$30 million in fines and penalties, including a \$3 million civil penalty, \$25 million in disgorgement, and a \$2 million penalty to OFAC for violating sanctions against the former government of Iraq.

According to the SEC's complaint, in Fall 2000, the U.N. received reports of the Iraqi oil surcharge demands, and advised oil traders that it was illegal to make such payments. Chevron was notified as early as December 2000 that it was illegal to make the surcharge payments. In January 2001, Chevron instituted a company-wide policy prohibiting the payment of surcharges in connection with purchases of Iraqi oil. In April 2001, Chevron began purchasing Iraqi oil through third parties, and continued doing so through May 2002. In total, Chevron purchased approximately 78 million barrels of Iraqi crude oil under 36 contracts with third parties.

According to the SEC, despite the company's January 2001 policy, Chevron's traders entered into the third-party contracts with actual or constructive knowledge that the third parties were making illegal surcharge payments to Iraq. E-mail traffic appeared to show that traders were aware that the surcharges were being used to cover the cost of kickbacks to the Iraqi government. An Italian third-party, whose company on occasion sold oil to Chevron, stated that both the trader he dealt with at Chevron and the trader's superiors knew about the illegal surcharge demands. Moreover, Chevron's premiums to third parties shortly before the surcharge policy began typically ranged from \$0.25 to \$0.28 per barrel, whereas after the surcharge policy was put in place Chevron's premiums rose as high as \$0.53 per barrel and typically ranged from \$0.36 to \$0.495.

In addition, Chevron's policies required traders to obtain prior written approval for all proposed Iraqi oil purchases and charged management with reviewing each such proposed deal.

Chevron's traders did not follow the policy and Chevron's management failed to ensure compliance. Furthermore, Chevron's management relied on its trader's representations regarding third-party sellers instead of properly inquiring into and considering the identity, experience and reputation of each third party seller. A credit check of one seller, whom Chevron used in two transactions, revealed that the seller was a "brass plate" company with no known assets, experience in the oil industry or actual operations.

Ultimately, Chevron, through its third-party contracts, made illegal surcharge payments of approximately \$20 million. In doing so, Chevron failed to implement a system of internal accounting controls sufficient to detect and prevent such payments. Chevron also improperly recorded the payments on its books and records, characterizing them simply as "premiums."

Ingersoll-Rand

On October 31, 2007, Ingersoll-Rand Company Limited ("Ingersoll-Rand"), a global, diversified industrial company, resolved fraud and FCPA charges with the DOJ and SEC in connection with illegal ASSF payments made by its subsidiaries to Iraqi officials under the OFFP. Ingersoll-Rand agreed to pay more than \$6.7 million in fines and penalties, including over \$2.2 million in disgorgement and prejudgment interest, a \$1.95 million civil penalty and a \$2.5 million criminal fine.

The SEC Complaint details corrupt practices of five European Ingersoll-Rand subsidiaries, ABG Allgemeine Baumaschinen-Gesellschaft mbH ("ABG"), Ingersoll-Rand Italiana, SpA ("I-R Italiana"), Thermo-King Ireland Limited ("Thermo King"), Ingersoll-Rand Benelux, N.V. ("I-R Benelux"), and Ingersoll-Rand World Trade Ltd. ("IRWT"). The DOJ filed separate criminal informations against Thermo King and against I-R Italiana.

Four of the European subsidiaries – ABG, I-R Italiana, Thermo-King and I-R Benelux – entered into 12 OFFP contracts that contained ASSF kickbacks. Under these contracts, the Ingersoll-Rand subsidiaries, along with their distributors and one contract partner, made approximately \$963,148 in ASSF payments and authorized approximately \$544,697 in additional payments.

ABG entered into six AFFP contracts that included improper ASSFs. Two of these contracts were entered into in November 2000 with the Mayoralty of Baghdad for road construction equipment and were negotiated by an ABG sales manager. Ingersoll-Rand's New Jersey office was notified of the kickback scheme by an anonymous fax on November 27, 2000 and immediately began an investigation. After discussing the matter internally and with outside counsel, however, Ingersoll Rand attempted to go forward with the contracts by submitting them to the U.N. for approval with a short note indicating the 10% markup. The U.N. advised that the ASSFs were not allowed and the Baghdad Mayoralty ultimately refused to go through with the contracts. Despite being put on notice of the potential kickback scheme, ABG's sales manager subsequently negotiated four further contracts including AFFP payments on ABG's behalf on an indirect basis through distributors who resold the goods. The distributors made a combined \$228,059 in ASSF payments and authorized a further \$198,000 payment that was not made.

I-R Italiana entered into four OFFFP contracts for large air compressors between November 2000 and May 2002 that included improper ASSF payments of approximately \$473,302. Three of the contracts were entered into directly between I-R Italiana and the Iraqi Oil Ministry, while the fourth was made through a Jordanian distributor. Payments under the first three contracts, which were entered into in November 2000, were justified by adding a fictitious line item to I-R Italiana's purchase orders, and were made by having I-R Italiana's Jordanian distributor issue false invoices for work that was not performed. The fourth contract, entered into in October 2001 between the Jordanian distributor and the Iraqi Oil Ministry, provided for I-R Italiana's distributor to re-sell goods purchased from I-R Italiana at a 119% markup, from which it made improper ASSF payments.

In October 2000, Thermo King authorized one ASSF payment of \$53,919 to General Automobile and Machinery Trading Company ("GAMCO"), an Iraqi government-owned company, relating to spare parts for refrigerated trucks. The ASSF payment was reflected in a side agreement negotiated and signed by Thermo-King's Regional Director. For reasons unrelated to the ASSF, the contract was ultimately denied by the U.N.

In June 2002, I-R Benelux entered into an agreement with a Jordanian third-party to sell 100 skid steer loaders and spare parts for resale to the Iraqi State Company for Agricultural Supplies. With I-R Benelux's knowledge, the Jordanian company purchased and resold the equipment through the OFFFP at a 70% markup, making ASSF payments totaling \$260,787 in connection with the sales. At the time it entered into the contract, officials at Ingersoll Rand headquarters were aware, through the anonymous fax sent to its New Jersey headquarters, that Iraqi authorities were demanding illicit payments on OFFFP contracts. Despite this awareness, Ingersoll Rand failed to perform adequate due diligence on the Jordanian entity.

In addition, in February 2002, I-R Italiana sponsored eight officials from the Iraqi Oil Ministry to spend two days touring a manufacturing facility in Italy. The Iraqi officials spent two additional days touring Florence at the company's expense and were provided \$8,000 in "pocket money." I-R Italiana's payment of holiday travel expenses and pocket money violated Ingersoll-Rand's internal policies. Ingersoll-Rand also failed to properly account for these payments, recording the payments as "cost of sales deferred."

The SEC and DOJ charged that Ingersoll-Rand failed to maintain an adequate system of internal controls to detect and prevent the payments and violated the books and records provisions of the FCPA by recording the payments as "sales deductions" and "other commissions." After discovering and investigating the illegal payments, Ingersoll-Rand conducted an internal review and terminated implicated employees. Ingersoll-Rand self-reported the results of the review to the government.

York International Corp. ("York")

On October 1, 2007, York International Corp. ("York"), a global provider of heating, air conditioning and refrigeration products that is now a subsidiary of Johnson Controls, entered into a three-year deferred prosecution agreement with the DOJ and settled civil charges with the SEC

related to improper payments under the OFFP and other foreign corruption allegations. The SEC charged York with violations of the anti-bribery, books and records, and internal controls provisions of the FCPA. The DOJ charged York with conspiracy to violate, and violations of, the wire fraud statute and books and records provision of the FCPA. York agreed to pay over \$22 million in fines and penalties, which includes a \$10 million criminal fine, a \$2 million civil penalty, and disgorgement and pre-judgment interest of over \$10 million.

Under the Deferred Prosecution Agreement, the DOJ can request documents and information from York, but the company can assert the attorney-client privilege and refuse to provide the requested materials. Such a refusal could come at cost to York as the agreement goes on to state that “[i]n the event that York withholds access to the information, documents, records, facilities and/or employees of York, the Department may consider this fact in determining whether York has fully cooperated with the Department.”

- OFFP Payments

According to the charging documents, beginning in 1999, York’s wholly-owned Dubai subsidiary, York Air Conditioning and Refrigeration FZE (“York FZE”), began participating in the OFFP. York FZE retained a Jordanian agent in connection with this activity and was able to obtain three contracts under the OFFP between March 1999 and April 2000 without making any illicit payments. In September 2000, the agent informed York FZE that it had been awarded a fourth contract, which was for the sale of air conditioner compressors (“Compressor Contract”) to the Iraqi Ministry of Trade. Shortly thereafter, however, the agent informed York FZE that the Iraqi government was requiring the payment of ASSFs in connection with humanitarian contracts. The agent recommended that York FZE increase its bid on the Compressor Contract it had just been awarded.

The Regional Sales Manager of York’s Delaware subsidiary, York Air Conditioning and Refrigeration, Inc. (“YACR”), responded that YACR would not enter into contracts that did not comply with U.N. rules. That manager, however, transferred out of the office for reasons unrelated to the OFFP, at which time a Dubai-based Area Manager assumed his duties. In November 2000, the Dubai-based Area Manager met with YACR’s Vice President and General Manager for the Middle East and the agent, and agreed that the agent would be paid an inflated commission and pass such payments on to the Iraqi government to cover the ASSF for the Compressor Contract.

The agent subsequently made ASSF payments on York FZE’s behalf in connection with five additional OFFP contracts, typically by depositing funds in a Jordanian bank account designated by the Iraqi ministries. The inflated commission payments were recorded improperly in York’s books and records as “consultancy” payments. In total, the agent paid approximately \$647,110 in ASSF kickback payments on behalf of York FZE.

- Other International Bribery Schemes

According to the SEC and DOJ filings, from 2001 to 2006, various York foreign subsidiaries made over eight hundred improper payments totaling over \$7.5 million made to

secure orders on approximately 774 commercial and government projects in the Middle East, India, China, Nigeria and Europe. According to the SEC, 302 of these projects involved government end-users, and York generated net profits of nearly \$9 million on contracts involving illicit payments.

The improper payments, referred to internally as “consultancy fees,” were made in three ways. First, complicit customer personnel would supply York employees with false invoices that York employees then used to obtain cash and distribute to individuals to secure contracts. Second, York employees directly wired money or sent checks to entities designated by customer personnel based on false invoices for purported consulting services. Finally, York sales personnel arranged for direct payments to be made to consulting firms or contractors designated by York’s customer in return for changing design specifications so that they would be more favorable to York.

Specifically,

- In the United Arab Emirates (“UAE”), YACR made thirteen improper payments in 2003 and 2004 totaling approximately \$550,000 in bribes to UAE officials to secure contracts in connection with the construction of a luxury hotel and convention complex named the Conference Palace, built and owned by the Abu Dhabi government. The officials were members of the hotel Executive Committee. The committee was established by government decree and reported to the Ministry of Finance, and its members were appointed by the Crown Prince of Abu Dhabi. Approximately \$522,500 in payments in connection with the project were made through an unspecified intermediary while knowing that the intermediary would pass most of it on to the UAE officials. The payments were approved by the same YACR Vice President who approved the kickbacks under the OFFP and YACR’s Dubai-based director of finance. York generated sales revenue of approximately \$3.7 million in connection with the luxury hotel project.
- York entities also made illicit payments in connection with a number of non-governmental Middle East projects. For example, in connection with an Abu Dhabi residential complex project, a YACR sales manager made a cash payment to an engineering consultant working for the end user to have the engineer submit design specifications that favored York equipment. To make the payment, the YACR sales manager arranged for a local contractor to generate a false invoice for \$2,000. The contractor returned \$1,900 of the resulting payment to the YACR sales manager, who passed it on to the engineering consultant. In another example, York Middle East, a business unit within York, made approximately \$977,000 in payments between 2000 and 2005 to a senior executive of a publicly-held UAE district cooling utility in order to secure future business with the cooling utility. The payments, which typically amounted to 7% of York’s sales on cooling utility projects, were made to entities in Europe or the West Indies designated by the senior

executive. The sales revenue associated with the district cooling utility payments was \$12.2 million.

- York's Indian subsidiary retained an agent to assist it in securing after-installation service contracts and to provide sales and marketing support in connection with equipment sold to the Indian Navy. An employee of the agent (who for a period of time was also employed by York India) admitted making routine payments to Indian Navy officials to secure business for York between 2000 and 2006. The payments were typically less than \$1,000, but over time amounted to approximately \$132,500 on 215 orders. The payments were made out of the nearly \$180,000 in commission payments made to the agent. York India generated revenue of \$2.4 million on contracts related to these payments.
- York's United Kingdom subsidiary, York United Kingdom ("York UK"), retained a Nigerian agent to provide site supervision and accommodations in connection with 2002 and 2005 contracts the subsidiary had with the NNPC. For each contract, the agent received a commission of approximately 30% of the contract value. A September 2002 e-mail from a principal of the agent to the York UK manager that signed the 2002 NNPC contract indicated that the commission payment was being shared with an NNPC official. A separate York UK manager who signed the second NNPC contract admitted that the agent's approximately 30% commission was unusually high. York UK has since terminated the agency relationship and ceased bidding on future NNPC contracts.
- Finally, from 2004 through 2006, York Refrigeration Marine (China) Ltd. ("YRMC") made improper payments to agents and other individuals, including Chinese government personnel at government-owned ship yards, in connection with sales of refrigeration equipment to ship builders. The payments, which were described as commissions, sales and marketing expenses or gifts and entertainment expenses, lacked sufficient supporting documentation and were for nebulous and undocumented services. York's local Hong Kong office approved the payments and processed them through the Danish subsidiary. In addition, in one instance, YRMC provided Chinese ship yard employees with electronics and laptop computers.

Monty Fu (Syncor)

On September 28, 2007, the SEC filed settled charges against Monty Fu, the founder and former chairman of Syncor International Corporation ("Syncor"), for failing to implement a sufficient system of internal accounting controls at Syncor and for aiding and abetting Syncor's violations of the books and records and internal controls provisions of the FCPA, arising from improper commission payments and referral fees by Syncor's wholly-owned Taiwanese subsidiary, Syncor Taiwan, to doctors employed by state-owned and private hospitals in Taiwan.

Without admitting or denying wrongdoing, Fu consented to an injunction from violating and aiding and abetting further such violations, and agreed to pay a civil monetary penalty of \$75,000.

According to the SEC's complaint, from 1985 through 1996, Syncor Taiwan's business consisted primarily of selling radiopharmaceutical products and medical equipment to Taiwanese hospitals. Beginning in 1985, Syncor Taiwan began making "commission" payments to doctors at private and public hospitals to influence their purchasing decisions. The commissions typically ranged between 10-20% of the sales price of the Syncor product and took the form of cash payments delivered by Syncor Taiwan personnel.

In 1996, Syncor Taiwan began establishing medical imaging centers in Taiwan in conjunction with private and public hospitals which generated management fees for Syncor Taiwan. Around 1997, Syncor Taiwan began providing "commission" payments to doctors to prescribe medicine for, or purchase products to be used in, Syncor's medical imaging centers. These payments were also typically in cash and were based on a percentage of the sales price. Also around 1997, Syncor Taiwan began paying doctors "referral fees" to induce the doctors to refer patients to the Syncor medical imaging centers. The referral fees again were in cash and typically represented between 3-5% of the fees that patients paid to the imaging center.

The magnitude of the payments during the relevant seventeen-year period averaged over \$30,000 per year from 1989 through 1993 and over \$170,000 per year from 1997 through the first half of 2002. Syncor Taiwan recorded both the commission and referral fee payments improperly as "Advertising and Promotions" expenses, contrary to Syncor's stated accounting policies and internal guidelines.

According to the SEC, at all relevant times, Fu was aware that Syncor was making the commission payments and referral fees. In 1994, an outside audit revealed the existence of certain of these practices, which prompted Syncor's then-CEO to caution Fu on the propriety of making such payments. The SEC complaint asserts that the audit put Fu on actual or constructive notice that the payments were being improperly recorded in Syncor Taiwan's books and records, which were then incorporated into Syncor's books and records and filed with the SEC.

In light of the above conduct, the SEC determined that Syncor had insufficient internal controls to detect and prevent non-compliance with the FCPA by Syncor Taiwan. The SEC asserts that Fu, as a result of his various positions within Syncor, including founder of the company, creator of the Syncor Taiwan subsidiary and brother of the Taiwan country manager during the relevant period, had the authority to implement additional internal controls, but failed to do so. As a result, Fu was found to have knowingly failed to implement a system of internal accounting controls in violation of the Securities Exchange Act §13(b)(5) and Rule 13b2-1, and to have aided and abetted Syncor's violations of the books and records and internal controls provisions of the FCPA.

Previously, in 2002, Syncor agreed to settle civil and administrative proceedings with the SEC arising out of related conduct. Syncor agreed to a \$500,000 civil penalty in connection with that settlement and was enjoined from future violations of the books and records and internal controls provisions of the FCPA. At that time, Syncor also settled related DOJ criminal charges by agreeing to pay a \$2 million criminal fine. On January 1, 2003, Syncor became a wholly-owned subsidiary of Cardinal Health, Inc.

Bristow Group Inc. (“Bristow”)

On September 26, 2007, Bristow Group Inc. (“Bristow”), a Houston-based helicopter transportation and oil and gas production facilities operation company, settled FCPA anti-bribery, books and records, and internal controls provisions charges with the SEC relating to improper payments made by Bristow’s Nigerian affiliate. Bristow, which self-reported the violations, consented to the entry of a cease-and-desist order, but the SEC imposed no fine or monetary penalty.

From at least 2003 through approximately the end of 2004, Bristow’s subsidiary, AirLog International, Ltd. (“AirLog”), through its Nigerian affiliate, Pan African Airlines Nigeria Ltd. (“PAAN”), made at least \$423,000 in improper payments to tax officials in Delta and Lagos States, causing the officials to reduce the amount of PAAN’s annual expatriate employment tax, known as the expatriate “Pay As You Earn” (“PAYE”) tax. The payments were made with the knowledge and approval of senior employees of PAAN, and the release of funds for the payments was approved by at least one former senior officer of Bristow.

PAAN was responsible for paying an annual PAYE tax to the governments of the Nigerian states in which PAAN operated. At the end of each year, the state governments assessed the taxes based on the state government’s predetermined, or “deemed,” salaries and sent PAAN a demand letter. PAAN then negotiated with the tax officials to lower the amount assessed. In each instance, the PAYE tax demand was lowered and a separate cash payment for the tax officials was negotiated. Upon payment, the state governments provided PAAN with a receipt reflecting only the amount payable to the state government, not the payment to tax officials. Through the improper payments, Bristow avoided \$793,940 in taxes in Delta State and at least \$80,000 in taxes in Lagos State.

Bristow discovered the improper payments when its newly appointed Chief Executive Officer heard a comment at a company management meeting suggesting the possibility of improper payments to government officials. The CEO immediately brought the matter to the attention of the audit committee, which retained outside counsel to investigate. Bristow “promptly brought this matter to the Commission’s staff’s attention.”

During its internal investigation, Bristow also discovered that PAAN and Bristow Helicopters (Nigeria), Ltd. (“Bristow Nigeria”) — the Nigerian affiliate of Bristow Helicopters (International), Ltd. (“Bristow Helicopters”) — underreported their payroll expenses to the Nigerian state governments. Neither Bristow Helicopters nor Bristow Nigeria is organized under the laws of the United States or is an issuer within the meaning of the securities laws, but their

financials are consolidated into Bristow's financials. As a result, Bristow's periodic reports filed with the SEC did not accurately reflect certain of the company's payroll-related expenses. Bristow ultimately restated its financial statements for the fiscal years 2000 through 2004 and the first three quarters of 2005 to correct this error.

Chandramowli Srinivasan (EDS)

On September 25, 2007, the SEC filed a settled civil action against Chandramowli Srinivasan, the founder and former president of management consulting firm A.T. Kearney Ltd. - India ("ATKI"), in connection with improper payments made to senior employees of partially state-owned enterprises in India between 2001 and 2003. At the time of the alleged offenses, ATKI was a unit of A.T. Kearney, Inc., a subsidiary of Texas-based information technology company Electronic Data Systems ("EDS"). Without admitting or denying the SEC's allegations, Srinivasan agreed to entry of a final judgment ordering him to pay a \$70,000 civil penalty and enjoining him from future violations of the FCPA's anti-bribery provisions and from knowingly falsifying books and records.

According to the SEC, between 2001 and 2003, two partially government-owned Indian companies retained ATKI for management consulting services. In 2001, the companies became dissatisfied with ATKI and threatened to cancel the contracts. At the time, the two Indian clients accounted for over three quarters of ATKI's revenue. To induce the companies not to cancel the contracts, Srinivasan agreed to, and ultimately did, make direct and indirect payments of cash, gifts and services to certain senior employees of the Indian companies. These payments totaled over \$720,000. As a result of the payments, the Indian companies did not cancel their contracts with ATKI, and one of the companies awarded ATKI two additional contracts in September 2002 and April 2003.

In order to fund the payments, Srinivasan and an ATKI contract accountant fabricated invoices that Srinivasan then signed and authorized, thus causing EDS to record the payments improperly in its books and records. EDS realized over \$7.5 million in revenue from the Indian companies after ATKI began paying the bribes.

Also on September 25, 2007, the SEC filed settled charges with EDS for violating the books and records provisions of the FCPA in connection with the improper payments made by Srinivasan. The SEC's settlement with EDS also included several unrelated, non-FCPA books and records violations. EDS consented to an SEC order requiring it to pay approximately \$490,000 in disgorgement and prejudgment interest and cease and desist from committing future books and records violations. In resolving the matter with EDS, the SEC noted that EDS discovered and reported Srinivasan's improper payments to the SEC in 2004.

Paradigm

On September 21, 2007, the DOJ entered into a non-prosecution agreement with Paradigm B.V. ("Paradigm"), a Dutch software solutions company serving the oil and gas industry, in connection with improper payments in Kazakhstan, China, Mexico, Nigeria, and Indonesia between 2002 and 2007. Paradigm was, at the time of the agreement, a private limited

liability company, which had maintained its principal place of business in Israel until July 2005 when it relocated to Houston, Texas (rendering Paradigm a “domestic concern” for purposes of the FCPA). Paradigm discovered the payments while conducting due diligence in preparation for listing on a U.S. stock exchange. Paradigm agreed to pay a \$1 million fine, implement new enhanced internal controls and retain outside counsel for eighteen months to review its compliance with the non-prosecution agreement.

According to the DOJ, in Kazakhstan, Paradigm was bidding on a contract for geological software in August 2005. An official of Kazakhstan’s national oil company, KazMunaiGas (“KMG”), recommended that Paradigm use a particular agent, ostensibly to assist it in the tender process. Paradigm agreed to use the agent, Frontera Holding S.A. (“Frontera”), a British West Indies company, without conducting any due diligence and without entering into a written contract. Following Paradigm’s award of the contract, it received an invoice from Frontera requesting payment of a “commission” of \$22,250, which Paradigm paid. The DOJ found that the documentary evidence indicating that Frontera prepared any tender documentation or performed any services to be “lacking.”

Paradigm conducted its business in China largely through a representative office (“Paradigm China”), which was responsible for software sales and post-contract support. In July 2006, Paradigm China entered into an agreement with a local agent, Tangshan Haitai Oil Technology Co Ltd. (“Tangshan”), in connection with an unspecified transaction with Zhonghai Petroleum (China) Co., Ltd. (“Zhonghai”), a subsidiary of the China National Offshore Oil Company (“CNOOC”). The agent agreement provided that Tangshan was to receive a 5% commission and contemplated that commission payments would be passed on to representatives of Zhonghai, with Paradigm China and Tangshan splitting the costs of these commissions equally. Although documentation did not exist to determine how many of these payments were made, Paradigm China’s country manager confirmed that at least once such payment was made.

Further, Paradigm China retained employees of state-owned oil companies as “internal consultants” and agreed to pay them in cash to evaluate Paradigm’s software. The payments to the officials were intended to induce the internal consultants to encourage their companies to purchase Paradigm’s products. Paradigm also paid these internal consultants “inspection” and “acceptance” fees of between \$100-200 at or around the time of business negotiations and after Paradigm’s products were delivered and installed. Finally, Paradigm China paid for “training” trips for internal consultants and other employees of state-owned companies and provided them with airfare, hotel, meals, gifts, cash per diems, and entertainment (including sightseeing and cash for shopping). Paradigm was unable to document the total amount of payments made to the internal consultants or for such training trips.

In 2004, Paradigm acquired a Mexican entity, AGI Mexicana S.A. de C.V. (“Paradigm Mexico”), and entered into a subcontract with the Mexican Bureau of Geophysical Contracting (“BGP”). Paradigm Mexico was to perform services in connection with BGP’s contract with Pemex, the Mexican national oil company. Paradigm Mexico used the services of an agent in connection with this contract without entering into a written agreement. The agent requested \$206,698 in commission payments to be paid through five different entities. Paradigm Mexico

failed to conduct any due diligence on the agent or the entities through which payment was requested. Paradigm Mexico paid certain of the agent's invoices. When new senior management learned of the payments, however, the payments were halted. The agent sued Paradigm Mexico in Mexican court, but Paradigm prevailed in the suit.

Further, Paradigm Mexico spent approximately \$22,000 on trips and entertainment for a Pemex decision maker in connection with the BGP contract and a second subcontract with a U.S. oil services company, including a \$12,000 trip to Napa Valley that coincided with the Pemex official's birthday. Around the time of the second contract, Paradigm also acquiesced to a demand to hire the Pemex official's brother as a driver (who did perform some driving duties after being retained). Finally, Paradigm Mexico leased a house from the wife of a separate tender official of a Pemex subsidiary in close proximity to the signing of a third contract between Paradigm Mexico and the Pemex subsidiary. The house was used by Paradigm Mexico's staff, and the rental fee "appears to have been fair market value." The Pemex decision maker on the first two contracts was also the "responsible official" for this third contract.

In 2003, Paradigm's Nigerian subsidiary proposed entering into a joint venture with Integrated Data Services Limited ("IDSL"), the "services arm" subsidiary of the NNPC. Paradigm Nigeria hired an agent to assist in its Nigerian operations and, after submitting its bid for the joint venture, amended the agent's contract to provide a commission in the event the joint venture bid was successful. A meeting between Paradigm officials and IDSL concerning the proposed joint venture took place in Houston in 2003. In May 2005, former Paradigm executives agreed to make between \$100,000 and \$200,000 of corrupt payments through its agent to unidentified Nigerian politicians in order to win the joint venture contract. When Paradigm learned it had not received the contract, it terminated the agency relationship.

Paradigm's Indonesian subsidiary conducted business through an agent, exclusively so from April 2004 through January 2007. In 2003, employees of Pertamina, Indonesia's national oil company, requested funds for the purpose of obtaining or retaining business. The agent was involved in making the payments. The frequency and amount of these payments could not be determined from available documentation, but Paradigm's regional controller confirmed that at least one such improper payment had been made.

The DOJ emphasized that it agreed not to prosecute Paradigm or its subsidiaries and affiliates as a result of this wide-range of corrupt practices (assuming Paradigm's compliance with its obligations under the non-prosecution agreement) because Paradigm "had conducted an investigation through outside counsel, voluntarily disclosed its findings to the Justice Department, cooperated fully with the Department and instituted extensive remedial compliance measures" – which the DOJ described as "significant mitigating factors."

The compliance measures to which Paradigm agreed to address deficiencies in its internal controls, policies and procedures in preparation of its listing on a United States exchange as a public company, included (i) promulgation of a compliance code designed to reduce the prospect of FCPA violations that would apply to all Paradigm directors, officers, employees and, where appropriate, third parties such as agents, consultants and joint venture partners operating on

Paradigm's behalf internationally; (ii) the assignment of responsibility to one or more senior corporate official for implementation and oversight of compliance with these policies; (iii) periodic FCPA training for all directors, officers, employees, agents and business partners and annual certification by those parties of compliance with Paradigm's compliance policies and procedures; and (iv) appropriate due diligence pertaining the retention and oversight of agents and business partners.

Textron

On August 21 and 23, 2007, Textron Inc. ("Textron"), a global, multi-industry company based in Providence, Rhode Island, entered into a non-prosecution agreement with the DOJ and settled FCPA books and records and internal control provisions charges with the SEC relating to improper payments made by two of Textron's fifth-tier, French subsidiaries in connection with the OFFP and improper payments and failed due diligence by those and other Textron subsidiaries in the United Arab Emirates ("UAE"), Bangladesh, Indonesia, Egypt, and India.

In total, Textron will pay over \$4.5 million dollars to settle the charges. Specifically, according to the terms of the SEC settlement, Textron is required to disgorge \$2,284,579 in profits, plus approximately \$450,461 in pre-judgment interest, and to pay a civil penalty of \$800,000. Textron will also pay a \$1,150,000 fine pursuant to the non-prosecution agreement with the DOJ.

Further, Textron agreed to cooperate with the government in its ongoing investigation and to strengthen its FCPA compliance program, including (i) extending the application of its FCPA policies to "all directors, officers, employees, and, where appropriate, business partners, including agents, consultants, representatives, distributors, teaming partners, joint venture partners and other parties acting on behalf of Textron in a foreign jurisdiction," (ii) adopting and implementing "corporate procedures designed to ensure that Textron exercises due care to assure that substantial discretionary authority is not delegated to individuals whom Textron knows, or should know through the exercise of due diligence, have a propensity to engage in illegal or improper activities,"¹⁹ and (iii) ensuring that senior corporate officials retain responsibility for the implementation and oversight of the FCPA compliance program and report directly to the Audit Committee of the Textron Board of Directors.

From 2001 through 2003, two of Textron's French subsidiaries, which Textron acquired in 1999, made approximately \$650,539 in kickback payments in connection with the sale of humanitarian goods to Iraq.

According to the SEC complaint and DOJ non-prosecution agreement, starting in the middle of 2000, the Textron subsidiaries, with the assistance of Lebanese and Jordanian consulting firms, inflated three OFFP contracts with the Iraqi Ministry of Oil and ten contracts with the Iraqi Ministry of Industry and Minerals to include the cost of secret ASSF payments. In violation of Textron's compliance policies, neither consulting firm was retained through a

¹⁹ This element is borrowed from the Federal Sentencing Guidelines; *see* U.S. Sentencing Guidelines Manual § 8B2.1(b)(3).

written contract. With the knowledge and approval of management officials of the Textron subsidiaries, the consultants made the ASSF payments to Iraqi accounts outside of the U.N. Oil for Food Escrow Account and were then reimbursed by the Textron subsidiaries. The payments were recorded as “consultation” or “commission” fees.

In addition, Textron’s internal investigation of the Oil for Food payments revealed that between 2001 and 2005, various companies within Textron’s industrial segment, known as its “David Brown” subsidiaries, made improper payments of \$114,995 to secure thirty-six contracts in the UAE, Bangladesh, Indonesia, Egypt, and India. For most of these payments, the government appears to have evidence that the funds were provided either directly or indirectly to foreign officials. However, the FCPA charge stemming from the Indonesia payments rests on the fact that Textron cannot show that the funds it provided a local representative were not funneled to a government official.

Specifically, the SEC complaint alleges that David Brown Union Pump engaged a local representative to sell spare parts to Pertamina, an Indonesian governmental entity. The total contract price for the transaction was \$321,171, with approximately \$149,000 allocated to after-sales services. “Thus, almost half of the contract value was for after-sales services, which was highly unusual.” In January 2002, David Brown Union Pump paid the representative \$149,822, including a commission of \$17,250 and the remainder allocated to after-sales service fees. The representative paid approximately \$10,000 to a procurement official at Pertamina to help sponsor a golf tournament, with very little documentation to show what the representative did with the remainder of the funds allocated to after-sales services.

In describing the company’s failure to maintain adequate internal controls sufficient to prevent or detect the above violations, the SEC complaint notes that that despite the “endemic corruption problems in the Middle East,” Textron failed to take “adequate confirming steps” to ensure that the managers and employees of its subsidiaries “were exercising their duties to manage and comply with compliance issues.”

The SEC Litigation Release indicates that the “Commission considered the remedial acts promptly undertaken by Textron, which self-reported, and cooperation afforded the Commission staff in its continuing investigation.”

Delta & Pine Land Company

On July 25 and 26, 2007, the SEC filed two settled enforcement proceedings charging Delta & Pine Land Company (“Delta & Pine”), a Mississippi-based company engaged in the production of cottonseed, and its subsidiary, Turk Deltapine, Inc. (“Turk Deltapine”), with violations of the FCPA. On July 25, 2007, the Commission filed a federal lawsuit charging the companies with violating the anti-bribery and books and records and internal controls provisions of the FCPA. On July 26, 2007, the SEC issued an administrative order finding that Delta & Pine violated the books and records and internal controls provisions and that Turk Deltapine violated the anti-bribery provisions of the FCPA. In the lawsuit, the companies agreed to pay jointly and severally a \$300,000 penalty. In the administrative proceeding, the companies agreed

to cease and desist from further FCPA violations and Delta & Pine agreed to retain an independent consultant to review and make recommendations concerning the company's FCPA compliance policies and procedures and submit such report to the SEC.

In both the federal court complaint and the administrative order, the SEC charged that, from 2001 to 2006, Turk Deltapine made payments of approximately \$43,000 to officials of the Turkish Ministry of Agricultural and Rural Affairs in order to obtain governmental reports and certifications that were necessary for Turk Deltapine to obtain, retain, and operate its business in Turkey. Specifically, Turk Deltapine regularly paid provincial government officials to issue inspection reports and quality control certifications without undertaking their required inspections and procedures. The payments included cash, travel expenses, air conditioners, computers, office furniture, and refrigerators.

The complaint and order note that upon learning of the payments in 2004, Delta & Pine failed to receive all the pertinent facts from Turk Deltapine employees and, rather than halting the payments, arranged for the payments to be made by a chemical company supplier that was reimbursed for its payments and granted a ten percent handling fee. An internal Delta & Pine document noted that there were "no effective controls put in place to monitor this process."

Si Chan Wooh

On Friday, June 29, 2007, Si Chan Wooh, former senior officer of Schnitzer subsidiary SSI International, pleaded guilty to conspiring to violate the anti-bribery provisions of the FCPA in connection with the improper payments made by Schnitzer to government officials in China (which are described above in more detail in connection with the discussion of the Philip settlement). As part of his guilty plea, Wooh agreed to cooperate with the DOJ's ongoing investigation. Without admitting or denying wrongdoing, Wooh settled related charges with the SEC, consenting to an injunction prohibiting him from future violations of the FCPA's anti-bribery provisions and from aiding and abetting violations of the books and records provisions. The settlement with the SEC required Wooh to pay approximately \$16,000 in disgorgement and interest and a \$25,000 civil penalty.

Wooh was Executive Vice President for SSI International from February 2000 through October 2004, and President from October 2004 through September 2006. According to the SEC complaint, from at least 1999 through 2004, Wooh violated the FCPA's anti-bribery provisions by causing Schnitzer to pay approximately \$205,000 in bribes to managers of state-owned Chinese steel mills to induce them to purchase scrap metal from Schnitzer. The complaint also alleges that Wooh caused Schnitzer to pay approximately \$1.7 million in bribes to managers of privately owned steel mills in China and South Korea. In addition, Wooh provided gifts to managers of the state-owned steel mills. Based on the increased revenue that Schnitzer generated from sales involving improper payments, Wooh received a bonus of \$14,819.38.

Christian Sapsizian (Alcatel-Lucent)

On June 7, 2007, a former Alcatel CIT ("Alcatel") executive Christian Sapsizian, a French citizen, pleaded guilty in the Southern District of Florida to FCPA bribery and conspiracy

charges by participating in a scheme involving the payment of more than \$2.5 million in bribes to senior Costa Rican government officials. Sentencing is scheduled for September 24, 2008.

At the time of the payments, Sapsizian was Alcatel's deputy vice president responsible for Latin America. From February 2000 through September 2004, he, along with Alcatel's senior country officer in Costa Rica, conspired to bribe senior Costa Rican officials to obtain a mobile telephone contract with Costa Rica's state-owned telecommunications authority for Alcatel. The payments were funneled through one of Alcatel's Costa Rican consulting firms and made to a director of the state-owned telecommunications authority responsible for awarding telecommunications contracts. Sapsizian admitted that the director of the state-owned telecommunications authority was also an advisor to a senior Costa Rican government official, and that the bribes were shared with this official. Alcatel was awarded a mobile telephone contract worth \$149 million in August 2001.

As part of his plea, Sapsizian is cooperating with the government's ongoing investigation of Alcatel, which has indicated in its public filings that it is cooperating fully with the U.S. and Costa Rican government agencies.

As noted above, Alcatel merged with U.S. company Lucent Technologies in November 2006. Prior to the merger, Alcatel's shares traded as American Depository Receipts on the New York Stock Exchange.

Baker Hughes Inc.

On April 26, 2007, Baker Hughes Inc. settled charges with the SEC and DOJ relating to improper payments to two agents associated with its business in Kazakhstan and for failed due diligence in connection with payments made in Nigeria, Angola, Indonesia, Russia, Uzbekistan, and Kazakhstan. Baker Hughes was also penalized for violating a 2001 SEC cease and desist order requiring the company to comply with the books and records and internal controls provisions of the FCPA.

Combined, the SEC and DOJ settlements resulted in fines and penalties totaling \$44 million, the largest monetary sanction ever imposed in an FCPA case. The settlement is composed of over \$23 million in disgorgement and a \$10 million penalty to the SEC, along with an \$11 million criminal fine imposed by the DOJ. Under the terms of the SEC and DOJ resolutions, Baker Hughes is required to retain a monitor for three years to review and assess the company's compliance program and monitor its implementation of and compliance with new internal policies and procedures.

With regard to the Kazakhstan payments, Baker Hughes admitted that it hired an agent at the behest of a representative of Kazakhstan's former national oil company (Kazakhoil) in connection with Baker Hughes' efforts to secure subcontracting work on the Karachaganak oil field, although Baker Hughes had already been unofficially informed that it had won the contract and the agent had done nothing to assist Baker Hughes in preparing its bid. A Baker Hughes official apparently believed that if Baker Hughes did not hire the agent it would lose the subcontracting work as well as future business in Kazakhstan.

The agency agreement called for Baker Hughes to pay a commission of 2% on revenues from the Karachaganak project. From May 2001 through November 2003, Baker Hughes made 27 commission payments totaling approximately \$4.1 million to the agent (approximately \$1.8 million was made by Baker Hughes on behalf of subcontractors). Baker Hughes was also charged with pressuring one of its subcontractors to make a \$20,000 payment to the same agent in connection with an unrelated contract.

Separately, from 1998 to 1999, a Baker Hughes subsidiary also made payments to another agent, FT Corp., at the direction of a high-ranking executive of KazTransOil (the national oil transportation operator in Kazakhstan). Despite already having an agent for the project in question, the Baker Hughes subsidiary hired FT Corp. after the contract award was delayed for fear that it would not be awarded the chemical contract with KazTransOil. In doing so, it failed to conduct sufficient due diligence and its agency agreement contained no FCPA representations. In December 1998, an employee of Baker Hughes' subsidiary learned that the FT Corp. representative was also a high-ranking KazTransOil executive. Nevertheless, payments were made until April 1999, with FT Corp. receiving commissions via a Swiss bank account of approximately \$1.05 million.

In addition to settling charges relating to the above improper payments, Baker Hughes also settled charges stemming from allegations that it improperly recorded items in its books and records, and failed to implement sufficient internal controls, relating to its business in several countries. In each instance, the government found Baker Hughes to have violated these requirements — even though there is no finding that illegal payments (which, in one instance, was only \$9,000) were in fact made — because Baker Hughes failed to conduct sufficient due diligence to determine whether the payments were provided to government officials. In other words, the SEC found violations not after proof was adduced that Baker Hughes made corrupt payments to foreign government officials, but rather from the company's inability to know that payments *were not* being passed on to government officials — effectively shifting the burden onto companies to prove that payments were not made to government officials when no or inadequate due diligence is conducted.

For example, between 1998 and 2004, a Baker Hughes subsidiary made payments to an agent (“N Corp.”) totaling nearly \$5.3 million in connection with N Corp.'s assistance in selling products to customers in Kazakhstan, Russia, and Uzbekistan. Prior to 2002, there was no written agreement with N Corp., and the agreement eventually entered into in 2002 did not contain the full FCPA provisions required by Baker Hughes' FCPA policies and procedures. In addition, N Corp. made it through Baker Hughes' revised due diligence procedures, including review by outside counsel hired to assist with agent re-certifications.

Baker Hughes self-reported its violations to the DOJ and the SEC. In its sentencing memorandum, the DOJ highlighted the company's “exceptional” cooperation. In addition to self-reporting, Baker Hughes terminated employees and agents it believed to be involved in the corrupt payments and spent \$50 million on an internal investigation of its activities in twelve countries. The investigation included independent analysis of financial records by forensic accountants, review by outside counsel of tens of millions of pages of electronic data, hundreds

of interviews and the formation of a blue ribbon panel to advise the company on its dealings with the government that included the late Alan Levenson, former director of the SEC's division of corporation finance, Stanley Sporkin, retired federal district judge and ex-director of the SEC's division of enforcement, and James Doty, former general counsel to the SEC. Baker Hughes met repeatedly with the DOJ in the course of its investigation, made its employees available for interviews, and provided a "full and lengthy report of all findings." These efforts led to a \$27 million reduction in fines under the sentencing guidelines and avoided a potential criminal trial and the prospect of Baker Hughes being disbarred from government contracts or losing export licenses.

On August 17, 2007, the law firm Lerach Coughlin Stoia Geller Rudman & Robbins filed a shareholder derivative suit against Baker Hughes related, in part, to its FCPA violations.

Charles Martin (Monsanto)

On March 6, 2007, the SEC filed a settled complaint against Charles Martin, the former Government Affairs Director for Asia for Monsanto Company ("Monsanto"), based on an improper payment of \$50,000 to an Indonesian official designed to induce the official to repeal language in a decree unfavorable to Monsanto. Martin consented, without admitting or denying wrongdoing, to an injunction prohibiting him from future violations of the FCPA's anti-bribery provisions and from aiding and abetting violations of the FCPA's books and records and internal controls provisions. The settlement requires Martin to pay a civil monetary penalty of \$30,000.

According to the SEC complaint, Monsanto develops and markets genetically modified organisms ("GMO"), which are controversial in some countries including Indonesia. To increase acceptance of its products, Monsanto hired a consultant to represent it in Indonesia. The consultant, which the complaint notes also represented other U.S. companies working in Indonesia, worked closely with Martin in lobbying the Indonesian government for legislation favorable to Monsanto and monitoring Indonesian legislation that could affect Monsanto's interests.

In February 2001, Martin and the consultant secured limited approval from the Indonesian government to allow farmers to grow genetically modified cotton. Later that year, however, the Indonesian Ministry of Environment issued a decree requiring an environmental impact assessment for bio-technology products such as the genetically modified cotton. The decree presented a significant obstacle to Monsanto in its efforts to market the genetically modified cotton and other similar products.

Martin and the consultant unsuccessfully lobbied a senior environment official to remove the unfavorable language. Thus, in late 2001, Martin told the consultant to "incentivize" the senior official by making a \$50,000 payment. Martin directed the consultant to generate false invoices to cover the payment, which Martin approved and took steps to ensure that Monsanto paid. In February 2002, the consultant made the payment to the official. Despite the payment, the senior official failed to remove the unfavorable language from the decree.

In January 2005, Monsanto settled actions with the SEC and DOJ stemming largely from the same conduct. In the SEC actions, without admitting or denying the allegations, Monsanto consented to the entry of a final judgment in district court imposing a \$500,000 civil fine, and an administrative order requiring it to cease and desist from future FCPA violations and requiring it to hire an independent consultant to review its FCPA policies. Monsanto also entered into a deferred prosecution agreement with the DOJ under which the company agreed to pay a \$1 million fine and continue to cooperate with the DOJ and SEC investigations.

Dow Chemical Corporation

On February 13, 2007, the SEC filed a settled civil action against Dow Chemical Company (“Dow”) for violations of the books and records and internal controls provisions of the FCPA related to payments made by DE-Nocil Crop Protection Ltd (“DE-Nocil”), a fifth-tier Dow subsidiary headquartered in Mumbai, India, to federal and state officials in connection with the company’s agro-chemical products. Without admitting or denying wrongdoing, Dow consented to pay a civil monetary penalty of \$325,000 and to the entry of a cease-and-desist order.

The SEC’s complaint alleged that from 1996 through 2001, DE-Nocil made a series of improper payments to Indian government officials totaling approximately \$200,000, none of which were properly recorded in DE-Nocil’s books. Specifically, the complaint alleged that DE-Nocil, made approximately \$39,700 in improper payments to an official in India’s Central Insecticides Board (“CIB”) to expedite the registration of three of the company’s products. Most of these payments were made to contractors, which added fictitious charges to their bills or issued false invoices to DE-Nocil. The contractors then disbursed the funds to the CIB official at DE-Nocil’s direction.

In addition, DE-Nocil allegedly “routinely used money from petty cash to pay” various state officials, including state inspectors. The complaint states that these inspectors could prevent the sale of DE-Nocil’s products by falsely claiming that a company’s product samples were misbranded or mislabeled, which carried significant potential penalties. Rather than face the false accusations and suspension of sales, DE-Nocil made the payments from petty cash. The complaint recognized that other companies commonly made such payments as well and noted that, although the payments were small in amount — “well under \$100” — they “were numerous and frequent.” Dow estimated that DE-Nocil made \$87,400 in such payments between 1996 and 2001.

Finally, DE-Nocil allegedly made estimated improper payments of \$37,600 in gifts, travel and entertainment to various officials, \$19,000 to government business officials, \$11,800 to sales tax officials, \$3,700 to excise tax officials, and \$1,500 to customs officials.

In reaching its settlement with Dow, the SEC took into account, among other things, (i) the fact that Dow had conducted an internal investigation of DE-Nocil and, upon completion, self-reported to the SEC; (ii) Dow’s remedial efforts, including employee disciplinary actions; (iii) its retention of an independent auditor to conduct a forensic audit of DE-Nocil’s books and

records; (iv) the company's improved FCPA compliance training and a restructuring of its global compliance program; (v) its decision to join a non-profit association specializing in anti-bribery due diligence; and (vi) its hiring of an independent consultant to review and assess its FCPA compliance program.

El Paso Corporation

On February 7, 2007, the SEC filed settled charges against The El Paso Corporation ("El Paso") for violations of the books and records and internal controls provisions of the FCPA arising from improper surcharge payments that El Paso and its predecessor-in-interest, The Coastal Corporation ("Coastal"), made in connection with the Iraqi OFFP. Without admitting or denying wrongdoing, El Paso consented to an injunction from violating the books and records and internal controls provisions, and to pay a civil monetary penalty of \$2.25 million. On the same date, El Paso settled charges of wire fraud and engaging in prohibited transactions with the government of Iraq, agreeing to forfeit approximately \$5.5 million to the U.S. government.²⁰

Coastal had longstanding ties with the Iraqi government. The company received the first Oil for Food contract in 1996. The complaint alleges that Coastal first received a demand for an improper payment in Fall 2000 from a SOMO official, who insisted that Coastal pay an additional \$.10 surcharge per barrel on all future oil purchases under an existing Coastal contract. A consultant and former Coastal official arranged to make the surcharge payment, which amounted to over \$200,000, in two installments to an Iraqi-controlled Jordanian bank account in 2001 and 2002. Coastal then refused to pay any additional demanded surcharges and did not enter into further direct contracts with SOMO.

However, Coastal, which in January 2001 merged with a wholly-owned El Paso subsidiary, continued to purchase Iraqi crude oil indirectly through third parties. The complaint alleges that based on its past experience, trade press and communications with those third parties, El Paso knew or was reckless in not knowing that illegal surcharges were being paid in connection with that oil and that the third parties were passing the surcharges back to El Paso in premiums. The complaint further asserts that recorded conversations of the company's oil traders demonstrated the company's knowledge of the surcharge demand. For example, in one taped call, an El Paso official reminded an El Paso trader of past conversations with SOMO officials regarding the surcharges in which "they told us – blatantly – that we would have to pay."

In or around 2001, El Paso inserted a provision in some of its third-party Iraqi oil purchase contracts requiring its contract partners to represent that they had "made no surcharge or other payment to SOMO" outside the Oil for Food Escrow Account. The complaint asserts that the representations were false, that El Paso officials did not conduct sufficient due diligence to assure themselves that illegal surcharges were not being paid, and that recorded conversations demonstrated that El Paso knew that the contract provision was ineffectual. For example, in at

²⁰ The SEC and DOJ inconsistently describe the fine as a disgorgement of profits and the value of the illegal surcharges, respectively.

least one conversation, a third party indicated that he was willing to make the illegal surcharge payments and sign a false certification denying that any illegal surcharge was paid.

The complaint asserts that between June 2001 and 2002, surcharge payments of approximately \$5.5 million were paid in connection with these transactions and that El Paso generated approximately \$5.5 million in net profit off the transactions.

On October 1, 2007, Oscar Wyatt Jr., the former chairman of Coastal, pleaded guilty to one count of conspiracy to commit wire fraud in connection with the OFFP. The U.S. Government accused him of paying millions in illegal surcharges directly to Iraqi officials in return for oil allocations from 2000 to 2002. On November 28, 2007, a final judgment was entered sentencing Wyatt to one year and one day imprisonment and ordering him to forfeit over \$11 million.

Vetco International Ltd.

On February 6, 2007, the DOJ settled cases against three wholly owned subsidiaries of Vetco International Ltd. and entered into a non-prosecution agreement with a fourth subsidiary. The companies admitted that they violated, and conspired to violate, the FCPA in connection with over 350 indirect payments totaling approximately \$2.1 million made through an international freight forwarding company (since reported to be Panalpina World Transport Holding Ltd. (“Panalpina”)) to employees of the Nigerian Customs Service between September 2002 and April 2005.

The payments were designed to attain preferential treatment in the customs-clearing process for the companies’ deepwater oil drilling equipment in connection with the Bonga Project, Nigeria’s first deepwater oil drilling project. The Vetco companies made three types of improper payments through the freight forwarder — at least 338 “express courier” payments totaling over \$2 million designed to expedite the customs clearance of Vetco shipments, at least 19 “interventions” totaling almost \$60,000 to “resolve” problems or violations that arose in connection with Vetco shipments, and at least 21 “evacuations” totaling almost \$75,000 when shipments that were urgently needed were delayed in customs because of the failure to pay customs duties or other documentation irregularities. The complaints underlying the settled proceeding suggest that a payment designed to “secure an improper” advantage, whether or not it actually assisted in obtaining or retaining business, can serve as a basis for an FCPA anti-bribery violation, conflating the statutory elements identified above as (vi) and (vii).

The Vetco subsidiaries agreed to pay a total of \$26 million in fines, the largest criminal fine to date in an FCPA prosecution. This was the second time that one of the subsidiaries, Vetco Gray UK, pleaded guilty to violating the FCPA. In 2004, Vetco Gray UK (under a different name) and an affiliated company pleaded guilty to paying more than \$1 million in bribes to officials of National Petroleum Investment Management Services (“NAPIMS”), a Nigerian government agency that approves potential bidders for contract work on oil exploration projects. Subsequently, Vetco Gray UK was renamed and acquired by a group of private equity-backed entities. In anticipation of that acquisition, the acquirers obtained an FCPA Advisory

Opinion that indicated that the DOJ intended to take no action in connection with the acquisition based, in part, on the acquirers' pledge to institute and implement a vigorous FCPA compliance system for the acquired company.²¹ In calculating the fine against Vetco Gray UK, which totaled \$12 million of the \$26 million in fines, the DOJ "took into account" Vetco Gray UK's prior violation and the failure of the acquirers, in fact, to institute an effective FCPA compliance system.

In addition to the fines, Vetco International Ltd. agreed, among other things, (i) to a partial waiver of the attorney-client privilege by providing all memoranda of interviews by inside or outside counsel or any other consultant or agent in relation to its internal investigation of the improper payments; (ii) to the appointment of a monitor, mutually acceptable to Vetco International Ltd. and the DOJ, to review and evaluate over a period of three years its and the Vetco subsidiaries' internal accounting and compliance controls and recordkeeping procedures as they relate to the books and records and anti-bribery provisions of the FCPA; (iii) to institute and implement robust FCPA compliance systems, including regular FCPA training for, and annual certifications by, all directors, officers and employees, agents and business partners of the subsidiaries; and (iv) to conduct "compliance reviews" of thirty-one countries in which the Vetco companies do business, all existing or proposed joint ventures, and various acquisitions made since 2004.

The SEC has not instituted a related enforcement action. On February 23, 2007, GE purchased the Vetco entities and thus is bound by the Vetco plea agreements.

²¹ See FCPA Opinion Release 2004-02 (July 12, 2004).

Other FCPA and Related Developments

In addition to the numerous settlements discussed above, there have been a number of significant developments related to the FCPA in late 2007 and the first half of 2008, including (i) the issuance of important DOJ Opinion Procedure Releases, (ii) several ongoing or recently concluded criminal matters, (iii) a spate of FCPA-related civil litigation and the introduction of legislation that would create a limited private right of action under the FCPA, (iv) a controversy regarding the appointment of compliance monitors, (v) proposed revisions to the Principles of Federal Prosecution of Business Organizations; and (vi) World Bank-related developments. These issues are discussed below.

Opinion Procedure Releases

DOJ Opinion Procedure Release No. 08-01

On January 15, 2008, the DOJ issued Opinion Procedure Release 08-01. At thirteen pages, it is the longest Release to date, and contains complex factual circumstances involving FCPA and local regulatory issues. The Release highlights the importance of adequate due diligence, transparency and the need to comply with local law when entering into foreign transactions.

Release 08-01 addresses the potential acquisition by the Requestor's foreign subsidiary of a controlling interest in an entity responsible for managing certain public services for an unidentified foreign municipality.²² At the time of the proposed transaction, the public utility (the "Investment Target") was majority-owned (56%) by a foreign governmental entity ("Foreign Government Owner") and minority-owned (44%) by a foreign private company ("Foreign Company 1"). The foreign private company was owned and controlled by a foreign individual ("Foreign Private Company Owner"), who had substantial business experience in the municipality and with the public services provided by the Investment Target.

Both the Foreign Government Owner and Foreign Company 1 appointed representatives to the Investment Target. Foreign Private Company Owner acted as the representative and general manager on behalf of Foreign Company 1 while another individual served as the representative and general manager on behalf of the Foreign Government Owner. Because of the Foreign Government Owner's majority stake, its representative was considered the legal representative and senior general manager for the Investment Target. Foreign Private Company Owner, by contrast, was not technically an employee of the Investment Target and received no compensation for serving as its general manager. The Release indicates that, nevertheless, the Requestor considered the Foreign Private Company Owner a "foreign official" for purposes of the FCPA.

²² The Requestor is described as a Fortune 500 United States company with annual revenues of several billion dollars and operations in over 35 countries.

The Release indicates that sometime prior to November 2007, the Foreign Government owner and governmental entity responsible for managing state-owned entities determined that they would fully privatize the Investment Target. Around November 2007, the public bid process for the disposing of the Foreign Government Owner's 56% interest in the company was initiated.

The Requestor represented that, previously in late 2005, the Foreign Private Company Owner, who was searching for a foreign investor with relevant experience, contacted the Requestor. In June 2006, the parties developed a proposed scenario whereby the Foreign Private Company Owner would seek to acquire, through a second foreign entity ("Foreign Company 2"), 100% of the Investment Target through the government auction of the majority stake. The Requestor's subsidiary would then purchase a controlling stake from Foreign Company 2 at a substantial premium over what the Foreign Private Company Owner paid for the Foreign Government Owner's stake. The Release does not clearly indicate whether there were any requirements regarding the privatization process — such as a citizenship requirement for purchasers — that would have prevented the Requestor from acquiring the Foreign Government Owner's stake in the Investment Target directly.

In connection with the proposed transaction, the Requestor performed due diligence to examine, among other things, potential FCPA risks. The Requestor's due diligence included (i) a report by an investigative firm; (ii) screening the relevant individuals against the denied persons and terrorist watch lists; (iii) inquiries to U.S. Embassy officials; (iv) a forensic accounting review; (v) an initial due diligence report by outside counsel; and (v) review of the due diligence report by a second law firm.

The Requestor identified what it initially believed to be two FCPA-related risks that required resolution prior to consummating the transaction. First, the Requestor believed that the Foreign Private Company Owner, by virtue of his position as manager of the majority government-owned Investment Target, was subject to certain foreign privatization regulations, which the Requestor believed required disclosure of his ownership interests in Foreign Company 1 and Foreign Company 2 to the foreign government. Second, the Requestor believed that the Foreign Private Company Owner was arguably prohibited from acting on a corporate opportunity relating to the Investment Target — such as realizing a purchase price premium for the Investment Target shares — unless disclosed to and approved by the Foreign Government Owner.

The Requestor asked the Foreign Private Company Owner to make the necessary disclosures. Initially, the Foreign Private Company Owner refused, indicating that such disclosures were contrary to normal business practices in the foreign country and could result in competitive concerns, and the Requestor abandoned the transaction. However, after approximately three weeks, the parties resumed discussions. Ultimately, through a series of discussions with relevant government officials and attorneys, the Requestor learned that the foreign government took the position that the Foreign Private Company Owner was not subject to the foreign privatization regulations, as he was an unpaid, minority representative with the Investment Target. Further, the Requestor informed these officials and attorneys of Foreign

Private Company Owner's roles in both Foreign Company 1 and Foreign Company 2 and the substantial premium he would receive upon completion of the transaction. These agencies and officials informed the Requestor that they were aware of these issues and had taken them into consideration in approving Foreign Company 2's bid.

In describing its willingness to proceed with the transaction, the Requestor cited seven factors: (i) the Foreign Private Company Owner was purchasing the Investment Target shares without financial assistance from the Requestor (which apparently would have been inconsistent with the foreign privatization law); (ii) the premium to be paid by the Requestor was justified based on legitimate business considerations, including the apparently very different valuation methodologies used in the United States and the foreign country; (iii) the Requestor would make no extra or unjustified payments to Foreign Company 2 from which the Foreign Private Company Owner might make improper payments to a foreign official; (iv) the Requestor would make no payments to any foreign official (other than the Foreign Private Company Owner); (v) Foreign Private Company Owner's status as a "foreign official," which resulted solely from the fact that the Investment Target was majority owned by the state, would soon cease; (vi) the Foreign Private Company Owner's purchase of the government stake was lawful under the foreign country's laws; and (vii) the Foreign Private Company Owner was not illegally or inappropriately pursuing a corporate opportunity belonging to the Investment Target by proceeding with the transaction.

In determining not to take an enforcement action based on the proposed transaction, the DOJ highlighted four factors:

- The Requestor conducted "reasonable" due diligence of the Foreign Private Company Owner, focused on both FCPA risks and compliance with local laws and regulations. The DOJ also noted that the documentation of such diligence would be kept within the United States.
- The Requestor required and obtained transparency relating to the significant premium that the Foreign Private Company Owner would realize from the sale of the formerly government-owned stake to the Requestor.
- The Requestor obtained from the Foreign Private Company Owner, representations and warranties regarding past and future compliance with the FCPA and other relevant anti-corruption laws.
- The Requestor retained the contractual right to discontinue the business relationship in the event of a breach by the Foreign Private Company Owner, including violations of relevant anti-corruption laws.

DOJ Opinion Procedure Release 08-02

On June 13, 2008, the DOJ issued Opinion Release 08-02, which provided no-action comfort in connection with Halliburton's proposed purchase of the English oil-services company

Expro International Group PLC (“Expro”).²³ Expro, traded on the London Stock Exchange, provides well-flow management for the oil and gas industry. At the time of the Release, Halliburton was competing with a largely foreign investment group known as Umbrellastream to acquire Expro.

As described by Halliburton and assumed by the DOJ, U.K. legal restrictions governing the bidding process prevented Halliburton from performing complete due diligence into, among other things, Expro’s potential FCPA exposure prior to the acquisition. According to the Release, Halliburton had access to certain information provided by Expro, but its due diligence was limited to that information. Halliburton could have conditioned its bid on successful FCPA due diligence and pre-closing remediation. Umbrellastream’s bid, however, contained no such conditions, meaning a conditioned Halliburton bid could have been rejected solely on the basis of such additional contingencies.

As a consequence of its perceived inability to conduct exacting pre-acquisition due diligence, Halliburton proposed that it conduct detailed post-acquisition due diligence coupled with extensive self-reporting through a staged process. It should be recognized that while proposed by Halliburton as part of its opinion release request, it would be usual under the circumstances for Halliburton to have made its proposal after discussions with the DOJ to ensure as best as possible that its suggested work plan would be acceptable.

First, immediately following closing, Halliburton was to meet with the DOJ to disclose any pre-closing information that suggested that any FCPA, corruption, or related internal controls or accounting issues existed at Expro. In this regard, it should be noted that Halliburton claimed that its pre-existing confidentiality agreement with the target prohibited it from disclosing the potentially troublesome conduct that it uncovered through its due diligence process. In a footnote, the DOJ accepts the representation that Halliburton had to enter into a confidentiality agreement and therefore not disclose the findings of its limited due diligence review, but cautions companies seeking guidance on entering into agreements that limit the amount of information the company can disclose to the DOJ.

Second, within ten business days of the closing, Halliburton was to present to the DOJ a comprehensive, risk-based FCPA and anti-corruption due diligence work plan organized into high risk, medium risk, and lowest risk elements. The work plan was to include each of the critical due diligence areas including: (i) use of agents and third parties; (ii) commercial dealings with state owned companies; (iii) joint venture, teaming and consortium arrangements; (iv) customs and immigration matters; (v) tax matters; and (vi) government licenses and permits. Such due diligence was to be conducted by external counsel and third party consultants with assistance from internal resources as appropriate. A status report was to be provided to the DOJ with respect to high-risk findings within 90 days, medium-risk findings within 120 days, and

23 In a break from typical Opinion Release practice, Halliburton is identified by name. Typically, requestors remain anonymous. Expro and other involved parties were not identified by name but were identifiable through context and publicly available sources. Trace International, the requestor in Opinion Release 08-03, is also identified by name.

low-risk findings within 180 days. All due diligence was to be concluded within one year with periodic reports to the DOJ throughout the process.

Third, agents and third parties with whom Halliburton was to have a continuing relationship were to sign new contracts with Halliburton incorporating FCPA and anti-corruption representations and warranties and providing for audit rights as soon as commercially reasonable. Agents and third parties with whom Halliburton determined not to have a continuing relationship were to be terminated as expeditiously as possible, particularly where FCPA or corruption-related problems were discovered.

Fourth, employees of the target company were to be made subject to Halliburton's Code of Business Conduct (including training related thereto) and those who were found to have acted in violation of the FCPA or anti-corruption prohibitions would be subject to personnel action, including termination.

In light of its proposed plan of post-acquisition due diligence, Halliburton posed three questions to the DOJ. First, whether the proposed acquisition itself would violate the FCPA. Second, whether through the proposed acquisition, Halliburton would "inherit" any FCPA liabilities of Expro based on pre-acquisition unlawful conduct. Third, whether Halliburton would be held criminally liable for any post-acquisition unlawful conduct by Expro prior to Halliburton's completion of its FCPA and anti-corruption due diligence, if such conduct were disclosed to the DOJ within 180 days of closing.

Based on Halliburton's proposed plan (and assuming full compliance with it), the DOJ concluded that it did not intend to take enforcement action against Halliburton. The DOJ specifically noted that this representation did not extend to the target company or its personnel.

With regard to Halliburton's first proposed question, the DOJ emphasized that because stock ownership of the target company was widely disbursed, it was not a case where the payment for the shares could be used in furtherance of earlier illegal acts of the target as distinguished from other situations previously identified by the DOJ. Previously, in Release 01-01, the DOJ noted the potential for inheriting liability by a non-U.S. joint venture partner for corrupt activities undertaken prior to that company's entry into the joint venture.²⁴ The U.S. requestor feared that, in entering into the joint venture, it might violate the FCPA should it later become apparent that one or more of the contracts contributed by the non-U.S. co-venturer was obtained or maintained through bribery. The DOJ provided no action comfort based on the Requestor's representation that it was not aware of any contributed contracts that were tainted by bribes. The Release cautioned without elaboration, however, that the Requestor might "face liability under the FCPA if it or the joint venture knowingly take any action in furtherance of a payment to a foreign official with respect to previously existing contracts."

24 The Release explicitly identifies Release 01-01 as "precedent." Such a characterization is at odds with the DOJ's longstanding position (which is repeated in Release 08-02) that the Releases apply only to the specific requestor. The DOJ's invocation of the word precedent (even if not sufficient to be relied on in court proceedings or otherwise) is certainly a window into the mind of the DOJ as to the seriousness with which companies should view the guidance offered by the DOJ in its releases.

Release 08-02 gives greater insight into what activities may or may not be deemed “in furtherance of” previous acts of bribery by an acquired company or joint venture partner. The Release conditionally absolves Halliburton of successor liability under the reasoning that the funds contributed through the purchase would overwhelmingly go to widely-disbursed public shareholders, not Expro itself, and that there was no evidence that any Expro shareholders received their shares corruptly. Implicitly, the Release can be read to endorse the view that payments to shareholders who have received their shares corruptly would violate the FCPA.

The DOJ also determined that, in light of the restrictions placed on Halliburton in performing pre-acquisition due diligence, and the company’s commitment to implement extensive post-acquisition due diligence, remedial and reporting measures, that it did not intend to take enforcement action with regard to any FCPA liabilities Halliburton could be argued to have inherited by Expro based on pre-acquisition unlawful conduct or for post-acquisition unlawful conduct by Expro prior to Halliburton’s completion of its FCPA due diligence, if such conduct were disclosed to the DOJ within 180 days of closing.

Although the DOJ issued no-action relief, the Release is heavily qualified and contains significant expectations for Halliburton, were it to acquire Expro under the stated conditions. Above all else, the Release illustrates the critical need for due diligence. Although the circumstances made pre-acquisition due diligence impracticable due to the operation of non-U.S. law, the underlying message is that where such impediments do not exist, substantial and probing due diligence is expected. The DOJ also for the first time explicitly endorsed a program of post-acquisition due diligence, thereby bowing (albeit gently) to compelling commercial circumstances that would otherwise render a company subject to the FCPA uncompetitive. In doing so, the DOJ placed significant emphasis on conducting due diligence in all appropriate locations that includes (i) carefully calibrating risks (including the need for thorough examination of third party and governmental relationships); (ii) an exacting review of broad categories of documents (including e-mail and financial and accounting records); (iii) the need for witness interviews not only of the target personnel but others; and (iv) the retention of outside counsel and other professionals working with internal resources as appropriate. As to the latter point, it can be speculated that the use of internal resources will be deemed appropriate only where such resources are qualified and free of disabling conflicts.

The DOJ also placed considerable emphasis on the need for remediation, including the need (i) to terminate problematic relationships (including with employees and third parties); (ii) to enter into new contractual relationships with enhanced compliance protocol (including new contracts that contain audit rights) as “soon as commercially reasonable”; and (iii) to conduct effective compliance training.

Finally, the Release contains broad self-reporting obligations to the DOJ in all risk categories. The self-reporting aspects of the due diligence program can be seen (with the due diligence itself) as a critical basis upon which the DOJ provided its no-action relief. In addition, the DOJ was careful to extend the benefits of self-reporting to the target company in the context of any enforcement action the DOJ might pursue against the target and its personnel following such disclosures. This could raise important issues with respect to the attorney-client privilege

and work product protections that must therefore be considered at the outset in connection with any company that might find it necessary or desirable to engage in similar self-reporting.

On June 23, 2008, ten days after the Release, Expro accepted Umbrellastream's bid, despite Halliburton's offer of a higher price per share. On June 26, the British High Court rejected an argument by two hedge funds that controlled 21 percent of Expro shares that the bidding should have been turned over to an auction. On July 2, Expro announced that the acquisition by Umbrellastream had been completed.

DOJ Opinion Procedure Release 08-03

On July 11, 2008, the DOJ issued Opinion Procedure Release 08-03 in response to a request submitted by TRACE International, Inc. ("TRACE"), a membership organization that specializes in anti-bribery initiatives around the world. TRACE, which is organized under the laws of the District of Columbia and therefore a "domestic concern" for the purpose of the FCPA, proposed paying for certain expenses for approximately twenty Chinese journalists in connection with an anti-corruption press conference to be held in Shanghai. The journalists were employed by Chinese media outlets, most of which are wholly-owned by the Chinese government, arguably making them "foreign officials" for purposes of the FCPA.

TRACE proposed paying slightly different travel expenses based on whether the journalist was based in Shanghai or traveling from outside of Shanghai. For those based within Shanghai, TRACE proposed providing them with a cash stipend of approximately \$28 U.S. dollars to cover lunch, transportation costs, and incidental expenses. For journalists traveling from outside of Shanghai, TRACE proposed providing them with a cash stipend of approximately \$62 U.S. dollars to cover lunch, local transportation costs, incidental expenses, and two additional meals. TRACE also planned on reimbursing the out-of-town journalists for economy-class travel expenses (by air, train, bus or taxi) upon the submission of a receipt, and pay for one night's lodging at a hotel at a rate not to exceed \$229 per journalist, which TRACE would pay directly to the hotel. With respect to the cash stipends, TRACE noted that they would be provided openly to each journalist upon signing in at the conference.

In providing no-action relief, the DOJ determined that the expenses were reasonable under the circumstances, as they directly related to the promotion of TRACE's products or services, and therefore fell within the "promotional expenses" affirmative defense under the FCPA. The DOJ noted, however, that despite the fact that such reimbursements may be commonplace, it placed no weight on that fact, which further confirms the view that commonality of a particular practice bears no weight on the appropriateness of that practice in the context of the FCPA.

Criminal Matters

United States v. William J. Jefferson

On June 4, 2007, Congressman William J. Jefferson was indicted on 16 counts of soliciting bribes, money laundering, honest services fraud, obstruction of justice, racketeering,

violations of the FCPA, conspiracy and related offenses. The 94-page indictment alleges that Jefferson solicited and/or received hundreds of thousands of dollars in bribes for himself or his family members in the form of “consulting fees,” ownership interests in various businesses, shares of revenue or profit from companies he aided, and monthly fees or retainers. The indictment details numerous executed and attempted schemes involving telecommunications deals in Ghana and Nigeria, oil concessions in Equatorial Guinea, and satellite transmission contracts in Botswana, Equatorial Guinea and the Republic of Congo. In many of the schemes, Jefferson allegedly used his position and influence as a member of the U.S. House of Representatives to further the interests of businesses in which he owned a stake or that had agreed to pay him bribes.

The FCPA-related charges stem primarily from Jefferson’s alleged offer to bribe an official of the Nigerian state-owned telecommunications company Nitel in exchange for the official’s assistance in obtaining telecommunications approvals on behalf of a Nigerian joint venture in which Jefferson held an interest. The indictment alleges that Jefferson offered \$500,000 as a “front-end” payment and a “back-end” payment of at least half of the profits of one of the joint venture companies to the official in exchange for the official’s assistance in obtaining approvals that would have allowed the Nigerian joint venture to locate its equipment at Nitel’s facilities and use Nitel’s telephone lines. As part of the “front-end” payment, Jefferson promised to deliver \$100,000 in cash to the Nigerian official, which a partner in the joint venture provided to Jefferson. Several days later, on August 3, 2005, \$90,000 of the \$100,000 was discovered in the freezer in Jefferson’s Washington, D.C. home during a raid by federal authorities.

In August 2007, the U.S. Court of Appeals for the District of Columbia found that a May 2006 raid on Congressman Jefferson’s office was unconstitutional. A trial date has been tentatively set for December 2008.

Congressman Jefferson has maintained his innocence and, in June 2008, announced that he intends to seek reelection.

United States v. Victor Kozeny, Frederic Bourke, Jr. and David Pinkerton

In May 2005, the DOJ indicted Victor Kozeny, Frederic Bourke Jr. and David Pinkerton in connection with a scheme to bribe Azeri government officials to attempt to secure control over the State Oil Company of Azerbaijan (“SOCAR”).

Kozeny controlled two investment companies: Oily Rock Ltd. and Minaret Ltd. In preparation for the privatization of several previously state-owned enterprises, the government of Azerbaijan issued free vouchers to its citizens that could be freely transferred and purchased, even by foreigners. Kozeny, through Oily Rock and Minaret, sought to acquire large amounts of these vouchers in order to gain control of SOCAR upon its privatization and profit significantly from the resale of their controlling interest in the private market. Oily Rock and Minaret attracted several outside investors, including Bourke, who invested approximately \$8 million,

and Pinkerton, who was a managing director in the private equity group of AIG and invested approximately \$15 million through his position there.

Beginning in 1997, Kozeny, acting by himself and also as an agent for Bourke and Pinkerton, paid or caused to be paid millions of dollars in bribes to Azeri government officials to secure a controlling stake in SOCAR. The officials included a senior official of the Azeri government, a senior official of SOCAR, and two senior officials at the Azeri government organization that administered the voucher program. The alleged violations consisted of a promise to transfer two-thirds of Oily Rock's and Minaret's vouchers to the government officials, a \$300 million stock transfer to the government officials, several million dollars in cash payments, and travel, shopping and luxury expenditures paid for by Oily Rock and Minaret. The 27-count indictment alleged 12 violations of the FCPA, 7 violations of the Travel Act, 4 money laundering violations, 1 false statement count for each individual (3 total), and 1 count of conspiracy to violate the FCPA and Travel Act.

On June 21, 2007, the Honorable Shira A. Scheindlin dismissed the FCPA criminal accounts against Bourke and Pinkerton (and almost all of the remaining counts as well) as time-barred by the five-year statute of limitations period in 18 U.S.C. § 3282.

Apparently, the DOJ's Office of International Affairs submitted official requests to Switzerland and the Netherlands for bank account records and, in July 2003, based on those requests, the government applied (pursuant to 18 U.S.C. § 3292 "Suspension of limitations to permit United States to obtain foreign evidence") for an order suspending the running of the statute of limitations. The order was promptly granted, with the period for suspension of the statute of limitations running from the official request date to the earlier of final action by both the Netherlands and Switzerland, or three years. Unbeknownst to the judge or the government, at the time the order was granted, the governing five-year statute of limitations had already run.

Judge Scheindlin explained that the "majority of the conduct charged in the Indictment occurred between March and July 1998. Accordingly, the five-year statute of limitations would have run sometime between March and July 2003. Because the Indictment was not returned until May 12, 2005, all of those offenses are time-barred unless the government can demonstrate that the statute of limitations was tolled."²⁵

On July 16, 2007, Judge Scheindlin reversed her decision as to three of the dismissed counts, accepting the government's position that those counts alleged conduct within the limitations period.²⁶ On August 21, 2007, the DOJ filed an appeal of the dismissal of the remaining counts with the Second Circuit.

The corresponding charges against Kozeny were not dismissed, as his extradition from the Bahamas was still pending at the time of the decision. On October 24, 2007, the Supreme Court of the Bahamas ruled that Kozeny could not be extradited as the grounds for extradition

²⁵ Slip Op., at 24.

²⁶ The three counts were (i) conspiracy by Bourke and Pinkerton to violate the FCPA and Travel Act; (ii) a substantive FCPA violation by Bourke; and (iii) money laundering conspiracy by Bourke and Pinkerton.

were insufficient and the United States had abused the court process in its handling of the extradition hearing. The prosecution indicated it will appeal the decision. The Czech Republic is also apparently seeking extradition of Kozeny.

On July 2, 2008, the prosecution filed a motion requesting that an order of *nolle prosequi* be filed with respect to Pinkerton, which Judge Scheindlin granted. The prosecution stated that, despite the fact that its appeal from Judge Scheindlin's June 21, 2007 order was still pending, "the Government has concluded that further prosecution of David Pinkerton in this case would not be in the interest of justice." The remaining charges against Bourke, who has pleaded innocent, have not been dismissed.

In February 2004, prosecutors obtained a related conviction of Clayton Lewis, a former employee of the hedge fund Omega Advisors, Inc. ("Omega"), who pleaded guilty to violating and conspiring to violate the FCPA. In July 2007, Omega settled with the government, entering into a non-prosecution agreement with the DOJ, agreeing to a civil forfeiture of \$500,000 and to continue cooperating with the DOJ's investigation. Omega invested more than \$100 million with Kozeny in 1998 for the Azeri privatization program, losing its entire investment. Lewis, Omega's prime contact with Kozeny, admitted that he knew of Kozeny's scheme prior to investing Omega's funds.

United States v. Kay

In December 2001, David Kay and Douglas Murphy were indicted on 12 counts of violating the FCPA in connection with payments made to Haitian officials to lower the customs import charges and taxes owed by their employer, American Rice, Inc. ("ARI"). Specifically, among other measures to avoid the customs duties and taxes, Murphy and Kay underreported imports and paid customs officials to accept the underreporting. ARI discovered these practices, which were considered "business as usual" in Haiti, in preparing for a civil lawsuit and self-reported them to government regulators.

The district court dismissed the indictment, holding that the statutory language "to obtain or retain business" did not encompass payments to lower customs duties and taxes. In February 2004, the Fifth Circuit Court of Appeals reversed the district court, holding that improper payments geared towards securing an improper advantage over competitors, *e.g.*, through lower customs duties and sales taxes, were at least potentially designed to obtain or retain business and therefore might fall within the statute's scope. The Court reasoned as follows:

Avoiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that the business is otherwise legally obligated to expend. And this, in turn, enables it to take any number of actions to the disadvantage of competitors. Bribing foreign officials to lower taxes and customs duties certainly *can* provide an unfair advantage over competitors and thereby be of assistance to the payor in obtaining or retaining business.

The Fifth Circuit remanded the case for the district court to determine whether the government could adduce sufficient evidence to prove that the alleged bribes in question were

intended to lower the company's cost of doing business in Haiti "enough to have a sufficient nexus to garnering business there or to maintaining or increasing business operations" already there "so as to come within the scope of the business nexus element."

In February 2005, a jury convicted Kay and Murphy on 12 FCPA bribery counts and a related conspiracy count, and the court sentenced Kay to 37 months imprisonment and Murphy to 63 months. Both defendants appealed their convictions and sentences. One of the critical questions on appeal was whether the district court properly instructed the jury on the *mens rea* element of an offense under the FCPA when it failed to inform them that the FCPA has both "willfulness" and "corruptly" elements. The government asserted that the jury charge's invocation of the word "corruptly" was sufficient, while the defense argued that a distinct willfulness charge was necessary for the jury to make the required *mens rea* determination. The defendants further asserted that the Government had failed to prove that they had used the mails or instrumentalities of interstate commerce — specifically, shipping documents underreporting the amount of rice being shipped — "in furtherance" of the alleged bribes. Rather, they argued, the Government had showed only that the bribes they paid "cleared the way" for acceptance of the shipping documents, not the other way around.

On October 24, 2007, the Fifth Circuit issued its decision upholding the convictions and the disputed jury instructions. In doing so, the court discussed the *mens rea* requirement under the FCPA and determined that while a defendant "must have known that the act was in some way *wrong*" they are not required to know that their activity violates the FCPA in order to be found guilty. The court determined that the jury instruction encompassed this *mens rea* requirement by defining a "corrupt" act as one "done voluntarily and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means." The court also rejected the defendants' "in furtherance" argument, concluding that there was sufficient evidence for a jury to conclude that the shipping documents had been used "in furtherance" of the bribes, as there was testimony to the effect that the amount of a bribe paid to a customs official was calculated by comparing the invoice listing the accurate amount of rice being shipped and the false shipping documents underreporting that amount.

In a January 10, 2008 decision, the Fifth Circuit denied defendants' motion for a rehearing *en banc*.

BAE Systems

On June 28, 2007, British defense company BAE Systems disclosed that the DOJ had launched an investigation of the company. BAE had been investigated by the British Government for accusations that it paid Prince Bandar of Saudi Arabia close to £1 billion over a 10-year period in connection with a £43 billion arms deal. It has been alleged that BAE channeled money for close to ten years into Saudi Arabian embassy bank accounts at Riggs Bank in Washington, DC through the Bank of England.

In December 2006, Britain's Serious Fraud Office ("SFO") abruptly halted its investigation of BAE citing national security concerns. It has been reported that the decision was prompted by a threat from Saudi Arabia to withdraw all cooperation on security and intelligence with regard to terrorism as well as potentially pulling out of other business deals with British companies. Following the SFO's decision to halt the investigation, two anti-arms trade groups brought suit challenging the decision. In April 2008, Britain's High Court issued a scathing decision condemning the SFO's decision and indicating that the Saudi threats were an attempt to "pervert the course of justice in the United Kingdom." On July 7-8, 2008, Britain's highest appeals court, the House of Lords, heard arguments on the matter, and is expected to issue a ruling sometime during Fall 2008.

It is unclear to what extent the British government is cooperating with the U.S. investigation of BAE. The British Government has previously refused to acknowledge the existence of the Bank of England account through which the improper payments were allegedly channeled, and the British Ministry of Defence has reportedly sought legal advice on how to proceed and to what extent it will cooperate with the DOJ. There are indications, moreover, that BAE itself may be less than cooperative with U.S. authorities. In May 2008, BAE's former CEO Mike Turner and director Nigel Rudd were detained at George Bush International Airport in Houston upon entering the United States. Although they were later released, authorities apparently copied their computers, cellular phones and documents. The DOJ has also apparently subpoenaed a number of U.S.-based BAE employees in connection with its investigation.

On September 19, 2007, the law firm Coughlin Stoia Geller Rudman & Robbins filed a shareholder derivative suit against BAE based, in part, on the allegations of bribery. The defendants have filed motions to dismiss the suit, which remains ongoing.

In May 2008, an independent committee chaired by the Right Honorable Lord Woolf of Barnes²⁷ and appointed by the BAE Board of Directors issued a report concerning BAE's "ethical policies and procedures." The Woolf Committee was charged with, among other things, identifying the "high ethical standards to which a global company should adhere," assessing "the extent to which [BAE] may currently meet these standards," and recommending "the action [BAE] should take to achieve such standards." Its inquiry, the committee acknowledged, was undertaken against the backdrop of the allegations that BAE faces. However, its task was "not to conduct an inquiry into the truth or otherwise of the criticisms of past conduct."

The committee's report emphasized that ethical business conduct encompasses more than simple compliance with the law and that a global company should aim for standards that are over and above the minimum required by legislation. Although certain of the "Woolf Committee" recommendations are specific to BAE and the defense industry, the report contains important and

27 Among several other prestigious positions and activities, Lord Woolf served as Master of the Roles (third chief judge of England and Wales) from 1996-2000 and as Lord Chief Justice of England and Wales from 2000-2005; he has prepared influential reports on English prisons (1990) and civil procedure (1996); and he currently is a non-permanent judge of the Court of Final Appeal in Hong Kong and President of the Qatar Financial Centre's Civil and Commercial and Appeal Court.

illuminating discussions of ethical and compliance policies and procedures and assessment of certain key risk areas for companies operating internationally generally.

Among other things, the report addresses the role and responsibilities of Boards of Directors and senior executives. With respect to Boards, the report notes that Directors have both a responsibility and statutory duty under U.K. law to ensure high standards of ethical business conduct. The ethical nature of decisions and their impact on the company's reputation should be items of regular discussion at Board meetings. The Woolf Committee further recommends that Boards establish a committee specifically dedicated to ensuring the company's adherence to ethical business conduct and assessing its reputational risk. This committee would assess policies, procedures and controls, and ensure that such mechanisms are being properly applied in order to manage reputational risk. The committee would also report to the entire Board of Directors on reputational risk, in a similar manner to which the Audit Committee reports on financial risk.

Despite the important oversight role of the Board, the Woolf Committee recognizes that it is the job of senior executives to develop and implement policies and procedures that will work in practice. Senior executives, beginning with the chief executive, are expected to assume personal responsibility for the implementation of high standards of ethical conduct and exercise such high standards in their own conduct and decision making. In addition to regular communication of such standards both within and outside of the organization, the Woolf Committee recommends that executives be incentivized through their performance appraisal and remuneration structure for meeting certain goals relating to high standards of ethical business conduct.

Although the Woolf Committee emphasizes the importance of an overall corporate code of conduct, it underscores the particular need for robust policies and procedures in a company's key areas of risk, be they geographic, type of customer, use of third parties or other. These areas of risk will obviously vary by company and industry, which will require a company to thoroughly assess its operations before it can implement effective policies and procedures. After doing so, the Woolf Committee recommends training not only company employees on the relevant policies and procedures, but also third parties where necessary. In addition, such policies and procedures should be factored into other business decisions, such as mergers, acquisitions and contracts, to assess the ethical impact of those business decisions on the company and its reputation.

Further, the Woolf Committee highlights certain risks that companies increasingly face when conducting business globally. Although these are discussed in the context of the defense industry, many of them are universal risks that companies face when doing, or seeking to do, business abroad, including (i) the use of outside advisors and other third parties; (ii) the practice of facilitation payments; (iii) the provision of gifts and hospitality; and (iv) making acquisitions and entering into other business relationships. With respect to the hiring of advisors and other third parties, the report illustrates numerous potential "red flags" of which companies should be wary, including, among others, a history of corruption in the territory, lack of experience by the advisor, unusually high commissions or urgent payment requests, recommendation of the advisor

by a government official, and the refusal by the advisor to sign an agreement that he has not and will not make prohibited payments.

The Woolf Committee notes that there has been increased attention in recent years on “indirect corruption” by third parties with which a company has a business relationship, stating that “the clear trend in regulatory requirements, particularly in the US, is to impose responsibility, and by implication ethical and reputational risk, upon the contracting company irrespective of whether it knew, or ought to have known, of corrupt practices by third parties.” Although this may overstate the case to a certain extent, the committee report underscores the critical importance of performing adequate due diligence on third parties, as there is a significant danger that a company will face liability or suffer reputational damage when a third party with which it is affiliated engages in improper conduct.

Gerald and Patricia Green

On January 16, 2008, Gerald and Patricia Green, co-owners of Film Festival Management, Inc. (“FFM”), were indicted on one count of conspiring to violate, and six counts of violating, the antibribery provisions of the FCPA. The indictment alleges that from 2002 to 2007, Mr. and Mrs. Green bribed a Thai government official in order to secure contracts to run the annual Bangkok International Film Festival (“Bangkok Film Festival”), which was funded and administered by the Tourism Authority of Thailand (“TAT”).

The indictment alleges that between 2002 and 2007, the Greens conspired to, and ultimately did, bribe a senior Thai government official, identified as the “Governor,” who was the senior government officer of the TAT from 2002 to 2006. The Governor also served as the president of the Bangkok Film Festival and, in this position, had the ability to select businesses to provide goods and services for the festival. According to the indictment, in 2002, the Governor selected Mr. Green to run the 2003 Bangkok Film Festival. In return, Mr. Green apparently agreed to pay a percentage of the 2003 Bangkok Film Festival contract value to the Governor. One of the Green business entities made a \$30,000 payment to a United Kingdom bank account held by the Governor’s daughter for the benefit of the Governor.

According to the DOJ, the Greens were also selected to run the Bangkok Film Festival for 2004, 2005 and 2006, and made payments for the Governor’s benefit in connection with these contracts. The payments typically ranged between 10-20% of the total amount of the Bangkok Film Festival contracts and were classified in the Green entities’ books and records as “sales commissions.” The payments were primarily made by wire transfer to bank accounts in the United Kingdom, Singapore and the Isle of Jersey held by the daughter or a friend of the Governor, although the Greens also allegedly made cash payments directly to the Governor during her visits to Los Angeles.

The indictment asserts that the Greens took considerable efforts to hide their scheme, including moving money through several business entities, some with fraudulent addresses and telephone numbers. Because the Governor was authorized to approve payments on behalf of the TAT up to a certain dollar amount, the Greens purposely sought contracts under different

business names to create the appearance that the money was being paid to different entities. In reality, all the work related to the film festivals was managed by the same personnel out of the same Los Angeles-based office run by the Greens. In structuring the transactions in such a manner, the Greens were able to avoid scrutiny into the large amounts of money being paid by the TAT to the Greens' business entities.

The government alleges that, in total, the Greens' business entities received over \$7 million from the TAT in connection with Bangkok Film Festival contracts between 2002 and 2007, and that the Greens paid at least \$900,000 of that money to or for the benefit of the Governor in order to obtain and retain the contracts.

Chiquita

On March 19, 2007, Chiquita Brands International Inc. ("Chiquita") pleaded guilty to one count of engaging in transactions with a specially designated global terrorist organization. Under the terms of the written plea agreement, Chiquita was required to pay a \$25 million criminal fine, implement and maintain an effective compliance and ethics program, and received five years' probation. This judgment was formally entered on September 24, 2007.

The plea agreement arises from payments that Chiquita made to the right-wing terrorist organization Autodefensas Unidas de Colombia ("AUC") from 1997 through February 2004. The factual proffer underlying the plea agreement indicates that from 1989 to 1997, Chiquita also made payments to left-wing terrorist organizations Fuerzas Armadas Revolucionarias de Columbia ("FARC") and Ejercito de Liberacion Nacional ("ELN"). In its self-disclosure, Chiquita represented that it made the payments under threat of violence and that refusal to make the payments would have forced Chiquita to withdraw from Colombia, where it has operated for more than a century. Chiquita is reported to have made over \$49 million in payments between 2001 and 2004 alone.

Roderick Hills, then-head of Chiquita's Audit Committee and former Chairman of the SEC, approached Michael Chertoff, then assistant attorney general and currently secretary of homeland security, to self-report the payments and seek the government's advice on how to proceed. Chiquita officials claim that Mr. Chertoff and subsequently other DOJ officials recognized the difficult position that the company was in, noted larger ramifications for U.S. interests if the corporate giant pulled out of Colombia overnight and did not instruct Chiquita to halt the payments. Thus, although outside counsel advised Chiquita in writing on September 8, 2003 that "[DOJ] officials have been unwilling to give assurances or guarantees of non-prosecution; in fact, officials have repeatedly stated that they view the circumstances presented as a technical violation and cannot endorse current or future payments," Chiquita continued to pay the AUC throughout 2003 and early 2004.

According to press reports, a federal grand jury was convened to consider indictment against Hills and other high-level Chiquita officials for their approval of the payments. The Department of Justice, however, announced in September 2007 that, as a matter of prosecutorial discretion, it would not pursue the charges against the Chiquita officials.

Although the Chiquita case does not directly implicate the FCPA, it raises difficult issues regarding when and under what circumstances a company should self-report and underscores the fact that, even in extreme circumstances such as those Chiquita faced, the government is unlikely to accept the argument that public policy or other broader circumstances might excuse or mitigate a company's illegal practices.

ERHC Energy

In May 2006, the FBI, at the direction of the Department of Justice, executed a search warrant at the offices of ERHC Energy, a small, relatively unknown Houston company that obtained valuable oil and gas rights in Sao Tome and Principe in connection with development of offshore oil licenses in the Joint Development Zone ("JDZ") operated by the two countries. Chrome Oil Services Ltd., a company owned or controlled by Nigerian businessman Emeka Offor, owns a controlling stake in ERHC. Offor's connections to Nigerian government officials as well as allegations that he made improper payments to secure ERHC's interest in the JDZ have been widely reported in the press and were the subject of a Report of the Sao Tome Attorney General that was released to the public in December 2005. On August 17, 2007, Offor resigned as chairman of ERHC, but stated that he remained committed to his investment in the company.

The DOJ has not yet issued an indictment in the matter against ERHC or any of its principals. The SEC, however, filed a subpoena enforcement action on June 1, 2007 against O.J. Chidolue for his failure to produce documents and appear for testimony in connection with the SEC's formal investigation into ERHC. Chidolue, a Houston attorney, is counsel for Chrome Energy (parent company to Chrome Oil Services Ltd.) and was at one time the Secretary and director of another Chrome entity. Chidolue and the SEC agreed that Chidolue would provide documents by June 29, 2007 and testify on July 18, 2007. However, Chidolue initially produced only a single document and is negotiating with the SEC regarding the scope of his production. His testimony appears to have been postponed pending these discussions.

Additionally, on July 5, 2007, the Senate Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs issued a subpoena to ERHC requiring ERHC to produce documents in connection with its acquisition of oil and gas interests in the Gulf of Guinea. In 2004, the same subcommittee issued a report evaluating the effectiveness of the anti-money laundering provisions of the Patriot Act, using Riggs Bank ("Riggs") as a case history.

Among other things, the 2004 Riggs report implicated six American oil companies — ExxonMobil, Devon Energy, ChevronTexaco, Amerada Hess, Vanco Energy, and Marathon Oil — which had made large payments into Riggs accounts controlled by government officials of Equatorial Guinean and their relatives. The report uncovered that the American companies had engaged in numerous potentially corrupt transactions with Equatorial Guinean officials, including (i) leasing and purchasing land from government officials and their families, often at high rates; (ii) providing funds for the Equatorial Guinean Embassy in Washington and the Permanent Mission to the United Nations in New York, including funding the Embassy's

medical insurance and social security payments; (iii) paying educational expenses for children of government officials; (iv) purchasing services from companies owned by Equatorial Guinea officials, including security firms and labor providers; and (v) forming joint ventures with companies owned by the Equatorial Guinea government or government officials.

ERHC's February 11, 2008 Form 10-Q states that, "[t]he investigations by the DOJ, SEC and Senate Subcommittee are continuing. The Company anticipates that these investigations will be lengthy and do [*sic*] not expect these investigations to be concluded in the immediate future."

United States v. Giffen

In April 2003, the Department of Justice indicted James H. Giffen for allegedly making more than \$78 million in improper payments to government officials in Kazakhstan. The indictment also charged J. Bryan Williams with tax evasion in connection with a \$2 million payment he received after securing valuable oil rights for his then-employer, Mobil Oil.²⁸ Despite the fact that the indictment was handed down over four years ago, the prosecution against Giffen continues.

According to the indictment, Giffen was the Chairman of the Board, Chief Executive Officer and principal shareholder of Mercator Corporation, a New York-based merchant bank. Giffen and Mercator represented the Kazakh government in connection with a series of large oil and gas rights negotiations. Giffen held the title of counselor to the President, and he and Mercator provided advice on strategic planning, investment priorities, and attracting foreign investment to the Kazakh government. Giffen was also awarded success fees in exchange for helping broker some large oil and gas right deals between United States oil companies and the Kazakh government.

The DOJ alleged that between 1995 and 2000, Giffen caused at least four United States oil companies — Mobil Oil, Texaco, Amoco and Phillips Petroleum — to make payments into escrow accounts in connection with some of Kazakhstan's most lucrative oil and gas projects, in particular, the Tengiz and Karachaganak projects. Then, through a series of sham transactions with two Swiss banks, Giffen was able to divert these payments into secret Swiss bank accounts beneficially held for two Kazakh government officials. For example, in 1996, Mobil Oil purchased a 25% stake in the large Tengiz oil field in Kazakhstan and agreed to pay Giffen the success fee he was owed by the Kazakh government for helping to broker the deal. Giffen diverted \$22 million of this fee into secret Swiss bank accounts and made unlawful payments to two government officials out of the accounts. From 1995 through 2000, he diverted over \$70 million of funds in such a manner, and is alleged to have made approximately \$78 million in improper payments to at least two Kazakh officials during the relevant time period.

28 Williams settled the charges in June 2003. He was sentenced to three years and ten months in prison, and ordered to pay a \$25,000 fine and more than \$3.5 million in restitution.

In total, Giffen was charged with 13 violations of the FCPA, 8 counts of wire fraud, 1 count of mail fraud, 35 counts of money laundering, 3 counts of filing a false tax return, and 1 count of conspiracy to commit money laundering, mail and wire fraud, and to violate the FCPA.

Giffen's response has been novel, if nothing else. Within a year of his indictment, Giffen sought discovery in support of a possible public authority defense, claiming that, by its actions, the United States government effectively authorized his conduct. The discovery requests, sustained over government objection, triggered the Classified Information Procedures Act ("CIPA"),²⁹ which governs the handling of classified information in federal cases. As a result, there has followed a complicated knot of discovery tie-ups, including *in camera* judicial reviews of classified documents and the government's unsuccessful interlocutory appeal of the District Court's denial of its motion *in limine* to preclude Giffen from presenting a public authority defense.³⁰ As the Second Circuit recognized, "regulating Giffen's access to classified information has presented the district court with a significant challenge."³¹

Although the Second Circuit in *dicta* cast significant doubt on the viability of Giffen's public authority defense as a substantive matter, a review of the docket indicates that issues relating to discovery of classified materials continue to delay the progression of the case to trial. The last nineteen months of docket entries, following the Second Circuit's January 2007 issued mandate, reflect continued sealed filings on discovery and references to "discovery issues that remain in dispute." Were the District Court to authorize the disclosure of classified materials to Giffen, further delay would be likely, as the government would almost certainly appeal that ruling.

Giffen's alleged activities are also at the core of the civil litigation filed by Grynberg against BP, Statoil, British Gas, and others discussed *infra*. Mr. Grynberg alleges in his civil suit that BP, Statoil and the other defendants paid approximately \$12 million in bribes to Kazakh officials through Giffen.

Civil Litigation

FCPA-Related Civil Litigation

The FCPA currently does not create a private cause of action (but see discussion regarding recent legislation *infra*). There has, however, been a proliferation of FCPA-related civil litigation since late 2006. These suits have taken four forms: (i) lawsuits by foreign governments; (ii) shareholder derivative suits; (iii) class action securities claims; and (iv) commercial actions between business partners.

29 18 U.S.C. App. § 3.

30 *See United States v. Giffen*, 473 F.3d 30 (2d Cir. 2006) (dismissing appeal for lack of jurisdiction).

31 *Id.*, at 41 n.11. *See also* Morvillo, *supra* ("When a defendant seeks to use classified information to rebut the government's charges . . . the task is not a simple one. The defendant is required to jump through a multitude of procedural hoops to access the desired information.").

The most recent such suit falls into the first category. On June 27, 2008, the Iraqi government filed suit in the United States District Court for the Southern District of New York against over 90 corporations (almost 50 parent companies and over 40 of their affiliates) and two individuals alleging, among others, Racketeering Influenced Corrupt Organizations (“RICO”), common law fraud and breach of fiduciary duty claims based on allegations of bribery in connection with the Oil for Food program. Each of the companies discussed above in connection with the OFFP settlements (or one of their affiliates) — AB Volvo, Flowserve, Akzo Nobel, Chevron, Ingersoll-Rand, York, Textron and El Paso — is named in the complaint, along with numerous other companies, many of which are known to be under investigation by the DOJ and/or SEC.

The Iraqi government asserts claims both directly and as *parens patriae* on behalf of the Iraqi people. In addition to any factually-specific defenses the defendant companies may have, the companies as a group will likely have substantial defenses both to the direct and *parens patriae* claims. With regard to the former, as the complaint concedes, the Iraqi government under Saddam Hussein required companies to make improper payments to the Iraqi government to participate in the OFFP. As a recipient of the alleged bribes, Iraq typically would not have standing to assert claims based on those payments. Iraq will likely argue that the bribes were demanded by the Saddam Hussein regime and that the current elected government is not responsible for, or bound by, the Hussein regime’s actions. There is, however, a long line of precedent that “changes in the government or the internal policy of a state do not as a rule affect its position in international law.... [T]hrough the government changes, the nation remains, with rights and obligations unimpaired.”³² Indeed, in *Kalasho v. Republic of Iraq*, No. 06-11030, 2007 WL 2683553, at * 5-6 (E.D. Mich. Sept. 7, 2007), the magistrate judge relied on this principle in recommending that a default judgment be entered against the current Iraqi government based on alleged injuries the plaintiff suffered at the hands of the Hussein government. The district court rejected the magistrate’s recommendation on other grounds, but did not question the notion that the current Iraqi government stands in the shoes of the Hussein regime.

Although there is less precedent addressing this issue, courts have also rejected the argument that a foreign state has *parens patriae* standing (a special species of standing accorded to governments of the States of the United States in certain circumstances) to bring suits in a U.S. court on behalf of its citizens, unless there is a clear indication by the Supreme Court, the Executive Branch or Congress to grant such standing under the circumstances presented.³³ The Supreme Court has never held that (or addressed the question whether) a foreign state has *parens patriae* standing under any circumstances. Thus, the relevant inquiry for the lower courts will be whether any of the potentially relevant statutes or treaties indicates that the Executive Branch or Congress intended to confer such standing on Iraq to bring suit based on allegations of bribery under the OFFP, which may be a difficult hurdle to clear.

32 *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396, 401 (2d Cir. 1927); see also *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 731 F. Supp. 619, 621 (S.D.N.Y. 1990); *Restatement (Third) of Foreign Relations Law of the United States* § 208(a).

33 See *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 335-43 (1st Cir. 2000); *State of Sao Paulo v. American Tobacco Co.*, 919 A.2d 1116, 1121-22 (Del. 2007).

Similar to the Iraq suit, on February 28, 2008, Bahrain's state-owned steel company, Aluminum Bahrain ("Alba"), filed suit in federal court in Pittsburgh against Alcoa (formerly "Aluminum Company of America"), seeking over \$1 billion damages. Alba alleges that, over a period of 15 years, Alcoa has engaged in conduct such as overcharging, fraud, and bribery of Bahraini officials. Alba's suit is also based on common law fraud and the RICO act. The suit arose out of an internal investigation by the Bahraini government designed to uncover corruption in state owned companies. The suit quickly caught the attention of the Department of Justice, which intervened in late March 2008. Alba's civil suit has since been stayed pending the DOJ's investigation into the allegations against Alcoa.

On May 6, 2008, an ironworkers' pension fund filed a shareholders' derivative action in federal court against certain current and former Alcoa officers and directors based on the alleged bribes to Bahraini government officials. The DOJ has not as of yet moved to stay the derivative action.

Alcoa is far from the only company facing a shareholder derivative suit stemming from conduct alleged to violate the FCPA. Others such as Faro, Chevron and BAE currently face similar suits, each alleging that the officers and directors of the company breached their fiduciary duties by authorizing and/or permitting bribes to be paid to foreign officials.

Several companies similarly face securities class suits, either as stand alone actions or as companions to derivative suits. As early as December 31, 2005, Titan Corporation ("Titan") settled a securities class action, in which the plaintiffs alleged that (i) Titan had failed to disclose that (a) foreign consultants for Titan had made improper payments to foreign government officials in violation of FCPA and (b) Titan had improperly recorded such payments in its books and records, and (ii) as a result, the company was unable to enter into a definitive merger agreement with Lockheed Martin, despite both shareholder and regulatory approval of the planned merger. The court granted class certification simultaneously to approving the \$61.5 million settlement.

In late 2006 and 2007, two federal district courts and the Ninth Circuit denied motions to dismiss class action securities complaints relating to alleged misstatements regarding FCPA issues brought under Section 10b and 20(a) of the Exchange Act. In both *In re Immucor Inc. Sec. Litig.*, No. 1:05-CV-2276-WSD, 2006 U.S. Dist. LEXIS 72335 (N.D. Georgia, Oct. 4, 2006), and *In re Nature's Sunshine Products Sec. Litig.*, 486 F. Supp. 2d 1301 (D. Utah, May 21, 2007), the plaintiffs allege that the defendant companies had made misleading statements in their SEC filings and elsewhere relating to improper payments of which the companies were aware. The *Nature's Sunshine* plaintiffs allege that in the company's 2005 Sarbanes Oxley certifications, the CEO falsely asserted that he was unaware of fraud involving management or employees exercising significant control over financial reporting when he himself had made illegal payments under the FCPA. The *Immucor* plaintiffs similarly alleged that the company had issued nine false or misleading statements that understated the scope and gravity of investigations into corrupt activities by the company's subsidiaries in Italy and misrepresented the strength of the company's internal control mechanisms, where, in fact, Immucor was aware of criminal activity dating back as far as 1998.

The *Nature Sunshine* suit is ongoing. *Immucor*, however, settled in May 2007 for \$2.5 million. Willbros Group settled its FCPA-related class action suit for \$10.5 million on February 15, 2007 and Faro entered into a Memorandum of Understanding to settle its class action suit for \$6.875 million on February 26, 2008.

There are at least two current suits falling into the last category of FCPA-related civil actions, actions brought by business partners. On April 9, 2008, a Denver-based oil company, the Grynberg Production Corporation (“Grynberg”), filed suit in the Southern District of New York against BP Plc (“BP”), StatoilHydro ASA (“Statoil”), British Gas, and several executives at these companies. Grynberg began partnering with the defendant corporations in 1990 with the goal of capitalizing on the growing oil market in Kazakhstan. Grynberg’s complaint asserts RICO, common law fraud, theft, and breach of constructive trust claims based on the allegation that BP, Statoil, and British Gas without Grynberg’s knowledge, used nearly \$12 million dollars from the partnership to bribe Kazakh officials. Jack Grynberg, founder and CEO of the company, has publicly asserted that one of the primary motivations for filing the complaint was to distance himself and his company from any potential FCPA violations by his joint venture partners.

On March 24, 2008, Argo-Tech Corporation (“Argo-Tech”), a manufacturer of, among other things, high performance aerospace engine fuel pumps and systems and a subsidiary of Eaton Corporation, filed suit against its business partner, the Yamada Corporation (“Yamada”), and Yamada’s subsidiary, Upsilon International Corporation (“Upsilon”), in the U.S. District Court for the Northern District of Ohio, seeking compensatory damages for Yamada’s breach of contract and a declaratory judgment that would allow Argo-Tech to terminate its distributorship agreement with Yamada due to alleged contractual violations, including provisions requiring Yamada and its personnel (i) to “obey the letter and spirit” of the FCPA and any similar local laws and (ii) to comply with Argo-Tech’s policy against giving bribes, kickbacks or any benefits to customer personnel.

The complaint alleges that General Electric, Northrop Grumman and the Japanese Ministry of Defense (“MOD”) have all terminated their relationships with Yamada in connection with allegations of improper payments or over-billing related to sales to the MOD. The Japanese government’s investigation into these allegations has already led to the arrest of a senior Yamada executive, a former Vice Minister of Defense and the Vice Minister’s wife. The Argo-Tech complaint further alleges that “Yamada’s and [Upsilon’s] wrongful conduct has found its way to Argo-Tech’s doorstep.” Specifically, Argo-Tech asserts that on December 28, 2007, the MOD sent Argo-Tech a letter stating that “[i]t was revealed that Yamada Corporation overcharged Ministry of Defense (MOD), Japan by falsifying quotations from foreign manufacturers.” Attached to the letter was a quote from Upsilon listing a third-party price for Argo-Tech fuel pumps (\$126,000 per fuel pump) significantly over that which Argo-Tech quoted to Upsilon (\$67,890 per pump).

On March 26, 2008, Yamada and Upsilon brought a countersuit against Argo-Tech in the Northern District of California, asserting that Argo-Tech was in breach of the contract for anticipatory repudiation of the distributorship agreement and seeking a declaration that Argo-

Tech does not have a lawful basis to terminate the agreement. Yamada's suit also seeks compensatory damages, which it estimates at over \$5 million in gross profits per year for the entire term of the agreement through 2044.

Foreign Business Bribery Prohibition Act of 2008 (H.R. 6188)

On June 4, 2008 Congressman Edwin Perlmutter introduced H.R. 6188, the Foreign Business Bribery Prohibition Act of 2008. H.R. 6188 would "authorize certain private rights of action under the Foreign Corrupt Practices Act of 1977 for violations by foreign concerns that damage domestic businesses." The bill is awaiting consideration in the House Judiciary, Energy, and Commerce Committees.

H.R. 6188 would create a limited private right of action by a United States issuer, domestic concern or person against a "foreign concern" (defined as "any person other than" a U.S. issuer, domestic concern or person) that violates the FCPA. To recover damages, the plaintiff would be required to show that the defendant's conduct both (i) prevented the plaintiff from obtaining or retaining business, and (ii) assisted the foreign concern in obtaining or retaining such business. The bill would allow plaintiffs to seek recovery, in the form of treble damages, for either the amount of business lost due to the foreign company's alleged violation or the amount of business gained by the foreign company because of their alleged violation. A defendant would be permitted to assert the affirmative defenses available under the FCPA (e.g., that the payment was lawful under the foreign country's laws or was a reasonable and bona fide promotion expense) and facilitation payments would also be excluded from coverage.

The bill raises myriad potential jurisdictional issues. For example, to fall within the FCPA's jurisdictional requirements, a foreign concern must "corruptly [] make use of the [United States] mails or any means or instrumentality of interstate commerce or [] do any other act in furtherance of" a prohibited payment. Similar language in the domestic mail and wire fraud statutes has been expansively interpreted by the courts such that a use of the mails or wires that is even tangentially linked to the underlying fraudulent conduct is sufficient for jurisdictional purposes. A similarly broad interpretation within the context of a private right of action under the FCPA would undoubtedly raise potentially difficult issues concerning the extraterritorial application of U.S. laws.

Moreover, DOJ guidance indicates that the department interprets the FCPA's jurisdictional language over foreign concerns to cover instances where a foreign concern merely "causes an act to be done within the territory of the United States." The DOJ acknowledges, however, that this jurisdictional interpretation has yet to be reviewed by a court.

Monitors

FCPA Compliance Monitors

As illustrated by several of the above settlements, it is now common for the DOJ to require the appointment of a monitor to oversee a deferred prosecution (or, in rare cases, a non-prosecution) agreement for FCPA violations. Such monitors are typically responsible for

ensuring that a company adopts and implements the new or enhanced compliance policies or procedures required by the deferred prosecution agreement and otherwise complies with the FCPA, as well as for reporting to the DOJ regarding the company's efforts and progress.

Until recently, the DOJ appointed corporate monitors. This practice was purportedly intended to ensure that the monitor remained sufficiently independent from the settling company and thus could provide an objective assessment of deficiencies or necessary enhancements to the company's internal controls. Recently, however, the DOJ's appointment practices have come under scrutiny and criticism.

In October 2007, a group of medical supply companies settled with the DOJ over violations that they paid "kickbacks" and bribes to United States doctors. (As noted below, the manufacturers are now under investigation for violating the FCPA.) The settlements, which were overseen by New Jersey's U.S. Attorney Christopher Christie, required the appointment of compliance monitors. Several high-profile attorneys with close ties to Mr. Christie or the DOJ were selected to serve as monitors, including a former New Jersey State Attorney General, two former U.S. attorneys, and former Attorney General John Ashcroft (Mr. Christie's former boss). Mr. Ashcroft's monitorship reportedly could be worth up to \$52 million for his law firm.

By January 2008, concerns began to surface regarding the potential impropriety of appointing compliance monitors with strong ties to the DOJ. In February 2008, Representative Frank Pallone introduced a bill designed to create more transparency in the monitor appointment process. In March 2008, in anticipation of Congressional hearings relating to Representative Pallone's legislation and to the controversy surrounding Ashcroft's monitor contract, the DOJ passed appointment guidelines for compliance monitors. The new guidelines implemented a system whereby the Deputy Attorney General has final veto power over all monitor appointments. The new guidelines also forbade further association between the monitor and the settling company for a set period of time following the compliance monitoring process. The new guidelines have also come under criticism as although they created additional procedural requirements, they did not address the potential appointment of those close to the DOJ to monitorships and the associated appearance of impropriety in the eyes of some.

In mid-March 2008, Congress held hearings on the compliance monitor situation. Neither the SEC nor the DOJ settled an FCPA case for approximately two months following those hearings. As noted above, in mid-May 2008, Willbros Group settled FCPA charges with both the SEC and the DOJ. In connection with a three-year prosecution agreement, the DOJ allowed Willbros Group to select its own monitor, subject to the DOJ's final approval. The DOJ followed the same procedure in its June 2008 settlements with AGA Medical and Faro Technologies. While not codified, the process of allowing settling companies to choose their own monitor, subject to the DOJ's final approval, appears to have become the unofficial practice for appointing compliance monitors.

McNulty Memorandum Update

McNulty Memorandum Update

On July 9, 2008, in testimony before the Senate Judiciary Committee, Attorney General Michael B. Mukasey announced that the DOJ will revise its policy regarding the prosecution of business organizations. That same day, in a letter to Senate Judiciary Committee Chair Patrick Leahy and Ranking Member Arlen Specter, Deputy Attorney General Mark Filip provided certain details regarding the intended revisions (the “Filip” letter).

The current Principles of Federal Prosecution of Business Organizations (the “Principles”), outlined in the “McNulty Memo,” have been strongly criticized since the McNulty Memo was released on December 12, 2006. Criticism has centered on the DOJ’s perceived abuse of its ability to leverage waivers of the attorney-client privilege and work product doctrine and to deny cooperation credit to corporations that maintain the privilege or take other action (such as advancing attorneys’ fees to employees) the DOJ views unfavorably.

On June 26, 2008, Senator Specter re-introduced the Attorney-Client Privilege Protection Act of 2008, which has already passed the House. The Act would largely prohibit prosecutors and enforcement agencies (including the DOJ, IRS and SEC) from requesting privilege waivers and would not allow prosecutors to consider privilege waivers, joint defense agreements, advanced attorney’s fees or other similar conduct in determining whether an organization has cooperated with the government.

The July 9, 2008 Filip letter outlines the revisions the DOJ intends to make to the Principles “in the next few weeks,” including: (i) cooperation will be measured by the extent to which a corporation discloses relevant facts and evidence, not its waiver of privilege; (ii) federal prosecutors will not demand disclosure of “Category II” information (non-factual attorney work product and core attorney-client privileged communications) as a condition for cooperation credit; and (iii) federal prosecutors will not consider whether the corporation has advanced attorneys’ fees to its employees, entered into a joint defense agreement or retained or sanctioned employees in evaluating cooperation. The letter requests that the Judiciary Committee “give us an opportunity to implement these changes and then review their operation after a reasonable amount of time before pursuing the legislation in this area.”

Senator Specter’s response, released the next day in a July 10, 2008 letter, expressed concern at perceived delays by the DOJ in responding to Senate criticisms and stated that it was “too much to ask for the legislative process to await a written revision of McNulty and then await a review of the implementation of a new memorandum for a ‘reasonable amount of time’ which could be very long.” The letter further criticized the proposed revisions outlined in the Filip letter as “unsatisfactorily vague,” noting in particular that it will be difficult to distinguish from non-factual attorney work product (which the Filip letter indicates would be exempted from disclosure) and factual work product, the disclosure of which apparently the DOJ would still take into account in assessing cooperation.

Senator Spector requested a “more explicit statement on a ‘Filip Memorandum’” recommending that the Judiciary Committee otherwise move forward with the legislative process.

World Bank-Related Developments

World Bank Group Guidance on Doing Business in Nigeria

On May 20, 2008, the World Bank and the International Finance Corporation (collectively, the “World Bank Group”) issued a report entitled “Doing Business in Nigeria 2008.”³⁴ The “Doing Business” series of reports are an effort by the World Bank Group to provide “objective measures of business regulations and their enforcement” across 178 countries as well as at the city and regional level. Generally speaking, the “Doing Business” reports measure how government regulations enhance or restrain business activity. The report compares nations and sub-national regions against each other on various business regulatory measures in the hopes that such comparisons will prompt reform and generate best practices among various nations and regions.

“Doing Business in Nigeria 2008” is the first sub-national report on Sub-Saharan Africa, which reflects Nigeria’s importance as an investment target. It also notes the country’s continued struggle to battle corruption and economic inefficiencies. The report examines 10 Nigerian states³⁵ and Abuja Federal Capital Territory, and compares them with each other as well as with 178 worldwide economies. The study focuses on four factors: (i) starting a business; (ii) dealing with licenses; (iii) registering property; and (iv) enforcing contracts. In addition to its analyses, the report provides helpful lists of procedures that companies can use as guidelines when starting a business, dealing with licenses or registering property in the country.

The report found that, as a whole, Nigeria ranks 108 out of 178 economies for ease of doing business. By comparison, the United States ranked third. Although improved business registration and building permit processes made it easier to do business in Nigeria since the World Bank Group issued its last report, more vigorous improvements by other developing nations have hindered Nigeria’s overall ranking. Among the ten Nigerian states and Abuja, it was deemed easiest to do business in Kaduna and most difficult to do business in Ogun (by comparison, Abuja ranks second and Lagos ranks eighth). The most difficult business process throughout Nigeria involves the registration of property, where Nigeria as a whole ranks 173rd.

In the context of addressing these discrete aspects of the Nigerian business environment, the report notes that difficult business environments can push legitimate entrepreneurs into the underground economy, a consequence it describes as “a serious problem in Nigeria.” One overarching theme of the report is that inefficient or inconsistent business practices allow for

34 The report notes that while the report is a product of the World Bank Group staff, it does not necessarily reflect the views of the Executive Directors of the World Bank or the governments they represent. Moreover, the World Bank Group does not guarantee the accuracy of the information contained in the report.

35 The ten Nigerian states analyzed were Abia, Anambra, Bauchi, Cross River, Enugu, Kaduna, Kano, Lagos, Ogun and Sokoto.

corruption to flourish. By highlighting these inefficiencies and inconsistencies, the World Bank Group hopes to prompt reform and illuminate best practices, thus raising the Nigerian business environment as a whole. Until such reforms are made, however, Nigeria will likely face continued pervasive corruption, particularly in light of the potential for outsized investment returns this emerging economy has to offer through natural resource development.

World Bank Department of Institutional Integrity

In April 2008, the World Bank Group's Department of Institutional Integrity ("INT") for the first time publicly released a redacted report detailing the results of its investigation into allegations of fraud and corruption in connection with a World Bank-funded project, specifically, contracts issued under an Emergency Demobilization and Reintegration Project (the "EDRP") in the Democratic Republic of Congo ("DRC"). The purpose of the EDRP is to finance the demobilization, reinsertion and reintegration of ex-military combatants into civilian life. Several DRC government agencies were created to implement the project, including one known as CONADER that was responsible for procurement.

The investigation was launched after the World Bank learned of corruption allegations from several persons directly or indirectly involved in the implementation of the EDRP. On the basis of several witness interviews and the review of a "large amount of project documentation, including contracts and payment data," the World Bank identified, among other potential improprieties, three instances of corruption in connection with EDRP contracts. In the first, the World Bank found that two companies were involved in the bribing of a CONADER official to receive a computer equipment and servicing contract valued at over \$900,000. The first company (referred to as "Company B") submitted the bid for the contract, which was between \$300,000 and \$450,000 higher than those of the competing bidders and just below the CONADER project official's internal cost estimate for the project. CONADER awarded the contract to Company B and, before receiving a no-objection letter as required by World Bank regulations, Company B immediately began to perform its contractual duties.

Company B also approached a second company (referred to as "Company A") as a potential partner in the project. Company A demanded a meeting with CONADER officials to confirm that the contract had actually been awarded. In the subsequent meeting with the CONADER official, the official demanded the payment of a bribe, and Company B acknowledged that it had promised a portion of the profits from the contract to CONADER. Company A officials, with the knowledge of Company B officials, then wired \$20,000 to the bank account of a friend of the CONADER official. The World Bank subsequently cancelled the contract.

In another instance, the INT concluded that CONADER issued numerous small contracts for security services to a single company, rather than awarding a single large contract valued at over \$1.1 million, in order to avoid World Bank procurement thresholds requiring competitive tender and World Bank approval. Similarly, the INT determined that CONADER had split contracts with another company relating to air transportation services into four separate agreements so as to fall below the World Bank threshold despite there being no legitimate

economic rationale for so dividing the contracts and despite the fact that, under an agreement between the World Food Program (“WFP”) and CONADER, WFP had responsibility for entering into transportation-related agreements. The report does not indicate what sanction, if any, was imposed as a result of these practices.

The INT traces its origins to 1996, when the World Bank Group’s then-President James Wolfensohn announced the beginning of a fight against the “cancer of corruption” in his annual report address. In 1997, the World Bank’s Board of Executive Directors adopted an anti-corruption strategy based on four pillars: (i) to prevent fraud and corruption in Bank-financed projects; (ii) to assist countries that ask for help in fighting corruption; (iii) to “mainstream” the Bank’s corruption concerns directly into country analysis and lending decisions; and (iv) to join the broader international effort against corruption. In 1999, the World Bank formed the Anti-Corruption and Fraud Investigations Unit, which later merged with its Business Ethics Office to become the INT. The INT is responsible for investigating “allegations of fraud, corruption, coercion, collusion, and obstructive practices related to World Bank Group-financed projects.”

The INT is responsible for investigating both allegations of fraud by third parties (“external”) and World Bank employees (“internal”). Sanctionable offenses for external parties include kickbacks, bribes, accounting fraud and overcharging, misuse of project assets and misrepresentation of qualifications during the bidding process. Sanctionable offenses for internal parties also include corruption-related offenses, but extend to allegations of workplace misconduct, such as sexual harassment, abuse of authority and retaliation. The World Bank further sanctions “obstructive” practices, such as destruction of documents or intimidation of witnesses in connection with an investigation.

The INT relies on three primary methods for detecting and investigating corruption allegations. First, the World Bank has established a Fraud and Corruption Hotline whereby individuals can submit complaints related to corruption, fraud or misconduct. According to the World Bank, these complaints are typically resolved within five months of being received.

Second, the INT has instituted a Voluntary Disclosure Program (“VDP”) to “encourage[] firms who have engaged in fraudulent or corrupt practices in relation to Bank-financed projects to cease misconduct for good, and to fully disclose the details of those practices.” Under the VDP’s Terms and Conditions, participating firms are required to, among other things, conduct a thorough internal review to ensure that they are reporting all potentially relevant instances of misconduct, make changes to their existing compliance programs as requested by the World Bank, and hire an independent compliance monitor to conduct three annual comprehensive reviews into the entity’s adherence to the VDP Terms and Conditions. In exchange for their voluntary disclosure (and adherence to the Terms and Conditions), the World Bank will agree not to debar the entity from future participation in World Bank projects, and will make an effort to keep their identity confidential.

Third, the INT has implemented a Detailed Implementation Review (“DIR”) program that is “a proactive diagnostic tool for assessing the risk of fraud, corruption, and mismanagement in World Bank-financed projects.” The INT apparently uses data mining,

reviews project documentation, and uses other forensic techniques to determine if indicia of fraud exist in connection with World Bank projects. The DIRs are specifically intended to detect (and prompt investigation into) instances of potential fraud in the absence of any prior allegations or evidence of wrongful activity.

After the INT conducts an investigation into potential wrongdoing, it recommends sanctions based on whether the alleged misconduct is internal or external. If the allegations concern an external party, the sanctions process involves two steps. First, the INT sends its findings to the Evaluation and Suspension Officer, who determines whether the INT has sufficient evidence to support a finding that the party more likely than not engaged in a sanctionable practice. If the evidence is deemed sufficient, the Evaluation and Suspension Officer informs the subject party, which is permitted to appeal to the World Bank's Sanctions Board. Sanctions for external misconduct include letters of reprimand, restitution and temporary or permanent disbarment. The World Bank publishes on its website a list of debarred firms and individuals, which as of July 2008, contained approximately 120 names. If the conduct involves a World Bank employee, the INT submits its findings to the World Bank's Vice President of Human Resources to determine what, if any, sanction is appropriate, including up to termination and a permanent bar from re-hire at the World Bank.

A September 2007 Independent Panel Review of the INT led by former Federal Reserve Chairman Paul Volcker made a critical assessment of the INT, noting that despite some successes and a dedicated staff, the INT faced "serious operational issues and severe strains in relations with some [World Bank] Operations units," which has contributed to some "counterproductive relations between the Bank and borrowers and funding partners." The Independent Panel Review issued numerous recommendations aimed at strengthening the INT's anti-corruption efforts. Among other things, the Review recommended certain organizational changes within the INT, such as a direct reporting line from the head of the INT to the World Bank President and the formation of an internal consulting unit to work with the Bank's operational units to develop protections against corruption and assist with education and training. The Independent Panel Review also recommended that the INT act with greater transparency, both within the World Bank organization and with respect to its investigatory findings generally.

By publicly releasing the results of its investigation into the EDRP project in Congo, INT appears to be attempting to implement, at least in part, the transparency recommendations of the Independent Panel Review and may be signaling that it will adopt a more robust, results-oriented approach to investigating allegations of corruption and fraud going forward.

In addition, the World Bank Group has taken several recent steps to improve its corruption related investigatory protocol. For example, on February 18, 2006, leaders of the World Bank Group, the International Monetary Fund ("IMF") and several regional development organizations agreed to establish a "Joint International Financial Institution Anti-Corruption Task Force to work towards a consistent and harmonized approach to combat corruption in the activities and operations of the member institutions." The purpose of the Task Force was to more effectively combat corruption in connection with projects undertaken or financed by the various organizations.

Company Disclosures

Scores of companies have made FCPA-related disclosures in their 2007 and 2008 public filings. Many of those disclosures relate to ongoing internal or government investigations, while others report the results of previously conducted investigations. The following discusses certain illustrative or important disclosures so far from 2007 and 2008.

Siemens AG

Over the last several years, Siemens has been the subject of a series of multi-national corruption investigations, in connection with which the company has reportedly spent several tens of millions of dollars. Siemens' May 4, 2007 Form 6-K provides an update to the previously reported investigation by Munich prosecutors into certain current and former employees of the company's Communications or "Com" unit on suspicion of embezzlement, bribery, and tax evasion. Previously, the Com unit's CEO and Siemens' CFO had been questioned in connection with the investigation (with the Com unit's CEO actually being arrested and released). Siemens reported that on March 26, 2007, the Munich prosecutors conducted further searches of the company's premises and of private residences, and issued additional arrest warrants for a current and former Com employee. According to Siemens, the employee has since been suspended.

Siemens' November 28, 2007 Form 20-F and May 5, 2008 Form 6-K gave further explanation of the scope of the investigation. The investigation of the Munich public prosecutor now extends beyond the former Communications group. The Munich public prosecutor has announced that groups under investigation include Siemens' Power Transmission and Distribution group, in which a former member of the Managing Board is a suspect, the Power Generation group, the Medical Solutions group, the Transportation Systems group and Siemens' IT Solutions and Services group.

In addition to the Munich investigation, the DOJ is investigating possible criminal violations of U.S. law and the SEC informed Siemens in the second quarter of 2007 that its inquiry had been converted from an informal to a formal one. Siemens faces related investigations in Austria, China, Germany, Greece, Hungary, Indonesia, Israel, Italy, Liechtenstein, Malaysia, Nigeria, Norway, Russia, and Switzerland as well.

In both Hungary and Norway, the investigations relate to contracts with the military. In December 2007, the Norwegian public prosecutor's office conducted a search of Siemens AS Norway's offices and several private homes. The searches related to payments made by Siemens for golf trips attended by members of the Norwegian Department of Defense in 2003 and 2004. The Department of Defense also announced that it would not conduct further business with Siemens. Meanwhile Siemens Zrt. Hungary is being investigated for suspicious payments in connection with consulting agreements made with shell corporations relating to contracts for military communications equipment.

Russian authorities are investigating the alleged embezzlement of public funds when awarding contracts to Siemens in 2003 and 2005. The contracts relate to the delivery of medical equipment to public authorities in Ekaterinburg. An employee of Siemens Russia was previously arrested in connection with this investigation. Certain of the Chinese and Indonesian investigations also appear related to medical equipment contracts.

Siemens further reports it was contacted by representatives of regional development banks, including the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development and the European Investment Bank, regarding anti-corruption inquiries and other matters of relevance to them.

On January 24, 2008, the Company announced at its annual shareholders meeting that the SEC and DOJ had agreed to begin discussions regarding a possible settlement of their investigations.

Bausch & Lomb

Bausch & Lomb's April 1, 2007 Form 10-Q revealed that a previously reported internal investigation by the company's Audit Committee is now complete. The investigation began after reports surfaced of potentially improper sales practices by a former employee and focused on the FCPA implications of Bausch & Lomb's Spanish subsidiary providing free medical products to doctors performing surgical procedures in public facilities in Spain. In some instances, the provision of free product appears to have been inappropriately documented or inaccurately recorded in the subsidiary's books and records.

Bausch & Lomb voluntarily reported the matter to the SEC and indicated that the investigation had revealed no evidence that the company's senior management in Rochester or regional management in London "authorized, directed, controlled or knowingly acquiesced in the subject sales practices...."

Private Equity firm Warburg Pincus purchased Bausch & Lomb in October 2007, suspending Bausch & Lomb's reporting duties.

AON Corporation

In its November 8, 2007 Form 10-Q, Aon Corporation ("AON"), the world's largest insurance broker, disclosed that it had undertaken an internal investigation of potential improper payments that could implicate the FCPA and foreign anti-bribery laws. Although AON offered no details of the payments, AON disclosed that it self-reported the investigation to the SEC and DOJ and several non-U.S. regulators. AON further indicated that it has entered into an agreement with the DOJ tolling the applicable statute of limitations. Although such agreements are common in connection with deferred prosecution agreements, it is unusual for a company to enter into a tolling agreement in relation to its own internal investigation. The DOJ may have been motivated to ask for the agreement to avoid the statute of limitations issues it has encountered in connection with the Kozeny prosecution described above.

INNOSPEC Inc.

According to INNOSPEC Inc.'s March 31, 2007 Form 10-Q, the SEC notified INNOSPEC in February 2006 that as part of the ongoing Oil for Food investigation, it was investigating whether INNOSPEC's wholly owned indirect subsidiary, Alcor Chemie Vertriebs GmbH ("Alcor"), had breached the FCPA in connection with transactions executed under any of Alcor's five contracts with the Iraqi Ministry of Oil. The SEC subpoenaed documents relating to these transactions and INNOSPEC indicated that it believes all relevant documents have been produced. INNOSPEC further states that it "has maintained and continues to maintain that it and its subsidiaries complied with relevant laws, including the FCPA."

According to the company's March 31, 2008 Form 10-Q, the DOJ has since contacted INNOSPEC and in March 2008 requested documents from the company. INNOSPEC is cooperating in both investigations. In addition, on May 21, 2008, the United Kingdom's Serious Fraud Office notified INNOSPEC that it was conducting a similar inquiry.

ITT Corp.

In its October 26, 2007 Form 10-Q, ITT Corp., a diversified manufacturing and engineering company, disclosed that it had received an anonymous complaint regarding the possible payment of commissions to foreign government officials by employees of its Nanjing Goulds Pumps company, in Nanjing, China. ITT is conducting an investigation and voluntarily disclosed the preliminary results of the investigation to the DOJ and SEC.

eLandia International, Inc.

In its September 14, 2007 Form 8-K/A, eLandia International, Inc. ("eLandia"), a global provider of information technology communications and other services, disclosed that, as a part of its acquisition of Latin Node Inc., eLandia identified certain past payments to consultants in Central America that were made in the absence of adequate records and controls for a U.S. public company. eLandia initiated an investigation led by a Special Committee of the Board of Directors. eLandia determined that the agreements, records and controls supporting Latin Node's payments to consultants were inadequate and began establishing a new system of internal legal and accounting controls.

In its May 20, 2008 Form 10-Q, eLandia disclosed that the internal investigation has preliminarily revealed certain pre-acquisition payments by Latin Node made in violation of the FCPA. eLandia reported these potential violations to the SEC, the DOJ, and the FBI. On April 3, 2008, the DOJ issued a subpoena requesting certain information in connection with the investigation.

eLandia also disclosed a further development. eLandia's subsidiary AST Telecom, LLC ("AST") is obligated under a Loan Agreement with ANZ Finance American Samoa, Inc. and ANZ America Samoa Bank (jointly, "ANZ") for \$5,800,000. Of this amount, \$800,000 is in the form of a term loan due on October 30, 2015. AST had pledged all of its assets to secure the obligation, but now believes that the aforementioned FCPA investigation may have resulted in a

breach of its covenants with ANZ, thereby making the loan callable. eLandia thus listed the amounts due to ANZ as liabilities of discontinued operations and classified them as current liabilities on the accompanying consolidated balance sheets.

ABB

On July 26, 2007, Swiss-based ABB disclosed that it was investigating “suspect payments” that may have violated the FCPA. The payments were apparently made by employees of ABB subsidiaries in Asia, South America and Europe, particularly Italy. ABB discovered the payments as part of its internal audit and compliance program and disclosed the payments to both the DOJ and SEC on July 13, 2007.

According to its March 19, 2008 Form 20-F, in August 2007, ABB made a voluntary disclosure to the SEC and the DOJ relating to payments made by employees of ABB’s recently-divested Lummus Global business. These suspect payments were discovered as a result of ABB’s internal audit and compliance program. In connection with ABB’s sale of the Lummus Global business, ABB retained certain liabilities, including for potential fines and penalties relating to these suspect payments. It is unclear if the July 2007 disclosure to the government regarding “suspect payments” in Asia, South America and Europe and the August 2007 disclosure relating to Lummus Global relate to the same conduct.

In 2004, two ABB subsidiaries pleaded guilty to violating the FCPA and agreed to pay a \$10.5 million fine in connection with improper payments to NAPIMS to secure oil and gas projects in Nigeria. The parent company ABB also agreed, without admitting or denying the allegations in the complaint, to pay \$5.9 million in disgorgement and prejudgment interest and to retain an FCPA compliance consultant in connection with an enforcement action by the SEC based on the same conduct.

NATCO Group, Inc.

According to its Form 10-Q for the Quarter ended March 31, 2008, on February 28, 2008, with the assistance of counsel, the Audit Committee of the Board of Directors of the NATCO Group, Inc. (“NATCO”), a Texas-based company that provides oil, gas and water services, initiated a review of payments made abroad which may implicate the FCPA. Based on the results of that internal review, NATCO determined that “the payments were made to one or more person(s) who identified themselves as government employees, in order to obtain certain work permits and licenses, and to satisfy certain ‘penalties’ assessed by the authorities.” The review indicated the total of the payments at issue was approximately \$161,000 and that the payments were made in 2006 and 2007. NATCO disclosed its findings to the DOJ and SEC, and, on March 11, 2008, the SEC informed NATCO that it had opened a preliminary inquiry into the matter.

Customs Investigations

On July 20, 2007, fifteen oil and gas services companies met with the DOJ as part of an ongoing criminal investigation of activities of Panalpina (which, according to reports, is the

freight forwarding company involved in the Vetco matter discussed above) and potentially improper payments to customs officials in Nigeria and elsewhere. On July 24, 2007, Panalpina announced its own internal investigation and that its U.S. subsidiary had been asked by the DOJ to provide documents relating to activities in Nigeria, Kazakhstan, and Saudi Arabia. According to press reports, the SEC has also instituted a civil investigation into the matter. On September 20, 2007, Panalpina announced that it has suspended offering its services in Nigeria.

Global Industries, GlobalSantaFe Corporation (now part of Transocean), Nabors Industries, Inc., Noble Corporation, Tidewater, Inc., Parker Drilling Company, Royal Dutch Shell, Schlumberger and Transocean each recently disclosed in their public filings internal investigations into the legality of activities undertaken by local agents and affiliates in dealing with the customs authorities. All but Nabors (which was not specific) indicated that the inquiries relate at least in part to Nigeria and/or Panalpina. On August 14, 2007, Transocean announced it had widened its internal inquiry beyond Panalpina to include the FCPA compliance of one of Transocean's customs agents in Nigeria. On October 4, 2007, Tidewater announced that it had determined that other aspects of its international operations outside of Nigeria merited FCPA review.

At least four of these companies, Global, GlobalSantaFe, Noble, and Tidewater, attended the July 20, 2007 meeting with the DOJ. The eleven other participants have not been disclosed.

Tidewater announced in its May 30, 2008 Form 10-K that special counsel had substantially completed its review. Tidewater also announced that it had entered into an agreement with the DOJ tolling certain statutes of limitations for a nine-month period to end October 10, 2008.

Medical Device Investigations

In recent years, there have been several noteworthy enforcement actions against medical industry companies, as well as disclosures in companies' periodic filings that suggest possible future enforcement activity. As noted above, on June 3, 2008, privately-held medical device manufacturer AGA entered into a three-year deferred prosecution agreement with the DOJ relating to improper payments made to doctors employed by state-owned hospitals and other officials in China. The following is a brief summary of select company disclosures that have not yet led to settled enforcement actions.

- *Biomet Inc., Stryker Corp., Zimmer Holdings Inc., Smith & Nephew plc and Medtronic Inc*

The SEC is investigating possible violations of the FCPA by Biomet Inc., Stryker Corp., Zimmer Holdings Inc., Smith & Nephew plc and Medtronic Inc. In September and October 2007, the companies made announcements about the SEC's action and denied any violations. The companies make replacement implants for knees, hips and the spine and control most of the U.S. market. Zimmer, Stryker, Medtronic and Smith & Nephew are public companies, while Biomet is owned by Blackstone Group, Goldman Sachs Capital Partners, KKR and TPG Capital.

In 2007, all but Medtronic entered into deferred prosecution agreements with the DOJ relating to the alleged payment of kickbacks to induce U.S. (but not foreign) doctors to buy their products. Depuy Orthopedics (part of Johnson & Johnson) also joined the settlement. Biomet, Zimmer, Smith & Nephew and Depuy paid penalties of \$310 million in aggregate. Stryker paid no fine. (The monitor controversy described above relates to these agreements).

- *Covidien Limited*

Covidien Limited (“Covidien”) is an entity that separated from Tyco International Limited (“Tyco”) in June 2007, and owns the former healthcare businesses of Tyco. According to its February 11, 2008 Form 10-Q, Tyco received and responded to various allegations that Tyco subsidiaries (some of which are now part of Covidien) made improper payments. During 2005, Tyco reported to the DOJ and the SEC the investigative steps and remedial measures that it had taken in response to the allegations. According to the 10-Q, the internal review revealed that some business practices may not comply with FCPA requirements.

- *Bristol Myers Squibb*

According to Bristol Myers’s February 22, 2008 Form 10-K, in October 2004, the SEC notified the Bristol Myers that it was conducting an informal inquiry into the activities of certain of Bristol Myers’ German pharmaceutical subsidiaries. That inquiry became formal in October 2006. The SEC’s inquiry encompasses matters currently under investigation by the German prosecutor in Munich, Germany.

- *Johnson & Johnson*

According to Johnson & Johnson’s May 7, 2008 Form 10-Q, in February 2007, Johnson & Johnson voluntarily disclosed to the DOJ and the SEC that foreign subsidiaries are believed to have made improper payments in connection with the sale of medical devices in two “small-market” countries. The 10-Q further indicates that, in the course of the disclosure process, other potential FCPA violations in other markets have been disclosed to the agencies.

- *Wright Medical Group*

According to its June 10, 2008 Form 8-K, Wright Medical Group, Inc. (“Wright Medical”) became the latest medical device company to disclose that its “principal operating subsidiary, Wright Medical Technology, Inc., had received a letter from the SEC informing us that it is conducting an informal investigation regarding potential violations of the FCPA in the sale of medical devices in a number of foreign countries by companies in the medical device industry.” According to Wright Medical’s filing, it “understand[s] that several other medical device companies have received similar letters...[and] intend[s] to fully cooperate with this informal investigation.”

- *Sincere Pharmaceutical Group and Mindray Medical International Limited*

Sincere Pharmaceutical Group (“Sincere”) and Mindray Medical International Limited, both based in the Cayman Islands included statements in their June 24, 2008 and June 30, 2008 Form 20-F Annual Reports that they had “limited ability to manage the activities of” their distributors and/or third-party marketing firms related to the sale and promotion of their medical products in China, particularly the procurement decisions of hospitals. Sincere’s disclosure additionally noted that Chinese laws “regarding what types of payments to promote or sell our products are impermissible are not always clear.”

Summary and Analysis

The settled actions, ongoing criminal matters and other related developments, and company disclosures to date in 2007 and 2008 underscore a number of important lessons and themes of which companies should be aware in conducting their operations, designing and implementing their compliance programs, considering whether to enter into potential transactions or to affiliate with an international agent, intermediary or joint venture partner, and dealing with government agencies.

- *Increasing Pace of Enforcement:* The United States government continues to emphasize FCPA enforcement to a greater extent than ever before. On several occasions recently, U.S. officials have publicly stressed that FCPA enforcement is a “high priority,” and have backed those words with actions. The first half of 2008 alone saw more enforcement actions than any previous full year other than 2007. In June 2008, SEC Director of Enforcement Linda Thompson noted that “[t]he Commission has filed more FCPA cases in the last two years than in all of the preceding years combined.” Ever greater numbers of companies are disclosing that they are conducting internal FCPA investigations or are subject to government investigations. These developments have prompted several commentators to observe that FCPA violations pose one of the most, if not the most, significant corporate risk to companies operating internationally.
- *Larger Penalties:* The civil and criminal fines resulting from FCPA prosecutions and settlements continued to rise in 2007 and 2008. Settlements totaling more than \$5 million have become increasingly frequent, including, Ingersoll-Rand (\$6.7 million), Flowserve (\$10.5 million), AB Volvo (\$19.6 million), York (\$22 million), Vetco (\$26 million), Chevron (\$30 million), Willbros Group (\$32.3 million) and Baker Hughes (\$44 million). In addition, as noted above, a government official has publicly speculated that the day when a \$100 million FCPA settlement occurs may not be far off.
- *Prosecutions and Investigations Span the World and a Wide Range of Industries:* The 2007 and 2008 settlements and related activities illustrate the breadth of potential FCPA exposure, covering Africa, the Middle East, South and Central America, the Caribbean, East, Central and South Asia, and Europe. As illustrated by the Smith prosecution and Self plea agreement for bribing a United Kingdom Defence official, contrary to the popular misconception, the FCPA remains a concern for companies doing business even in developed countries, not simply in the developing world. The settlements range across numerous industries as well, including the oil and oil field services, defense, construction and engineering, agricultural and agro-chemical, pharmaceutical, medical, steel, industrial manufacturing, and telecommunications industries. The indictments of Gerald and Patricia Green indicate that even Hollywood is not immune from FCPA concerns.
- *Need for Appropriate Due Diligence:* The watershed 2007 Baker Hughes settlement made clearer than ever the compelling need for appropriate due diligence on agents and

intermediaries. The failure to conduct due diligence leaves a company in a position where it cannot rationally form a basis to conclude that no illegal payment was made and therefore can subject the company to liability under at least the relevant recordkeeping and internal control requirements. The AB Volvo and Textron settlements, both based in part on the failure to conduct adequate due diligence and containing broad language regarding the “endemic corruption problems” in the Middle East and the resulting need for enhanced compliance measures, reinforce these lessons. The critical need for adequate due diligence is strongly reinforced by DOJ Opinion Procedure Releases 08-01 and 08-02, which both address the issue in the acquisition context. Release 08-02 indicates that due diligence in such context must at least include (i) carefully calibrating risks (including the need for thorough examination of third party and governmental relationships); (ii) an exacting review of broad categories of documents (including e-mail and financial records); (iii) witness interviews not only of target personnel but others; and (iv) the retention of outside counsel and other professionals working with internal resources as appropriate. Release 08-01 further suggests that such due diligence should also take into account relevant local legal issues. (*See, e.g., DOJ Opinion Procedure Release 08-02, DOJ Opinion Procedure Release 08-01, AB Volvo, Ingersoll-Rand, Paradigm, Textron, Delta & Pine, Baker Hughes*).

- *Need to Examine Carefully the Qualifications of Agents and Third Parties:* Emphasis is placed on the need to understand the background, competence and track record of the agent or intermediary, a message reiterated in the Woolf Committee’s report on BAE. Companies that are insufficiently qualified or with little or no assets (*i.e.*, a “brass plate” company) should be avoided. (*See, e.g., AB Volvo, Chevron, Paradigm, Baker Hughes, Ott and Young, BAE Woolf Report*).
- *Careful Examination of Tasks to Be Performed by Agent and Their Relative Value:* Companies must examine the competence of the agent to provide the particular tasks for which it is being engaged together with the relative value of those tasks. “Paper tasks” will not suffice. Companies must also validate the tasks allegedly being provided by the agent to ensure they are undertaken. In addition, unusually high commissions, fees or expenses should be carefully reviewed to determine if such payments are justified on commercial grounds. (*See, e.g., Faro, Willbros Group, ITXC, AB Volvo, Flowserve, Westinghouse, Akzo Nobel, York, Paradigm, Baker Hughes, Ott and Young*).
- *Source of Agent:* Companies are reminded to be especially suspicious of agents suggested to them by government officials with whom such companies are bidding or negotiating. (*See, e.g., Paradigm, Baker Hughes*).
- *Need to Conduct Appropriate Employee and Third Party Training:* Companies that fail to conduct appropriate employee or third party training may face liability if the conduct of those parties ends up violating the FCPA. (*See, e.g., Faro, Philip, Lucent, Fu*).
- *Need to Closely Review Changes in Agreements with an Agent or Third Party:* A significant change in the payment or other material terms of an agreement with an

international agent or third party can be a potential red flag to which management should pay close attention. Several of the Oil-for-Food settlements, including those with Chevron, Flowserve and Akzo Nobel, involved scenarios whereby the arrangements entered into with a third party were altered to facilitate or mask improper payments. Thus, changes in the nature or terms of arrangements with third parties should be closely examined to ensure that they have a legitimate basis. (See, e.g., *Flowserve, Akzo Nobel, Chevron*).

- *Increase in FCPA-Related Civil Suits*: As described above, there has been a noticeable increase in recent years of FCPA-related civil actions. These suits have taken several forms, including suits by foreign governments, public company shareholders and business partners. (See, e.g., *Iraqi Oil-for-Food Suit, Faro, Argo-Tech v. Yamada*).
- *Clarification on Successor Liability*: DOJ Opinion Release 08-02 provides clarity on the issue of inherited liability in the context of acquisitions and joint venture partnerships. A critical question is under what circumstances, if any, can a company be held liable for acts deemed “in furtherance” of the acquired company’s or joint venture partner’s improper payments. In Release 08-02, the DOJ reasoned that the Requestor, Halliburton, would not violate the FCPA by acquiring the target, Expro, which may or may not have violated the FCPA prior to the acquisition because the money to be paid to acquire the company would go to Expro’s shareholders, not Expro itself. Moreover, the stock ownership in Expro was widely disbursed. Thus, it was unlikely that any of the shareholders were corruptly given their shares such that they would be improperly enriched by the acquisition. Implicitly, the Release can be read to endorse the view that payments to shareholders or joint venture partners who have received their shares corruptly would violate the FCPA. (See, e.g., *DOJ Opinion Procedure Release 08-02, Kay*).
- *Direct Parent Company Involvement Not Required*: The government will prosecute based on the conduct of even far-removed foreign subsidiaries and even in the absence of alleged knowledge or direct participation of the parent company in the improper conduct. As a result, as the Willbros Group and several Oil-for-Food settlements make clear, companies must ensure that their FCPA compliance policies and procedures are implemented throughout the corporate structure and are extended quickly to newly acquired subsidiaries. (See, e.g., *Faro, Willbros Group, AB Volvo, Flowserve, Westinghouse, Akzo Nobel, Ingersoll-Rand, York, Bristow, Paradigm, Textron, Delta & Pine, Dow*).
- *Foreign Subsidiaries Treated as Agents of the Parent*: The criminal information underlying the DOJ’s action against Schnitzer Steel’s Korean subsidiary describes the subsidiary as Schnitzer Steel’s “agent.” The government has asserted that a foreign subsidiary acted as the agent of its United States parent corporation on at least one other occasion (in the 2005 enforcement proceedings against Diagnostic Products Corporation and its Chinese subsidiary). The FCPA’s legislative history and jurisdictional language suggest that a parent company cannot be held liable for an anti-bribery violation by its

foreign subsidiary of which it was not aware and in which it did not participate. (When the subsidiary's financials are consolidated into its own, the parent has no such defense under the FCPA books and records and internal controls provisions). The agency theory reflected in Schnitzer and Diagnostic Products could potentially be used (at least as an initial enforcement posture) to hold parent companies liable for acts of bribery by a foreign subsidiary, despite the parent's lack of knowledge or participation. (*See, e.g., Philip (Schnitzer)*).

- *Paper Procedures Not Enough*: Company procedures that require due diligence, FCPA covenants, or other contractual provisions and certifications, or appropriate accounting practices provide no protection (and may prove harmful) when they are not followed. (*See, e.g., Lucent, Chevron, Ingersoll-Rand, Fu, Textron, Baker Hughes, El Paso*).
- *Hiring An Outside Law Firm Not Sufficient*: The mere use of outside counsel without due diligence being undertaken in an appropriate and careful fashion will not insulate a company from FCPA liability. (*See, e.g., Ingersoll-Rand, Baker Hughes*).
- *Improper Payments to Foreign Ministries or Foreign Private Parties May Run Afoul the FCPA*: In the Schnitzer Steel and related settlements, the government asserted violations of the FCPA based on payments not only to government officials in China, but also to employees of private steel mills in China and South Korea, explaining “[t]hese mills were privately owned and the managers were not foreign officials. However, Schnitzer violated the FCPA by failing to properly account for and disclose the bribes in its internal records and filings.” Similarly, without addressing the issue directly, the Oil for Food prosecutions are premised on improper payments made to government accounts rather than to foreign officials, with the York proceeding also including allegations of numerous payments to commercial, non-governmental parties outside the OFFP. The related proceedings against Monty Fu and Syncor similarly involved payments to doctors employed by both public and private hospitals in Taiwan. (*See, e.g., AB Volvo, Flowserve, Akzo Nobel, Philip, Chevron, Ingersoll-Rand, York, Fu, Textron, Wooh, El Paso*).
- *Broad Reading of Obtain or Retain Business Element*: The SEC and DOJ continue to read the “obtain or retain business” element of the FCPA broadly to capture a very wide range of conduct beyond the prototypical payment to win a contract award, including payments to expedite and approve patent applications, to obtain favorable treatment in pending court cases, to schedule inspections, to obtain product delivery certificates, to alter engineering design specifications in favor of a particular bidder, to obtain preferential customs treatment, to avoid or expedite necessary inspections, to alter the language in an administrative decree, to obtain governmental reports and certifications necessary to market a product, and to reduce taxes. (*See, e.g., AGA Medical Corporation, Willbros Group, Bristow, Delta & Pine, Martin, Dow, Vetco, Kay*).
- *Broad Reading of Foreign Official*: Similarly, federal prosecutors continue to construe the term “foreign official” to include even relatively low level employees of state

agencies and state-owned institutions, such as workers in hospitals, telecommunications companies, ship-yards, and steel mills and members of an executive committee overseeing the construction of a government-owned hotel. It appears that journalists working for state-owned media concerns and an unpaid manager of a government majority-owned entity also fall within the government's broad interpretation of "foreign official." (See, e.g., *DOJ Opinion Procedure Release 08-03*, *DOJ Opinion Release 08-01*, *Lucent*, *York*, *Fu*, *Delta & Pine*, *Wooh*, *Dow*, *Vetco*).

- *Anything of Value*: The FCPA prohibits far more than mere cash payments and can be violated by the provision of such diverse benefits as travel, entertainment, scholarships, vehicles, property, watches, electronics, office furniture, stock and share of profits. (See, e.g., *PCI*, *AB Volvo*, *Lucent*, *Philip*, *Ingersoll-Rand*, *York*, *Delta & Pine*, *Dow*, *Kozeny*, *Jefferson*).
- *The FCPA Covers "Promises" to Make Payments and Payments that Do Not Accomplish Their Purpose*: An executed payment that results in the company obtaining or retaining business is not necessary for an FCPA violation. As the *AB Volvo* and *Flowserve* settlements illustrate, improper payments that are authorized but never ultimately made are still considered improper. In addition, as the *Jefferson* indictment and *Martin* prosecution indicate, either a promise of a payment that is not actually delivered (because it was intercepted in the Congressman's freezer) or an unsuccessful attempt to influence a foreign official can suffice. (See, e.g., *ITXC*, *AB Volvo*, *Flowserve*, *Jefferson*, *Martin*, *Textron*).
- *Narrow View of Facilitation Payments*: The government takes an exceedingly narrow view of what constitutes a facilitation payment – a payment that expedites routine or ministerial governmental acts that does not run afoul of the FCPA. For example, the DOJ's settlement with *Westinghouse* appears to rest on, among other things, payments for services such as scheduling shipping inspections or obtaining product delivery certificates that could arguably constitute facilitating payments. (See, e.g., *Westinghouse*).
- *No De Minimis Exception*: There is no de minimis exception to the FCPA's prohibitions. The *Baker Hughes* prosecution included charges associated with a \$9,000 payment; the *Dow* settlement featured numerous payments of "well under \$100"; and the *Paradigm* settlement involved "acceptance" fees of between \$100-200. (See, e.g., *Paradigm*, *Baker Hughes*, *Dow*).
- *Separate Prosecutions for Companies and Individuals*: Both the SEC and DOJ remain willing to prosecute individuals when the facts warrant such action. As in *Fu*, *Martin*, *Philip*, *Wooh* and *Srinivasan*, individual enforcement actions can follow or coincide with settlements with the company. By contrast, in *Sapsizian* and *Steph*, the government brought cases against the individuals before reaching a resolution with their employers. Finally, the government is willing to pursue individuals in their capacity as "domestic concerns" without pursuing associated entities, as illustrated by the actions against *Gerald*

and Patricia Green and the former officers of PCI. (*See, e.g., Willbros Group, PCI, ITXC, Philip, Green, Srinivasan, Fu, Martin, Wooh, Sapsizian, Steph*).

- *Global Investigations*: A growing number of FCPA prosecutions stem from large-scale investigations involving numerous companies, such as the Oil-for-Food and the Nigerian Customs investigations. In other instances, as with Siemens, Alcatel and ERHC, investigations by foreign agencies or officials can lead to U.S. investigations or prosecutions. As seen with the Iraqi Oil-for-Food suit, action by Bahrain's state-owned steel company against Alcoa, and Argo-Tech's suit against Yamada, foreign or global investigations can lead to private actions as well. The World Bank's recently invigorated Department of Institutional Integrity and its joint task force with the IMF and several regional development organizations may be a source of ancillary and follow-on corruption prosecutions in the future. Finally, U.S. regulators may consider enforcement activities by foreign regulators in determining the ultimate disposition of a matter, as illustrated by the Flowserve and Akzo Nobel matters. Indeed, in the latter proceeding, the DOJ was willing to waive a criminal fine as long as Akzo Nobel's Dutch subsidiary satisfied the criminal sanction imposed on it by Dutch regulators. (*See, e.g., AB Volvo, Flowserve, Akzo Nobel, Chevron, Ingersoll-Rand, York, El Paso, INNOSPEC, Nigerian Customs Investigations, Siemens, Alcatel, ERHC, Textron*).
- *Mergers and Acquisitions*: FCPA issues can arise in the context of mergers and acquisitions, as illustrated by Opinion Releases 08-01 and 08-02. FCPA concerns can complicate or delay these potentially lucrative transactions, and acquirers are well-advised to conduct sufficient FCPA due diligence prior to closing, including examining the target's agency relationships and joint venture partners, to avoid unanticipated exposure due to the acquired company's undisclosed practices. When such pre-acquisition due diligence is not possible, it appears that the DOJ may grant special dispensation to conduct post-acquisition due diligence, but likely only if coupled with extensive reporting requirements. (*See, e.g., Opinion Release 08-02, Opinion Release 08-01, PCI, Baker Hughes, Vetco*).
- *Liability for Payments Made on Behalf of Subcontractors*: The mere fact that a payment is made on behalf of a subcontractor is not a defense to the potential inappropriateness of the payment. (*See, e.g., Baker Hughes*).
- *Commonality of Practice Not an Excuse*: Correcting a widely-held misperception, it is clear that a common but illegal practice is still illegal. Relatedly, as Chiquita illustrates, even in extreme circumstances or when broader policy concerns are implicated, prosecutors are unlikely to excuse illegal conduct. (*See, e.g., DOJ Opinion Procedure Release 08-03, Faro, Willbros Group, Lucent, El Paso, Dow, Baker Hughes, Chiquita, Textron, Kay*).
- *Discontinue Improper Payments Once Discovered*: Once payments to an agent or others are determined to be inconsistent with the FCPA or company policies, termination of the payments is expected. Creative payment arrangements, such as a severance arrangement,

or alternative structures such as the use of third party intermediaries to continue the improper practices, will not suffice. (See, e.g., *Willbros Group, Monty Fu, Philip, Baker Hughes, Delta & Pine, Chiquita, Textron*).

- *Recidivism will be Punished Harshly*: Repeat offenders will be punished harshly. In both *Vetco* and *Baker Hughes*, the large fines reflected, in part, the fact that the companies had previously violated the FCPA and had failed to implement the enhanced compliance processes and procedures to which they agreed as part of the settlements of those earlier prosecutions. *ABB*, which reached an FCPA settlement in 2004 and has subsequently disclosed further potentially improper payments to the DOJ and the SEC, may face similar treatment if it is found to have again violated the FCPA. (See, e.g., *Vetco, Baker Hughes, ABB*).
- *Requirement of Monitors or Consultants*: The 2007 and 2008 settlements continued the trend of appointing monitors or consultants to companies to help ensure FCPA compliance. Certain recent settlements, such as those with *Willbros Group, AGA* and *Faro*, appear to reflect a change in practice, where rather than the DOJ appointing the monitor directly, the settling company is permitted to choose its own corporate monitor, subject to DOJ approval. (See, e.g., *Faro, AGA, Willbros Group, Delta & Pine, Baker Hughes, Vetco*).
- *Self-Reporting, Remedial Measures, and Cooperation*: Through a variety of means, the DOJ and SEC have signaled that companies that self-report violations and cooperate extensively with governmental investigations may face less severe penalties. For example, despite allegations of wide-ranging improper conduct over a sustained period, including illicit payments to government officials in Kazakhstan, China, Mexico, Nigeria and Indonesia between 2002 and 2007, the DOJ entered into a *non-prosecution* agreement with *Paradigm* in return for the company paying a relatively small fine of \$1 million, implementing new enhanced internal controls and retaining outside counsel for eighteen months to review its compliance with the non-prosecution agreement. In doing so, the DOJ emphasized as “significant mitigating factors” the fact that *Paradigm* “had conducted an investigation through outside counsel, voluntarily disclosed its findings to the Justice Department, cooperated fully with the Department and instituted extensive remedial compliance measures.” (See, e.g., *Faro, AGA, Westinghouse, Bristow, Paradigm, Textron, Dow, Baker Hughes*).
- *Continued Cooperation, Including Waiver of Attorney-Client Privilege, as a Condition of Settlement*: In many instances, initial settlements require a party to continue to cooperate with an ongoing investigation, including measures such as an agreement to waive the attorney-client privilege. Recently introduced legislation and a potential revision of the DOJ’s prosecutorial guidelines, however, may prohibit or limit the practice of seeking attorney-client waivers as an element of cooperation. (See, e.g., *Martin, Wooh, Vetco, El Paso, Textron*).

- *Use of Precedent*: In Opinion Release 08-02, the DOJ explicitly refers to one of its previous Opinion Releases as “precedent,” despite the DOJ’s longstanding position (which is repeated in Release 08-02) that the Releases apply only to the specific requestor. The DOJ’s invocation of the word precedent (even if not sufficient to be relied on in court proceedings or otherwise) underscores the seriousness with which companies should view the guidance offered by the DOJ in its releases. (*See, e.g., DOJ Opinion Release 08-02*).

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