

Foreign Corrupt Practices Act Interim Update

November 2007

Introduction and Overview

This year has seen the continued trend of ever increasing enforcement activity under the Foreign Corrupt Practices Act (“FCPA”). We have already seen the largest ever criminal fine under the FPCA — \$26 million in the Vetco matter — and the largest ever combined penalty under the FCPA — \$44 million for Baker Hughes. In addition to the increased pace of enforcement and record-breaking penalties, two broad themes emerge. First, and foremost, the government is placing an unparalleled emphasis on the need for companies to conduct appropriate and company-wide due diligence in their dealings abroad (particularly regarding the use of agents). In effect, through recent settlements, the government has shifted the burden onto companies to prove that payments were not made to government officials when no or inadequate due diligence is conducted. Second, although (as described below) the anti-bribery provisions of the FCPA prohibit direct and indirect payments to foreign *officials*, the government will bring books and records and internal controls charges based on improper payments made to foreign ministries or agencies or even private parties.

After outlining the requirements of, and penalties under, the FCPA, this 2007 Update provides (i) a description of the recent FCPA settlements, (ii) a description of ongoing FCPA criminal matters, (iii) a selection of recent FCPA-related company disclosures, (iv) a summary and analysis of the critical lessons from these FCPA developments, and (v) a description of certain recent international corruption-related developments.

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 Department of Justice (“DOJ”) and the Securities and

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).

Exchange Commission (“SEC” or the “Commission”) 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 or “a firm belief that a person is engaging in such conduct or that a circumstance exists, or that a 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 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 requirements compel every issuer that has publicly registered securities to make and keep books, records and accounts, which, in

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).

⁹ H.C.R. No. 100-576, at 920 (1988).

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.¹⁰

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.¹¹ 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.¹² 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.¹³

Civil penalties for FCPA violations include imposition of a monetary penalty, disgorgement and injunctive relief.¹⁴ 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.¹⁵ These fines are not indemnifiable by a person's employer or principal.¹⁶

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.¹⁷

Recent Settlements

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

¹⁰ 15 U.S.C. § 78m(b)(2)(A)&(B).

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

¹² 18 U.S.C. § 3571(d).

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

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

¹⁵ 15 U.S.C. §§ 78dd-2(g), 78ff.

¹⁶ 15 U.S.C. § 78dd-2(g)(3).

¹⁷ 15 U.S.C. § 78ff(a).

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 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.¹⁸ 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.

¹⁸ See FCPA Opinion Release 2004-02 (July 12, 2004).

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 Oil for Food Program. 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.¹⁹

The United Nations established the Iraqi Oil for Food Program in 1996 in an effort to provide Iraqi citizens with humanitarian aid out of 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, but the purchase price was to be paid to a U.N.-controlled escrow account that funded the humanitarian purchases. According to the SEC complaint, from August 2000 to March 2003, Iraqi officials conditioned the distribution of allocations of oil under the Oil for Food Program on the recipient’s agreement to pay kickbacks in the form of surcharges on each barrel of oil. If the company did not pay the surcharge, it did not receive oil allocations.

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.”

¹⁹ The SEC and DOJ inconsistently describe the fine as a disgorgement of profits and the value of the illegal surcharges, respectively.

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 itself 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 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 Oil for Food Program. 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. He faces 18 to 24 months in prison under a plea agreement and will forfeit \$11 million.

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.

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.

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.

Si Chan Wooh (Schnitzer Steel)

On Friday, June 29, 2007, Si Chan Wooh, former senior officer of SSI International, Inc. ("SSI"), a subsidiary of Schnitzer Steel Industries ("Schnitzer"), pleaded guilty to conspiring to violate the anti-bribery provisions of the FCPA in connection with payments made over a ten-year period to government officials in China, agreeing 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 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 payments consisted of standard "kickbacks" paid out of the revenues Schnitzer generated from the sale, as well as "overpayments" from the Chinese steel mills to Schnitzer that Schnitzer would then refund to the officials. In addition, Wooh provided gifts to managers of the state-owned steel mills. The improper payments generated revenues for Schnitzer of approximately \$96 million and net profits of approximately \$6.3 million on 30 sales transactions. Based on this revenue, Wooh received a bonus of \$14,819.38.

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. The complaint states that "[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." Schnitzer paid approximately \$420,000 in bribes in China, generating revenue of approximately \$214 million. It paid approximately \$1.3 million in bribes in South Korea, generating revenue of approximately \$290 million.

On October 16, 2006, Schnitzer and its wholly owned South Korean subsidiary settled FCPA charges with both the SEC (cease and desist order) and the DOJ (guilty plea combined with a non-prosecution agreement), stemming from the same and related practices. In resolving the charges, the government found, among other things, that a South Korean Schnitzer subsidiary paid more than \$200,000 in bribes and provided gifts to managers of Chinese state-owned steel mills, as well as providing over \$420,000 in improper payments to managers of privately owned steel mills in order to induce them to purchase scrap metal from Schnitzer or its Japanese clients. Schnitzer attempted to conceal these bribes in its books and records and made the payments through off-book foreign bank accounts. For the payment of these bribes and other inappropriate conduct, Schnitzer agreed to pay over \$15 million in criminal fines and civil penalties. Schnitzer also agreed to retain a compliance monitor for three years and to cooperate with ongoing civil and criminal investigations.

Steven J. Ott and Roger Michael Young (ITXC Corporation)

On July 25, 2007, Steven J. Ott and Roger Michael Young, former executives of ITXC Corporation (“ITXC”), a former publicly traded telecommunications company, pleaded guilty to conspiring to violate the FCPA and the Travel Act in connection with corrupt payments to foreign telecommunications officials in Africa. In a related case, ITXC official Yaw Osei 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 also ordered to pay a \$7,500 fine and to serve two years of supervised release (beyond his 18 month sentence). Ott and Young are scheduled for sentencing on October 29, 2007.

The criminal guilty pleas of Ott and Young follow civil enforcement actions that the SEC filed against Amoako in August 2005 and Ott and Young in September 2006. The SEC proceedings against Amoako, Ott and Young were stayed pending the DOJ’s parallel investigations.

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

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.”

Christian Sapsizian (Alcatel-Lucent)

On June 7, 2007, a former Alcatel CIT 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 December 20, 2007.

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.

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

Textron Inc.

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 Oil for Food Program 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 \$450,461.68 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,”²⁰ 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 under the UN Oil for Food Program.

According to the SEC complaint and DOJ non-prosecution agreement, starting in the middle of 2000, Iraqi ministries demanded secret kickbacks from humanitarian goods suppliers in the form of an “After-Sales Service Fee” (“ASSF”). The Textron subsidiaries, with the assistance of Lebanese and Jordanian consulting firms, inflated three Oil for Food contracts with the Iraqi Ministry of Oil and ten contracts with the Iraqi Ministry of Industry and Minerals to include the cost of the secret ASSF payments. In violation of Textron’s compliance policies, neither consulting firm was retained through a 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 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 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,

²⁰ This element is borrowed from the Federal Sentencing Guidelines; *see* U.S. Sentencing Guidelines Manual § 8B2.1(b)(3).

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 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."

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.

Ongoing Criminal Matters

United States v. Kay

In 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. The district court dismissed the indictment, holding that the statutory language “to obtain or retain business” did not encompass payments to lower customs duties. In 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 2005, a jury convicted both defendants 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 have appealed their convictions and sentences and, on April 2, 2007, the Fifth Circuit Court of Appeals once again heard oral arguments on the matter. One of the critical questions on appeal is 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 contends that the jury charge’s invocation of the word “corruptly” was sufficient, while the defense argues that a distinct willfulness charge was necessary for the jury to make the required *mens rea* determination.

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.

Jason Edward Steph (Willbros Group Inc.)

On July 23, 2007, a Houston grand jury indicted Jason Edward Steph, a U.S. citizen living in Kazakhstan and a former executive of Willbros Group Inc. (“Willbros”), on charges of

conspiring to violate the FCPA and money laundering in connection with a bribery scheme involving Nigerian officials and the award of a \$387 million gas pipeline project.

Willbros, a publicly traded company that provides construction, engineering and other services in the oil and gas industry, has conducted business in Nigeria for over 40 years, primarily through several subsidiaries. According to the Steph indictment, one of these subsidiaries formed a joint venture with the Nigerian subsidiary of a German construction company. In December 2003, the joint venture bid on certain aspects of the Eastern Gas Gathering System (“EGGS”) Project, a natural gas pipeline system in the Niger delta.

The indictment alleges that Steph and others, including Nigeria-based employees of the German company, engaged in a scheme to bribe officials of the Nigerian National Petroleum Corporation (“NNPC”), the NAPIMS, other Nigerian officials and political parties, and officials of the operator of the EGGS Project, to secure the contract awards. Most of the payments were made to the officials through “consultants” and were characterized on Willbros’ books as consulting fees. The indictment alleges that, at one point, after a Willbros internal investigation terminated payments to one of the consultants, Steph and others arranged for the payments to be made from alternate sources, including a “loan” from principals of a Nigerian oil and gas company. In total, the indictment alleges that over \$6 million was paid, promised or authorized to be paid to various Nigerian government officials.

The Steph indictment arises from Willbros’ internal investigation of James K. Tillery, the former President of Willbros wholly owned subsidiary, Willbros International, Inc. (“WII”), regarding potential tax improprieties. During that investigation, Willbros discovered documents and encrypted files on Tillery’s computer that revealed that, among other things, he and other WII employees may have made, promised to make, caused to be made, or approved payments to government officials in Bolivia, Nigeria and Ecuador. Tillery resigned from the company in January 2005. That same month, Willbros voluntarily reported the findings of its investigation to the SEC and DOJ, which both opened investigations.

On September 14, 2006, former Willbros executive Jim Bob Brown pleaded guilty to violating the FCPA in connection with the Nigerian scheme described above as well as to conspiring to pay at least \$300,000 to officials of the Ecuadorian state oil company to obtain a gas pipeline rehabilitation contract. His sentencing hearing is currently scheduled for January 17, 2008. Also on September 14, 2006, Brown consented, without admitting or denying the allegations, to an order filed by the SEC enjoining him from future violations of the anti-bribery and books and records provisions of the FCPA. Under the judgment, the court is to determine at a later date, upon motion by the SEC, whether Brown will pay a civil penalty and, if so, what amount. The SEC action is stayed pending sentencing in the criminal suit.

On February 15, 2007, Willbros settled a class action lawsuit for \$10.5 million that alleged that Willbros materially misstated its financial results by knowing or recklessly disregarding the FCPA violations and the effect those violations would have on its financial

performance. According to Willbros' second quarter Form 10-Q, the company is cooperating fully with the SEC's and DOJ's ongoing investigations.

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.

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.

It is unclear to what extent the British government will cooperate with the U.S. investigation. The British Government has 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 is reported to be seeking legal advice on how to proceed and to what extent it will cooperate with the DOJ.

On September 13, 2007, the law firm Coughlin Stoia Geller Rudman & Robbins filed a shareholder derivative suit against BAE based, in part, on the allegations of bribery.

Leo Winston Smith (Pacific Consolidated Industries LP)

On June 18, 2007, Leo Winston Smith, former founder, executive vice president and director of sales of Pacific Consolidated Industries LP ("PCI"), was arrested after being indicted by a federal grand jury in Santa Ana, California on April 25, 2007. Among other charges, Smith is alleged to have violated the FCPA by bribing a Project Manager at the British Ministry of Defence in order to obtain contracts valued at over \$11 million with the Royal Air Force. PCI was a private company that manufactured air separation units and nitrogen concentration trolleys for defense departments throughout the world.

The indictment alleges that Smith paid more than \$300,000 in bribes to the Ministry of Defence official in exchange for equipment contracts worth more than \$11 million between 1999 and 2003. Payments to the official were often disguised as commission payments from a bogus marketing contract entered into between PCI and a relative of the official. Smith received more than \$500,000 in commissions from PCI from the contracts.

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.

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.²¹ Despite the fact that the indictment was handed down over four years ago, the investigation 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.

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,

²¹ 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.

the United States government effectively authorized his conduct. The discovery requests, sustained over government objection, triggered the Classified Information Procedures Act (“CIPA”),²² 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.²³ As the Second Circuit recognized, “regulating Giffen’s access to classified information has presented the district court with a significant challenge.”²⁴

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 eight 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.

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

²² 18 U.S.C. App. § 3.

²³ See *United States v. Giffen*, 473 F.3d 30 (2d Cir. 2006) (dismissing appeal for lack of jurisdiction).

²⁴ *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.”).

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 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.

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.

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 will pay a \$25 million criminal fine, implement and maintain an effective compliance and ethics program, receive five years’ probation, and cooperate in the DOJ’s ongoing investigation.

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. 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.

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.

A federal grand jury is currently considering indictment against Hills and other high-level Chiquita officials for their approval of the payments.

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.

Company Disclosures

Scores of companies have made FCPA-related disclosures in their 2007 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.

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' disclosure gives a sense of the scope of the investigation. In addition to the Munich investigation, related investigations continue in Liechtenstein, Switzerland, Italy, Greece, and "other countries," including the U.S. 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.

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...."

Pride International

Pride International's ("Pride") May 8, 2007 Form 10-Q provides an update into its investigation of possible FCPA violations in several countries, including Venezuela, Mexico, Saudi Arabia, Kazakhstan, Brazil and India. The initial focus of Pride's investigation centered on payments to Venezuelan and Mexican government officials totaling less than \$1 million. The Venezuelan payments were apparently made from early 2003 through 2005 to government

officials, or to vendors with the intent that they be passed on to government officials, in order to extend a drilling contract and to collect payment for work Pride completed in connection with its drilling contracts. In Mexico, payments were apparently made from 2002 through 2006 to one or more government officials in connection with clearing equipment through customs or moving personnel through immigration. Pride also apparently provided potentially improper entertainment to Mexican government officials.

Additionally, Pride disclosed that its Audit Committee, through outside counsel, has undertaken a review of the company's other international operations, and has evidence of potentially improper payments in Saudi Arabia, Kazakhstan, Brazil and India related to clearing equipment through customs or resolving outstanding customs issues and totaling approximately \$1 million.

The 10-Q states that Pride's management and Audit Committee believe that members of the company's senior operations management either were aware, or should have been aware, that improper payments to government officials were made or proposed.

Pride voluntarily disclosed to the DOJ and SEC information relating to these potentially improper payments and its investigations, and has undertaken steps (outlined in its 2006 Form 10-K) to improve its internal controls and compliance environment.

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."

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.

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.

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, Nabors Industries, Inc., Noble, Corporation Tidewater, Inc., 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 to Nigeria. 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.

Summary And Analysis

The settled actions, ongoing criminal matters and company disclosures to date in 2007 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 is emphasizing 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. 2007 is on pace to be the busiest year ever in FCPA enforcement. To date, the DOJ and SEC, combined, have already initiated more FCPA actions than any other previous year. Moreover, according to public records, there are

almost 60 open governmental investigations. As the BAE investigation indicates, the U.S. government will pursue potential FCPA violations even in the face of a close ally's refusal to proceed due to stated national security concerns.

- *Larger Penalties*: The civil and criminal fines resulting from FCPA prosecutions and settlements continued to rise in 2007. Most prominently, Vetco agreed to pay a record \$26 million criminal fine and Baker Hughes agreed to pay a record total of \$44 million under settlements with the DOJ and SEC. These large penalties follow, among others, the \$21 million in penalties that Statoil ASA paid in 2006; the over \$15 million that Schnitzer paid in 2006; the \$28.5 million paid by Titan Corporation in 2005; and the over \$16 million in fines that ABB paid in 2004.
- *Prosecutions and Investigations Span the World and a Wide Range of Industries*: The 2007 settlements and ongoing prosecutions 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 and ranging across the oil and oil field services, defense, construction and engineering, agricultural and agro-chemical, pharmaceutical, medical, steel, industrial manufacturing, and telecommunications industries. As the Smith prosecution for bribing a United Kingdom Defence official indicates, contrary to the popular misconception, the FCPA remains a concern for companies doing business even in developed countries, not simply in the developing world.
- *Need for Appropriate Due Diligence*: The watershed Baker Hughes settlement makes 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 the relevant recordkeeping and internal control requirements. The Textron settlement, also based in part on the failure to conduct adequate due diligence and containing broad language regarding the "endemic corruption" in the Middle East and the resulting need for enhanced compliance measures, reinforces Baker Hughes' lessons. (See, e.g., *Baker Hughes, Delta & Pine, Textron*).
- *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 knowledge or direct participation of the parent company in the improper conduct. As a result, as the Textron settlement makes 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., *Dow, Bristow, Delta & Pine, Textron*).
- *Paper Procedures Not Enough*: Company procedures that require due diligence, FCPA covenants or other contractual provisions or certifications provide no protection (and may prove harmful) when they are not followed. (See, e.g., *El Paso, Baker Hughes, Textron*).

- 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., *Baker Hughes*).
- Improper Payments to Foreign Ministries or Foreign Private Parties May Run Afoul the FCPA: In *Wooh* (and the late-2006 settlement with Schnitzer Steel), 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, both of the Oil for Food prosecutions are premised on improper payments made to government accounts rather than to foreign officials. (See, e.g., *Wooh, El Paso, Textron*).
- 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 wide range of conduct beyond the prototypical payment to win a contract award, including payments 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., *Vetco, Kay, Dow, Martin, Delta & Pine*).
- Broad Reading of Foreign Official: Similarly, federal prosecutors continue to construe the term “foreign official” to include employees, even relatively low level employees, of state agencies and state-owned institutions. (See, e.g., *Vetco, Dow, Wooh, Delta & Pine*).
- 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, office furniture, stock and share of profits. (See, e.g., *Dow, Jefferson, Kozeny, Delta & Pine*).
- 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 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., *Jefferson, Martin, Textron*).
- 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 and the Dow settlement featured payments “well under \$100” (but numerous). (See, e.g., *Dow, Baker Hughes*).

- Separate Prosecutions for Companies and Individuals: Both the SEC and DOJ remain willing to prosecute individuals when the facts warrant such action. As in Martin and Wooh, individual enforcement actions can follow settlements with the company. By contrast, in Sapsizian and Steph, the government brought cases against the individuals before reaching a resolution with their employers. (See, e.g., *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. (See, e.g., *El Paso, INNOSPEC, Nigerian Customs Investigations, Siemens, Alcatel, ERHC, Textron*).
- Mergers and Acquisitions: FCPA issues can arise in the context of mergers and acquisitions. 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. The risk is heightened when red flags present themselves post-acquisition. (See, e.g., *Vetco, Smith, Baker Hughes*).
- 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 common 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., *El Paso, Dow, Baker Hughes, Chiquita, Textron*).
- Need to Examine Carefully the Qualifications of Agent: Emphasis is placed on the need to understand the background, competence and track record of the agent or intermediary. (See, e.g., *Baker Hughes, Ott and Young*).
- 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. (See, e.g., *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., *Baker Hughes*).

- *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, will not necessarily avoid criticism under the FCPA. (See, e.g., *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 recently disclosed 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 settlements continued the trend of appointing monitors or consultants to companies to help ensure FCPA compliance. (See, e.g., *Vetco, Baker Hughes, Delta & Pine*).
- *Continued Cooperation as a Condition of Settlement, Including Waiver of Attorney-Client Privilege*: In many instances, initial settlements require a party to continue to cooperate with an ongoing investigation and may include other measures such as an agreement to waive the attorney-client privilege. (See, e.g., *Martin, Wooh, Vetco, El Paso, Textron*).
- *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. (See, e.g., *Bristow, Baker Hughes, Dow, Textron*).

International Developments

The first half of 2007 has witnessed an array of anti-corruption initiatives and prosecutions across the globe, from executions in China to investigations of former state leaders in El Salvador and Zambia. Elsewhere, resignations of public figures in the wake of corruption charges or extravagant purchases made by modestly paid foreign officials rise significant corruption concerns. What follows is a brief selection of international developments that highlights certain worldwide corruption developments and trends.

China

Over the last several years, China has taken several measures aimed at cracking down on corruption. Indeed, it has been reported that over the last five years, China's prosecutorial departments initiated 150,000 corruption cases involving more than 170,000 people. During that

same period, China recovered a reported \$2.3 billion from the prosecution of corruption cases. Despite common criticism that political concerns motivate the selection of which matters to prosecute, there is no denying the significant enforcement efforts.

Most recently, on July 9, 2007, former drug and food safety chief Zheng Xiaoyu was executed. The Supreme People's Court approved the death sentence against after Xiaoyu was convicted of taking bribes worth some 6.5 million yuan (\$850,000) from eight companies. He is the highest-ranking Chinese official executed since 2000. The harsh sentence likely reflects domestic and international concerns about consumer safety after a series of revelations of tainted food, medicines and other products originating in China. The government alleged that Zheng abused rules in renewing drug production licenses to squeeze kickbacks from companies and that his actions led to the approval of medicines that should have been blocked or taken from the market, including six fake drugs.

Democratic Republic of the Congo

In June 2007, the Congolese government announced that it will evaluate sixty mining deals signed with foreign corporations for evidence of corruption. Recently elected Congolese president Joseph Kabila has appointed a commission to review every mining contract signed in the last decade. The Kabila government, which won the country's first democratic elections in forty years, has placed a moratorium on new contracts and stated its hope that it will be able to renegotiate some of the existing contracts once the review process is completed. This is a process not dissimilar to that employed by then-elect Nigerian President Obasanjo at the start of his tenure with respect to oil and gas concessions.

El Salvador

The National Assembly removed the constitutional immunity granted to Mario Osorto, a public minister and representative of the ruling party, so that he can be brought to trial on charges of corruption. Osorto is also implicated in the recent murders of three Salvadorian legislators killed by members of the organized crime unit of the Guatemalan police force.

Equatorial Guinea

Considerable controversy continues to surround Teodorin Nguema Obiang, the son of Equatorial Guinea's president, who purchased a \$35 million mansion in Malibu, California in late 2006, raising questions about how he could afford such a purchase on his \$60,000 government salary as Minister of Agriculture and Forestry. The home was not his first big ticket purchase — he owns a fleet of exotic cars and several mansions abroad. Although his father has declared the country's oil accounts a state secret, Nguema's testimony in a South African commercial dispute last August indicated that it is routine for government ministers to form joint ventures with foreign enterprises in order to bid on government contracts. "A cabinet minister ends up with a sizeable part of the contract price in his bank account," he testified. This

information follows the above-referenced Senate investigation into Riggs Bank, into which most of Equatorial Guinea's oil revenues were paid. The investigation revealed that approximately \$35 million had been siphoned off by the Obiang family and senior officials of the regime.

Iran

In March 2007, French authorities opened a formal investigation of Total S.A. chief executive, Christophe de Margerie, and other high-ranking Total executives. It is alleged that Total paid kickbacks of as much as €26 million to Iranian officials to win a gas contract in the South Pars oil field in the late 1990's. Most of the payments were allegedly made to the son of a former president of Iran. At the time, Total was aggressively pursuing oil development in the Middle East. The investigation, which also includes Total's chief financial officer and head of gas and power, was sparked by a tip from Swiss authorities, which provided documents to French officials on the matter.

In 2003, the SEC issued a formal order of investigation into the business of certain oil companies, including Total, in Iran. To date, the investigation has not resulted in any enforcement actions.

Nigeria

Since 2003, the Nigerian Economic and Financial Crimes Commission ("EFCC"), has been responsible for investigating and prosecuting economic and financial crimes, including bribery and corruption. Throughout 2006 and 2007, the EFCC has carried out corruption investigations of 31 of Nigeria's 36 governors.

In April 2007, Nigeria held national elections. On May 9, 2007, the FBI confirmed that it was aware of potential plans of 12 unnamed Nigerian Governors to flee Nigeria after the end of their terms in late May, that it will work with the Nigerian government and that the United States potentially will extradite fleeing government officials to Nigeria for prosecution. On June 8, 2007, the EFCC demanded that 15 outgoing governors turn themselves in to authorities or face arrest.

On July 26, 2007, Diepreye Alamieyeseigha, the former Governor of Bayelsa State, became the first Nigerian ex-Governor convicted of corruption charges when he was sentenced to two years in prison after a Lagos court found him guilty of money laundering. Alamieyeseigha was arrested in December 2005 in Bayelsa's state capital after jumping bail in Britain.

Reportedly, recently elected President Yar'Adua has ordered a restructuring of Nigeria's corruption investigations, such that the EFCC will now focus on money-laundering and terrorism, while the Independent Corrupt Practices and Other Related Offences Commission ("ICPC"), will take over the governmental corruption investigations. On July 2, 2007, the ICPC announced the launch of 90 investigations into each of the 36 Nigerian states in a project called

“Operation Hawk.” The EFCC reportedly has begun finalizing its cases against the Governors in order to prosecute them or hand over the investigations to the ICPC.

Peru

Peruvian Interior Minister Pilar Mazzetti resigned in February of 2007 following revelations that she approved the purchase of 469 police vehicles at an inflated price from a Chilean company, Automotores Gildemeister. A congressional commission investigating recent government purchases brought to light other instances of inflated prices paid by other ministries, which forced the cancellation of the Ministry of Health’s contract to purchase ambulances and the Ministry of Education’s contract to purchase school supplies.

Russia

In February 2007, President Vladimir Putin authorized one of the most significant anti-corruption drives in recent years after a report warned that the problem posed a serious threat to Russia’s entire system of governance. The drive includes several unusual or heavy-handed measures, including the installation of cameras in offices of certain government officials, the identification of officials in “corruption-prone positions” who will be “transferred to fixed-term contracts, be liable to observation (such as phone tapping or being followed) without court warrant, and dismissal without proof of crime or wrongdoing, and have a daily limit on the amount of cash they may carry,” the encouragement of citizens to inform on one another, and the establishment of a network of informers within the ranks of the civil service.

South Africa

Prosecutors are currently working to restart their stalled case against former Deputy President Jacob Zuma. Prosecutors allege that he received bribes from the French arms company Thint. The National Prosecuting Authority had dropped an earlier case on the same charges due to a lack of evidence, but a South African court has now granted the state permission to obtain documents from the Republic of Mauritius that may make a stronger case against Zuma.

Uganda

On March 29, 2007, the Millennium Challenge Corporation, a United States Government corporation designed to work with some of the poorest countries in the world, signed a \$10.4 million agreement with Uganda aimed at reducing corruption. The nearly three-year program tackles corruption by improving public procurement, improving audit and financial management practices, strengthening the role of civil society, and building capacity to facilitate more effective follow-up of reported malpractice. The United States Agency for International Development will oversee implementation of the program.

Zambia

On May 4, 2007, former President Frederick Chiluba was ordered by a British court to repay \$46 million in a civil case; this money had allegedly been stolen from the Zambian government and transferred through British banks to finance Chiluba's extravagant lifestyle. Chiluba was later instructed by the British court to vacate his house in Lusaka after the court decided it had been purchased with stolen funds. Additionally, current Zambian President Levy Mwanawasa, Chiluba's handpicked successor, has been pursuing anticorruption action against the former Chiluba government, although he has also stated that Mr. Chiluba will be pardoned if he admits the allegations of corruption and returns 75% of the money he stole.

For more information, please contact:

Kevin T. Abikoff
(202) 721-4770

abikoff@hugheshubbard.com

Derek J. T. Adler
(212) 837-6086

adler@hugheshubbard.com

F. Amanda DeBusk
(202) 721-4790

debusk@hugheshubbard.com

Edward M. Little
(212) 837-6400

little@hugheshubbard.com

Lisa A. Cahill
(212) 837-6155

cahill@hugheshubbard.com

Marc A. Weinstein
(212) 837-6460

weinstei@hugheshubbard.com

Beatrice A. Hamza-Bassey
(212) 837-6778

hamza@hugheshubbard.com

Gregory M. Williams
(202) 721-4643

williamg@hugheshubbard.com

Bryan J. Sillaman
(202) 721-4688

sillaman@hugheshubbard.com

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Hughes Hubbard & Reed LLP | One Battery Park Plaza
New York, New York 10004-1482 | 212-837-6000

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